Chapter 458-20 WAC
EXCISE TAX RULES

WAC

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DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

458-20-114 Nonbusiness income—Bona fide initiation fees, dues, contributions, tuition fees and endowment funds. [Statutory Authority: RCW 82.32.300. WSR 86-02-039 (Order NET 85-8), § 458-20-114, filed 12/31/85; WSR 84-08-012 (Order 84-1), § 458-20-114, filed 3/27/84; Order NET 70-3, § 458-20-114 (Rule 114), filed 5/29/70, effective 7/1/70.] Repealed by WSR 95-22-099, filed 11/1/95, effective 12/2/95. Statutory Authority: RCW 82.32.300.

458-20-122 Sales of feed, seed, fertilizer, spray materials, and other tangible personal property for farm use. [Statutory Authority: RCW 82.32.300. WSR 94-07-049, § 458-20-122, filed 3/10/94, effective 4/10/94; WSR 86-21-085 (Order ET 86-18), § 458-20-122, filed 10/17/86; WSR 86-09-058 (Order ET 86-7), § 458-20-122, filed 4/17/86; Order ET 70-3, § 458-20-122 (Rule 122), filed 5/29/70, effective 7/1/70.] Repealed by WSR 03-18-024, filed 8/25/03, effective 9/25/03. Statutory Authority: RCW 82.01.060(2), 82.32.300, and 34.05.230. Later promulgation, see WAC 458-20-210.

458-20-123 Public and lending libraries. [Statutory Authority: RCW 82.32.300. WSR 83-07-034 (Order NET 83-17), § 458-20-123, filed 3/15/83; Order NET 70-3, § 458-20-123 (Rule 123), filed 5/29/70, effective 7/1/70.] Repealed by WSR 92-23-021, filed 11/10/92, effective 12/11/92. Statutory Authority: RCW 82.32.300. Later promulgation, see WAC 458-20-167 and 458-20-189.

458-20-125 Miscellaneous sales for farm use. [Statutory Authority: RCW 82.32.300. WSR 83-07-034 (Order NET 83-17), § 458-20-125, filed 3/15/83; Order NET 70-3, § 458-20-125 (Rule 125), filed 5/29/70, effective 7/1/70.] Repealed by WSR 94-07-051, filed 3/10/94, effective 4/10/94. Statutory Authority: RCW 82.32.300.

458-20-130 Sales of real property, standing timber, minerals, natural resources. [Statutory Authority: RCW 82.32.300. WSR 87-19-007 (Order NET 87-5), § 458-20-130, filed 9/8/87; WSR 83-07-034 (Order NET 83-17), § 458-20-130, filed 3/15/83; Order NET 70-3, § 458-20-130 (Rule 130), filed 5/29/70, effective 7/1/70.] Repealed by WSR 00-22-034, filed 10/25/00, effective 11/25/00. Statutory Authority: RCW 82.32.300.

458-20-137 Articles manufactured and installed. [Statutory Authority: RCW 82.32.300. WSR 83-07-034 (Order NET 83-17), § 458-20-137, filed 3/15/83; Order NET 70-3, § 458-20-137 (Rule 137), filed 5/29/70, effective 7/1/70.] Repealed by WSR 98-01-111, filed 12/18/97, effective 1/18/98. Statutory Authority: RCW 82.32.300.

458-20-147 Public stenographers. [Order NET 73-1, § 458-20-147, filed 11/2/73; Order NET 70-3, § 458-20-147 (Rule 147), filed 5/29/70, effective 7/1/70.] Repealed by WSR 92-23-021, filed 11/10/92, effective 12/11/92. Statutory Authority: RCW 82.32.300. Later promulgation, see WAC 458-20-138 and 458-20-224.

458-20-149 Jewelry repair shops. [Order NET 70-3, § 458-20-149 (Rule 149), filed 5/29/70, effective 7/1/70.] Repealed by WSR 93-03-005, filed 1/8/93, effective 2/8/93. Statutory Authority: RCW 82.32.300.

458-20-152 Shoe repairmen and shoe shiners. [Order NET 70-3, § 458-20-152 (Rule 152), filed 5/29/70, effective 7/1/70.] Repealed by WSR 92-23-021, filed 11/10/92, effective 12/11/92. Statutory Authority: RCW 82.32.300. Later promulgation, see WAC 458-20-173.

458-20-155 Information and computer services. [Statutory Authority: RCW 82.32.300. WSR 85-20-012 (Order ET 85-4), § 458-20-155, filed 9/20/85; Order ET 70-3, § 458-20-155 (Rule 155), filed 5/29/70, effective 7/1/70.] Repealed by WSR 13-06-015, filed 2/25/13, effective 3/28/13. Statutory Authority: RCW 82.32.200 and 82.01.060.

458-20-157 Producers of poultry and hatching eggs. [Statutory Authority: RCW 82.32.300. WSR 86-21-085 (Order NET 86-18), § 458-20-157, filed 10/17/86. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order NET 78-4), § 458-20-157, filed 6/27/78; Order NET 70-3, § 458-20-157 (Rule 157), filed 5/29/70, effective 7/1/70.] Repealed by WSR 99-08-005, filed 3/25/99, effective 4/25/99. Statutory Authority: RCW 82.32.300.

458-20-161 Persons buying or producing wheat, oats, dry peas, corn, barley, dry beans, lentils and triticale and making sales thereof. [Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order NET 83-16), § 458-20-161, filed 3/15/83. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order NET 78-4), § 458-20-161, filed 6/27/78; Order NET 70-3, § 458-20-161 (Rule 161), filed 5/29/70, effective 7/1/70.] Repealed by WSR 00-22-035, filed 10/25/00, effective 11/25/00. Statutory Authority: RCW 82.32.300.

458-20-17901 Public utility tax—Energy conservation and cogeneration deductions. [Statutory Authority: RCW 82.32.300. WSR 93-07-066, § 458-20-17901, filed 3/17/93, effective 4/17/93; WSR 86-01-077 (Order 85-7), § 458-20-17901, filed 12/18/85.] Repealed by WSR 13-14-121, filed 7/3/13, effective 8/3/13. Statutory Authority: RCW 82.32.300, 82.01.060(2) and chapter 82.16 RCW. Later promulgation, see WAC 458-20-179.

458-20-184 Tax on conveyances repealed. [Statutory Authority: RCW 82.32.300. WSR 87-19-007 (Order NET 87-5), § 458-20-184, filed 9/8/87; WSR 83-07-033 (Order NET 83-16), § 458-20-184, filed 3/15/83; Order NET 70-3, § 458-20-184 (Rule 184), filed 5/29/70, effective 7/1/70.] Repealed by WSR 97-21-022, filed 10/7/97, effective 11/7/97. Statutory Authority: RCW 82.32.300.

458-20-18601 Wholesale and retail cigarette vendor licenses. [Statutory Authority: RCW 82.32.300. WSR 95-07-068, § 458-20-18601, filed 3/14/95, effective 4/14/95; WSR 92-06-081, § 458-20-18601, filed 3/4/92, effective 4/4/92.] Repealed by WSR 05-02-035, filed 12/30/04, effective 1/30/05. Statutory Authority: RCW 82.24.235, 82.32.300, and 82.01.060(1).

458-20-188 Slot machines, pinball machines and other mechanical devices wherein an element of skill or of chance involves a pay-out to the player. [Order NET 70-3, § 458-20-188 (Rule 188), filed 5/29/70, effective 7/1/70.] Repealed by Order NET 73-1, filed 11/2/73. See chapter 218, Laws of 1973 1st ex. sess. for taxability of persons operating the machines or devices previously covered by this rule. See WAC 458-20-187.

458-20-191 Federal reservations. [Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), § 458-20-191, filed 3/15/83; Order ET 75-1, § 458-20-191, filed 5/2/75; Order ET 70-3, § 458-20-191 (Rule 191), filed 5/29/70, effective 7/1/70.] Repealed by WSR 05-03-002, filed 1/5/05, effective 2/5/05. Statutory Authority: RCW 82.32.300, 82.01.060(1), and 34.05.230. Later promulgation, see WAC 458-20-190.

458-20-193A Sales of goods originating in Washington to persons in other states. [Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order NET 83-16), § 458-20-193A, filed 3/15/83; Order NET 70-3, § 458-20-193A (Rule 193 Part A), filed 5/29/70, effective 7/1/70.] Repealed by WSR 91-24-020, filed 11/22/91, effective 1/1/92. Statutory Authority: RCW 82.32.300. Later promulgation, see WAC 458-20-193.

458-20-193B Sales of goods originating in other states to persons in Washington. [Statutory Authority: RCW 82.32.300. WSR 89-06-015 (Order 89-3), § 458-20-193B, filed 2/23/89; WSR 83-07-033 (Order NET 83-16), § 458-20-193B, filed 3/15/83; Order NET 74-1, § 458-20-193B, filed 5/7/74; Order NET 70-3, § 458-20-193B (Rule 193 Part B), filed 5/29/70, effective 7/1/70.] Repealed by WSR 91-24-020, filed 11/22/91, effective 1/1/92. Statutory Authority: RCW 82.32.300. Later promulgation, see WAC 458-20-193.

458-20-206 Use tax, fuel oil, oil products, other extracted products. [Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order NET 83-1), § 458-20-206, filed 3/30/83; Order NET 70-3, § 458-20-206 (Rule 206), filed 5/29/70, effective 7/1/70.] Repealed by WSR 99-08-005, filed 3/25/99, effective 4/25/99. Statutory Authority: RCW 82.32.300.

458-20-212 Insurance adjusters. [Order ET 70-3, § 458-20-212 (Rule 212), filed 5/29/70, effective 7/1/70.] Repealed by WSR 12-11-006, filed 5/3/12, effective 6/3/12. Statutory Authority: RCW 82.32.300 and 82.01.060(2).

458-20-213 Oil company bulk station agents. [Order NET 70-3, § 458-20-213 (Rule 213), filed 5/29/70, effective 7/1/70.] Repealed by WSR 00-22-034, filed 10/25/00, effective 11/25/00. Statutory Authority: RCW 82.32.300.

458-20-215 Auditing out-of-state business. [Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order NET 83-1), § 458-20-215, filed 3/30/83; Order NET 70-3, § 458-20-215 (Rule 215), filed 5/29/70, effective 7/1/70.] Repealed by WSR 92-23-021, filed 11/10/92, effective 12/11/92. Statutory Authority: RCW 82.32.300. Later promulgation, see WAC 458-20-254.

458-20-219 Patronage dividends of cooperative associations, not deductible. [Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order NET 83-1), § 458-20-219, filed 3/30/83; Order NET 70-3, § 458-20-219 (Rule 219), filed 5/29/70, effective 7/1/70.] Repealed by WSR 92-23-021, filed 11/10/92, effective 12/11/92. Statutory Authority: RCW 82.32.300.

458-20-220 Painting, paper hanging, and sign painting. [Order NET 70-3, § 458-20-220 (Rule 220), filed 5/29/70, effective 7/1/70.] Repealed by WSR 92-23-021, filed 11/10/92, effective 12/11/92. Statutory Authority: RCW 82.32.300. Later promulgation, see WAC 458-20-170, 458-20-17001, 458-20-171 and 458-20-173.

458-20-225 Pattern makers. [Order NET 70-3, § 458-20-225 (Rule 225), filed 5/29/70, effective 7/1/70.] Repealed by WSR 99-08-005, filed 3/25/99, effective 4/25/99. Statutory Authority: RCW 82.32.300.

458-20-231 Tax on internal distribution. [Statutory Authority: RCW 82.32.300. WSR 99-02-055, § 458-20-231, filed 1/5/99, effective 2/5/99; WSR 90-23-020, § 458-20-231, filed 11/14/90, effective 12/15/90; WSR 83-08-026 (Order ET 83-1), § 458-20-231, filed 3/30/83; Order ET 70-3, § 458-20-231 (Rule 231), filed 5/29/70, effective 7/1/70.] Repealed by WSR 03-09-062, filed 4/14/03, effective 5/15/03. Statutory Authority: RCW 82.32.300 and 82.01.060(2).

458-20-232 Sales of intoxicating liquor. [Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order NET 83-1), § 458-20-232, filed 3/30/83; Order NET 73-1, § 458-20-232, filed 11/2/73; Order NET 71-1, § 458-20-232, filed 7/22/71; Order NET 70-3, § 458-20-232 (Rule 232), filed 5/29/70, effective 7/1/70.] Repealed by WSR 96-21-142, filed 10/23/96, effective 11/23/96. Statutory Authority: RCW 82.32.300 and 34.05.354.

458-20-234	Business tax on flour millers, manufacturers of soybean or sunflower oil. [Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order NET 83-1), § 458-20-234, filed 3/30/83; Order NET 70-3, § 458-20-234 (Rule 234), filed 5/29/70, effective 7/1/70.] Repealed by WSR 00-22-035, filed 10/25/00, effective 11/25/00. Statutory Authority: RCW 82.32.300.
458-20-237	Retail sales tax collection schedules. [Statutory Authority: RCW 82.32.300. WSR 91-05-038, § 458-20-237, filed 2/13/91, effective 3/16/91; WSR 83-09-028 (Order NET 83-2), § 458-20-237, filed 4/15/83; WSR 82-16-061 (Order NET 82-7), § 458-20-237, filed 7/30/82. Statutory Authority: RCW 82.32.300 and 82.08.060. WSR 82-06-020 (Order 82-1), § 458-20-237, filed 2/24/82. Statutory Authority: RCW 82.08.060 and 82.14.070. WSR 81-01-099 (Order 80-5), § 458-20-237, filed 12/23/80. Statutory Authority: RCW 82.08.060, 82.14.070 and 82.32.300. WSR 79-06-036 (Order NET 79-1), § 458-20-237, filed 5/17/79, effective 7/1/79; Order NET 76-2, § 458-20-237, filed 5/19/76; Order NET 72-3, § 458-20-237, filed 11/30/72; Order NET 70-3, § 458-20-237 (Rule 237), filed 5/29/70, effective 7/1/70.] Repealed by WSR 00-22-034, filed 10/25/00, effective 11/25/00. Statutory Authority: RCW 82.32.-300.
458-20-24002	Sales and use tax deferral—New manufacturing and research/development facilities. [Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-070, § 458-20-24002, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 88-17-047 (Order 88-5), § 458-20-24002, filed 8/16/88; WSR 87-19-007 (Order ET 87-5), § 458-20-24002, filed 9/8/87; WSR 86-14-019 (Order ET 86-13), § 458-20-24002, filed 6/24/86; WSR 85-21-013 (Order ET 85-5), § 458-20-24002, filed 10/7/85.] Repealed by WSR 10-23-057, filed 11/10/10, effective 12/11/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2).
458-20-242	Pollution control exemption and/or credits. (Rule 242) [Recodified as § 458-20-242A and 458-20-242B.]
458-20-253	Mobile homes and mobile home park fee. [Statutory Authority: RCW 82.32.300. WSR 89-21-002, § 458-20-253, filed 10/5/89, effective 11/5/89; WSR 89-01-033 (Order 88-8), § 458-20-253, filed 12/13/88.] Repealed by WSR 98-01-111, filed 12/18/97, effective 1/18/98. Statutory Authority: RCW 82.32.300.
458-20-259	Small timber harvesters—Business and occupation tax exemption. [Statutory Authority: RCW 82.32.300. WSR 98-16-107, § 458-20-259, filed 8/5/98, effective 9/5/98; WSR 90-17-007, § 458-20-259, filed 8/3/90, effective 9/3/90.] Repealed by WSR 01-15-072, filed 7/17/01, effective 8/17/01. Statutory Authority: RCW 82.32.300.
458-20-99999	Appendix—The Buck Act. Repealed by WSR 05-03-002, filed 1/5/05, effective 2/5/05. Statutory Authority: RCW 82.32.300, 82.01.060(1), and 34.05.230.

WAC 458-20-100 Appeals. (1) **Introduction.**

(a) This rule explains the procedures for administrative review of actions of the department or of its officers and employees in the assessment or collection of taxes, as provided in RCW 82.01.060(4), including, but not limited to:

(i) An assessment of tax, interest, or penalties;

(ii) The denial of a refund, credit, or deferral request;

(iii) The issuance of a balance due notice or a notice of delinquent taxes, including a notice of collection action; and

(iv) The issuance of an adverse ruling on future liability from the taxpayer information and education section.

(b) Persons seeking administrative review of a business license revocation, a cigarette license revocation or suspension, a log export enforcement action, or orders to county officials under Title 84 RCW should refer to the following rules:

(i) WAC 458-20-10001 for information on the revocation of a certificate of registration or the revocation or suspension of a cigarette license; or

(ii) WAC 458-20-10002 for information on log export enforcement actions and orders to county officials issued under RCW 84.08.120 and 84.41.120.

(2) **Preappeal supervisor's conference and preappeal rulings on future liability.**

(a) **Supervisor's conferences.** Taxpayers are encouraged to request a supervisor's conference when they disagree with an action proposed by the department. Taxpayers should make their request for the conference with the division of the department that proposes to issue an assessment or take some other action in dispute. Supervisor's conferences provide an opportunity to resolve issues prior to the review provided in this rule.

(b) **Rulings.** Taxpayers may request an opinion on future reporting instructions and tax liability from the department's taxpayer information and education section of the taxpayer services division. The request must be in writing, contain all pertinent facts concerning the question presented, and may contain a statement of the taxpayer's views concerning the correct application of the law. The department will advise the taxpayer in writing of its opinion in a tax ruling. The tax ruling must state all pertinent facts upon which the opinion is based and, if the taxpayer's name has been disclosed, is binding upon both the taxpayer and the department under the facts stated. It will remain binding until the facts change, the applicable statute or rule changes, a published appellate court decision not subject to review changes a prior interpretation of law, the department publicly announces a change in the policy upon which this ruling is based, or the taxpayer is notified in writing that the ruling is no longer valid. Any change in the ruling will have prospective application only. Rulings on future tax liability are subject to review as provided in this rule.

(3) **How are appeals started?** A taxpayer starts a review of a departmental action by filing a written petition. Petitions should be addressed to:

Appeals Division
Washington State Department of Revenue
P.O. Box 47460
Olympia, Washington 98504-7460

A form petition is available on the department's web site at http://dor.wa.gov or upon request from the appeals division. Taxpayers may use the form petition or prepare one of their own. The taxpayer or its authorized representative must sign the petition, which must contain the following information:

(a) The taxpayer's name, address, registration/UBI number, telephone number, fax number, e-mail address, and contact person;

(b) If represented, the representative's name, address, telephone number, fax number, and e-mail address;

(c) Identifying information from the assessment notice, balance due notice, or other document being appealed;

(d) The amount of tax, interest, or penalties in controversy, and the time period at issue;

(e) The type of appeal requested (see subsection (6) of this section);

(f) Whether an in-person hearing in Olympia or Seattle, a telephone hearing, or no hearing is requested; and

(g) A brief explanation of each issue or area of dispute and an explanation why each issue or area of dispute should

be decided in the taxpayer's favor. To the extent known or available, taxpayers should cite applicable rules, statutes, or supporting case law and provide copies of records that support the taxpayer's position.

If a petition does not provide the required information, the department will notify the taxpayer in writing that the petition is not accepted for review. The notice will provide a period of time for the taxpayer to cure the defects in the petition. If a taxpayer is represented, the taxpayer should also have on file with the department a confidential tax information authorization.

(4) **To be timely, when must a petition be filed or extensions requested?** A taxpayer must file a petition with the department within thirty days after the date the departmental action has occurred.

(a) The appeals division may grant an extension of time to file a petition if the taxpayer's request is made within the thirty-day filing period. Requests for extensions may be in writing or by telephone, and must be directed to the department's appeals division.

(b) A petition or request for extension is timely if it is postmarked or received within the thirty-day filing period.

(c) The appeals division may not grant an extension of time to file a petition for refund that would exceed the time limits in WAC 458-20-229 (Refunds). A request for a refund of taxes paid must be filed within four years after the close of the tax year in which the taxes were paid. See WAC 458-20-229 for procedures on seeking a refund.

(d) The appeals division will notify taxpayers in writing when a petition is rejected as not timely.

(5) **How are appeals scheduled, heard, and decided?** The appeals division will acknowledge receipt of the petition and identify the administrative law judge (ALJ) assigned to the appeal. ALJs are attorneys trained in the interpretation of the Revenue Act and precedents established by prior rulings and court decisions. They are employed by the department to provide an informal, final review of agency actions.

(a) **Scheduling.** The ALJ will notify parties of the time when any additional documents or arguments must be submitted. If a party fails to comply with a scheduling letter or established timelines, the ALJ may decline to consider arguments or documents submitted after the scheduled timelines. A status conference in complex cases may be scheduled to provide for the orderly resolution of the case and to narrow issues and arguments for hearing.

(b) **Hearings.** Hearings may be by telephone or in-person. The ALJ may decide the case without a hearing if legal or factual issues are not in dispute, the taxpayer does not request a hearing, or the taxpayer fails to appear at a scheduled hearing or otherwise fails to respond to inquiries from the department. The appeals division will notify the taxpayer by mail whether a hearing will be held, whether the hearing will be in-person or by telephone, the location of any in-person hearing, and the date and time for any hearing in the case. The date and time for a hearing may be continued at the ALJ's discretion. Other departmental employees may attend a hearing, and the ALJ will notify the taxpayer when other departmental employees are attending. The taxpayer may appear personally or may be represented by an attorney, accountant, or any other authorized person. All hearings before an ALJ are conducted informally and in a nonadversarial, uncontested manner.

(c) **Hearing and posthearing submissions.** If a taxpayer asks to submit additional records or documents at a hearing, the taxpayer must explain why they were not submitted under the deadlines established in the scheduling letter. The ALJ has the discretion to allow late submissions by the taxpayer or the department and, if allowed, will provide the other party with additional time to respond. If additional document production or additional briefing is allowed by the ALJ, posthearing, such briefing or documents usually must be submitted within thirty days after the hearing, unless good cause is shown for additional time. ALJs have the discretion to allow additional time for further fact-finding, including scheduling an additional hearing, as necessary in a particular case.

(d) **Determinations.** Following the hearing, if any, and review of all submissions, the ALJ will issue a determination consistent with the applicable statutes, rules, case law, and department precedents. The appeals division will notify the taxpayer in writing of the decision. The determination of the ALJ is the final decision of the department and is binding upon the taxpayer unless a petition for reconsideration is timely filed by the taxpayer and accepted by the department.

(6) **Are all appeals the same?** No, in addition to regular appeals, called mainstream appeals, an appeal may also be assigned as a small claims or executive level appeal based on the amount at issue or the complexity of the issues. In addition, an appeal may be expedited under certain urgent circumstances.

(a) **Small claims appeals.** Except as set forth in (a)(i), (ii), or (iii) of this subsection, when the tax at issue in the appeal is twenty-five thousand dollars or less and the total amount of the tax plus penalties and interest at issue in the appeal is fifty thousand dollars or less, the appeal will be heard as a small claims appeal.

(i) The department may decline to hear an appeal as a small claims appeal if the department finds the appeal is not suitable for small claims resolution. Appeals with multiple or complex issues, issues of first impression, issues of industry-wide application, or constitutional issues are generally not suitable for small claims resolution.

(ii) The appeals division will notify the taxpayer in writing when an appeal is to be heard as a small claims appeal. The taxpayer may request in writing that the matter not be heard as a small claims appeal. Such requests will be granted if received or postmarked within fifteen days following the date of the notice.

(iii) In the petition the taxpayer may affirmatively request that the petition not be heard as a small claims appeal. Such requests will be granted.

Taxpayers should provide all evidence and supporting authority prior to or during the small claims hearing. Within ten working days of a small claims hearing, the department will issue an abbreviated written decision (determination) containing only the department's conclusions. The determination in a small claims appeal is the final action of the department.

(b) **Executive level appeals.** If an appeal involves an issue of first impression (one for which no agency precedent has been established) or an issue that has industry-wide sig-

nificance or impact, a taxpayer may request that the petition be heard at the executive level. The request must specify the reasons why an executive level appeal is appropriate. The appeals division will grant or deny the request and will notify the taxpayer of that decision in writing. If granted, the director or the director's designee and an ALJ will hear the matter. The appeals division, on its own initiative, may also choose to hear an appeal at the executive level. The appeals division will notify the taxpayer if the department chooses to hear an appeal at the executive level.

Following the executive level hearing, the appeals division will issue a proposed determination, which becomes final thirty days from the date of issuance unless the taxpayer or another division of the department timely files an objection to the proposed determination. Objections must identify specific errors of law or fact. Unless an extension is granted, objections must be postmarked or received by the appeals division within thirty days from the date the proposed determination was issued. The taxpayer or operating division filing objections must also provide the other party with a copy of its objections. The ALJ will issue the final determination, which may or may not reflect changes based on the objections. Although rare, the ALJ and the director's designee, in consultation with the director, may grant a second hearing to hear argument on the objections. The determination in an executive level appeal is the final action of the department.

(c) **Expedited appeals.** On a very limited basis it may be necessary to expedite the review of a petition. Taxpayers or other divisions in the department requesting expedited review must make the request in writing to the appeals division, with a copy supplied to the other party. The appeals division will grant or deny such requests solely at its discretion. The appeals division will advise the taxpayer and the affected division of its decision pertaining to the expedited review request. This decision is not subject to appeal. Expedited review will be limited to appeals where it is clear that:

(i) There is a particular and extraordinary business necessity;

(ii) Document review is the only issue;

(iii) Only a legal issue remains in an appeal following a remand to an operating division;

(iv) A jeopardy warrant or bankruptcy is likely; or

(v) Urgent review is necessary within the department.

If expedited review is at the taxpayer's request, the determination in an expedited appeal is the final action of the department. If expedited review is requested by the department, the taxpayer may petition for reconsideration as provided in subsection (7) of this section.

(7) **Request for reconsideration.** If a taxpayer believes that an error has been made in a determination, the taxpayer may, within thirty days of the issuance of the determination, petition in writing for reconsideration of the decision. Small claim appeals, executive appeals, and appeals expedited at the request of the taxpayer are not subject to reconsideration. The request for reconsideration must specify mistakes in law or fact contained in the determination and should also provide legal authority as to why those mistakes necessitate the reconsideration of the determination. A taxpayer may request an executive level reconsideration when the determination decided an issue of first impression or an issue that has industry-wide impact or significance. The request for executive reconsideration must also specify the reasons why executive level review is appropriate.

The appeals division may, without a hearing, grant or deny the request for reconsideration. If the request is denied, the department will mail to the taxpayer written notice of the denial and the reason for the denial. The denial is then the final action of the department. If the request is granted, a hearing on reconsideration may be conducted or a determination may be issued without a hearing. A reconsideration determination is the final action of the department.

(8) **Appeals to board of tax appeals.** A taxpayer may appeal a denial of a petition for correction of an assessment under RCW 82.32.160 or a denial of a petition for refund under RCW 82.32.170 to the board of tax appeals. The board of tax appeals also has jurisdiction to hear appeals taken from department decisions rendered under RCW 82.34.110 (relating to pollution control facilities tax exemptions and credits) and 82.49.060 (relating to watercraft excise tax). The board of tax appeals does not have jurisdiction to hear appeals from determinations involving rulings of future tax liability issued by the taxpayer information and education section. See RCW 82.03.130 (1)(a) and 82.03.190. A taxpayer filing an appeal with the board of tax appeals must pay the tax by the due date, unless arrangements are made with the department for a stay of collection under RCW 82.32.200. See WAC 458-20-228 (Returns, remittances, penalties, extensions, interest, stay of collection).

(9) **Thurston County superior court.** A taxpayer may also pay the tax in dispute and petition for a refund in Thurston County superior court. The taxpayer must comply with the requirements of RCW 82.32.180.

(10) **Settlements.** At any time during the appeal process, the taxpayer or the department may propose to compromise the matter by settlement. Taxpayers interested in settling a dispute should submit a written offer to the ALJ. The offer should identify the amount in dispute, why the dispute should be settled, the amount offered in settlement, and why the amount being offered is reasonable.

(a) Settlement may be appropriate when:

(i) The issue is nonrecurring. An issue is nonrecurring when the law has changed so future periods are treated differently than the periods under appeal; or the taxpayer's position or business activity has changed so that in future periods the issue under consideration is changed or does not exist; or the taxpayer agrees to a prospective change;

(ii) A conflict exists between precedents, such as statutes, rules, excise tax bulletins, or specific written instructions to the taxpayer;

(iii) A strict application of the law would have unduly harsh consequences which may be only relieved by an equitable doctrine; or

(iv) There is uncertainty of the outcome of the appeal if it were presented to a court. Factors to be considered include the relative degrees of certainty and the costs for both the taxpayer and the state. This category includes cases which involve factual issues that might require extensive expert testimony to resolve.

(b) Settlement is not appropriate when:

(i) The same issue in the taxpayer's appeal is being litigated by the department;

(ii) The taxpayer challenges a long-standing departmental policy or a rule that the department will not change unless the policy or rule is declared invalid by a court of record;

(iii) The taxpayer presents issues that have no basis upon which relief for the taxpayer can be granted or given. Settlement will not be considered if the taxpayer's offer of settlement is simply to eliminate the inconvenience or cost of further negotiation or litigation, and is not based upon the merits of the case;

(iv) The taxpayer's only argument is that a statute is unconstitutional; or

(v) The taxpayer's only argument is financial hardship. Financial hardship issues are properly discussed with the department's compliance division.

(c) Each settlement is concluded by a closing agreement signed by both the department and the taxpayer as provided by RCW 82.32.350 and is binding on both parties as provided in RCW 82.32.360. A closing agreement has no precedential value.

[Statutory Authority: RCW 82.32.300, 82.01.060 (2) and (4). WSR 05-20-036, § 458-20-100, filed 9/29/05, effective 11/1/05. Statutory Authority: RCW 82.32.300. WSR 90-24-049, § 458-20-100, filed 11/30/90, effective 1/1/91; WSR 83-07-032 (Order ET 83-15), § 458-20-100, filed 3/15/83; Order ET 75-1, § 458-20-100, filed 5/2/75; Order ET 70-3, § 458-20-100 (Rule 100), filed 5/29/70, effective 7/1/70.]

WAC 458-20-10001 Adjudicative proceedings—Brief adjudicative proceedings—Certificate of registration (tax registration endorsement) revocation. (1) **Introduction.** The department of revenue (department) has adopted the procedure for brief adjudicative proceedings provided in RCW 34.05.482 through 34.05.494, except for RCW 34.05.491(5), for actions involving revocation of a certificate of registration (tax registration endorsement) pursuant to RCW 82.32.215. This section explains the procedure for these brief adjudicative proceedings. This section does not apply to the following:

• Adjudicative proceedings under WAC 458-20-10002, which addresses converted brief adjudicative proceedings and formal adjudicative proceedings relating to log export enforcements;

• Nonadjudicative proceedings under RCW 82.32.160 and 82.32.170, and WAC 458-20-100;

• Enforcement proceedings under RCW 82.24.550 and 82.26.220; and

• Brief adjudicative proceedings for matters relating to the revocation of reseller permits under WAC 458-20-102.

The department has not adopted RCW 34.05.491(5), which provides that a request for administrative review is deemed to have been denied if the agency does not make a disposition of the matter within twenty days after the request is submitted.

(2) **Brief adjudicative proceedings - procedure.** The following procedure applies to the department's brief adjudicative proceedings for actions involving revocation of a certificate of registration, unless the matter is converted to a formal proceeding as provided in subsection (8) of this section.

(a) **Notice.** The department will set the time and place of the hearing. Written notice shall be served upon the taxpayer(s) at least seven days before the date of the hearing. Service is to be made pursuant to subsection (5)(a) of this section. The notice must include:

(i) The names and addresses of each taxpayer to whom the proceedings apply and, if known, the names and addresses of the taxpayer's representative(s), if any;

(ii) The mailing address and the telephone number of the person or office designated to represent the department in the proceeding;

(iii) The official file or other reference number and the name of the proceeding;

(iv) The name, official title, mailing address and telephone number of the presiding officer, if known;

(v) A statement of the time, place and nature of the proceeding;

(vi) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(vii) A reference to the particular sections of the statutes and/or rules involved;

(viii) A short and plain statement of the matters asserted by the department against the taxpayer and the potential action to be taken; and

(ix) A statement that if the taxpayer fails to attend or participate in a hearing, the hearing can proceed and that adverse action may be taken against the taxpayer.

(x) When the department is notified or otherwise made aware that a limited-English-speaking person is a person to whom the proceedings apply, all notices, including the notice of hearing, continuance and dismissal, must either be in the primary language of that person or must include a notice in the primary language of the person which describes the significance of the notice and how the person may receive assistance in understanding and responding to the notice. In addition, the notice must state that if a party or witness needs an interpreter, a qualified interpreter will be appointed at no cost to the party or witness. The notice must include a form to be returned to the department to indicate whether such person, or a witness, needs an interpreter and to identify the primary language or hearing impaired status of the person.

(b) **Appearance and practice at a brief adjudicative proceeding.** The right to practice before the department in a brief adjudicative proceeding is limited to:

(i) Persons who are natural persons representing themselves;

(ii) Attorneys at law duly qualified and entitled to practice in the courts of the state of Washington;

(iii) Attorneys at law entitled to practice before the highest court of record of any other state, if attorneys licensed in Washington are permitted to appear before the courts of such other state in a representative capacity, and if not otherwise prohibited by state law;

(iv) Public officials in their official capacity;

(v) Certified public accountants entitled to practice in the state of Washington;

(vi) A duly authorized director, officer, or full-time employee of an individual firm, association, partnership, or corporation who appears for such firm, association, partnership, or corporation;

(vii) Partners, joint venturers or trustees representing their respective partnerships, joint ventures, or trusts; and

(viii) Other persons designated by a person to whom the proceedings apply with the approval of the presiding officer.

In the event a proceeding is converted from a brief adjudicative proceeding to a formal proceeding, representation is limited to the provisions of law and RCW 34.05.428.

(c) **Hearings by telephone.** With the concurrence of the presiding officer and all persons involved in the proceedings, a hearing may be conducted telephonically. The conversation will be recorded and will be made a part of the record of the hearing.

(d) **Presiding officer.**

(i) The presiding officer must be an assistant director of the department's compliance division, or such other person as the director of the department may designate.

(ii) The presiding officer shall conduct the proceeding in a just and fair manner and before taking action, the presiding officer shall provide the taxpayer an opportunity to be informed of the department's position on the pending matter.

(iii) The presiding officer has all authority granted under chapter 34.05 RCW.

(e) **Entry of orders.**

(i) When the presiding officer issues a decision, the presiding officer shall briefly state the basis and legal authority for the decision. Within ten days of issuing the decision, the presiding officer shall serve upon the parties, the initial order and information regarding any departmental administrative review that may be available.

(ii) The decision and the brief written statement of the basis and legal authority for it is an initial order. The initial order will become a final order if no review is requested as provided in subsection (3) of this section.

(3) **Review of initial orders from brief adjudicative proceeding.** The following procedure applies to the department's review of a brief adjudicative proceeding conducted pursuant to subsection (2) of this section, unless the matter is converted to a formal proceeding as provided in subsection (8) of this section.

(a) **Request for review of the initial order.** A party to a brief adjudicative proceeding under subsection (2) of this section may request review of the initial order by filing a written petition for review, or making an oral request for review, with the department's appeals division within twenty-one days after service of the initial order is received or deemed to be received by the party. The address and telephone number of the appeals division is:

Appeals Division
Department of Revenue
P.O. Box 47460
Olympia, Washington 98504-7460
Telephone Number: 360-534-1335
Fax: 360-534-1340

(i) When a petition of review of the initial order is made, the taxpayer must submit to the appeals division at the time the petition is filed any evidence or written material relevant to the matter that the party wishes the reviewing officer to consider. If the petition for review is made by oral request, the taxpayer must also submit any evidence or written material to the appeals division on the same day that the oral request is made.

(ii) The department may, on its own motion, conduct an administrative review of the initial order as provided for in RCW 34.05.491.

(b) **Reviewing officer.** The appeals division shall appoint a reviewing officer who shall make such determination as may appear to be just and lawful. The reviewing officer shall provide the taxpayer and the department an opportunity to explain their positions on the matter and shall make any inquiries necessary to ascertain whether the proceeding should be converted to a formal adjudicative proceeding. The review by the appeals division shall be governed by the brief adjudicative procedures of chapter 34.05 RCW and this section; or WAC 458-20-10002 in the event a brief adjudicative hearing is converted to a formal adjudicative proceeding, and not by the processes and procedures of WAC 458-20-100. The reviewing officer shall have the authority of a presiding officer as provided in this section.

(c) **Record review.** Review of an initial order is limited to the evidence considered by the presiding officer, the initial order, the recording of the initial proceeding, and any records and written evidence submitted by the parties to the reviewing officer. However, the agency record need not constitute the exclusive basis for the reviewing officer's decision.

(i) The reviewing officer may request additional evidence from either party at any time during its review of the initial order. Once the reviewing officer requests evidence from a party, that party has seven days after service of the request to supply the evidence to the reviewing officer, unless the reviewing officer, in his or her discretion, allows additional time to submit the evidence.

(ii) In addition to requesting additional evidence, the reviewing officer may review any records of the department necessary to confirm that the tax warrant upon which the initial order of revocation was based remains unpaid. In the event that the tax warrant has been satisfied subsequent to the entry of the initial order, but before the issuance of the final order, the reviewing officer shall reinstate the taxpayer's certificate of registration.

(iii) If the reviewing officer determines that oral testimony is needed, he/she may schedule a time for both parties to present oral testimony. Notice of the oral testimony must be given to the parties in the same manner as the notice provided in subsection (2)(a) of this section. Oral statements before the reviewing officer shall be by telephone, unless specifically scheduled by the reviewing officer in his or her discretion to be in person.

(iv) The department will have an opportunity to respond to the taxpayer's request for review and may also submit any other relevant evidence and written material to the reviewing officer. The department must submit its material within seven days of service of the material submitted by the party requesting review of the initial order. The department must also serve a copy of all evidence and written material provided to the reviewing officer to the taxpayer requesting review according to subsection (5) of this section. Proof of service is required under subsection (5)(h) of this section when the department submits material to the taxpayer under this subsection.

(d) **Failure to participate.** If a party requesting review of an initial order under this subsection fails to participate in the proceeding or fails to provide documentation to the reviewing officer upon his or her request, the reviewing officer may uphold the initial order based upon the record.

(e) **The final orders.**

(i) The reviewing officer may issue two final orders. The first final order (the "final order") must include the decision of the reviewing officer and a brief statement of the basis and legal authority for the decision. This order may contain confidential taxpayer information under RCW 82.32.330, and, therefore, cannot be disclosed by the department, except to the taxpayer.

(ii) The reviewing officer may issue a second final order (the "posting order"). The posting order will be issued when the reviewing officer has ordered the revocation of the tax registration certificate. The posting order will state what certificate of registration is being revoked, the listing of the tax warrants involved, and what jurisdictions the tax warrants were filed in.

(iii) Unless specifically indicated otherwise, the term "final order" as used throughout this section shall refer to both the final order and the posting order.

(iv) The parties can expect that, absent continuances, the final order and posting order will be entered within twenty days of the petition for review.

(f) **Reconsideration.** Unless otherwise provided in the reviewing officer's order, the reviewing officer's order represents the final position of the department. A reconsideration of the reviewing officer's order may be sought only if the right to a reconsideration is contained in the final order.

(g) **Judicial review.** Judicial review of the final order of the department is available under Part V, chapter 34.05 RCW. However, judicial review may be available only if a review of the initial decision has been requested under this subsection and all other administrative remedies have been exhausted. See RCW 34.05.534.

(4) **Rules of evidence - record of the proceeding.**

(a) Evidence is admissible if in the judgment of the presiding or reviewing officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely on in conducting their affairs. The presiding and reviewing officer should apply RCW 34.05.452 when ruling on evidentiary issues in the proceeding.

(b) All oral testimony must be recorded manually, electronically, or by another type of recording device. The agency record must consist of the documents regarding the matters that were considered or prepared by the presiding officer, or by the reviewing officer in any review, and the recording of the hearing. These records must be maintained by the department as its official record.

(5) **Service.** All notices and other pleadings or papers filed with the presiding or reviewing officer must be served on the taxpayer, their representatives/agents of record, and the department.

(a) Service is made by one of the following methods:

• In person;

• By first-class, registered, or certified mail;

• By fax and same-day mailing of copies;

• By commercial parcel delivery company; or

• By electronic delivery pursuant to RCW 82.32.135.

(b) Service by mail is regarded as completed upon deposit in the United States mail properly stamped and addressed.

(c) Service by electronic fax is regarded as completed upon the production by the fax machine of confirmation of transmission.

(d) Service by commercial parcel delivery is regarded as completed upon delivery to the parcel delivery company, properly addressed with charges prepaid.

(e) Service by electronic delivery is regarded as completed on the date that the department electronically sends the information to the parties or electronically notifies the parties that the information is available to be accessed by them.

(f) Service to a taxpayer, their representative/agent of record, the department, and presiding officer must be to the address shown on the notice described in subsection (3)(a) of this section.

(g) Service to the reviewing officer must be to the appeals division at the address shown in subsection (3) of this section.

(h) Where proof of service is required, the proof of service must include:

• An acknowledgment of service;

• A certification, signed by the person who served the document(s), stating the date of service; that the person did serve the document(s) upon all or one or more of the parties of record in the proceeding by delivering a copy in person to (names); and that the service was accomplished by a method of service as provided in this subsection.

(6) **Interpreters.** When a party or witness requires an interpreter, chapters 2.42 and 2.43 RCW will apply. When those statutes are silent on an issue before the presiding or reviewing officer, the provisions regarding interpreters in WAC 10-08-150 apply.

(7) **Informal settlements.** The department encourages informal settlement of issues in proceedings under its jurisdiction. The presiding or reviewing officer may not order settlement of the proceedings. Settlement is at the discretion of the parties. Settlement of a proceeding may be concluded by:

(a) A stipulation signed by the taxpayer and the department, or their respective representatives, and/or recited into the record of the proceedings. If the stipulation provides for a payment agreement, the presiding or reviewing officer may order a continuance of the proceedings during the period of repayment and dismissal when all payments have been made. An order providing for the reconvening of the proceedings if the payment agreement is breached is allowed so long as the proceeding is not held less than seven days after notice of the reconvening is provided. Except as provided in this subsection, the presiding or reviewing officer must enter an order in conformity with the terms of the stipulation; or

(b) The entry of an order dismissing the proceedings if the department withdraws the revocation of the certificate of registration.

(8) **Conversion of a brief adjudicative proceeding to a formal proceeding.** The presiding or reviewing officer may at any time, on motion of the taxpayer, the department, or the officer's own motion, convert the brief adjudicative proceeding to a formal proceeding.

(a) The presiding or reviewing officer may convert the proceeding if the officer finds that use of the brief adjudicative proceeding:

• Violates any provision of law,

• The protection of the public interest requires the agency to give notice to and an opportunity to participate to persons other than the parties, or

• The issues and interests involved warrant the use of procedures governed by RCW 34.05.413 through 34.05.476 or 34.05.479.

(b) WAC 458-20-10002 applies to formal proceedings. In proceedings to revoke a taxpayer's certificate of registration, the converted proceeding is itself the independent administrative review by the department of revenue as provided in RCW 82.32A.020(6).

(9) **Computation of time.** In computing any period of time prescribed by this section, the day of the act or event after which the designated period is to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, or a state legal holiday, in which event the period runs until the next day which is not a Saturday, Sunday, or state legal holiday. When the period of time prescribed is less than seven days, intermediate Saturdays, Sundays, and holidays will be excluded in the computation.

(10) **Posting of a final order of revoking a tax registration endorsement - revocation not a substitute for other collection methods or processes available to the department.** When an order revoking a tax registration endorsement is a final order of the department, the department shall post a copy of the posting order in a conspicuous place at the main entrance to the taxpayer's place of business and it must remain posted until such time as the warrant amount has been paid.

(a) It is unlawful to engage in business after the revocation of a tax registration endorsement. A person engaging in the business after a revocation may be subject to criminal sanctions as provided in RCW 82.32.290. RCW 82.32.290(2) provides that a person violating the prohibition against such engaging in business is guilty of a Class C felony in accordance with chapter 9A.20 RCW.

(b) Any certificate of registration revoked shall not be reinstated, nor a new certificate of registration issued until:

(i) The amount due on the warrant has been paid, or provisions for payment satisfactory to the department of revenue have been entered; and

(ii) The taxpayer has deposited with the department of revenue as security for taxes, increases and penalties due or which may become due under such terms and conditions as the department of revenue may require, but the amount of the security may not be greater than one-half the estimated average annual tax liability of the taxpayer.

(c) Revocation proceedings will not substitute for, or in any way curtail, other collection methods or processes available to the department.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 11-17-094, § 458-20-10001, filed 8/22/11, effective 9/22/11. Statutory Authority: RCW 82.32.300 and 82.01.060. WSR 11-04-056, § 458-20-10001, filed 1/26/11, effective 2/26/11. Statutory Authority: RCW 82.32.300 and 34.05.410. WSR 95-07-070, § 458-20-10001, filed 3/14/95, effective 4/14/95.]

WAC 458-20-10002 Adjudicative proceedings—Formal adjudicative proceedings—Log export enforcement actions pursuant to chapter 240-15 WAC—Orders to county officials issued to pursuant to RCW 84.08.120 and 84.41.120—Converted brief adjudicative proceedings. (1) **Introduction.** The department conducts adjudicative proceedings pursuant to chapter 34.05 RCW, the Administrative Procedure Act (APA). This section explains the procedure and process for formal adjudicative proceedings conducted by the department. These formal proceedings include, but are not limited to, log export enforcement actions pursuant to chapter 240-15 WAC, orders to county officials issued pursuant to RCW 84.08.120 and 84.41.120, and converted brief adjudicative proceedings. This section does not apply to wholesale and retail cigarette license revocation/suspension of RCW 82.24.550, certificate of registration (tax registration endorsement) revocation of RCW 82.32.215, or other proceedings which are brief adjudicative proceedings and are explained in WAC 458-20-10001. This section also does not apply to the nonadjudicative proceedings as provided in RCW 82.32.160, 82.32.170 and WAC 458-20-100.

(2) **Formal adjudicative proceedings - procedure and process.** RCW 34.05.413 through 34.05.479 and chapter 10-08 WAC shall apply to formal adjudicative proceedings conducted by the department of revenue.

(a) **Presiding officer - final order - review.** The presiding officer of a formal adjudicative proceeding shall be the director, department of revenue, or such person as the director shall designate. The presiding officer, whether the director of the department of revenue, or such person as the director shall have designated, shall make the final decision and shall enter a final order as provided in RCW 34.05.461 (1)(b). No further administrative review is available from a decision of the presiding officer.

(b) **Petitions for reconsideration.** RCW 34.05.470 provides that petitions for reconsideration shall be filed within ten days of the final order. A petition for reconsideration shall be filed with the presiding officer at the address of the presiding officer provided in the notice of the proceedings, or at such other address as may be provided in the final order, and shall be in the form of other pleadings in the matter. As with all other pleadings, a copy of the petition shall be served upon all other parties to the proceeding.

[Statutory Authority: RCW 82.32.300 and 34.05.410. WSR 95-07-069, § 458-20-10002, filed 3/14/95, effective 4/14/95.]

WAC 458-20-10003 Brief adjudicative proceedings for matters related to suspension, nonrenewal, and nonissuance of licenses to sell spirits. (1) **Introduction.** The department of revenue (department) conducts adjudicative proceedings pursuant to chapter 34.05 RCW, the Administrative Procedure Act (APA). The department adopts in this section, the procedures as provided in RCW 34.05.482 through 34.05.494 for the administration of brief adjudicative proceedings to review the department notice explained in subsection (2) of this section. The department must provide the notice before it may proceed in requesting that the Washington liquor control board (board) suspend, not renew, or not issue a taxpayer's spirits license(s) as defined in RCW 66.24.-010 (3)(c), referred to in this section as "agency action."

This section explains the procedure pertaining to the adopted brief adjudicative proceedings.

(2) **Department notice.** If a taxpayer is more than thirty days delinquent in reporting or remitting spirits taxes on a tax return or assessed by the department, including applicable penalties and interest, the department may request that the

board suspend the taxpayer's spirits license or licenses and refuse to renew any existing spirits license held by the taxpayer or issue any new spirits license to the taxpayer. Before the department may take agency action, the department must provide the taxpayer with at least seven calendar days prior written notice of the delinquency and inform the taxpayer that the department intends to make the request to the board. The department notice must include:

(a) A listing of any unfiled tax returns;

(b) The amount of unpaid spirits taxes as applicable, including any applicable penalties and interest;

(c) Who to contact to inquire about payment arrangements; and

(d) Information that the taxpayer may seek administrative review of the department notice, including the deadline for seeking such review.

A taxpayer may seek an administrative review of the department notice as explained under subsection (3) of this section. Brief adjudicative proceedings under this section do not include the right to challenge the amount of any spirits taxes assessed by the department.

(3) **Conduct of brief adjudicative proceedings.** To initiate an appeal of a department notice, the taxpayer has seven calendar days from the date on the department notice to request a review of that notice. The taxpayer must file a written notice of appeal explaining why the taxpayer disagrees with the notice of delinquency.

A form notice of appeal is available at http://dor.wa.gov or by calling 1-800-647-7706. The completed form should be mailed or faxed to the department at:

Department of Revenue
Compliance Administration
Spirits License Suspension Petition
P.O. Box 47473
Olympia, WA 98504-7473
Fax: 360-586-8816

(a) A presiding officer, who will be either the assistant director of the compliance division or such other person as designated by the director of the department (director), will conduct brief adjudicative proceedings. The presiding officer for brief adjudicative proceedings will have agency expertise in the subject matter but will not otherwise have participated in the specific matter. The presiding officer's review is limited to the written record.

(b) As part of the notice of appeal, the taxpayer or the taxpayer's representative may include written documentation explaining the taxpayer's view of the matter. The presiding officer may also request additional documentation from the taxpayer or the department and will designate the date by which the documents must be submitted.

(c) In addition to the record, the presiding officer for brief adjudicative proceedings may employ agency expertise as a basis for decision.

(d) Within ten days of receipt of the taxpayer's notice of appeal, the presiding officer will enter an initial order including a brief explanation of the decision under RCW 34.05.485. All orders in these brief adjudicative proceedings will be in writing. The initial order will become the department's final order unless a petition for review is made to the department's appeals division under subsection (4) of this section. If the presiding officer's order invalidates the department notice, the department may in its discretion start new proceedings by sending a new department notice.

(4) **Review of initial order from brief adjudicative proceeding.** A taxpayer that has received an initial order upholding a department notice under subsection (3) of this section may request a review by the department by filing a written petition for review or by making an oral request for review with the department's appeals division within twenty-one days after the service of the initial order on the taxpayer as described in subsection (8) of this section.

A form petition of review is available at http://dor.wa.gov. A request for review should state the reasons for the review.

The address, telephone number, and fax number of the appeals division are:

Appeals Division
Spirits License Petition for Review/Spirits Taxes
Department of Revenue
P.O. Box 47460
Olympia, WA 98504-7460
Telephone Number: 360-534-1335
Fax: 360-534-1340

(a) A reviewing officer, who will be either the assistant director of the appeals division or such other person as designated by the director, will conduct a brief adjudicative proceeding and determine whether the initial order was correctly decided. The reviewing officer's review is limited to the written record.

(b) The agency record need not constitute the exclusive basis for the reviewing officer's decision. The reviewing officer will have the authority of a presiding officer.

(c) The order of the reviewing officer will be in writing and include a brief statement of the reasons for the decision, and it must be entered within twenty days of the petition for review. The order will include a notice that judicial review may be available. The order of the reviewing officer represents a final order of the department. If a final order invalidates the department notice, the department may in its discretion start new proceedings by sending a new department notice.

(d) A request for review is deemed denied if the department does not issue an order on review within twenty days after the petition for review is filed.

(5) **Record in brief adjudicative proceedings.** The record with respect to the brief adjudicative proceedings under RCW 34.05.482 through 34.05.494 related to department notice will consist of:

(a) *The record before the presiding officer*: The record before the presiding officer consists of the department notice; the taxpayer's appeal of the department notice; all records relied upon by the department or submitted by the taxpayer related to the department notice; and all correspondence between the taxpayer and the department regarding the department notice.

(b) *The record before the reviewing officer*: The record before the reviewing officer consists of all documents included in the record before the presiding officer; the taxpayer's petition for review; and all correspondence between

the taxpayer and the department regarding the taxpayer's petition for review.

(6) **Court appeal.** Court appeal from the final order of the department is available pursuant to Part V, chapter 34.05 RCW. However, court appeal may be available only if a review of the initial decision has been requested under subsection (4) of this section and all other administrative remedies have been exhausted. See RCW 34.05.534.

(7) **Computation of time.** In computing any period of time prescribed by this section or by the presiding officer or reviewing officer, the day of the act or event after which the designated period is to run is not to be included. The last day of the period is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the next day which is not a Saturday, Sunday or legal holiday. This subsection does not apply with respect to computation of the seven calendar days required for the department notice.

(8) **Service.** All notices and other pleadings or papers filed with the presiding or reviewing officer must be served on the taxpayer, their representatives/agents of record, and the department.

(a) Service is made by one of the following methods:

(i) In person;

(ii) By first-class, registered or certified mail;

(iii) By fax and same-day mailing of copies;

(iv) By commercial parcel delivery company; or

(v) By electronic delivery pursuant to RCW 82.32.135.

(b) Service by mail is regarded as completed upon deposit in the United States mail properly stamped and addressed.

(c) Service by electronic fax is regarded as completed upon the production by the fax machine of confirmation of transmission.

(d) Service by commercial parcel delivery is regarded as completed upon delivery to the parcel delivery company, properly addressed with charges prepaid.

(e) Service by electronic delivery is regarded as completed on the date that the department electronically sends the information to the parties or electronically notifies the parties that the information is available to be accessed by them.

(f) Service to a taxpayer, their representative/agent of record, the department, and presiding officer must be to the address shown on the notice described in subsection (3)(a) of this section.

(g) Service to the reviewing officer must be to the appeals division at the address shown in subsection (4) of this section.

(h) Where proof of service is required, the proofs of service must include:

(i) An acknowledgment of service;

(ii) A certificate, signed by the person who served the document(s), stating the date of service; that the person did serve the document(s) upon all or one or more of the parties of record in the proceeding by delivering a copy in person to (names); and that the service was accomplished by a method of service as provided in this subsection.

(9) **Continuance.** The presiding officer or reviewing officer may grant, in their sole discretion, a request for a continuance by motion of the taxpayer, the department, or on its own motion.

(10) **Conversion of a brief adjudicative proceeding to a formal proceeding.** The presiding officer or reviewing officer, in their sole discretion, may convert a brief adjudicative proceeding to a formal proceeding at any time on motion of the taxpayer, the department, or the presiding/reviewing officer's own motion.

(a) The presiding/reviewing officer will convert the proceeding when it is found that the use of the brief adjudicative proceeding violates any provision of law, when the protection of the public interest requires the agency to give notice to and an opportunity to participate to persons other than the parties, and when the issues and interests involved warrant the use of the procedures of RCW 34.05.413 through 34.05.479.

(b) When a proceeding is converted from a brief adjudication to a formal proceeding, the director may become the presiding officer or may designate a replacement presiding officer to conduct the formal proceedings upon notice to the taxpayer and the department.

(c) In the conduct of the formal proceedings, WAC 458-20-10002 will apply to the proceedings.

(11) **Taking agency action.** The department may initiate agency action as follows:

(a) If the taxpayer does not file a timely appeal under subsection (3) of this section, the department may proceed with agency action the day following the end of the period for requesting such appeal;

(b) If the taxpayer does not make a petition for review consistent with subsection (4) of this section, the department may proceed with agency action the day following the end of the period for making such petition of review;

(c) If the department makes a final order adverse to the taxpayer under subsection (4) of this section, the department may proceed with agency action the day following the date the department issues its final order.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 12-24-008, § 458-20-10003, filed 11/27/12, effective 12/28/12.]

WAC 458-20-101 Tax registration and tax reporting. (1) **Introduction.** This section explains tax registration and tax reporting requirements for the Washington state department of revenue as established in RCW 82.32.030 and 82.32.045. This section discusses who is required to be registered, and who must file excise tax returns. This section also discusses changes in ownership requiring a new registration, the administrative closure of taxpayer accounts, and the revocation and reinstatement of a tax reporting account with the department of revenue. Persons required to file tax returns should also refer to WAC 458-20-104 (Small business tax relief based on volume of business).

(2) **Persons required to obtain tax registration endorsements.** Except as provided in (a) of this subsection, every person who is engaged in any business activity for which the department of revenue is responsible for administering and/or collecting a tax or fee, shall apply for and obtain a tax registration endorsement with the department of revenue. (See RCW 82.32.030.) This endorsement shall be reflected on the face of the business person's registrations and licenses document. The tax registration endorsement is nontransferable, and valid for as long as that person continues in business.

(a) Registration under this section is not required if all of the following conditions are met:

(i) The person's value of products, gross proceeds of sales, or gross income of the business, from all business activities taxable under chapter 82.04 RCW (business and occupation tax), is less than twelve thousand dollars per year;

(ii) A person's gross income from all business activities taxable under chapter 82.16 RCW (public utility tax), is less than twelve thousand dollars per year;

(iii) The person is not required to collect or pay to the department of revenue retail sales tax or any other tax or fee which the department is authorized to administer and/or collect; and

(iv) The person is not otherwise required to obtain a license or registration subject to the master application procedure provided in chapter 19.02 RCW. For the purposes of this section, the term "license or registration" means any agency permit, license, certificate, approval, registration, charter, or any form or permission required by law, including agency rule, to engage in any activity.

(b) The term "tax registration endorsement," as used in this section, has the same meaning as the term "tax registration" or "certificate of registration" used in Title 82 RCW and other sections in chapter 458-20 WAC.

(c) The term "person" has the meaning given in RCW 82.04.030.

(d) The term "tax reporting account number" as used in this section, is the number used to identify persons registered with the department of revenue.

(3) **Requirement to file tax returns.** Persons registered with the department must file tax returns and remit the appropriate taxes to the department, unless they are placed on an "active nonreporting" status by the department.

(a) The department may relieve any person of the requirement to file returns by placing the person in an active nonreporting status if all of the following conditions are met:

(i) The person's value of products (RCW 82.04.450), gross proceeds of sales (RCW 82.04.070), or gross income of the business (RCW 82.04.080), from all business activities taxable under chapter 82.04 RCW (business and occupation tax), is:

(A) Beginning July 1, 1999, less than twenty-eight thousand dollars per year (chapter 357, Laws of 1999); or

(B) Prior to July 1, 1999, less than twenty-four thousand dollars per year;

(ii) The person's gross income (RCW 82.16.010) from all business activities taxable under chapter 82.16 RCW (public utility tax) is less than twenty-four thousand dollars per year; and

(iii) The person is not required to collect or pay to the department retail sales tax or any other tax or fee the department is authorized to collect.

(b) The department will notify those persons it places on an active nonreporting status. (A person may request to be placed on an active nonreporting status if the conditions of (a) of this subsection are met.)

(c) Persons placed on an active nonreporting status by the department are required to timely notify the department if their business activities do not meet any of the conditions explained in (a) of this subsection. These persons will be removed from an active nonreporting status, and must file tax returns and remit appropriate taxes to the department, beginning with the first period in which they do not qualify for an active nonreporting status.

(d) Persons that have not been placed on an active nonreporting status by the department must continue to file tax returns and remit the appropriate taxes.

(4) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The status of each situation must be determined after a review of all facts and circumstances.

(a) Bob Brown is starting a bookkeeping service. The gross income of the business is expected to be less than twelve thousand dollars per year. Due to the nature of the business activities, Bob is not required to pay or collect any other tax which the department is authorized to collect.

Bob Brown is not required to apply for and obtain a tax registration endorsement with the department of revenue. The conditions under which a business person may engage in business activities without obtaining the tax registration endorsement have been met. However, if Bob Brown in some future period has gross income exceeding twelve thousand dollars per year, he will be required to obtain a tax registration endorsement. If Bob's gross income exceeds twenty-eight thousand dollars per year, he will be required to file tax returns and remit the appropriate taxes.

(b) Cindy Smith is opening a business to sell books written for children to local customers at retail. The gross proceeds of sales are expected to be less than twelve thousand dollars per year.

Cindy Smith must apply for and obtain a tax registration endorsement with the department of revenue. While gross income is expected to be less than twelve thousand dollars per year, Cindy Smith is required to collect and remit retail sales tax.

(c) Alice Smith operates a taxicab service with an average gross income of eighteen thousand dollars per year. She also owns a management consulting service with an average gross income of fifteen thousand dollars per year. Assume that Alice is not required to collect or pay to the department any other tax or fee the department is authorized to collect. Alice qualifies for an active nonreporting status because her taxicab income is less than the twenty-four thousand dollar threshold for the public utility tax, and her consulting income is less than the twenty-four thousand dollar threshold for the business and occupation (B&O) tax. If the department of revenue does not first place her on an active nonreporting status, she may request the department to do so.

(5) **Out-of-state businesses.** The B&O and public utility taxes are imposed on the act or privilege of engaging in business activity within Washington. RCW 82.04.220 and 82.16.-020. Out-of-state persons who have established sufficient nexus in Washington to be subject to Washington's B&O or public utility taxes must obtain a tax registration endorsement with this department if they do not satisfy the conditions expressed in subsection (2)(a) of this section. Out-of-state persons required to collect Washington's retail sales or use tax, or who have elected to collect Washington's use tax, even though not statutorily required to do so, must obtain a tax registration endorsement.

(a) Persons with out-of-state business locations should not include income that is disassociated from their instate activities in their computations for determining whether the gross income thresholds provided in subsection (2)(a)(i) and (ii) of this section are satisfied.

(b) Out-of-state persons making sales into or doing business within Washington should also refer to the following rules in chapter 458-20 WAC for a discussion of their tax reporting responsibilities:

(i) WAC 458-20-103 (Time and place of sale);

(ii) WAC 458-20-193 (Inbound and outbound interstate sales of tangible personal property);

(iii) WAC 458-20-193D (Transportation, communication, public utility activities, or other services in interstate or foreign commerce);

(iv) WAC 458-20-194 (Doing business inside and outside the state); and

(v) WAC 458-20-221 (Collection of use tax by retailers and selling agents).

(6) **Registration procedure.** The state of Washington initiated the unified business identifier (UBI) program to simplify the registration and licensing requirements imposed on the state's business community. Completion of the master application enables a person to register or license with several state agencies, including the department of revenue, using a single form. The person will be assigned one unified business identifier number, which will be used for all state agencies participating in the UBI program. The department may assign the unified business identifier number as the taxpayer's revenue tax reporting account number, or it may assign a different or additional number as the revenue tax reporting account number.

(a) Persons completing the master application will be issued a registrations and licenses document. The face of this document will list the registrations and licenses (endorsements) which have been obtained.

(b) The department of revenue does not charge a registration fee for issuing a tax registration endorsement. Persons required to complete a master application may, however, be subject to other fees.

(c) While the UBI program is administered by the department of licensing, master applications are available at any participating UBI service provider location. The following agencies of the state of Washington participate in the UBI program (see RCW 19.02.050 for a more complete listing of participating agencies):

(i) The office of the secretary of state;

(ii) The department of licensing;

(iii) The department of employment security;

(iv) The department of labor and industries;

(v) The department of revenue.

(7) **Temporary revenue registration certificate.** A temporary revenue registration certificate may be issued to any person who operates a business of a temporary nature.

(a) Temporary businesses, for the purposes of registration, are those with:

(i) Definite, predetermined dates of operation for no more than two events each year with each event lasting no longer than one month; or

(ii) Seasonal dates of operation lasting no longer than three months. However, persons engaging in business activities on a seasonal basis every year should refer to subsection (8) of this section.

(b) Each temporary registration certificate is valid for a single event. Persons that subsequently make sales into Washington may incur additional tax liability. Refer to WAC 458-20-193 (Inbound and outbound interstate sales of tangible personal property) for additional information on tax reporting requirements. It may be required that a tax registration endorsement be obtained, in lieu of a temporary registration certificate. See subsection (2) of this section.

(c) Temporary revenue registration certificates may be obtained by making application at any participating UBI agency office, or by completing a seasonal registration form.

(8) **Seasonal revenue tax reporting accounts.** Persons engaging in seasonal business activities which do not exceed two quarterly reporting periods each calendar year may be eligible for a tax reporting account with a seasonal reporting status. This is a permanent account until closed by the taxpayer. The taxpayer must specify in which quarterly reporting periods he or she will be engaging in taxable business activities. The quarterly reporting periods in which the taxpayer is engaging in taxable business activities may or may not be consecutive, but the same quarterly period or periods must apply each year. The taxpayer is not required to be engaging in taxable business activities during the entire period.

The department will provide and the taxpayer will be required to file tax returns only for the quarterly reporting periods specified by the taxpayer. Examples of persons which may be eligible for the seasonal reporting status include persons operating Christmas tree and/or fireworks stands. Persons engaging in taxable business activities in more than two quarterly reporting periods in a calendar year will not qualify for the seasonal reporting status.

(9) **Display of registrations and licenses document.** The taxpayer is required to display the registrations and licenses document in a conspicuous place at the business location for which it is issued.

(10) **Multiple locations.** A registrations and licenses document is required for each place of business at which a taxpayer engages in business activities for which the department of revenue is responsible for administering and/or collecting a tax or fee, and any main office or principal place of business from which excise tax returns are to be filed. This requirement applies to locations both within and without the state of Washington.

(a) For the purposes of this subsection, the term "place of business" means:

(i) Any separate establishment, office, stand, cigarette vending machine, or other fixed location; or

(ii) Any vessel, train, or the like, at any of which the taxpayer solicits or makes sales of tangible personal property, or contracts for or renders services in this state or otherwise transacts business with customers.

(b) A taxpayer wishing to report all tax liability on a single excise tax return may request a separate registrations and licenses document for each location. The original registrations and licenses document shall be retained for the main office or principal place of business from which the returns are to be filed, with additional documents obtained for all

branch locations. All registrations and licenses documents will reflect the same tax reporting account number.

(c) A taxpayer desiring to file a separate excise tax return covering a branch location, or a specific construction contract, may apply for and receive a separate revenue tax reporting account number. A registrations and licenses document will be issued for each tax reporting account number and will represent a separate account.

(d) A master application must be completed to obtain a separate registrations and licenses document, or revenue tax reporting account number, for a new location.

(11) **Change in ownership.** When a change in ownership of a business occurs, the new owner must apply for and obtain a new registrations and licenses document. The original document must be destroyed, and any further use of the tax reporting account number for tax purposes is prohibited.

(a) A "change in ownership," for purposes of registration, occurs upon but is not limited to:

(i) The sale of a business by one individual, firm or corporation to another individual, firm or corporation;

(ii) The dissolution of a partnership;

(iii) The withdrawal, substitution, or addition of one or more partners where the general partnership continues as a business organization and the change in the composition of the partners is equal to or greater than fifty percent;

(iv) Incorporation of a business previously operated as a partnership or sole proprietorship;

(v) Changing from a corporation to a partnership or sole proprietorship; or

(vi) Changing from a corporation, partnership or sole proprietorship to a limited liability company or a limited liability partnership.

(b) For the purposes of registration, a "change in ownership" does not occur upon:

(i) The sale of all or part of the common stock of a corporation;

(ii) The transfer of assets to an assignee for the benefit of creditors or upon the appointment of a receiver or trustee in bankruptcy;

(iii) The death of a sole proprietor where there will be a continuous operation of the business by the executor, administrator, or trustee of the estate or, where the business was owned by a marital community or registered domestic partnership, by the surviving spouse or surviving domestic partner of the deceased owner;

(iv) The withdrawal, substitution, or addition of one or more partners where the general partnership continues as a business organization and the change in the composition of the partners is less than fifty percent; or

(v) A change in the trade name under which the business is conducted.

(c) While changes in a business entity may not result in a "change in ownership," the completion of a new master application may be required to reflect the changes in the registered account.

(12) **Change in location.** Whenever the place of business is moved to a new location, the taxpayer must notify the department of the change. A new registrations and licenses document will be issued to reflect the change in location.

(13) **Lost registrations and licenses documents.** If any registrations and licenses document is lost, destroyed or defaced as a result of accident or of natural wear and tear, a new document will be issued upon request.

(14) **Administrative closure of taxpayer accounts.** The department may, upon written notification to the taxpayer, close the taxpayer's tax reporting account and rescind its tax registration endorsement whenever the taxpayer has reported no gross income and there is no indication of taxable activity for two consecutive years.

The taxpayer may request, within thirty days of notification of closure, that the account remain open. A taxpayer may also request that the account remain open on an "active nonreporting" status if the requirements of subsection (3)(a) of this section are met. The request shall be reviewed by the department and if found to be warranted, the department will immediately reopen the account. The following are acceptable reasons for continuing as an active account:

(a) The taxpayer is engaging in business activities in Washington which may result in tax liability.

(b) The taxpayer is required to collect or pay to the department of revenue a tax or fee which the department is authorized to administer and/or collect.

(c) The taxpayer has in fact been liable for excise taxes during the previous two years.

(15) **Reopening of taxpayer accounts.** A business person choosing to resume business activities for which the department of revenue is responsible for administering and/or collecting a tax or fee, may request a previously closed account be reopened. The business person must complete a new master application. When an account is reopened a new registrations and licenses document, reflecting a current tax registration endorsement, shall be issued. Persons requesting the reopening of an account which had previously been closed due to a revocation action should refer to subsection (16) of this section.

(16) **Revocation and reinstatement of tax registration endorsements.** Actions to revoke tax registration endorsements must be conducted by the department pursuant to the provisions of chapter 34.05 RCW, the Administrative Procedure Act, and the taxpayers bill of rights of chapter 82.32A RCW. Persons should refer to WAC 458-20-10001, Adjudicative proceedings—Brief adjudicative proceedings—Wholesale and retail cigarette license revocation/suspension—Certificate of registration (tax registration endorsement) revocation, for an explanation of the procedures and processes pertaining to the revocation of tax registration endorsements.

(a) The department of revenue may, by order, revoke a tax registration endorsement if any tax warrant issued under the provisions of RCW 82.32.210 is not paid within thirty days after it has been filed with the clerk of the superior court, or for any other reason expressly provided by law.

(b) The revocation order will be posted in a conspicuous place at the main entrance to the taxpayer's place of business and must remain posted until the tax registration endorsement has been reinstated. A revoked endorsement will not be reinstated until:

(i) The amount due on the warrant has been paid, or satisfactory arrangements for payment have been approved by the department; and

(ii) The taxpayer has posted with the department a bond or other security in an amount not exceeding one-half the estimated average annual liability of the taxpayer.

(c) It is unlawful for any taxpayer to engage in business after its tax registration endorsement has been revoked.

(17) **Penalties for noncompliance.** The law provides that any person engaging in any business activity, for which registration with the department of revenue is required, shall obtain a tax registration endorsement.

(a) The failure to obtain a tax registration endorsement prior to engaging in any taxable business activity constitutes a gross misdemeanor.

(b) Engaging in business after a tax registration endorsement has been revoked by the department constitutes a Class C felony.

(c) Any tax found to have been due, but delinquent, and any tax unreported as a result of fraud or misrepresentation, may be subject to penalty as provided in chapter 82.32 RCW, WAC 458-20-228 and 458-20-230.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 08-16-073, § 458-20-101, filed 7/31/08, effective 8/31/08; WSR 07-03-031, § 458-20-101, filed 1/8/07, effective 2/8/07. Statutory Authority: RCW 82.32.300. WSR 00-01-069, § 458-20-101, filed 12/13/99, effective 1/13/00; WSR 97-08-050, § 458-20-101, filed 3/31/97, effective 5/1/97; WSR 95-07-089, § 458-20-101, filed 3/17/95, effective 4/17/95; WSR 93-13-126, § 458-20-101, filed 6/22/93, effective 7/23/93; WSR 86-12-015 (Order ET 86-11), § 458-20-101, filed 5/27/86; WSR 83-07-032 (Order ET 83-15), § 458-20-101, filed 3/15/83; Order ET 73-1, § 458-20-101, filed 11/2/73; Order ET 71-1, § 458-20-101, filed 7/22/71; Order ET 70-3, § 458-20-101 (Rule 101), filed 5/29/70, effective 7/1/70.]

WAC 458-20-10101 Business licensing service—Total fee payable—Handling of fees. (1) **Introduction.** Chapter 298, Laws of 2011, transferred responsibility for the master license service program (MLS) from the department of licensing to the department of revenue, effective July 1, 2011. This program is now referred to as the business licensing service (BLS).

Information about BLS is available online at http://business.wa.gov/BLS. If you are seeking in-person assistance, you may want to visit:

6500 Linderson Way S.W., Suite 102
Tumwater, WA 98501
8 a.m. to 5 p.m., Monday - Friday
(except state holidays or temporary layoff days)

The department of licensing continues to issue, renew, and regulate professional licenses, see http://dol.wa.gov/business/.

(2) **What fee do I need to pay when applying for or renewing a license?** The fee payable will be the total amount of all individual license fees, late filing fees, other penalty fees, and handling fees, and may include additional fees charged to cover credit or debit card processing. Licensing fees vary depending on the license for which you are applying. Refer to http://bls.dor.wa.gov/specialtylicenses.aspx for information about licenses and license fee amounts.

(3) **What does the department do with these fees?** The department will distribute the fees received for individual licenses issued or renewed to the appropriate agencies on an established schedule.

(4) **When do I get my business license?** The business license will not be issued until the full amount of the total fee payable is collected. When the fee payment received is less than the total fee payable, the department will bill the applicant for the balance.

(5) **Can I get a refund?** The business license application and renewal handling fees collected under RCW 19.02.075 are not refundable. When a license is denied or when an applicant withdraws an application, a refund of any other refundable portion of the total payment will be made in accordance with the applicable licensing laws.

(6) **What are the handling fees?** The business license application handling fee amounts are:

Type of handling fee:	Fee amount:
Business license application filing	$19.00
License renewal application filing	$11.00

[Statutory Authority: 2013 c 4, 2011 c 298, RCW 19.02.030 and 19.02.075. WSR 13-17-048, § 458-20-10101, filed 8/13/13, effective 10/1/13. Statutory Authority: 2011 c 298 and RCW 19.02.075. WSR 12-04-060, amended and recodified as § 458-20-10101, filed 1/30/12, effective 3/1/12. Statutory Authority: RCW 19.02.030(3). WSR 10-13-039, § 308-300-160, filed 6/8/10, effective 7/9/10; Order 476-DOL, § 308-300-160, filed 12/30/77.]

WAC 458-20-102 Reseller permits. (1) **Introduction.** This section provides information about reseller permits issued by the department of revenue (department). Effective January 1, 2010, reseller permits replaced resale certificates as the documentation necessary to substantiate the wholesale nature of a sales transaction. Reseller permits are issued to businesses that make wholesale purchases, such as retailers, wholesalers, manufacturers, and qualified contractors. The permits allow businesses to purchase certain items or services at wholesale without paying retail sales tax. Additional information can be found on the department's internet site: http://dor.wa.gov.

(a) **What other sections provide related information?** The following sections may contain additional relevant information:

• WAC 458-20-10201 (Application process and eligibility requirements for reseller permits) for more information about the application process and eligibility requirements for obtaining a reseller permit;

• WAC 458-20-10202 (Brief adjudicative proceedings for matters related to reseller permits) for more information about the procedures for appealing the denial of an application for a reseller permit; and

• WAC 458-20-102A (Resale certificates), which explains the resale certificate documentation requirements for wholesale sales occurring before January 1, 2010.

(b) **Examples.** This section contains examples which identify a number of facts and then state a conclusion. The examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(2) **What is a reseller permit?** A reseller permit is a document issued to a business by the department that the business provides to a seller to substantiate a wholesale purchase. Each reseller permit contains a unique identifying number. Businesses should keep the original permit and

make and distribute copies of the permit to sellers from whom they make wholesale purchases as described in subsection (6) of this section. Sellers can store copies of reseller permits in either paper or electronic format.

The reseller permit document issued by the department contains an optional, blank "Notes" section in which the permit holder can provide additional information, such as a description of the items or services the permit holder wishes to purchase at wholesale.

(3) **Who may use a reseller permit?** The buyer may authorize any person in its employ to use a copy of the buyer's reseller permit on the buyer's behalf. However, misuse of the reseller permit subjects the buyer to:

• Revocation of the reseller permit;

• Penalties as provided in RCW 82.32.290 and 82.32.291; and

• Tax, interest, and any other penalties imposed by law.

The buyer is responsible for educating all persons authorized to use the reseller permit on the proper use of the buyer's reseller permit.

(4) **How long is a reseller permit effective?** Except as otherwise provided in this subsection, reseller permits are generally valid for a period of forty-eight months from the date of issuance, renewal, or reinstatement.

(a) **Conditions when permit is effective for twenty-four months.** A reseller permit is valid for a period of twenty-four months and may be renewed for a period of forty-eight months, effective July 1, 2010, if the permit is issued to a taxpayer who:

(i) Is not registered with the department under RCW 82.32.030;

(ii) Has been registered with the department under RCW 82.32.030 for a continuous period of less than one year as of the date that the department received the taxpayer's application for a reseller permit;

(iii) Was on nonreporting status as authorized under RCW 82.32.045(4) at the time that the department received the taxpayer's application for a reseller permit or to renew or reinstate a reseller permit;

(iv) Has filed tax returns reporting no business activity for purposes of sales and business and occupation taxes for the twelve-month period immediately preceding the date that the department received the taxpayer's application for a reseller permit or to renew or reinstate a reseller permit; or

(v) Has failed to file tax returns covering any part of the twelve-month period immediately preceding the department's receipt of the taxpayer's application for a reseller permit or to renew or reinstate a reseller permit.

(b) **Federally recognized Indian tribe.** The provisions of (a) of this subsection do not apply to reseller permits issued to any business owned by a federally recognized Indian tribe or by an enrolled member of a federally recognized Indian tribe, if the business does not engage in any business activity that subjects the business to the B&O tax (chapter 82.04 RCW). Permits issued to such businesses are valid for forty-eight months from the date of issuance, renewal, or reinstatement.

(c) **Contractors.** Except as otherwise provided in this subsection (c), until June 20, 2013, a reseller permit issued, renewed, or reinstated to a "contractor" as defined in WAC 458-20-10201(302) will be valid for a period of twelve months from the date of issuance, renewal, or reinstatement.

(i) Beginning July 1, 2013, reseller permits issued, renewed, or reinstated to a contractor will be valid for a period of twenty-four months from the date of issuance, renewal, or reinstatement.

(ii) However, the department may issue, renew, or reinstate permits for a period of twenty-four months beginning July 1, 2011, if the department is satisfied that the contractor is entitled to make purchases at wholesale and that issuing or renewing the reseller permit in this manner is unlikely to jeopardize collection of sales taxes due based on the criteria discussed in WAC 458-20-10201(305).

(d) **Renewal of reseller permit.** Applications to renew a reseller permit cannot be made more than ninety days before the expiration of the reseller permit.

(e) **Business ownership change.** A new reseller permit is required whenever a change in the ownership of the buyer's business requires a new tax registration. (See WAC 458-20-101 Tax registration and tax reporting.) The new business may not make purchases under the authority of the reseller permit issued to the business before the change in ownership.

(f) **Revoked or invalid reseller permit.** Purchases may not be made under the authority of a reseller permit that has been revoked by the department or is otherwise invalid. For more information about reseller permit revocation or other invalidation of reseller permits, see subsection (14) of this section.

(5) **Sales at wholesale.** All sales are treated as retail sales unless the seller takes from the buyer a copy of a reseller permit, a uniform exemption certificate authorized by RCW 82.04.470, or obtains the data elements as described in subsection (7) of this section. Reseller permits may only be used for sales at wholesale and generally may not be used as proof of entitlement to retail sales tax exemptions otherwise provided by law.

(6) **When may a buyer use a reseller permit?** The buyer may use a reseller permit only when making wholesale purchases. (See RCW 82.04.060 for additional information.) The reseller permit may not be used when making tax-exempt retail purchases.

(7) **Seller's responsibilities.** The seller has the burden of proving that the buyer had a reseller permit at the time of sale. A seller may meet its burden by taking from the buyer, at the time of sale or within one hundred twenty days after the sale, a copy of a reseller permit issued to the buyer by the department under RCW 82.32.780 or 82.32.783.

(a) In lieu of a copy of a reseller permit issued by the department, pursuant to RCW 82.04.470 a seller may accept from a buyer that is **required** to be registered with the department under RCW 82.32.030:

(i) A properly completed uniform exemption certificate approved by the streamlined sales and use tax agreement governing board; or

(ii) Any other exemption certificate as may be authorized by the department and properly completed by the buyer.

(b) Certificates authorized in (a)(i) and (ii) of this subsection must include the reseller permit number issued by the department to the buyer.

(c) A seller who accepts exemption certificates authorized in (a) of this subsection is not required to verify with the

department whether the buyer is required to be registered with the department under RCW 82.32.030. It must be noted, however, that nothing in this subsection (c) may be construed to modify any of the provisions of RCW 82.08.050.

(d) In lieu of a copy of a reseller permit issued by the department, pursuant to RCW 82.04.470 a seller may accept from a buyer that is **not required** to be registered with the department under RCW 82.32.030:

(i) A properly completed uniform sales and use tax exemption certificate developed by the multistate tax commission;

(ii) A properly completed uniform exemption certificate approved by the streamlined sales and use tax agreement governing board; or

(iii) Any other exemption certificate as may be authorized by the department and properly completed by the buyer.

The Streamlined Sales and Use Tax Agreement Certificate of Exemption and Multistate Tax Commission Uniform Sales and Use Tax Exemption Certificate can each be obtained on the department's internet site at http://dor.wa.gov.

(e) A seller who accepts a uniform exemption certificate authorized in (d) of this subsection is not required to verify with the department whether the buyer is required to be registered with the department under RCW 82.32.030. It must be noted, however, that nothing in this subsection (e) may be construed to modify any of the provisions of RCW 82.08.-050.

(f) **Data elements.** In lieu of obtaining a reseller permit or the documentation in (a) or (d) of this subsection, RCW 82.08.050(7) authorizes a seller to capture the relevant data elements as allowed under the streamlined sales and use tax agreement. "Data elements" are the information required to be supplied on the actual Streamlined Sales and Use Tax Agreement Certificate of Exemption: Name, address, type of business, reason for exemption, identification number required by the state to which the sale is sourced, state and country issuing identification number, and if a paper form is used, a signature of the purchaser. See Streamlined Sales Tax Governing Board, Inc. Rule 317.1(A) for more information.

(g) **The term "reseller permit."** For purposes of this section, unless otherwise specified, the term "reseller permit" hereinafter contemplates all of the following: A copy of a reseller permit, a uniform exemption certificate authorized by RCW 82.04.470 as described in (a) and (d) of this subsection, or data elements as described in (f) of this subsection.

(h) **Seller must provide documentation or information.** If the seller has not obtained a reseller permit or the documentation described in (a), (b), (d), or (f) of this subsection, the seller is liable for the tax due unless it can sustain the burden of proving that a sale is a wholesale sale by demonstrating facts and circumstances that show the sale was properly made at wholesale. The department will consider all evidence presented by the seller, including the circumstances of the sales transaction itself, when determining whether the seller has met its burden of proof. It is the seller's responsibility to provide the information necessary to evaluate the facts and circumstances of all sales transactions for which reseller permits are not obtained. Facts and circumstances that should be considered include, but are not necessarily limited to, the following:

• The nature of the buyer's business. The items being purchased at wholesale must be consistent with the buyer's business. For example, a buyer having a business name of "Ace Used Cars" would generally not be expected to be in the business of selling furniture;

• The nature of the items sold. The items sold must be of a type that would normally be purchased at wholesale by the buyer; and

• Additional documentation. Other available documents, such as purchase orders and shipping instructions, should be considered in determining whether they support a finding that the sales are sales at wholesale.

(i) **Annual electronic verification.** Notwithstanding anything in RCW 82.04.470 to the contrary, a seller who maintains records establishing that it uses electronic means to verify, at least once per calendar year, the validity of its customers' reseller permits need not take a copy of a reseller permit or other documentation or the data elements as authorized in (a), (d), or (f) of this subsection for wholesale sales to those customers with valid reseller permits as confirmed by the department for all sales occurring within twelve months following the date that the seller last electronically verified the validity of its customers' reseller permits, using the department's reseller permit verification system. A seller that meets the requirements of this subsection will be deemed to have met its burden of proving a sale is a wholesale sale rather than a retail sale.

(j) **Can a seller request a refund for sales tax paid out-of-pocket after obtaining appropriate documentation?** If the seller is required to make payment to the department, and later is able to present the department with proper documentation or prove by facts and circumstances that the sales in question are wholesale sales, the seller may in writing request a refund of the taxes paid along with the applicable interest. Both the request and the documentation or proof that the sales in question are wholesale sales must be submitted to the department within the statutory time limitations provided by RCW 82.32.060. (See WAC 458-20-229 Refunds.) However, refer to (m) of this subsection in the event of an audit situation.

(k) **Timing requirements for single orders with multiple billings.** If a single order or contract will result in multiple billings to the buyer, and a reseller permit was not obtained or on file at the time the order was placed or the contract entered, a reseller permit must be received by the seller within one hundred twenty days after the first billing. For example, a subcontractor entering into a construction contract for which it has not received a reseller permit must obtain it within one hundred twenty days of the initial construction draw request, even though the construction project may not be completed at that time and additional draw requests will follow.

(l) **Proof of wholesale sales obtained, from a buyer not required to be registered, after one hundred twenty days have passed from sale date.** If proof that a sale was a wholesale sale is obtained more than one hundred twenty days after the sale or sales in question, the nonregistered buyer must specifically identify the sale or sales to which it applies. Certificates, such as a uniform exemption certificate, used must be accompanied by other documentation signed by the buyer specifically identifying the sales in question and stating that

the provisions of the accompanying certificate apply. A nonspecific certificate that is not obtained within one hundred twenty days is generally not, in and of itself, acceptable proof of the wholesale nature of the sales in question. The certificate and/or required documentation must be obtained within the statutory time limitations provided by RCW 82.32.050.

(m) **Additional time to secure documentation in audit situation.** If in event of an audit the department discovers that the seller has not secured, as described in this subsection, the necessary certificates and/or documentation, the seller will generally be allowed one hundred twenty days in which to obtain and present appropriate certificates and/or documentation, or prove by facts and circumstances the sales in question are wholesale sales. The time allotted to the seller will commence from the date the auditor initially provides the seller with the results of the auditor's wholesale sales review. The processing of the audit report will not be delayed as a result of the seller's failure within the allotted time to secure and present appropriate documentation, or its inability to prove by facts and circumstances that the sales in question were wholesale sales.

(8) **Department's reseller permit verification system.** Pursuant to RCW 82.32.785, the department has developed a system available on its internet site that allows sellers to voluntarily verify whether their customers' reseller permits are valid. Sellers are under no obligation to use the verification system. The system is accessible at the department's internet site: http://dor.wa.gov. Information available on the system includes the name of the permit holder, the status of the reseller permit, and the expiration date of the permit.

(9) **Penalty for improper use of reseller permit.** If any buyer improperly uses a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services at retail without payment of sales tax that was legally due on the purchase, the department must assess against that buyer a penalty of fifty percent of the tax due on the improperly purchased item or service. See RCW 82.32.291. This penalty is in addition to all other taxes, penalties, and interest due, and can be imposed even if there was no intent to evade the payment of retail sales tax. The penalty will be assessed by the department and applies only to the buyer. However, see subsection (13) of this section for situations in which the department must waive the penalty.

(a) **Improper use of reseller permit.** A buyer that purchases items or services at retail without payment of sales tax legally due on the purchase is deemed to have improperly used a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase the items or services without payment of sales tax and is subject to the penalty described above in this subsection if the buyer:

(i) Furnished to the seller a reseller permit number, a reseller permit or copy of a reseller permit, or other documentation authorized under RCW 82.04.470 to avoid payment of sales tax legally due on the purchase; or

(ii) Made the purchase from a seller that had previously used electronic means to verify the validity of the buyer's reseller permit with the department and, as a result, did not require the buyer to provide a copy of its reseller permit or furnish other documentation authorized under RCW 82.04.470 to document the wholesale nature of the purchase. In such cases, the buyer bears the burden of proving that the purchases made without payment of sales tax were qualified purchases or the buyer remitted deferred sales tax directly to the department. The buyer not realizing that sales tax was not paid at the time of purchase is not reason for waiving the penalty.

Persons who purchase articles or services for dual purposes (i.e., some for their own consumption and some for resale) should refer to subsection (12) of this section to determine whether they may furnish a reseller permit to the seller.

(b) **Examples.**

(i) During a routine audit examination of a jewelry store, the department discovers that a dentist has furnished a reseller permit for the purchase of a necklace. The "Notes" section of the reseller permit indicates that in addition to operating a dentistry practice, the dentist also sells jewelry. The jewelry store correctly accepted the reseller permit as appropriate documentation.

Upon further investigation, the department finds that the dentist is not engaged in selling jewelry. The department will impose the retail sales tax, interest, and the fifty percent penalty for improper use of the reseller permit against the dentist.

(ii) M&M Plumbing Supply (M&M) has several regular customers who make purchases at wholesale. M&M uses the department's reseller permit verification system to find all regular customers that have a reseller permit. M&M keeps the required data elements in its system and begins to make wholesale sales to all customers the system shows have a reseller permit. While it is best for sellers to ensure customers intend to purchase at wholesale, in this case, M&M has satisfied its requirement to ensure that customers making wholesale purchases have reseller permits. It is the customer's responsibility to review purchase invoices to ensure that deferred sales tax is paid if the purchase is not a valid wholesale purchase. If the customer does not pay the tax due on the next tax return, the misuse penalty will be assessed.

(10) **Sales to nonresident buyers.** If the buyer is a nonresident who is not engaged in business in this state and is not required to be registered with the department under RCW 82.32.030 but buys articles here for the purpose of resale in the regular course of business outside this state, the seller may accept the following from the buyer in lieu of a reseller permit:

(a) A properly completed uniform sales and use tax exemption certificate developed by the multistate tax commission; or

(b) A properly completed uniform exemption certificate approved by the streamlined sales and use tax agreement governing board. Nonresident buyers who are not required to be registered with the department under RCW 82.32.030 are nonetheless eligible to apply for and receive a reseller permit. For more information about the application process and eligibility requirements for reseller permits, see WAC 458-20-10201 (Application process and eligibility requirements for reseller permits).

(11) **Sales to farmers.** Farmers selling agricultural products only at wholesale are generally not required to register with the department. (See WAC 458-20-101 Tax registration and tax reporting.)

(a) **Registered farmers.** Farmers who are required to be registered with the department must obtain a reseller permit to substantiate wholesale purchases. In lieu of a copy of a

reseller permit issued by the department, a seller may accept from a farmer that is registered with the department a properly completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions as long as that certificate includes the reseller permit number issued by the department to the farmer.

(b) **Unregistered farmers.** Farmers not required to be registered with the department may provide, and the seller may accept, any of the following documents to substantiate the wholesale nature of a purchase in lieu of a reseller permit:

(i) A Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions;

(ii) A properly completed uniform sales and use tax exemption certificate developed by the multistate tax commission; or

(iii) A properly completed uniform exemption certificate approved by the streamlined sales and use tax agreement governing board.

Farmers who are not required to be registered with the department are nonetheless eligible to apply for and receive a reseller permit. For more information about the application process and eligibility requirements for reseller permits, see WAC 458-20-10201 (Application process and eligibility requirements for reseller permits).

(12) **Purchases for dual purposes.** A buyer normally engaged in both consuming and reselling certain types of tangible personal property, and not able to determine at the time of purchase whether the particular property purchased will be consumed or resold, must purchase according to the general nature of the buyer's business. RCW 82.08.130. If the buyer principally consumes the articles in question, the buyer should not give a reseller permit for any part of the purchase. If the buyer principally resells the articles, the buyer may furnish a reseller permit for the entire purchase. For the purposes of this subsection, the term "principally" means greater than fifty percent.

(a) **Deferred sales tax liability.** If the buyer gives a reseller permit for all purchases and thereafter consumes some of the articles purchased, the buyer must remit the deferred sales tax on the value of the article used to the department. The deferred sales tax liability should be reported under the use tax classification on the buyer's excise tax return.

(i) Buyers making purchases for dual purposes under the provisions of a reseller permit must remit deferred sales tax on all products or services they consume. If the buyer fails to make a good faith effort to remit this tax liability, the penalty for the misuse of a reseller permit will be assessed. This penalty will apply to the unremitted portion of the deferred sales tax liability.

A buyer will generally be considered to be making a good faith effort to report its deferred sales tax liability if the buyer discovers a minimum of eighty percent of the deferred sales tax liability within one hundred twenty days of purchase, and remits the full amount of the discovered tax liability upon the next excise tax return. However, if the buyer does not satisfy this eighty percent threshold and can show by other facts and circumstances that it made a good faith effort to report the tax liability, the penalty will not be assessed. Likewise, if the department can show by other facts and circumstances that the buyer did not make a good faith effort in remitting its tax liability the penalty will be assessed, even if the eighty percent threshold is satisfied.

(ii) The following example illustrates the use of a reseller permit for dual-use purchases.

BC Contracting operates both as a prime contractor and speculative builder of residential homes. BC Contracting purchases building materials from seller that are principally incorporated into projects upon which BC acts as a prime contractor. BC provides seller with a reseller permit and purchases all building materials at wholesale. BC must remit deferred sales tax upon all building materials incorporated into the speculative projects to be considered to be properly using its reseller permit.

(b) **Tax paid at source deduction.** If the buyer has not provided a reseller permit to the seller but has paid retail sales tax on all articles of tangible personal property and subsequently resells a portion of the articles, the buyer must collect the retail sales tax from its retail customers as provided by law. When reporting these sales on the excise tax return, the buyer may then claim a deduction to recover the sales tax paid for the property resold.

(i) This deduction may be claimed under the retail sales tax classification only. It must be identified as a "taxable amount for tax paid at source" deduction on the deduction detail worksheet, which must be filed with the excise tax return. Failure to properly identify the deduction may result in the disallowance of the deduction. When completing the local sales tax portion of the tax return, the deduction must be computed at the local sales tax rate paid to the seller, and credited to the seller's tax location code.

(ii) The following example illustrates the tax paid at source deduction on or after July 1, 2008.

A seller is located in Spokane, Washington, and purchases equipment parts for dual purposes from a supplier located in Seattle, Washington. The supplier ships the parts to Spokane. The seller does not furnish a reseller permit for the purchase, and remits retail sales tax to the supplier at the Spokane tax rate. A portion of these parts are sold and shipped to a customer in Kennewick, with retail sales tax collected at the Kennewick tax rate. The seller must report the amount of the sale to the customer on its excise tax return and compute the local sales tax liability using the Kennewick location code (0302) and rate. The seller would claim the tax paid at source deduction for the cost of the parts resold to the customer and compute the local sales tax credit using the Spokane location code (3210) and rate.

(iii) Claim for deduction will be allowed only if the taxpayer keeps and preserves records in support of the deduction that include the names of the persons from whom such articles were purchased, the date of the purchase, the type of articles, the amount of the purchase and the amount of tax that was paid.

(iv) Should the buyer resell the articles at wholesale, or under other situations where retail sales tax is not to be collected, the claim for the tax paid at source deduction on a particular excise tax return may result in a credit. In such cases, the department will issue a credit notice that may be used against future tax liabilities. However, a taxpayer may request in writing a refund from the department.

(13) **Waiver of penalty for misuse of reseller permits.** The department will waive the penalty imposed for misuse of

reseller permits upon finding that the use of the reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services by a person not entitled to use the reseller permit for that purpose was due to circumstances beyond the control of the buyer or if the reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 was properly used for purchases for dual purposes and the buyer made a good faith effort to report deferred sales tax. However, the use of a reseller permit to purchase items or services for personal use outside of the business does not qualify for the waiver or cancellation of the penalty. The penalty will not be waived merely because the buyer was not aware of either the proper use of the reseller permit or the penalty. In all cases the burden of proving the facts is upon the buyer.

Example. During a routine audit examination of a computer dealer, it is discovered that a reseller permit was obtained from a bookkeeping service. Upon further investigation it is discovered that the bookkeeping service had no knowledge of the reseller permit, and had made no payment to the computer dealer. The employee who furnished the reseller permit had purchased the computer for personal use, and had personally made payment to the computer dealer.

The fifty percent penalty for the misuse of the reseller permit will be waived for the bookkeeping service. The bookkeeping service had no knowledge of the purchase or unauthorized use of the reseller permit. However, the department will impose the taxes, interest, and the fifty percent penalty for the misuse of the reseller permit against the employee.

(14) **Reseller permit revocation or other invalidation.** A reseller permit is no longer valid if the permit holder's certificate of registration is revoked, the permit holder's tax reporting account is closed by the department, or the permit holder otherwise ceases to engage in business.

(a) **Closing of an account.** A taxpayer who ceases to engage in business will have its tax reporting account closed by the department. The account can be closed per the request of the taxpayer or administratively by the department. The department will administratively close a tax reporting account if a taxpayer has not reported any gross income or filed a return within the last two years. For more information about administrative closure and reopening of taxpayer accounts, see WAC 458-20-101.

(b) **Reseller permit revocation.** The department may revoke a reseller permit of a taxpayer for any of the following reasons:

(i) The taxpayer used or allowed or caused its reseller permit to be used to purchase any item or service without payment of sales tax, but the taxpayer or other purchaser was not entitled to use the reseller permit for the purchase;

(ii) The department issued the reseller permit to the taxpayer in error;

(iii) The department determines that the taxpayer is no longer entitled to make purchases at wholesale; or

(iv) The department determines that revocation of the reseller permit would be in the best interest of collecting taxes due under Title 82 RCW.

(c) **Use of invalidated or revoked reseller permit.** A taxpayer whose reseller permit has been revoked or whose tax reporting account has been administratively closed by the department as discussed in (a) of this subsection will receive notice of the revocation or invalidation in writing. The revocation or invalidation is effective on the date specified in the revocation or invalidation notice. Use of a revoked or invalidated permit will result in the fifty percent penalty for improper use of a reseller permit as discussed in subsection (9) of this section.

(d) **Reinstatement of reseller permit.** A taxpayer who wishes to have its reseller permit reinstated after invalidation or revocation must apply to the department. For more information about the application process for reseller permits, see WAC 458-20-10201 (Application process and eligibility requirements for reseller permits).

(e) **Requests for reinstatement.** The department may refuse to reinstate a reseller permit revoked under (b)(i) of this subsection until all taxes, penalties, and interest due on any improperly purchased item or service have been paid in full. In the event a taxpayer whose reseller permit has been revoked under (b)(i) of this subsection reorganizes, the new business resulting from the reorganization is not entitled to a reseller permit until all taxes, penalties, and interest due on any improperly purchased item or service have been paid in full.

(f) **Business reorganization.** For purposes of this subsection, "reorganize" or "reorganization" means:

(i) The transfer, however affected, of a majority of the assets of one business to another business where any of the persons having an interest in the ownership or management in the former business maintain an ownership or management interest in the new business, either directly or indirectly;

(ii) A mere change in identity or form of ownership, however affected; or

(iii) The new business is a mere continuation of the former business based on significant shared features such as owners, personnel, assets, or general business activity.

(15) **Request for copies.** A person must, upon request of the department, provide the department with paper or electronic copies of all reseller permits, or other documentation as authorized in RCW 82.04.470, accepted by that person during the period specified by the department to substantiate wholesale sales. If, instead of the documentation specified in this subsection, the seller has retained the relevant data elements from such permits or other documentation authorized in RCW 82.04.470, as allowed under the streamlined sales and use tax agreement, the seller must provide such data elements to the department.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.32.780, and 82.32.783. WSR 11-12-021, § 458-20-102, filed 5/24/11, effective 6/24/11. Statutory Authority: RCW 82.32.300, 82.32.291, and 82.01.060(2). WSR 08-21-103, § 458-20-102, filed 10/16/08, effective 11/16/08; WSR 04-17-024, § 458-20-102, filed 8/9/04, effective 9/9/04. Statutory Authority: RCW 82.32.300. WSR 94-13-031, § 458-20-102, filed 6/6/94, effective 7/7/94; WSR 86-09-058 (Order ET 86-7), § 458-20-102, filed 4/17/86; WSR 83-07-034 (Order ET 83-17), § 458-20-102, filed 3/15/83; Order ET 70-3, § 458-20-102 (Rule 102), filed 5/29/70, effective 7/1/70.]

WAC 458-20-10201 Application process and eligibility requirements for reseller permits.

Part I - General

(101) Introduction. Effective January 1, 2010, reseller permits issued by the department of revenue (department) replace resale certificates as the documentation necessary to

substantiate the wholesale nature of a sales transaction. Unique requirements and provisions apply to construction contractors. (See Part III of this section.) This section explains the criteria under which the department will automatically issue a reseller permit, the application process for both contractors and taxpayers engaging in other business activities when the department does not automatically issue or renew a reseller permit, and the criteria that may result in the denial of an application for a reseller permit.

(102) What is a reseller permit? A reseller permit is the document issued to a taxpayer by the department, a copy of which the taxpayer provides to a seller to substantiate a wholesale purchase. A wholesale purchase is not subject to retail sales tax. See RCW 82.04.060; 82.08.020. Reseller permits are to be used for wholesale purchases made on and after January 1, 2010.

(103) Can any business obtain a reseller permit? No. This act was passed by the legislature to address the significant retail sales tax noncompliance problem resulting from both the intentional and unintentional misuse of resale certificates. The department will not issue a reseller permit unless the business can substantiate that the business is entitled to make wholesale purchases. Some businesses may not receive a reseller permit, and if they do make wholesale purchases, they will need to pay retail sales tax to the seller and then claim a "taxable amount for tax paid at source" deduction or request a refund from the department as discussed in subsection (205) of this section.

In addition to this section, information regarding the reseller permit is available at the following sources:

• http://dor.wa.gov, which is the department's web site;

• WAC 458-20-10202, which explains the process a taxpayer uses when appealing the department's denial of an application for a reseller permit; and

• WAC 458-20-102, which explains the taxpayer's responsibilities regarding the use of a reseller permit, the seller's responsibility for retaining a copy of a reseller permit, and the implications for a taxpayer not properly using a reseller permit and a seller not obtaining a copy of a reseller permit from the taxpayer.

Buyers and sellers should refer to the following for information regarding the resale certificate, which is the document used to substantiate the wholesale nature of a sales transaction occurring before January 1, 2010:

• WAC 458-20-102A (Resale certificates), which explains the taxpayer's responsibilities regarding the use of a resale certificate, the seller's responsibility for retaining a resale certificate, and the implications for a taxpayer not properly using a certificate and a seller not obtaining a certificate from the taxpayer. It is important to note that sellers should retain resale certificates for five years from the date of last use (e.g., December 31, 2014, for sales made in 2009) as the certificates may be requested by the department to verify the wholesale nature of a sale made before January 1, 2010.

Part II - Businesses Other than Contractors

(201) How does a business obtain a reseller permit? The department will automatically issue a reseller permit to a business if it appears to the department's satisfaction, based on the nature of the business's activities and any other information available to the department, that the business is entitled to make purchases at wholesale.

Those businesses that do not receive an automatically issued reseller permit may apply to the department to obtain a reseller permit. Applications are available at: http://dor.wa.gov or by calling 1-800-647-7706. Completed applications should be mailed or faxed to the department at:

Department of Revenue
Taxpayer Account Administration
P.O. Box 47476
Olympia, WA 98504-7476
Fax: 360-705-6733

(202) When does a business apply for a reseller permit? A business can apply for a reseller permit at any time.

(203) What criteria will the department consider when making its decision whether a business will receive a reseller permit?

(a) Except as provided in (b) of this subsection, a business other than a contractor will receive a reseller permit if it satisfies the following criteria (contractors should refer to subsection (305) of this section for an explanation of the requirements unique to them):

(i) The business has an active tax reporting account with the department;

(ii) The business must have reported gross income on tax returns covering a monthly or quarterly period during the immediately preceding six months or, if the business reports on an annual basis, on the immediately preceding annual tax return; and

(iii) Five percent or more of the business's gross income reported during the applicable six- or twelve-month period described in (a)(ii) of this subsection was reported under a retailing, wholesaling, or manufacturing business and occupation (B&O) tax classification.

(b) Notwithstanding (a) of this subsection, the department may deny an application for a reseller permit if:

(i) The department determines that an applicant is not entitled to make purchases at wholesale or is otherwise prohibited from using a reseller permit based on the nature of the applicant's business;

(ii) The applicant has been assessed the penalty for the misuse of a resale certificate or a reseller permit;

(iii) The application contains any material misstatement;

(iv) The application is incomplete; or

(v) The department determines that denial of the application is in the best interest of collecting the taxes due under Title 82 RCW.

(c) The department's decision to approve or deny an application may be based on tax returns previously filed with the department by the applicant, a current or previous examination of the applicant's books and records by the department, information provided by the applicant in the master application and the reseller permit application, and other information available to the department.

(d) For purposes of this subsection, "gross income" means gross proceeds of sales as defined in RCW 82.04.070 and value of products manufactured as determined under RCW 82.04.450.

(e) For purposes of this subsection and subsection (305) of this section, a "material misstatement" is a false statement

knowingly or purposefully made by the applicant with the intent to deceive or mislead the department.

(f) In the event that a business has reorganized, the new business resulting from the reorganization may be denied a reseller permit if the former business would not have qualified for a reseller permit under (a) or (b) of this subsection. For purposes of this subsection, "reorganize" means:

(i) The transfer, however effected, of a majority of the assets of one business to another business where any of the persons having an interest in the ownership or management in the former business maintain an ownership or management interest in the new business, either directly or indirectly;

(ii) A mere change in identity or form of ownership, however effected; or

(iii) The new business is a mere continuation of the former business based on significant shared features such as owners, personnel, assets, or general business activity.

(204) What if I am a new business and don't have a past reporting history? New businesses will generally be issued permits if they indicate they will engage in activity taxable under a retailing, wholesaling, or manufacturing B&O tax classification.

(205) What if I don't get a reseller permit and some of my purchases do qualify as wholesale purchases? It is possible that some taxpayers that do not qualify for a reseller permit will make wholesale purchases. In these circumstances, the taxpayer must pay retail sales tax on these purchases and then claim a "taxable amount for tax paid at source" deduction on the taxpayer's excise tax return. Alternatively, the taxpayer may request a refund from the department of retail sales tax it paid on purchases that are later resold without being used (intervening use) by the taxpayer or for purchases that would otherwise have met the definition of wholesale sale if the taxpayer had provided the seller with a reseller permit or uniform exemption certificate as authorized in RCW 82.04.470. See also WAC 458-20-229 (Refunds). However, such a deduction in respect to the purchase of services is not permitted if the services are not of a type that can be sold at wholesale under the definition of wholesale sale in RCW 82.04.060.

Part III - Construction Contractors

(301) How does a contractor obtain a reseller permit? The department will automatically issue a reseller permit to a contractor if the department is satisfied that the contractor is entitled to make purchases at wholesale and that issuing the reseller permit is unlikely to jeopardize collection of sales taxes due based on the criteria discussed in subsection (305) of this section.

Those businesses that do not receive an automatically issued reseller permit may apply to the department to obtain a reseller permit in the same manner as provided in subsection (201) of this section.

(302) How do I determine whether I am a "contractor"? For purposes of the reseller permit:

(a) A "contractor" is a person whose primary business activity is as a contractor as defined under RCW 18.27.010 or an electrical contractor as defined under RCW 19.28.006.

(b) "Retail construction activity" means the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and it also includes the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in commercial farming or agriculture. Retail construction activity generally involves residential and commercial construction performed for others, including road construction for the state of Washington. It generally includes construction activities that are not specifically designated as speculative building, government contracting, public road construction, logging road construction, radioactive waste cleanup on federal lands, or designated hazardous site clean-up jobs.

(c) "Wholesale construction activity" means labor and services rendered for persons who are not consumers in respect to real property, if such labor and services are expressly defined as a retail sale by RCW 82.04.050 when rendered to or for consumers. For purposes of this subsection, "consumer" has the same meaning under RCW 82.04.190.

(d) "Materials" is defined as tangible personal property that becomes incorporated into the real property being constructed, repaired, decorated, or improved. Materials are the type of tangible personal property that contractors on retail construction projects purchase at wholesale, such as lumber, concrete, paint, wiring, pipe, roofing materials, insulation, nails, screws, drywall, and flooring material. Materials do not include consumable supplies, tools, or equipment, whether purchased or rented, such as bulldozers. However, for purposes of the percentage discussed in subsection (305)(a)(iii) of this section, purchases of consumable supplies, tools, and equipment rentals may be included with material purchases if all such purchases are commingled in the applicant's records and it would be impractical to exclude such purchases.

(e) "Labor" is defined as the work of subcontractors (including personnel provided by temporary staffing companies) hired by a contractor to perform a portion of the construction services in respect to real property owned by a third party. In the case of speculative builders, labor includes the work of any construction contractor hired by the speculative builder. Labor does not include the work of taxpayer's employees. Nor does the term include consultants, engineers, construction managers, or other independent contractors hired to oversee a project. However, for purposes of the percentage discussed in subsection (305)(a)(iii) of this section, purchases of labor may include the wages of taxpayer's employees and amounts paid to consultants, engineers, construction managers or other independent contractors hired to oversee a project if all such purchases are commingled in the applicant's records and it would be impractical to exclude such purchases.

(303) How does a contractor apply for a reseller permit? A contractor applies for a reseller permit in the same manner as businesses apply as provided in subsection (201) of this section. However, the application identifies information specific to contractors that must be provided.

(304) When does a contractor apply for a reseller permit? The same guidelines for business applicants as provided in subsection (202) of this section also apply to contractor applicants.

(305) What are the criteria specific to contractors to receive a reseller permit?

(a) The department may issue a permit to a contractor that:

(i) Provides a completed application with no material misstatement as that term is defined in subsection (203)(e) of this section;

(ii) Demonstrates it is entitled to make purchases at wholesale; and

(iii) Reported on its application:

(A) Filed July 1, 2010, and after that at least twenty-five percent of its total dollar amount of material and labor purchases in the preceding twenty-four months were for retail and wholesale construction activities performed by the contractor;

(B) Filed from January 1, 2010, through June 30, 2010, that at least twenty-five percent of its total dollar amount of material and labor purchases in the preceding twelve months were for retail construction activities.

The department may, however, approve an application not meeting this criterion if the department is satisfied that approval is unlikely to jeopardize collection of the taxes due under Title 82 RCW.

(b) If the criteria in (a) of this subsection are satisfied, the department will then consider the following factors when determining whether to issue a reseller permit to a contractor:

(i) Whether the contractor has an active tax reporting account with the department;

(ii) Whether the contractor has reported gross income on tax returns covering a monthly or quarterly period during the immediately preceding six months or, if the contractor reports on an annual basis, on the immediately preceding annual tax return;

(iii) Whether the contractor has the appropriate certification and licensing with the Washington state department of labor and industries;

(iv) Whether the contractor has been assessed the penalty for the misuse of a resale certificate or a reseller permit; and

(v) Any other factor resulting in a determination by the department that denial of the contractor's application is in the best interest of collecting the taxes due under Title 82 RCW.

(c) The department's decision to approve or deny an application may be based on the same materials and information as discussed in subsection (203)(c) of this section.

(d) For purposes of this subsection, "gross income" means gross proceeds of sales as defined in RCW 82.04.070 and value of products manufactured as determined under RCW 82.04.450.

(e) The provisions of subsection (203)(f) of this section are equally applicable to contractors.

(306) What if a contractor does not obtain a reseller permit and some of its purchases do qualify as wholesale purchases? The provisions of subsection (205) of this section are equally applicable to contractors.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.32.780, and 82.32.783. WSR 10-14-080, § 458-20-10201, filed 7/1/10, effective 8/1/10.]

WAC 458-20-10202 Brief adjudicative proceedings for matters related to reseller permits. (1) **Introduction.** The department of revenue (department) conducts adjudicative proceedings pursuant to chapter 34.05 RCW, the Administrative Procedure Act (APA). The department adopts in this section the brief adjudicative procedures as provided in RCW 34.05.482 through 34.05.494 for the administration of brief adjudicative proceedings for the following matters related to reseller permits:

(a) A determination of whether an applicant for a reseller permit meets the criteria for a reseller permit per WAC 458-20-10201;

(b) On the administrative appeal of an initial order denying the taxpayer's application for a reseller permit, a determination as to whether the department's order denying the application was correctly based on the criteria for approving reseller permits as set forth in WAC 458-20-10201;

(c) A determination of whether a reseller permit should be revoked using the criteria per RCW 82.32.780 and WAC 458-20-102; and

(d) On the administrative appeal of an initial order revoking the taxpayer's reseller permit, a determination as to whether the department's order revoking the permit was correctly based on the criteria as set forth in RCW 82.32.780 and WAC 458-20-102.

This section explains the procedure and process pertaining to the adopted brief adjudicative proceedings.

(2) **Record in brief adjudicative proceedings.**

(a) The record with respect to a taxpayer's appeal per RCW 34.05.482 through 34.05.485 of the department's denial of an application for a reseller permit will consist of:

(i) The taxpayer's application for the reseller permit, the taxpayer's notice of appeal, the taxpayer's written response, if any, to the reasons set forth in the department's notice of denial of a reseller permit, all records relied upon by the department or submitted by the taxpayer; and

(ii) All correspondence between the taxpayer requesting the reseller permit and the department regarding the application for the reseller permit.

(b) The record with respect to a taxpayer's appeal per RCW 34.05.482 through 34.05.485 of the department's initial order revoking a reseller permit will consist of the department's notice of intent to revoke the reseller permit, the taxpayer's written response to the department's notice of intent to revoke, the taxpayer's notice of appeal, and all records relied upon by the department, or submitted by the taxpayer.

(3) **Conduct of brief adjudicative proceedings.**

(a) If the department denies an application for a reseller permit, it will notify the taxpayer of the denial in writing, stating the reasons for the denial. To initiate an appeal of the denial of the reseller permit application, the taxpayer must file a written appeal no later than twenty-one days after service of the department's written notice that the taxpayer's application has been denied.

(b) If the department proposes to revoke a reseller permit, it will notify the taxpayer of the proposed revocation in writing, stating the reasons for the proposed revocation. To contest the proposed revocation of the reseller permit, the taxpayer must file a written response no later than twenty-one days after service of the department's written notice of the proposed revocation of the reseller permit.

(c) A Reseller Permit Appeal Petition form, or form for a response to the proposed revocation of a reseller permit is available at http://dor.wa.gov or by calling 1-800-647-7706.

The completed form should be mailed or faxed to the department at:

Department of Revenue
Taxpayer Account Administration
P.O. Box 47476
Olympia, WA 98504-7476
Fax: 360-705-6733

(d) A presiding officer, who will be either the assistant director of the taxpayer account administration division or such other person as designated by the director of the department (director), will conduct brief adjudicative proceedings. The presiding officer for brief adjudicative proceedings will have agency expertise in the subject matter but will not otherwise have participated in responding to the taxpayer's application for a reseller permit or in the decision to propose revocation of the taxpayer's reseller permit.

(e) As part of the appeal, the taxpayer or the taxpayer's representative may present written documentation and explain the taxpayer's view of the matter. The presiding officer may request additional documentation from the taxpayer or the department and will designate the date by which the documents must be submitted.

(f) No witnesses may appear to testify.

(g) In addition to the record, the presiding officer for brief adjudicative proceedings may employ agency expertise as a basis for decision.

(h) Within twenty-one days of receipt of the taxpayer's appeal of the denial of a reseller permit or proposed revocation of the reseller permit, the presiding officer will enter an initial order, including a brief explanation of the decision per RCW 34.05.485. All orders in these brief adjudicative proceedings will be in writing. The initial order will become the department's final order unless an appeal is filed with the department's appeals division in subsection (4) of this section.

(4) **Review of initial orders from brief adjudicative proceeding.** A taxpayer may request a review by the department of an initial order issued per subsection (3) of this section by filing a petition for review or by making an oral request for review with the department's appeals division within twenty-one days after the service of the initial order on the taxpayer. A form for an appeal of an initial order per subsection (3) of this section is available at http://dor.wa.gov. A request for review should state the reasons the review is sought. A taxpayer making an oral request for review may at the same time mail a written statement to the address below stating the reasons for the appeal and its view of the matter. The address, telephone number, and fax number of the appeals division are:

Appeals Division, Reseller Permit Appeals
Department of Revenue
P.O. Box 47476
Olympia, WA 98504-7476
Telephone Number: 1-800-647-7706
Fax: 360-705-6733

(a) A reviewing officer, who will be either the assistant director of the appeals division or such other person as designated by the director, will conduct brief adjudicative proceedings and determine whether the department's initial order issued per subsection (3) of this section was correctly based on the criteria set forth in RCW 82.32.780, WAC 458-20-102, and 458-20-10201. The reviewing officer will review the record and, if needed, convert the proceeding to a formal adjudicative proceeding.

(b) The agency record need not constitute the exclusive basis for the reviewing officer's decision. The reviewing officer will have the authority of a presiding officer.

(c) The order of the reviewing officer will be in writing and include a brief statement of the reasons for the decision, and it must be entered within twenty days of the petition for review. The order will include a notice that judicial review may be available. The order of the reviewing officer represents the final decision of the department.

(d) A request for administrative review is deemed denied if the department does not issue an order on review within twenty days after the petition for review is filed or orally requested.

(5) **Conversion of a brief adjudicative proceeding to a formal proceeding.** The presiding officer or reviewing officer may convert the brief adjudicative proceeding to a formal proceeding at any time on motion of the taxpayer, the department, or the presiding/reviewing officer's own motion.

(a) The presiding/reviewing officer will convert the proceeding when it is found that the use of the brief adjudicative proceeding violates any provision of law, when the protection of the public interest requires the agency to give notice to and an opportunity to participate to persons other than the parties, and when the issues and interests involved warrant the use of the procedures of RCW 34.05.413 through 34.05.479.

(b) When a proceeding is converted from a brief adjudication to a formal proceeding, the director may become the presiding officer or may designate a replacement presiding officer to conduct the formal proceedings upon notice to the taxpayer and the department.

(c) In the conduct of the formal proceedings, WAC 458-20-10002 will apply to the proceedings.

(6) **Court appeal.** Court appeal from the final order of the department is available pursuant to Part V, chapter 34.05 RCW. However, court appeal may be available only if a review of the initial decision has been requested under subsection (4) of this section and all other administrative remedies have been exhausted. See RCW 34.05.534.

(7) **Computation of time.** In computing any period of time prescribed by this section or by the presiding officer, the day of the act or event after which the designated period is to run is not to be included. The last day of the period is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the next day which is not a Saturday, Sunday or legal holiday. When the period of time prescribed is less than seven days, intermediate Saturdays, Sundays and holidays are excluded in the computation. Service as discussed in subsection (8) of this section is deemed complete upon mailing.

(8) **Service.** All notices and other pleadings or papers filed with the presiding or reviewing officer must be served on the taxpayer, their representatives/agents of record, and the department.

(a) Service is made by one of the following methods:

(i) In person;

(ii) By first-class, registered or certified mail;

(iii) By fax and same-day mailing of copies;

(iv) By commercial parcel delivery company; or

(v) By electronic delivery pursuant to RCW 82.32.135.

(b) Service by mail is regarded as completed upon deposit in the United States mail properly stamped and addressed.

(c) Service by electronic fax is regarded as completed upon the production by the fax machine of confirmation of transmission.

(d) Service by commercial parcel delivery is regarded as completed upon delivery to the parcel delivery company, properly addressed with charges prepaid.

(e) Service by electronic delivery is regarded as completed on the date that the department electronically sends the information to the parties or electronically notifies the parties that the information is available to be accessed by them.

(f) Service to a taxpayer, their representative/agent of record, the department, and presiding officer must be to the address shown on the notice described in subsection (3)(a) of this section.

(g) Service to the reviewing officer must be to the appeals division at the address shown in subsection (4) of this section.

(h) Where proof of service is required, the proofs of service must include:

(i) An acknowledgment of service;

(ii) A certificate, signed by the person who served the document(s), stating the date of service; that the person did serve the document(s) upon all or one or more of the parties of record in the proceeding by delivering a copy in person to (names); and that the service was accomplished by a method of service as provided in this subsection.

(9) **Continuance.** The presiding officer or reviewing officer may grant a request for a continuance by motion of the taxpayer, the department, or on its own motion.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.32.780 and 82.32.783. WSR 12-11-007, § 458-20-10202, filed 5/3/12, effective 6/3/12; WSR 10-14-080, § 458-20-10202, filed 7/1/10, effective 8/1/10.]

WAC 458-20-102A Resale certificates. (1) **Introduction.** This section provides information regarding the use of resale certificates, which were the documents used to substantiate the wholesale nature of a sales transaction occurring prior to January 1, 2010. Resale certificates cannot be used to substantiate wholesale sales made after December 31, 2009.

This section provides information that applies to periods prior to January 1, 2010. It explains the conditions under which a buyer may furnish a resale certificate to a seller, and explains the information and language required on the resale certificate. This section also provides tax reporting information to persons who purchase articles or services for dual purposes (i.e., for both resale and consumption).

(a) **Legislation passed in 2009.** Effective January 1, 2010, reseller permits issued by the department of revenue (department) replace resale certificates as the documentation necessary to substantiate the wholesale nature of a sales transaction (chapter 563, Laws of 2009).

Businesses should consult:

• WAC 458-20-102 (Reseller permits) for more information about the use of reseller permits to substantiate wholesale sales beginning January 1, 2010;

• WAC 458-20-10201 (Application process and eligibility requirements for reseller permits) for more information about the application process and eligibility requirements for obtaining a reseller permit; and

• WAC 458-20-10202 (Brief adjudicative proceedings for matters related to reseller permits) for more information about the procedures for appealing the denial of an application for a reseller permit.

(b) **Legislation passed in 2003.** In 2003, the legislature enacted legislation conforming state law to portions of the national Streamlined Sales and Use Tax Agreement (chapter 168, Laws of 2003), which eliminates the good faith requirement when the seller takes from the buyer a resale certificate and also eliminates signature requirements for certificates provided in a format other than paper. These changes apply to resale certificates taken on and after July 1, 2004.

(c) **Legislation passed in 2007.** Additional Streamlined Sales and Use Tax Agreement legislation was enacted in 2007 (chapter 6, Laws of 2007). It eliminates the provision that resale certificates are only valid for four years from the date they are issued to the seller, as long as there is a recurring business relationship between the buyer and seller. This change is effective on July 1, 2008.

(2) **What is a resale certificate?** The resale certificate is a document or combination of documents that substantiates the wholesale nature of a sale. The resale certificate cannot be used for purchases that are not purchases at wholesale, or where a more specific certificate, affidavit, or other documentary evidence is required by statute or other section of chapter 458-20 WAC. While the resale certificate may come in different forms, all resale certificates must satisfy the language and information requirements of RCW 82.04.470.

(a) **What is the scope of a resale certificate?** Depending on the statements made on the resale certificate, the resale certificate may authorize the buyer to purchase at wholesale all products or services being purchased from a particular seller, or may authorize only selected products or services to be purchased at wholesale. The provisions of the resale certificate may be limited to a single sales transaction, or may apply to all sales transactions as long as the seller has a recurring business relationship with the buyer. A "recurring business relationship" means at least one sale transaction within a period of twelve consecutive months. Whatever its form and/or purpose, the resale certificate must be completed in its entirety and signed by a person who is authorized to make such a representation on behalf of the buyer.

(b) **Who may issue and sign certificates?** The buyer may authorize any person in its employ to issue and sign resale certificates on the buyer's behalf. The buyer is, however, responsible for the information contained on the resale certificate. A resale certificate is not required to be completed by every person ordering or making the actual purchase of articles or services on behalf of the buyer. For example, a construction company that authorizes only its bookkeeper to issue resale certificates on its behalf may authorize both the bookkeeper and a job foreman to purchase items under the provisions of the resale certificate. The construction company is not required to provide, nor is the seller required to obtain, a resale certificate signed by each person making purchases on behalf of the construction company.

The buyer is responsible for educating all persons authorized to issue and/or use the resale certificate on the proper use of the buyer's resale certificate privileges.

(3) **Resale certificate renewal.** Prior to July 1, 2008, resale certificates must be renewed at least every four years. As of July 1, 2008, the requirement to renew resale certificates at least every four years has been eliminated. The buyer must renew its resale certificate whenever a change in the ownership of the buyer's business requires a new tax registration. (See WAC 458-20-101 Tax registration and tax reporting.) The buyer may not make purchases under the authority of a resale certificate bearing a tax registration number that has been canceled or revoked by the department of revenue (department).

(4) **Sales at wholesale.** All sales are treated as retail sales unless the seller takes from the buyer a properly executed resale certificate. Resale certificates may only be used for sales at wholesale and may not be used as proof of entitlement to retail sales tax exemptions otherwise provided by law.

(a) **When may a buyer issue a resale certificate?** The buyer may issue a resale certificate only when the property or services purchased are:

(i) For resale in the regular course of the buyer's business without intervening use by the buyer;

(ii) To be used as an ingredient or component part of a new article of tangible personal property to be produced for sale;

(iii) A chemical to be used in processing an article to be produced for sale (see WAC 458-20-113 on chemicals used in processing);

(iv) To be used in processing ferrosilicon that is subsequently used in producing magnesium for sale;

(v) Provided to consumers as a part of competitive telephone service, as defined in RCW 82.04.065;

(vi) Feed, seed, seedlings, fertilizer, spray materials, or agents for enhanced pollination including insects such as bees for use in the federal conservation reserve program or its successor administered by the United States Department of Agriculture; or

(vii) Feed, seed, seedlings, fertilizer, spray materials, or agents for enhanced pollination including insects such as bees for use by a farmer for producing for sale any agricultural product. (See WAC 458-20-210 on sales to and by farmers.)

(b) **Required information.** All resale certificates, whether paper or nonpaper format, must contain the following information:

(i) The name and address of the buyer;

(ii) The uniform business identifier or tax registration number of the buyer, if the buyer is required to be registered with the department;

(iii) The type of business;

(iv) The categories of items or services to be purchased at wholesale, unless the buyer is in a business classification that may present a blanket resale certificate as provided by the department by rule;

(v) The date on which the certificate was provided;

(vi) A statement that the items or services purchased either are purchased for resale in the regular course of business or are otherwise purchased at wholesale; and

(vii) A statement that the buyer acknowledges that the buyer is solely responsible for purchasing within the categories specified on the certificate and that misuse of the resale certificate subjects the buyer to a penalty of fifty percent of the tax due, in addition to the tax, interest, and any other penalties imposed by law.

(c) **Additional requirements for paper certificates.** In addition to the requirements stated in (b) of this subsection, paper certificates must contain the following:

(i) The name of the individual authorized to sign the certificate, printed in a legible fashion;

(ii) The signature of the authorized individual; and

(iii) The name of the seller. RCW 82.04.470.

(5) **Seller's responsibilities.** When a seller receives and accepts from the buyer a resale certificate at the time of the sale, or has a resale certificate on file at the time of the sale, or obtains a resale certificate from the buyer within one hundred twenty days after the sale, the seller is relieved of liability for retail sales tax with respect to the sale covered by the resale certificate. The seller may accept a legible fax, a duplicate copy of an original resale certificate, or a certificate in a format other than paper.

(a) If the seller has not obtained an appropriate resale certificate or other acceptable documentary evidence (see subsection (8) of this section), the seller is personally liable for the tax due unless it can sustain the burden of proving through facts and circumstances that the property was sold for one of the purposes set forth in subsection (4)(a) of this section. The department will consider all evidence presented by the seller, including the circumstances of the sales transaction itself, when determining whether the seller has met its burden of proof. It is the seller's responsibility to provide the information necessary to evaluate the facts and circumstances of all sales transactions for which resale certificates are not obtained. Facts and circumstances that should be considered include, but are not necessarily limited to, the following:

(i) The nature of the buyer's business. The items being purchased at wholesale must be consistent with the buyer's business. For example, a buyer having a business name of "Ace Used Cars" would generally not be expected to be in the business of selling furniture;

(ii) The nature of the items sold. The items sold must be of a type that would normally be purchased at wholesale by the buyer; and

(iii) Additional documentation. Other available documents, such as purchase orders and shipping instructions, should be considered in determining whether they support a finding that the sales are sales at wholesale.

(b) If the seller is required to make payment to the department, and later is able to present the department with proper documentation or prove by facts and circumstances that the sales in question are wholesale sales, the seller may in writing request a refund of the taxes paid along with the applicable interest. Both the request and the documentation or proof that the sales in question are wholesale sales must be submitted to the department within the statutory time limitations provided by RCW 82.32.060. (See WAC 458-20-229 Refunds.) However, refer to (f) of this subsection in event of an audit situation.

(c) **Timing requirements for single orders with multiple billings.** If a single order or contract will result in multi-

ple billings to the buyer, and the appropriate resale certificate was not obtained or on file at the time the order was placed or the contract entered, the resale certificate must be received by the seller within one hundred twenty days after the first billing. For example, a subcontractor entering into a construction contract for which it has not received a resale certificate must obtain the certificate within one hundred twenty days of the initial construction draw request, even though the construction project may not be completed at that time and additional draw requests will follow.

(d) **Requirements for resale certificates obtained after one hundred twenty days have passed.** If the resale certificate is obtained more than one hundred twenty days after the sale or sales in question, the resale certificate must be specific to the sale or sales. The certificate must specifically identify the sales in question on its face, or be accompanied by other documentation signed by the buyer specifically identifying the sales in question and stating that the provisions of the accompanying resale certificate apply. A nonspecific resale certificate that is not obtained within one hundred twenty days is generally not, in and of itself, acceptable proof of the wholesale nature of the sales in question. The resale certificate and/or required documentation must be obtained within the statutory time limitations provided by RCW 82.32.050.

(e) **Examples.** The following examples explain the seller's documentary requirements in typical situations when obtaining a resale certificate more than one hundred twenty days after the sale. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(i) Beginning in January of year 1, MN Company regularly makes sales to ABC Inc. In June of the same year, MN discovers ABC has not provided a resale certificate. MN requests a resale certificate from ABC and, as the resale certificate will not be received within one hundred twenty days of many of the past sales transactions, requests that the resale certificate specifically identify those past sales subject to the provisions of the certificate. MN receives a legible fax copy of an original resale certificate from ABC on July 1st of that year. Accompanying the resale certificate is a memo providing a list of the invoice numbers for all past sales transactions through May 15th of that year. This memo also states that the provisions of the resale certificate apply to all past and future sales, including those listed. MN Company has satisfied the requirement that it obtain a resale certificate specific to the sales in question.

(ii) XYZ Company makes three sales to MP Inc. in October of year 1 and does not charge retail sales tax. In the review of its resale certificate file in April of the following year, XYZ discovers it has not received a resale certificate from MP Inc. and immediately requests a certificate. As the resale certificate will not be received within one hundred twenty days of the sales in question, XYZ requests that MP provide a resale certificate identifying the sales in question. MP provides XYZ with a resale certificate that does not identify the sales in question, but simply states "applies to all past purchases." XYZ Company has not satisfied its responsibility to obtain an appropriate resale certificate. As XYZ failed to secure a resale certificate within a reasonable period of time, XYZ must obtain a certificate specifically identifying the sales in question or prove through other facts and circumstances that these sales are wholesale sales. (Refer to (a) of this subsection for information on how a seller can prove through other facts and circumstances that a sale is a wholesale sale.) It remains the seller's burden to prove the wholesale nature of the sales made to a buyer if the seller has not obtained a valid resale certificate within one hundred twenty days of the sale.

(f) **Additional time to secure documentation in audit situation.** If in event of an audit the department discovers that the seller has not secured, as described in this subsection (5), the necessary resale certificates and/or documentation, the seller will generally be allowed one hundred twenty days in which to obtain and present appropriate resale certificates and/or documentation, or prove by facts and circumstances the sales in question are wholesale sales. The time allotted to the seller shall commence from the date the auditor initially provides the seller with the results of the auditor's wholesale sales review. The processing of the audit report will not be delayed as a result of the seller's failure within the allotted time to secure and present appropriate documentation, or its inability to prove by facts and circumstances that the sales in question were wholesale sales.

(6) **Penalty for improper use.** Any buyer who uses a resale certificate to purchase items or services without payment of sales tax and who is not entitled to use the certificate for the purchase will be assessed a penalty of fifty percent of the tax due on the improperly purchased item or service. This penalty is in addition to all other taxes, penalties, and interest due, and can be imposed even if there was no intent to evade the payment of retail sales tax. The penalty will be assessed by the department and applies only to the buyer. However, see subsection (12) of this section for situations in which the department may waive the penalty.

Persons who purchase articles or services for dual purposes (i.e., some for their own consumption and some for resale) should refer to subsection (11) of this section to determine whether they may give a resale certificate to the seller.

(7) **Resale certificate - suggested form.** While there may be different forms of the resale certificate, all resale certificates must satisfy the language and information requirements provided by RCW 82.04.470. The resale certificate is available on the department's internet site at http://dor.wa.gov, or can be obtained by calling the department's telephone information center at 1-800-647-7706 or by writing:

Taxpayer Services
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478

A resale certificate may be in any other form that contains substantially the same information and language, except that certificates provided in a format other than paper are not required to include the printed name of the person authorized to sign the certificate, the signature of the authorized individual, or the name of the seller.

Effective July 1, 2008, buyers also have the option of using a Streamlined Sales and Use Tax Agreement Certificate of Exemption, which has been modified for Washington

state laws. It can also be found on the department's internet site at http://dor.wa.gov.

(a) **Buyer's responsibility to specify products or services purchased at wholesale.** RCW 82.04.470 requires the buyer making purchases at wholesale to specify the kinds of products or services subject to the provisions of the resale certificate. A buyer who will purchase some of the items at wholesale, and consume and pay tax on some other items being purchased from the same seller, must use terms specific enough to clearly indicate to the seller what kinds of products or services the buyer is authorized to purchase at wholesale.

(i) The buyer may list the particular products or services to be purchased at wholesale, or provide general category descriptions of these products or services. The terms used to describe these categories must be descriptive enough to restrict the application of the resale certificate provisions to those products or services that the buyer is authorized to purchase at wholesale. The following are examples of terms used to describe categories of products purchased at wholesale, and businesses that may be eligible to use such terms on their resale certificates:

(A) "Hardware" for use by a general merchandise or building material supply store, "computer hardware" for use by a computer retailer;

(B) "Paint" or "painting supplies" for use by a general merchandise or paint retailer, "automotive paint" for use by an automotive repair shop; and

(C) "Building materials" or "subcontract work" for use by prime contractors performing residential home construction, "wiring" or "lighting fixtures" for use by an electrical contractor.

(ii) The buyer must remit retail sales tax on any taxable product or service not listed on the resale certificate provided to the seller. If the buyer gave a resale certificate to the seller and later used an item listed on the certificate, or if the seller failed to collect the sales tax on items not listed on the certificate, the buyer must remit the deferred sales or use tax due directly to the department.

(iii) RCW 82.08.050 provides that each seller shall collect from the buyer the full amount of retail sales tax due on each retail sale. If the department finds that the seller has engaged in a consistent pattern of failing to properly charge sales tax on items not purchased at wholesale (i.e., not listed on the resale certificate), it may hold the seller liable for the uncollected sales tax.

(iv) Persons having specific questions regarding the use of terms to describe products or services purchased at wholesale may submit their questions to the department for ruling. The department may be contacted on the internet at http://dor.wa.gov/ or by writing:

Taxpayer Services
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478

(b) **Blanket resale certificates.** A buyer who will purchase at wholesale all of the products or services being purchased from a particular seller will not be required to specifically describe the items or item categories on the resale certificate. If the certificate form provides for a description of the products or services being purchased at wholesale the buyer may specify "all products and/or services" (or make a similar designation). A resale certificate completed in this manner is often described as a blanket resale certificate.

(i) The resale certificate used by the buyer must, in all cases, be completed in its entirety. A resale certificate in which the section for the description of the items being purchased at wholesale is left blank by the buyer will not be considered a properly executed resale certificate.

(ii) As of July 1, 2008, renewal or updating of blanket resale certificates is not required as long as the seller has a recurring business relationship with the buyer. A "recurring business relationship" means at least one sale transaction within a period of twelve consecutive months.

To effectively administer this provision during an audit, the department will accept a resale certificate as evidence for wholesale sales that occur within four years of the certificate's effective date without evidence of sales transactions being made once every twelve months. For sales transactions made more than four years after the date of the properly completed resale certificate, the seller must substantiate that a recurring business relationship with the buyer has occurred for any sales outside the period of more than four years after the effective date of the resale certificate.

(c) **Resale certificates for single transactions.** If the resale certificate is used for a single transaction, the language and information required of a resale certificate may be written or stamped upon a purchase order or invoice. The language contained in a "single use" resale certificate should be modified to delete any reference to subsequent orders or purchases.

(d) **Examples.** The following examples explain the proper use of types of resale certificates in typical situations. These examples should be used only as a general guide. The tax status of other situations must be determined after a review of all of the facts and circumstances.

(i) ABC is an automobile repair shop purchasing automobile parts for resale and tools for its own use from DE Supply. ABC must provide DE Supply with a resale certificate limiting the certificate's application to automobile part purchases. However, should ABC withdraw parts from inventory to install in its own tow truck, deferred retail sales tax or use tax must be remitted directly to the department. The buyer has the responsibility to report deferred retail sales tax or use tax upon any item put to its own use, including items for which it gave a resale certificate and later used for its own use.

(ii) X Company is a retailer selling lumber, hardware, tools, automotive parts, and household appliances. X Company regularly purchases lumber, hardware, and tools from Z Distributing. While these products are generally purchased for resale, X Company occasionally withdraws some of these products from inventory for its own use. X Company may provide Z Distributing with a resale certificate specifying "all products purchased" are purchased at wholesale. However, whenever X Company removes any product from inventory to put to its own use, deferred retail sales tax or use tax must be remitted to the department.

(iii) TM Company is a manufacturer of electric motors. When making purchases from its suppliers, TM issues a paper purchase order. This purchase order contains the information required of a resale certificate and a signature of the

person ordering the items on behalf of TM. This purchase order includes a box that, if marked, indicates to the supplier that all or certain designated items purchased are being purchased at wholesale.

When the box indicating the purchases are being made at wholesale is marked, the purchase order can be accepted as a resale certificate. As TM Company's purchase orders are being accepted as resale certificates, they must be retained by the seller for at least five years. (See WAC 458-20-254 Recordkeeping.)

(8) **Other documentary evidence.** Other documentary evidence may be used by the seller and buyer in lieu of the resale certificate form described in this section. However, this documentary evidence must collectively contain the information and language generally required of a resale certificate. The conditions and restrictions applicable to the use of resale certificates apply equally to other documentary evidence used in lieu of the resale certificate form in this section. The following are examples of documentary evidence that will be accepted to show that sales were at wholesale:

(a) **Combination of documentary evidence.** A combination of documentation kept on file, such as a membership card or application, and a sales invoice or "certificate" taken at the point of sale with the purchases listed, provided:

(i) The documentation kept on file contains all information required on a resale certificate, including, for paper certificates, the names and signatures of all persons authorized to make purchases at wholesale; and

(ii) The sales invoice or "certificate" taken at the point of sale must contain the following:

(A) Language certifying the purchase is made at wholesale, with acknowledgment of the penalties for the misuse of resale certificate privileges, as generally required of a resale certificate; and

(B) The name and registration number of the buyer/business, and, if a paper certificate, an authorized signature.

(b) **Contracts of sale.** A contract of sale that within the body of the contract provides the language and information generally required of a resale certificate. The contract of sale must specify the products or services subject to the resale certificate privileges.

(c) **Other preapproved documentary evidence.** Any other documentary evidence that has been approved in advance and in writing by the department.

(9) **Sales to nonresident buyers.** If the buyer is a nonresident who is not engaged in business in this state, but buys articles here for the purpose of resale in the regular course of business outside this state, the seller must take from the buyer a resale certificate as described in this section. The seller may accept a resale certificate from an unregistered nonresident buyer with the registration number information omitted, provided the balance of the resale certificate is completed in its entirety. The resale certificate should contain a statement that the items are being purchased for resale outside Washington.

(10) **Sales to farmers.** Farmers selling agricultural products only at wholesale are not required to register with the department. (See WAC 458-20-101 Tax registration and tax reporting.) When making wholesale sales to farmers (including farmers operating in other states), the seller must take from the farmer a resale certificate as described in this section. Farmers not required to be registered with the department may provide, and the seller may accept, resale certificates with the registration number information omitted, provided the balance of the certificates are completed in full. Persons making sales to farmers should also refer to WAC 458-20-210 (Sales of tangible personal property for farming—Sales of agricultural products by farmers).

(11) **Purchases for dual purposes.** A buyer normally engaged in both consuming and reselling certain types of tangible personal property, and not able to determine at the time of purchase whether the particular property purchased will be consumed or resold, must purchase according to the general nature of his or her business. RCW 82.08.130. If the buyer principally consumes the articles in question, the buyer should not give a resale certificate for any part of the purchase. If the buyer principally resells the articles, the buyer may issue a resale certificate for the entire purchase. For the purposes of this subsection, the term "principally" means greater than fifty percent.

(a) **Deferred sales tax liability.** If the buyer gives a resale certificate for all purchases and thereafter consumes some of the articles purchased, the buyer must set up in his or her books of account the value of the article used and remit to the department the applicable deferred sales tax. The deferred sales tax liability should be reported under the use tax classification on the buyer's excise tax return.

(i) Buyers making purchases for dual purposes under the provisions of a resale certificate must remit deferred sales tax on all products or services they consume. If the buyer fails to make a good faith effort to remit this tax liability, the penalty for the misuse of resale certificate privileges may be assessed. This penalty will apply to the unremitted portion of the deferred sales tax liability.

A buyer will generally be considered to be making a good faith effort to report its deferred sales tax liability if the buyer discovers a minimum of eighty percent of the tax liability within one hundred twenty days of purchase, and remits the full amount of the discovered tax liability upon the next excise tax return. However, if the buyer does not satisfy this eighty percent threshold and can show by other facts and circumstances that it made a good faith effort to report the tax liability, the penalty will not be assessed. Likewise, if the department can show by other facts and circumstances that the buyer did not make a good faith effort in remitting its tax liability the penalty will be assessed, even if the eighty percent threshold is satisfied.

(ii) The following example illustrates the use of a resale certificate for dual-use purchases. This example should be used only as a general guide. The tax status of other situations must be determined after a review of all of the facts and circumstances. BC Contracting operates both as a prime contractor and speculative builder of residential homes. BC Contracting purchases building materials from Seller D that are principally incorporated into projects upon which BC acts as a prime contractor. BC provides Seller D with a resale certificate and purchases all building materials at wholesale. BC must remit deferred sales tax upon all building materials incorporated into the speculative projects to be considered to be properly using its resale certificate privileges. The failure to make a good faith effort to identify and remit this tax liability may result in the assessment of the fifty percent penalty for the misuse of resale certificate privileges.

(b) **Tax paid at source deduction.** If the buyer has not given a resale certificate, but has paid retail sales tax on all articles of tangible personal property and subsequently resells a portion of the articles, the buyer must collect the retail sales tax from its retail customers as provided by law. When reporting these sales on the excise tax return, the buyer may then claim a deduction in the amount the buyer paid for the property resold.

(i) This deduction may be claimed under the retail sales tax classification only. It must be identified as a "taxable amount for tax paid at source" deduction on the deduction detail worksheet, which must be filed with the excise tax return. Failure to properly identify the deduction may result in the disallowance of the deduction. When completing the local sales tax portion of the tax return, the deduction must be computed at the local sales tax rate paid to the seller, and credited to the seller's tax location code.

(ii) The following example illustrates the tax paid at source deduction on or after July 1, 2008. This example should be used only as a general guide. The tax status of other situations must be determined after a review of all of the facts and circumstances. Seller A is located in Spokane, Washington and purchases equipment parts for dual purposes from a supplier located in Seattle, Washington. The supplier ships the parts to Spokane. Seller A does not issue a resale certificate for the purchase, and remits retail sales tax to the supplier at the Spokane tax rate. A portion of these parts are sold and shipped to Customer B in Kennewick, with retail sales tax collected at the Kennewick tax rate. Seller A must report the amount of the sale to Customer B on its excise tax return, compute the local sales tax liability at the Kennewick rate, and code this liability to the location code for Kennewick (0302). Seller A would claim the tax paid at source deduction for the cost of the parts resold to Customer B, compute the local sales tax credit at the Spokane rate, and code this deduction amount to the location code for Spokane (3210).

(iii) Claim for deduction will be allowed only if the taxpayer keeps and preserves records in support of the deduction that show the names of the persons from whom such articles were purchased, the date of the purchase, the type of articles, the amount of the purchase and the amount of tax that was paid.

(iv) Should the buyer resell the articles at wholesale, or under other situations where retail sales tax is not to be collected, the claim for the tax paid at source deduction on a particular excise tax return may result in a credit. In such cases, the department will issue a credit notice that may be used against future tax liabilities. However, a taxpayer may request in writing a refund from the department.

(12) **Waiver of penalty for resale certificate misuse.** The department may waive the penalty imposed for resale certificate misuse upon finding that the use of the certificate to purchase items or services by a person not entitled to use the certificate for that purpose was due to circumstances beyond the control of the buyer. However, the use of a resale certificate to purchase items or services for personal use outside of the business does not qualify for the waiver or cancellation of the penalty. The penalty will not be waived merely because the buyer was not aware of either the proper use of the resale certificate or the penalty. In all cases the burden of proving the facts is upon the buyer.

(a) **Considerations for waiver.** Situations under which a waiver of the penalty will be considered by the department include, but are not necessarily limited to, the following:

(i) The resale certificate was properly used to purchase products or services for dual purposes; or the buyer was eligible to issue the resale certificate; and the buyer made a good faith effort to discover all of its deferred sales tax liability within one hundred twenty days of purchase; and the buyer remitted the discovered tax liability upon the next excise tax return. (Refer to subsection (11)(a)(i) of this section for an explanation of what constitutes "good faith effort.")

(ii) The certificate was issued and/or purchases were made without the knowledge of the buyer, and had no connection with the buyer's business activities. However, the penalty for the misuse of resale certificate privileges may be applied to the person actually issuing and/or using the resale certificate without knowledge of the buyer.

(b) **One time waiver of penalty for inadvertent or unintentional resale certificate misuse.** The penalty prescribed for the misuse of the resale certificate may be waived or canceled on a one time only basis if such misuse was inadvertent or unintentional, and the item was purchased for use within the business. If the department does grant a one time waiver of the penalty, the buyer will be provided written notification at that time.

(c) **Examples.** The following are examples of typical situations where the fifty percent penalty for the misuse of resale privileges will or will not be assessed. These examples should be used only as a general guide. The tax status of other situations must be determined after a review of all of the facts and circumstances.

(i) ABC Manufacturing purchases electrical wiring and tools from X Supply. The electrical wiring is purchased for dual purposes, i.e., for resale and for consumption, with more than fifty percent of the wiring purchases becoming a component of items that ABC manufactures for sale. ABC Manufacturing issues a resale certificate to X Supply specifying "electrical wiring" as the category of items purchased for resale. ABC regularly reviews its purchases and remits deferred sales tax upon the wiring it uses as a consumer.

ABC is subsequently audited by the department and it is discovered that ABC Manufacturing failed to remit deferred sales tax upon three purchases of wiring for consumption. The unreported tax liability attributable to these three purchases is less than five percent of the total deferred sales tax liability for wiring purchases made from X Supply. It is also determined that the failure to remit deferred sales tax upon these purchases was merely an oversight. The fifty percent penalty for the misuse of resale certificate privileges does not apply, even though ABC failed to remit deferred sales tax on these purchases. The resale certificate was properly issued, and ABC remitted to the department more than eighty percent of the deferred sales tax liability for wiring purchases from X Supply.

(ii) During a routine audit examination of a jewelry store, the department discovers that a dentist has provided a resale certificate for the purchase of a necklace. This resale certificate indicates that in addition to operating a dentistry practice, the dentist also sells jewelry. The resale certificate contains the information required under RCW 82.04.470.

Upon further investigation, the department finds that the dentist is not engaged in selling jewelry. The department will look to the dentist for payment of the applicable retail sales tax. In addition, the dentist will be assessed the fifty percent penalty for the misuse of resale certificate privileges. The penalty will not be waived or canceled as the dentist misused the resale certificate privileges to purchase a necklace for personal use.

(iii) During a routine audit examination of a computer dealer, it is discovered that a resale certificate was obtained from a bookkeeping service. The resale certificate was completed in its entirety and accepted by the dealer. Upon further investigation it is discovered that the bookkeeping service had no knowledge of the resale certificate, and had made no payment to the computer dealer. The employee who signed the resale certificate had purchased the computer for personal use, and had personally made payment to the computer dealer.

The fifty percent penalty for the misuse of the resale certificate privileges will be waived for the bookkeeping service. The bookkeeping service had no knowledge of the purchase or unauthorized use of the resale certificate. However, the department will look to the employee for payment of the taxes and the fifty percent penalty for the misuse of resale certificate privileges.

(iv) During an audit examination it is discovered that XYZ Corporation, a duplicating company, purchased copying equipment for its own use. XYZ Corporation issued a resale certificate to the seller despite the fact that XYZ does not sell copying equipment. XYZ also failed to remit either the deferred sales or use tax to the department. As a result of a previous investigation by the department, XYZ had been informed in writing that retail sales and/or use tax applied to all such purchases. The fifty percent penalty for the misuse of resale certificate privileges will be assessed. XYZ was not eligible to provide a resale certificate for the purchase of copying equipment, and had previously been so informed. The penalty will apply to the unremitted deferred sales tax liability.

(v) AZ Construction issued a resale certificate to a building material supplier for the purchase of "pins" and "loads." The "pins" are fasteners that become a component part of the finished structure. The "load" is a powder charge that is used to drive the "pin" into the materials being fastened together. AZ Construction is informed during the course of an audit examination that it is considered the consumer of the "loads" and may not issue a resale certificate for its purchase thereof. AZ Construction indicates that it was unaware that a resale certificate could not be issued for the purchase of "loads," and there is no indication that AZ Construction had previously been so informed.

The failure to be aware of the proper use of the resale certificate is not generally grounds for waiving the fifty percent penalty for the misuse of resale certificate privileges. However, AZ Construction does qualify for the "one time only" waiver of the penalty as the misuse of the resale certificate privilege was unintentional and the "loads" were purchased for use within the business.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.32.780, and 82.32.783. WSR 11-12-021, § 458-20-102A, filed 5/24/11, effective 6/24/11.]

WAC 458-20-103 Time and place of sale. Under the Revenue Act of 1935, as amended, the word "sale" means any transfer of the ownership of, title to, or possession of, property for a valuable consideration, and includes the sale or charge made for performing certain services.

For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this state when the goods sold are delivered to the buyer in this state, irrespective of whether title to the goods passes to the buyer at a point within or without this state.

With respect to the charge made for performing services which constitute sales as defined in RCW 82.04.040 and 82.04.050, a sale takes place in this state when the services are performed herein. With respect to the charge made for renting or leasing tangible personal property, a sale takes place in this state when the property is used in this state by the lessee.

Where gift certificates are sold which will be redeemed in merchandise, or in services which are defined by the Revenue Act as retail sales, the sale is deemed to occur and the retail sales tax shall be collected at the time the certificate is actually redeemed for the merchandise or services. The measure of the tax is the total selling price of the merchandise or services at the time of the redemption, including the redemption value of the certificate, or any part thereof, which is applied toward the selling price. (See WAC 458-20-235 for effect of rate changes on prior contracts and sales agreements. See also WAC 458-20-131 which deals with merchandising games, and which covers the situation where certificates or trade checks are issued which may be redeemed for services which are not retail sales, such as barber services, admissions, etc.)

Revised March 2, 1982.

[Statutory Authority: RCW 82.32.300. WSR 82-12-021 (Order ET 82-2), § 458-20-103, filed 5/25/82; Order ET 70-3, § 458-20-103 (Rule 103), filed 5/29/70, effective 7/1/70.]

WAC 458-20-104 Small business tax relief based on income of business. (1) **Introduction.** This rule explains the business and occupation (B&O) tax credit for small businesses provided by RCW 82.04.4451. This credit is commonly referred to as the small business B&O tax credit or small business credit (SBC). The amount of small business B&O tax credit available on a tax return can increase or decrease, depending on the reporting frequency of the account and the net B&O tax liability for that return. This rule also explains the public utility tax income exemption provided by RCW 82.16.040. The public utility tax exemption is a fixed amount, or threshold, based on the reporting frequency assigned to the account. Readers should refer to WAC 458-20-22801 (Tax reporting frequency—Forms) for an explanation of how the department of revenue (department) assigns a particular reporting frequency to each account. Readers may also want to refer to WAC 458-20-101 for an explanation of Washington's tax registration and tax reporting requirements.

This rule provides examples that identify a number of facts and then state a conclusion regarding the applicability of the income exemption for the public utility tax or small business B&O tax credit. These examples should be used only as a general guide. The tax results of other situations

must be determined after a review of all facts and circumstances.

(2) **The public utility tax income exemption.** Persons subject to public utility tax (PUT) are exempt from payment of this tax for any reporting period in which the gross taxable amount reported under the combined total of all public utility tax classifications does not equal or exceed the maximum exemption for the assigned reporting period. Per RCW 82.16.040, the public utility tax exemption amounts are:

for taxpayers reporting monthly.	$2,000 per month
for taxpayers reporting quarterly.	$6,000 per quarter
for taxpayers reporting annually	$24,000 per annum

(a) **What if the taxable income equals or exceeds the maximum exemption?** If the taxable income for a reporting period equals or exceeds the maximum exemption, tax must be remitted on the full taxable amount.

(b) **How does the exemption apply if a business does not operate for the entire tax reporting period?** The public utility tax maximum exemptions apply to the entire tax reporting period, even though the business may not have operated during the entire period.

(c) **Do taxable amounts for B&O tax or other taxes affect this exemption?** The public utility tax exemption is not affected by taxable amounts reported in the B&O tax section or any of the other tax sections of the tax return.

(d) **Example - How is the public utility tax exemption applied?** Taxpayer registers with the department and is assigned a quarterly tax reporting frequency. Taxpayer begins business activities on February 1st. During the two months of the first quarter that the taxpayer is in business, taxpayer's public utility gross income is seven thousand dollars. After deductions provided by chapter 82.16 RCW (Public utility tax) are computed, the total taxable amount is five thousand dollars. In this case, the taxpayer does not owe any public utility tax because the taxable amount of five thousand dollars is less than the six thousand dollar exemption threshold for quarterly taxpayers. The fact that the taxpayer was in business during only two months out of the three months in the quarter has no effect on the threshold amount. However, if there were no deductions available to the taxpayer, the taxable amount would have been seven thousand dollars. The public utility tax would then have been due on the full taxable amount of seven thousand dollars.

(3) **The small business B&O tax credit.** Persons subject to the B&O tax may be eligible to claim a small business B&O tax credit against the amount of B&O tax otherwise due. The small business B&O tax credit operates completely independent of the public utility tax exemption described above in subsection (2) of this rule. RCW 82.04.4451 authorizes the department to create a tax credit table for use by all taxpayers when determining the amount of their small business B&O tax credit. Taxpayers must use the tax credit table to determine the appropriate amount of their small business B&O tax credit. A tax credit table for each of the monthly, quarterly, and annual reporting frequencies can be found on the department's internet site at http://dor.wa.gov; or by contacting:

Taxpayer Services
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478
800-647-7706

The statute provides that taxpayers who use the tables will not owe any more tax than if they used the statutory credit formula to determine the amount of the credit.

Effective May 1, 2010, section 1102, chapter 23, Laws of 2010 1st sp. sess. amended RCW 82.04.4451. Prior to that amendment the small business credit was calculated at a maximum of thirty-five dollars multiplied by the number of months in the reporting period for all eligible taxpayers. As a result of the amendment, taxpayers who report at least fifty percent (i.e., fifty percent or greater) of their total B&O taxable amount under RCW 82.04.255 (real estate brokers), RCW 82.04.290 (2)(a) (service and other activities), and RCW 82.04.285 (contests of chance) have their maximum credit increased to seventy dollars multiplied by the number of months in the reporting period. (Just a few examples of businesses that generally have taxable amounts to report under RCW 82.04.290 (2)(a) are for-profit hospitals, for-profit research and development, accountants, attorneys, dentists, janitors, and landscape architects. Please see WAC 458-20-224, Service and other business activities for information and more examples of who should report under the service and other classification of the B&O tax.)

(a) **How is the credit applied if a business does not operate during the entire tax reporting period?** The small business B&O tax credit applies to the entire reporting period, even though the business may not have been operating during the entire period.

(b) **Can a husband and wife or partners in a state registered domestic partnership both take the credit?** Spouses or state registered domestic partners operating distinct and separate businesses are each eligible for the small business B&O tax credit. For both spouses or both domestic partners to qualify, each must have a separate tax reporting number and file his or her own business tax returns.

(c) **How do I determine the amount of the credit?** Taxpayers eligible for the small business B&O tax credit must follow the steps outlined in subsection (5) of this rule to determine the amount of credit available. Taxpayers who have other B&O tax credits to apply on a tax return, in addition to the small business B&O tax credit, may use the multiple B&O tax credit worksheet in subsection (4) of this rule before determining the amount of small business B&O tax credit available.

(d) **Can I carryover the small business B&O tax credit to future tax reporting periods?** Use of the small business B&O tax credit may not result in a B&O tax liability of less than zero, and thus there will be no unused credit.

(e) **Do I have to report and pay retail sales tax even if I do not owe any B&O tax?** Persons making retail sales must collect and pay all applicable retail sales taxes even if B&O tax is not due. There is no comparable retail sales tax exemption.

(4) **Multiple business and occupation tax credit worksheet.** The small business B&O tax credit should be computed after claiming any other B&O tax credits available under Title 82 RCW (Excise taxes). Examples of other B&O tax credits to be taken before computing the small business B&O tax credit include the multiple activities tax credit, high technology credit, commute trip reduction credit, pollution control credit, and cogeneration fee credit. The following multiple B&O tax credit worksheet describes the process taxpayers must follow to apply credits in the appropriate order. Refer to subsection (6) of this rule for an example illustrating the use of the multiple B&O tax credit worksheet.

MULTIPLE B&O TAX CREDIT WORKSHEET

1.	Determine the total Business and Occupation (B&O) tax due from the B&O section of your excise tax return.		$ _____
2.	Add together the credit amounts taken for:		
	Multiple Activities Tax Credit from Schedule C (if applicable).		$ _____
	(Add any other B&O tax credits from Title 82 RCW that will be applied to this return period.)	+	$ _____
	Total (Enter 0 if none of these credits are being taken.)		$ _____
3.	Subtract line 2 from line 1. This is the total B&O tax allowable for the Small Business Credit.		$ _____
4.	Find the specific tax credit table (Table 1 or Table 2) appropriate for the business activities and B&O taxable amounts on your excise tax return. Next, find the tax credit table which matches the reporting frequency assigned to the account. Then find the range of amounts which includes your total B&O tax due (see line three above).		
5.	Read across to the next column. This is the amount of the Small Business Credit to be used on the excise tax return.		$ _____

(5) **Using the tax credit table to determine your small business B&O tax credit.** The following steps explain how to use the small business B&O tax credit table:

(a) **Step one.** Determine the total B&O tax amount due from the excise tax return. This amount will normally be the total of the tax amounts due calculated for each classification in the B&O tax section of the excise tax return. However, if additional B&O tax credits will be taken on the return, refer to subsection (4) of this rule and the multiple B&O tax credit worksheet before going to step two.

(b) **Step two.** Find the B&O taxable amounts on the return reported under RCW 82.04.255 (real estate brokers), RCW 82.04.290 (2)(a) (service and other activities), and RCW 82.04.285 (contests of chance) then add them together. Divide that sum result by the total amount of all B&O taxable amounts reported on the return. If the result indicates less than fifty percent of the total of all B&O taxable amounts came from activities reported under RCW 82.04.255, 82.04.290 (2)(a), and 82.04.285 combined, use Table 1 of the small business B&O tax credit table. If the result indicates fifty percent or greater of the total of all B&O taxable amounts came from activities reported under RCW 82.04.255, 82.04.290 (2)(a), and 82.04.285 combined, use Table 2 of the small business B&O tax credit table.

(c) **Step three.** Find the small business B&O tax credit table that matches the assigned reporting frequency, monthly, quarterly, or annual.

(d) **Step four.** Find the "If Your Total Business and Occupation Tax is" column of the tax credit table and come down the column until you find the range of amounts which includes the total B&O tax due figure obtained from the excise tax return or multiple B&O tax credit worksheet.

(e) **Step five.** Read across to the "Your Small Business Credit is" column. The figure shown is the amount of the small business B&O tax credit that can be claimed on the "Small Business B&O Tax Credit" line in the "Credits" section of the excise tax return.

(6) **Examples - Using the "Multiple B&O Tax Credit Worksheet" and the tax credit tables.**

(a) **Using the "Multiple B&O Tax Credit Worksheet."** Assume that ABC reports quarterly. This quarter, ABC reports one hundred ninety dollars under the wholesaling classification and seventy dollars under the manufacturing classification for a total B&O tax liability of two hundred sixty dollars. ABC completes Schedule C, and determines it is entitled to a multiple activities tax credit (MATC) of seventy dollars. Using the multiple B&O tax credit worksheet, ABC enters two hundred sixty dollars on line one, enters seventy dollars on line two, and enters one hundred ninety dollars on line three (line two subtracted from line one). Line three, one hundred ninety dollars is the total B&O tax. ABC will use this amount to determine whether it is eligible for a small business B&O tax credit.

(b) **Using the small business B&O tax credit tables.** Assume the facts are the same as in the previous example in subsection (6)(a) of this rule. After completing the multiple B&O tax credit worksheet, ABC has one hundred ninety dollars of B&O tax liability left for potential application of the small business B&O tax credit. ABC does not have any business activity taxable under RCW 82.04.255 (real estate brokers), RCW 82.04.290 (2)(a) (service and other activities), and RCW 82.04.285 (contests of chance), so the ratio of those combined taxable amounts compared to the total of all B&O taxable amounts on the return is not fifty percent or greater. ABC will refer to Table 1 of the quarterly small business B&O tax credit table to find the "If Your Total Business and Occupation Tax is" column. Following down that column, ABC finds the tax range of one hundred eighty-six to

one hundred ninety-one dollars and comes over to the "Your Small Business Credit is" column on the right, which shows that a credit in the amount of twenty-five dollars is available. Before calculating the total amount of tax due for the return, ABC enters its small business B&O tax credit of twenty-five dollars in the "Credits" section.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-23-058, § 458-20-104, filed 11/12/10, effective 12/13/10. Statutory Authority: 2009 c 521. WSR 10-09-050, § 458-20-104, filed 4/15/10, effective 5/16/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 04-14-052, § 458-20-104, filed 6/30/04, effective 7/31/04. Statutory Authority: RCW 82.32.300. WSR 98-16-019, § 458-20-104, filed 7/27/98, effective 8/27/98; WSR 97-08-050, § 458-20-104, filed 3/31/97, effective 5/1/97; WSR 95-07-088, § 458-20-104, filed 3/17/95, effective 4/17/95; WSR 83-07-034 (Order ET 83-17), § 458-20-104, filed 3/15/83; Order ET 70-3, § 458-20-104 (Rule 104), filed 5/29/70, effective 7/1/70.]

WAC 458-20-105 Employees distinguished from persons engaging in business. (1) The Revenue Act imposes taxes upon persons engaged in business but not upon persons acting solely in the capacity of employees.

(2) While no one factor definitely determines employee status, the most important consideration is the employer's right to control the employee. The right to control is not limited to controlling the result of the work to be accomplished, but includes controlling the details and means by which the work is accomplished. In cases of doubt about employee status all the pertinent facts should be submitted to the department of revenue for a specific ruling.

(3) **Persons engaging in business.** The term "engaging in business" means the act of transferring, selling or otherwise dealing in real or personal property, or the rendition of services, for consideration except as an employee. The following conditions will serve to indicate that a person is engaging in business.

If a person is:

(a) Holding oneself out to the public as engaging in business with respect to dealings in real or personal property, or in respect to the rendition of services;

(b) Entitled to receive the gross income of the business or any part thereof;

(c) Liable for business losses or the expense of conducting a business, even though such expenses may ultimately be reimbursed by a principal;

(d) Controlling and supervising others, and being personally liable for their payroll, as a part of engaging in business;

(e) Employing others to carry out duties and responsibilities related to the engaging in business and being personally liable for their pay;

(f) Filing a statement of business income and expenses (Schedule C) for federal income tax purposes;

(g) A party to a written contract, the intent of which establishes the person to be an independent contractor;

(h) Paid a gross amount for the work without deductions for employment taxes (such as Federal Insurance Contributions Act, Federal Unemployment Tax Act, and similar state taxes).

(4) **Employees.** The following conditions indicate that a person is an employee.

If the person:

(a) Receives compensation, which is fixed at a certain rate per day, week, month or year, or at a certain percentage of business obtained, payable in all events;

(b) Is employed to perform services in the affairs of another, subject to the other's control or right to control;

(c) Has no liability for the expenses of maintaining an office or other place of business, or any other overhead expenses or for compensation of employees;

(d) Has no liability for losses or indebtedness incurred in the conduct of the business;

(e) Is generally entitled to fringe benefits normally associated with an employer-employee relationship, e.g., paid vacation, sick leave, insurance, and pension benefits;

(f) Is treated as an employee for federal tax purposes;

(g) Is paid a net amount after deductions for employment taxes, such as those identified in subsection (3)(h) of this section.

(5) **Full-time life insurance salespersons.** Chapter 275, Laws of 1991, effective July 1, 1991, provides that individuals performing services as full-time life insurance salespersons, as provided in section 3121 (d)(3)(B) of the Internal Revenue Code, will be considered employees. Treatment as an employee under this subsection (5) applies only to persons engaged in the full-time sale of life insurance. The status of other persons, including others listed in section 3121(d) of the Internal Revenue Code, will be determined according to the provisions of subsections (1) and (2) of this section (see WAC 458-20-164 for the proper tax treatment of insurance agents, brokers, and solicitors).

(6) **Operators of rented or owned equipment.** Persons who furnish equipment on a rental or other basis for a charge and who also furnish the equipment operators, are engaging in business and are not employees of their customers. Likewise, persons who furnish materials and the labor necessary to install or apply the materials, or produce something from the materials, are presumed to be engaging in business and not to be employees of their customers.

(7) **Casual laborers.** Persons regularly performing odd job carpentry, painting or paperhanging, plumbing, bricklaying, electrical work, cleaning, yard work, etc., for the public generally are presumed to be engaging in business. The burden of proof is upon such persons to show otherwise. However, refer to WAC 458-20-101 and 458-20-104 for registration and reporting requirements for such activities.

(8) A corporation, joint venture, or any group of individuals acting as a unit, is not an employee.

(9) **Booth renters.** For purposes of the business and occupation tax a "booth renter," as defined in RCW 18.16.-020(19), is considered engaged in business and not an employee. A "booth renter" is any person who:

(a) Performs cosmetology, barbering, esthetics, or manicuring services for which a license is required pursuant to chapter 18.16 RCW and

(b) Pays a fee for the use of salon or shop facilities and receives no compensation or other consideration from the owner of the salon or shop for the services performed.

(c) See WAC 458-20-118 for the proper treatment of amounts received for the rental or licensing of real estate and WAC 458-20-200 for the proper treatment of amounts received for leased departments.

[Statutory Authority: RCW 82.32.300. WSR 92-06-082, § 458-20-105, filed 3/4/92, effective 4/4/92; WSR 89-16-080 (Order 89-10), § 458-20-105, filed 8/1/89, effective 9/1/89; Order ET 70-3, § 458-20-105 (Rule 105), filed 5/29/70, effective 7/1/70.]

WAC 458-20-106 Casual or isolated sales—Business reorganizations. A casual or isolated sale is defined by RCW 82.04.040 as a sale made by a person who is not engaged in the business of selling the type of property involved. Any sales which are routine and continuous must be considered to be an integral part of the business operation and are not casual or isolated sales.

Furthermore, persons who hold themselves out to the public as making sales at retail or wholesale are deemed to be engaged in the business of selling, and sales made by them of the type of property which they hold themselves out as selling, are not casual or isolated sales even though such sales are not made frequently.

In addition the sale at retail by a manufacturer or wholesaler of an article of merchandise manufactured or wholesaled by him is not a casual or isolated sale, even though he may make but one such retail sale.

Business and Occupation Tax

The business and occupation tax does not apply to casual or isolated sales.

Retail Sales Tax

The retail sales tax applies to all casual or isolated retail sales made by a person who is engaged in the business activity; that is, a person required to be registered under WAC 458-20-101. Persons not engaged in any business activity, that is, persons not required to be registered under WAC 458-20-101, are not required to collect the retail sales tax upon casual or isolated sales.

However, persons in business as selling agents who are authorized, engaged or employed to sell or call for bids on tangible personal property belonging to another, and so selling or calling, are deemed to be sellers, and shall collect the retail sales tax upon all retail sales made by them. The tax applies to all such sales even though the sales would have been casual or isolated sales if made directly by the owner of the property sold.

A transfer of capital assets to or by a business is deemed not taxable to the extent the transfer is accomplished through an adjustment of the beneficial interest in the business. The following examples are instances when the tax will not apply.

(1) Transfers of capital assets between a corporation and a wholly-owned subsidiary, or between wholly-owned subsidiaries of the same corporation.

(2) Transfers of capital assets by an individual or by a partnership to a corporation, or by a corporation to another corporation in exchange for capital stock therein.

(3) Transfers of capital assets by a corporation to its stockholders in exchange for surrender of capital stock.

(4) Transfers of capital assets pursuant to a reorganization under 26 U.S.C Section 368 of the Internal Revenue Code, when capital gain or ordinary income is not realized.

(5) Transfers of capital assets to a partnership or joint venture in exchange for an interest in the partnership or joint venture; or by a partnership or joint venture to its members in exchange for a proportional reduction of the transferee's interest in the partnership or joint venture.

(6) Transfer of an interest in a partnership by one partner to another; and transfers of interests in a partnership to third parties, when one or more of the original partners continues as a partner, or owner.

The burden is upon the taxpayer to establish the facts concerning the adjustment of the beneficial interest in the business when exemption is claimed.

Use Tax

The use tax applies upon the use of any property purchased at a casual retail sale without payment of the retail sales tax, unless exempt by law. Uses which are exempt from the use tax are set out in RCW 82.12.030.

Where there has been a transfer of the capital assets to or by a business, the use of such property is not deemed taxable to the extent the transfer was accomplished through an adjustment of the beneficial interest in the business, provided, the transferor previously paid sales or use tax on the property transferred. (See the exempt situations listed under the retail sales tax subdivision of this rule.)

[Statutory Authority: RCW 82.32.300. WSR 83-07-034 (Order ET 83-17), § 458-20-106, filed 3/15/83; Order ET 75-1, § 458-20-106, filed 5/2/75; Order ET 74-1, § 458-20-106, filed 5/7/74; Order ET 70-3, § 458-20-106 (Rule 106), filed 5/29/70, effective 7/1/70.]

WAC 458-20-107 Requirement to separately state sales tax—Advertised prices including sales tax. (1) **Introduction.** Under the provisions of RCW 82.08.020 the retail sales tax is to be collected and paid upon retail sales, measured by the selling price.

(2) **Retail sales tax separately stated.** RCW 82.08.050 specifically requires that the retail sales tax must be stated separately from the selling price on any sales invoice or other instrument of sale, i.e., contracts, sales slips, and/or customer billing receipts. (For an exception covering food and beverage receipts, see WAC 458-20-124, Restaurants, cocktail bars, taverns and similar businesses.) This is required even though the seller and buyer may know and agree that the price quoted is to include state and local taxes, including the retail sales tax.

(a) The law creates a "conclusive presumption" that, for purposes of collecting the tax and remitting it to the state, the selling price quoted does not include the retail sales tax. This presumption is not overcome or rebutted by any written or oral agreement between seller and buyer.

(b) Selling prices may be advertised as including the tax, and in such cases, the advertised price is not the taxable selling price.

(3) **Advertising prices including tax.**

(a) RCW 82.08.055 provides that a seller may advertise prices as including the sales tax or that the seller is paying the sales tax under the following conditions:

(i) The words "tax included" are stated immediately following the advertised price in print size at least half as large as the advertised price print size, unless the advertised price is one in a listed series;

(ii) When advertised prices are listed in series, the words "tax included in all prices" are placed conspicuously at the head of the list in the same print size as the list;

(iii) If the price is advertised as including tax, the price listed on any price tag must be shown in the same way; and

(iv) All advertised prices and the words "tax included" are stated in the same medium, whether oral or visual, and if oral, in substantially the same inflection and volume.

(b) If these conditions are satisfied, as applicable, then price lists, reader boards, menus, and other price information mediums need not reflect the item price and separately show the actual amount of sales tax being collected on any or all items.

(c) The scope and intent of the foregoing is that buyers have the right to know whether retail sales tax is being included in advertised prices or not and that the tax is not to be used for the competitive advantage or disadvantage of retail sellers.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.08.050, and 2013 2nd sp.s. c 13. WSR 14-01-050, § 458-20-107, filed 12/12/13, effective 1/12/14. Statutory Authority: RCW 82.32.300, 82.01.060(2), and 82.08.050. WSR 08-14-021, § 458-20-107, filed 6/20/08, effective 7/21/08. Statutory Authority: RCW 82.32.300. WSR 90-10-080, § 458-20-107, filed 5/2/90, effective 6/2/90; WSR 86-03-016 (Order ET 86-1), § 458-20-107, filed 1/7/86; WSR 83-07-034 (Order ET 83-17), § 458-20-107, filed 3/15/83; Order ET 70-3, § 458-20-107 (Rule 107), filed 5/29/70, effective 7/1/70.]

WAC 458-20-108 Returned goods, allowances, cash discounts. (1) When a contract of sale is made subject to cancellation at the option of one of the parties or to revision in the event the goods sold are defective or if the sale is made subject to cash or trade discount, the gross proceeds actually derived from the contract and the selling price are determined by the transaction as finally completed.

(2) **Returned goods.** When sales are made either upon approval or upon a sale or return basis, and the purchaser returns the property purchased and the entire selling price is refunded or credited to the purchaser, the seller may deduct an amount equal to the selling price from gross proceeds of sales in computing tax liability, if the amount of sales tax previously collected from the buyer has been refunded by the seller to the buyer. If the property purchased is not returned within the guaranty period as established by contract or by customs of the trade, or if the full selling price is not refunded or credited to the purchaser, a presumption is raised that the property returned is not returned goods but is an exchange or a repurchase by the vendor.

To illustrate: S sells an article for $60.00 and credits his sales account therewith. The purchaser returns the article purchased within the guaranty period and the purchase price and the sales tax theretofore paid by the buyer is refunded or credited to him. S may deduct $60.00 from the gross amount reported on his tax return.

(3) **Defective goods.** When bona fide refunds, credits or allowances are given within the guarantee period by a seller to a purchaser on account of defects in goods sold, the amount of such refunds, credits or allowances may be deducted by the seller in computing tax liability, if the proportionate amount of the sales tax previously collected from the buyer has been refunded by the seller.

To illustrate: S sells an article to B for $60.00 and credits his sales account therewith. The article is later found to be defective.

(a) S gives B credit of $50.00 on account of the defect, and also a credit of sales tax collectible on that amount. S may deduct $50.00 from the gross amount reported in his tax returns. This is true whether or not B retains the defective article.

(b) B returns the article to S who gives B an allowance of $50.00 on a second article of the same kind which B purchases for an additional payment of $10.00, plus sales tax thereon. S may deduct $50.00 from the gross amount reported in his tax returns. The sale of the second article, however, must be reported for tax purposes as a $60.00 sale and included in the gross amount in his tax return.

(c) B returns the article to S who replaces it with a new article of the same kind free of charge, and without sales tax. S may deduct $60.00 from the gross amount reported in his tax returns, but the $60.00 selling price of the substituted article must be reported in the gross amount.

No deduction is allowed from the gross amount reported for tax if S in (b) and (c) of this subsection, does not credit his sales account with the selling price of the new article furnished to replace the defective one, but instead merely credits the sales account with an amount equal to the additional payment received, if any. In such case, the allowance for the defect is already shown in the sales account by the reduced sales price of the new article.

(4) **Motor vehicle warranties.** In the 1987 session, the Washington legislature enacted a "lemon law" creating enforcement provisions for new motor vehicle warranties. A manufacturer which repurchases a new motor vehicle under warranty because of a defective condition is required to refund to the consumer the "collateral charges" which include retail sales tax. The refund shall be made to the consumer by the manufacturer or by the dealer for the manufacturer. The department will then credit or refund the amount of the tax so refunded.

Evidence. To receive a credit or refund, the manufacturer or dealer must provide evidence that the retail sales tax was collected by the dealer and that it was refunded to the consumer. Acceptable proof will be:

(a) A copy of the dealer invoice showing the sales tax was paid by the consumer; and

(b) A signed statement from the consumer acknowledging receipt of the refunded tax. The statement should include the consumer's name, the date, the amount of the tax refunded, and the name of the dealer or the manufacturer making the refund.

(5) **Discounts.** The selling price of a service or of an article of tangible personal property does not include the amount of bona fide discounts actually taken by the buyer and the amount of such discount may be deducted from gross proceeds of sales providing such amount has been included in the gross amount reported.

(a) Discounts are not deductible under the retail sales tax when such tax is collected upon the selling price before the discount is taken and no portion of the tax is refunded to the buyer.

(b) Discount deductions will be allowed under the extracting or manufacturing classifications only when the value of the products is determined from the gross proceeds of sales.

(c) Patronage dividends which are granted in the form of discounts in the selling price of specific articles (for example, a rebate of one cent per gallon on purchases of gasoline) are

deductible. (Some types of patronage dividends are not deductible. See WAC 458-20-219.)

[Statutory Authority: RCW 82.32.300. WSR 88-01-050 (Order 87-9), § 458-20-108, filed 12/15/87; WSR 83-07-034 (Order ET 83-17), § 458-20-108, filed 3/15/83; Order ET 70-3, § 458-20-108 (Rule 108), filed 5/29/70, effective 7/1/70.]

WAC 458-20-109 Finance charges, carrying charges, interest, penalties. (1) **Introduction.** This section explains the B&O and public utility taxation of finance charges, carrying charges, interest and/or penalties received by taxpayers in the regular course of business. This section also explains when these amounts are not part of the selling price for retail sales tax purposes.

(2) **Business and occupation tax.** Persons who receive finance charges, carrying charges, service charges, penalties and interest are taxable under the service and other business activities classification on the receipt of amounts from these sources.

(a) Amounts received from these sources include but are not limited to:

(i) Interest received by persons engaged in public utility activities; and

(ii) Interest received by persons regularly engaged in the business of selling real estate.

(b) Persons engaged in financial business activities should refer to WAC 458-20-146.

(c) Amounts categorized as "interest" in a lease payment are generally taxable in the retailing classification as part of the total lease payment and part of the selling price for retail sales tax purposes. See WAC 458-20-211.

(d) Interest or finance charges received from an installment sale are taxable under the service classification.

(3) **Retail sales tax.** Retail sales tax applies as follows.

(a) Finance charges, carrying charges, service charges, penalties and/or interest from installment sales are not considered a part of the selling price of such property and are not subject to the retail sales tax, when:

(i) The amount of such finance charges, carrying charges, service charges, penalty, or interest is in addition to the usual or established cash selling price; and

(ii) The amount is segregated on the taxpayers' accounts; and

(iii) The amount is billed separately to customers.

(b) Amounts designated as finance charges, carrying charges, service charges or interest in a lease of tangible personal property must be included in the measure of retail sales tax regardless of the fact that such charges may be billed separately to customers. However, a penalty or interest charge for failure of the customer to make a timely lease payment is taxable under the service and other business activities classification and not subject to retail sales tax.

(4) **Examples.** The following examples identify a number of facts and then state a conclusion as to whether the situation results in taxable interest or finance charges. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(a) ABC Electric Company, who sells electricity to consumers, receives $9,000.00 in late charges in the month of November. These fees are taxable under the service and other classification of the business and occupation tax. The public utility tax would not apply to this income.

(b) XYZ Furniture Company sells furniture and allows its customers to pay for the furniture over a twelve-month period. The seller charges interest at twelve percent per annum for allowing the customer to defer immediate payment. The interest charged the customer is a separate activity from the sale of the furniture and is taxable under the service and other business activities classification.

(c) Jane Doe is leasing a car from ABC Leasing, Inc. The lease contract provides that if the customer is more than fifteen days late in making the lease payment, a five percent penalty will be charged. Jane Doe was more than fifteen days late in making her March payment and was required to pay the five percent penalty. The penalty amount received by ABC Leasing is a separate activity from the lease of the vehicle and is taxable under the service and other activity business and occupation tax. Retail sales tax does not apply to this amount.

(d) John Doe sold his personal residence on contract. He receives monthly interest and principal payments. The interest is received in exchange for the seller's deferring receipt of immediate payment. The sale of the residence was not related to any other business activities and John Doe has sold no other real estate. The interest is not taxable under the B&O tax since the transaction was a casual and isolated sale.

(e) Judy Smith is engaged in business as a real estate broker and regularly sells real estate for others. Judy Smith sold her personal residence on contract. She receives monthly interest and principal payments. She receives no other interest from real estate contracts. The sale of her own residence can be distinguished from the sale of real estate for others. Since this was a single sale of her own residence, it is a casual and isolated sale and the interest is not subject to B&O tax.

(f) James Smith sold on contract seventeen of twenty-three apartment complexes which he owned during a four-year period. He receives payment of principal and interest every month from these sales. The only other income he receives is from the rental of apartment units to nontransients. The income which James Smith receives as interest from the sale of the real estate is subject to the service and other B&O tax. The rental of the apartment units is not taxable for the B&O tax. The courts have held that the selling and financing of sales of capital assets by means of real estate contracts does not constitute an investment within the meaning of RCW 82.04.4281. James Smith is engaged in a taxable business activity. A deduction is provided to sellers who are engaged in banking, loan, security, or other financial businesses if the sale is primarily secured by a first mortgage or trust deed on nontransient residential property. However, James Smith is not engaged in these types of business, nor was the loan secured in this manner. Persons in a financial business should refer to WAC 458-20-146.

(g) David Roe acquired four pieces of real property over a period of several years. This property has been held for residential rental to nontransients. David Roe sold all of the real estate in 1991 and is receiving payments of principal and interest pursuant to sales contracts. The determination of whether the interest received is subject to the business and occupation tax depends on all facts and circumstances and cannot be made based on the limited facts set forth in this

example. Additional facts and circumstances would include, but not be limited to, the extent to which David Roe has purchased and sold real property in the past, the number of other sales contracts held by David Roe aside from the ones mentioned here, whether the property may have been acquired by inheritance, and the type of business in which David Roe regularly engages.

[Statutory Authority: RCW 82.32.300. WSR 91-23-038, § 458-20-109, filed 11/13/91, effective 1/1/92; Order ET 70-3, § 458-20-109 (Rule 109), filed 5/29/70, effective 7/1/70.]

WAC 458-20-110 Delivery charges. (1) **Introduction.** This section explains the manner in which delivery charges are considered for purposes of business and occupation (B&O), retail sales, and use taxes. For information about delivery charges with regard to promotional materials, see WAC 458-20-17803 (Use tax on promotional materials).

(2) **What are delivery charges?** "Delivery charges" means charges by the seller for preparation and delivery to a location designated by the purchaser of tangible personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing.

(3) **Do the business and occupation (B&O) and retail sales taxes apply to delivery charges?** The measure of the tax is "gross proceeds of sales" for B&O tax (RCW 82.04.-070) and "selling price" for retail sales tax (RCW 82.08.010). Gross proceeds of sales and selling price include all consideration paid by the buyer, without any deduction for costs of doing business such as material, labor, and transportation costs, including delivery charges. Thus, delivery charges by the seller are a component of these tax measures.

(a) **What if delivery charges are separately itemized on the sales invoice?** Amounts received by a seller from a buyer for delivery charges are included in the measure of tax regardless of whether charges for such costs are billed separately, itemized, or whether the seller is also the carrier. Limiting delivery charges to the actual cost of delivery to the seller does not affect taxability.

(b) **Does retail sales tax apply to all delivery charges by the seller?** Delivery charges by the seller making a retail sale are a component of the selling price. If the sale of the tangible personal property or service is exempt from retail sales tax, such as certain "food and food ingredients," retail sales tax does not apply to the selling price, including delivery charges, associated with that sale. Similarly, if the product is sold at wholesale, retail sales tax does not apply to the delivery charges of that sale.

If a retail sale consists of both taxable and nontaxable tangible personal property, and delivery charges are a component of the selling price, retail sales tax applies to the percentage of delivery charges allocated to the taxable tangible personal property. Retail sales tax is not due on delivery charges allocated to exempt tangible personal property.

The seller may use either of the following percentages to determine the taxable portion of the delivery charges:

(i) A percentage based on the total sales price of the taxable tangible personal property compared to the total sales price of all tangible personal property in the shipment; or

(ii) A percentage based on the total weight of the taxable tangible personal property compared to the total weight of all tangible personal property in the shipment.

(c) **Are there any situations in which delivery charges by the seller may be excluded from the measure of tax?** There is no specific exclusion from the measure of tax for delivery charges by the seller. Actual delivery costs, regardless of whether separately charged, may be excluded from the measure of the manufacturing and extracting B&O taxes when the products are delivered outside the state. For further discussion, refer to WAC 458-20-112 (Value of products). WAC 458-20-13501 (Timber harvest operations) provides guidance regarding this issue for persons engaged in activities associated with timber harvesting.

(d) **Delivery charges in cases of payments to third parties.** Delivery charges incurred after the buyer takes delivery of the goods are not part of the selling price when the seller is not liable for payment of the delivery charges. To be excluded from the gross proceeds of sales for B&O tax and selling price for retail sales tax, the seller must document that the buyer alone is responsible to pay the carrier for the delivery charges.

(e) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances. In these examples, if the seller had been required to collect use tax (RCW 82.12.040) instead of retail sales tax (RCW 82.08.050), the use tax collection responsibility remains the same as for retail sales tax. This is because, in this context, the "value of article used" has the same meaning as the "purchase price" or "selling price."

(i) **Example 1.** Jane Doe orders a life vest from Marine Sales and requests that the vest be mailed by the United States Postal Service to her home. Marine Sales places the correct postage on the package using its postage meter and separately itemizes a charge on the sales invoice to Jane at the exact amount of the postage cost. Marine Sales is subject to the retailing B&O tax on the gross proceeds of the sale and must collect retail sales tax on the selling price, both of which measures of tax include the charge for postage.

(ii) **Example 2.** XYZ Corporation orders equipment from ABC Distributors and provides ABC with a properly completed resale certificate (WAC 458-20-102A), for purchases made before January 1, 2010, or a reseller permit (WAC 458-20-102), for purchases made on or after January 1, 2010. ABC ships the equipment using overnight air delivery and itemizes the actual amount of its shipping costs on the sales invoice. ABC must remit wholesaling B&O tax on the gross proceeds of sale, which includes the amount billed as shipping charges. Since the equipment is purchased for resale, ABC does not collect or report retail sales tax.

(iii) **Example 3.** The facts in this example are the same as those in (ii) of this subsection except that XYZ provides ABC with a properly completed exemption certificate. Retail sales tax does not apply to the delivery charge because the selling price, of which the delivery charge is a component, is exempt from retail sales tax. However, the delivery charge is included in the gross proceeds of the sale, and thus, is subject to retailing B&O tax.

(iv) **Example 4.** Jones Computer Supply, a distributor, makes retail sales of computer products primarily by mail order. It is the practice of Jones Computer Supply to add a ten-dollar handling charge for each order. No separate charge

is made for actual transportation. The handling charge is part of the measure of tax for the retailing B&O and retail sales taxes.

(v) **Example 5.** ABC Construction in Seattle purchased a new saw from XYZ, Inc. The sales contract specifies that ABC will contract with MNO, Inc. for shipping to Seattle and that MNO, Inc. will pick up the saw in Spokane. ABC does contract with MNO for the shipping and is shown as the consignor on the bill of lading. The transportation charge is not included in the measure of tax for purposes of the retailing B&O and retail sales taxes because ABC, the buyer, is liable for payment to MNO, for shipping the new saw.

(4) **Delivery charges and use tax.** "Value of article used," which is the measure of the use tax for tangible personal property, includes the amount of any delivery charge paid or given to the seller or on behalf of the seller with respect to the purchase of such article. Beginning July 1, 2004, both the "value of the article used" and the "value of the service used" will be the "purchase price" in instances where the seller is required under RCW 82.12.040 to collect use tax from the purchaser. RCW 82.12.010. "Purchase price" has the same meaning as "selling price" as described in subsection (3) of this section. Consumers responsible for remitting use tax directly to the department should refer to WAC 458-20-178 (Use tax).

The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances. Presume that all transactions in the following examples occur July 1, 2004, or later.

(a) **Example 1.** ABC Construction ordered replacement parts for a saw from XYZ, Inc., a business located in Chicago that is not required to collect Washington taxes. XYZ contracted with MNO Freight to ship the parts from Chicago. ABC is subject to use tax on the value of the article used (presumed to be the purchase price of the parts) including the cost of the transportation, regardless of whether the transportation costs are itemized.

(b) **Example 2.** The facts in this example are the same as those in (a) of this subsection except that instead of ordering a replacement part, ABC Construction sends a broken part to XYZ, Inc. in Chicago for repair. ABC is subject to use tax on the repair service. The cost of transportation is included in the value of the service used, regardless of whether the transportation costs are itemized.

(c) **Example 3.** ABC Construction ordered replacement parts for a saw from XYZ, Inc., a business located in Chicago that is not required to collect Washington taxes. ABC hired MNO Freight to ship the parts from Chicago and was responsible for payment. ABC may exclude the cost of the transportation from the value on which use tax is due. The transportation costs ABC pays MNO are not a component of the value of the article used because the cost is not part of the consideration paid to XYZ for the replacement parts. ABC is subject to use tax on the value of the parts, which is presumed to be their purchase price.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-110, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300, 82.01.060(2), and chapters 82.04, 82.08 and 82.12 RCW. WSR 08-14-026, § 458-20-110, filed 6/20/08, effective 7/21/08. Statutory Authority: RCW 82.32.300 and 82.01.-060(2). WSR 05-02-039, § 458-20-110, filed 12/30/04, effective 1/30/05. Statutory Authority: RCW 82.32.300. WSR 91-23-037, § 458-20-110, filed 11/13/91, effective 12/14/91; Order ET 70-3, § 458-20-110 (Rule 110), filed 5/29/70, effective 7/1/70.]

WAC 458-20-111 Advances and reimbursements. The word "advance" as used herein, means money or credits received by a taxpayer from a customer or client with which the taxpayer is to pay costs or fees for the customer or client.

The word "reimbursement" as used herein, means money or credits received from a customer or client to repay the taxpayer for money or credits expended by the taxpayer in payment of costs or fees for the client.

The words "advance" and "reimbursement" apply only when the customer or client alone is liable for the payment of the fees or costs and when the taxpayer making the payment has no personal liability therefor, either primarily or secondarily, other than as agent for the customer or client.

There may be excluded from the measure of tax amounts representing money or credit received by a taxpayer as reimbursement of an advance in accordance with the regular and usual custom of his business or profession.

The foregoing is limited to cases wherein the taxpayer, as an incident to the business, undertakes, on behalf of the customer, guest or client, the payment of money, either upon an obligation owing by the customer, guest or client to a third person, or in procuring a service for the customer, guest or client which the taxpayer does not or cannot render and for which no liability attaches to the taxpayer. It does not apply to cases where the customer, guest or client makes advances to the taxpayer upon services to be rendered by the taxpayer or upon goods to be purchased by the taxpayer in carrying on the business in which the taxpayer engages.

For example, where a taxpayer engaging in the business of selling automobiles at retail collects from a customer, in addition to the purchase price, an amount sufficient to pay the fees for automobile license, tax and registration of title, the amount so collected is not properly a part of the gross sales of the taxpayer but is merely an advance and should be excluded from gross proceeds of sales. Likewise, where an attorney pays filing fees or court costs in any litigation, such fees and costs are paid as agent for the client and should be excluded from the gross income of the attorney.

On the other hand, no charge which represents an advance payment on the purchase price of an article or a cost of doing or obtaining business, even though such charge is made as a separate item, will be construed as an advance or reimbursement. Money so received constitutes a part of gross sales or gross income of the business, as the case may be. For example, no exclusion is allowed with respect to amounts received by (1) a doctor for furnishing medicine or drugs as a part of his treatment; (2) a dentist for furnishing gold, silver or other property in conjunction with his services; (3) a garage for furnishing parts in connection with repairs; (4) a manufacturer or contractor for materials purchased in his own name or in the name of his customer if the manufacturer or contractor is obligated to the vendor for the payment of the purchase price, regardless of whether the customer may also be so obligated; (5) any person engaging in a service business or in the business of installing or repairing tangible personal

property for charges made separately for transportation or traveling expense.

Revised May 1, 1947.

[Order ET 70-3, § 458-20-111 (Rule 111), filed 5/29/70, effective 7/1/70.]

WAC 458-20-112 Value of products. The term "value of products" includes the value of by-products, and except as provided herein, shall be determined by "gross proceeds of sales" whether such sales are at wholesale or at retail, to which shall be added all subsidies and bonuses received with respect to the extraction, manufacture, or sale thereof.

"The term 'gross proceeds of sales' means the value proceeding or accruing from the sale of tangible personal property . . . without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses." (RCW 82.04.070.)

In the case of bona fide sales of products. The law provides (RCW 82.04.450), that under the extracting and manufacturing classifications of the business and occupation tax the value of products extracted or manufactured shall be determined by the gross proceeds of sales in every instance in which a bona fide sale of such products is made, and whether sold at wholesale or at retail.

Sales to points outside the state. In determining the value of products delivered to points outside the state there may be deducted from the gross proceeds of sales so much thereof as the taxpayer can show to be actual transportation costs from the point at which the shipment originates in this state to the point of delivery outside the state.

All other cases. The law provides that where products extracted or manufactured are

(1) For commercial or industrial use (by the extractor or manufacturer—see WAC 458-20-134); or

(2) Transported out of the state, or to another person without prior sale; or

(3) Sold under circumstances such that the stated gross proceeds from the sale are not indicative of the true value of the subject matter of the sale; the value shall correspond as nearly as possible to the gross proceeds from other sales at comparable locations in this state of similar products of like quality and character, in similar quantities, under comparable conditions of sale, to comparable purchasers, and shall include subsidies and bonuses.

In the absence of sales of similar products as a guide to value, such value may be determined upon a cost basis. In such cases, there shall be included every item of cost attributable to the particular article or article extracted or manufactured, including direct and indirect overhead costs.

Revised June 1, 1970.

[Order ET 70-3, § 458-20-112 (Rule 112), filed 5/29/70, effective 7/1/70.]

WAC 458-20-113 Ingredients or components, chemicals used in processing new articles for sale. (1) The term "retail sale" means "every sale of tangible personal property . . . other than a sale to one who purchases for the purpose of resale . . . or for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale . . . (RCW 82.04.-050.)

(2) Ingredients or components. The sale of articles of tangible personal property which physically enter into and form a part of a new article or substance produced for sale does not constitute a retail sale. This does not exempt from the retail sales tax the sale of articles consumed in a manufacturing process which do not enter into and become a physical part of the new article produced for sale, such as fuel used for heating purposes, oil for machinery, sandpaper, etc.

(3) Also, the definition of retail sale does not exclude consumables purchased for use in manufacturing, refining, or processing new articles for sale merely because some constituents of the consumables may also be traceable in the finished product, which are impurities or undesirable or unnecessary constituents of the finished product.

(4) For articles to qualify for sales and use tax exemption as ingredients or components of products produced for sale, such articles or their constituents must be traceable in the finished product and identifiable as having been directly provided by the article claimed for exemption.

(5) Chemicals used in processing. Sales of chemicals to a person for use in processing articles produced for sale are not retail sales, and therefore are not subject to the retail sales tax.

(6) "Chemicals used in processing" carries its common restricted meaning in commercial usage. It includes only chemical substances which are used by the purchaser to unite with other chemical substances, present as ingredients or components of the articles or substances being processed, to produce a chemical reaction therewith, as contrasted with merely a physical change therein. A chemical reaction is one in which there takes place a permanent change of certain properties, with the formation of new substances which differ in chemical composition and properties from the substances originally present, and usually differ from them in appearance as well. It is not necessary that all of the new substances which are formed be present in the final completed article or substance which is sold; one or more of such new substances resulting from the chemical reaction may be removed or drawn off in the processing.

(7) To illustrate: Sales of chemicals to a pulp mill for use in the digesting and bleaching of pulp are not subject to the retail sales tax because such chemicals react chemically with the cellulose in the pulp fiber which, in turn, becomes a major ingredient of the final product, paper. Similarly, sales of carbon to an aluminum reduction plant for the primary purpose of forming a chemical reaction with alumina to remove its oxygen content are not retail sales.

(8) Conversely, sales of water purifiers and wetting agents to a pulp mill are taxable sales. The treated water acts primarily as a conveyor or carrier of the pulp fibers and only an insignificant part of the water becomes an ingredient of the final product. Similarly, sales of caustic soda to potato processors to remove peelings from potatoes are retail sales because the chemical reacts only with the peelings which are removed as waste, and not with the potatoes which are sold as the final product.

(9) Sales of diesel or fuel oil to a steel mill or foundry, for use or consumption primarily in generating heat, are retail sales and subject to the retail sales tax, notwithstanding the fact that some portion of the oil may cause a chemical reaction and to some extent alter the character of the article being manufactured or processed.

(10) Effective April 3, 1986, (chapter 231, Laws of 1986), purchases for the purpose of consuming the property purchased in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose is to create a chemical reaction directly through contact with an ingredient of ferrosilicon, are not subject to retail sales tax or use tax.

(11) In special cases where doubt exists, a special ruling will be made by the department of revenue upon submission of all the pertinent facts relative to the nature of the chemical substances concerned and the use made thereof by the purchaser.

Revised June 1, 1970.

[Statutory Authority: RCW 82.32.300. WSR 86-20-027 (Order 86-17), § 458-20-113, filed 9/23/86; Order ET 70-3, § 458-20-113 (Rule 113), filed 5/29/70, effective 7/1/70.]

WAC 458-20-115 Sales of packing materials and containers. (1) **Introduction.** This section explains the B&O, retail sales, and use taxes which apply to persons who sell packing materials and to those who use packing materials.

(2) **Definitions.** The term "packing materials" means and includes all boxes, crates, bottles, cans, bags, drums, cartons, wrapping papers, cellophane, twines, gummed tapes, wire, bands, excelsior, waste paper, and all other materials in which tangible personal property may be contained or protected within a container, for transportation or delivery to a purchaser.

(3) **Business and occupation tax.**

(a) Sales of packing materials to persons who sell tangible personal property contained in or protected by packing materials are sales for resale and subject to tax under the wholesaling classification. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from purchasers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(b) Sales of containers to persons who sell tangible personal property contained within the containers, but who retain title to such containers which are to be returned, are sales for consumption and subject to tax under the retailing classification. This class includes wooden or metal bottle cases, barrels, gas tanks, carboys, drums, bags and other items, when title to the container remains with the seller of the tangible personal property contained within the container, and even though a deposit is not made for the containers, and when such articles are customarily returned to the seller. If a charge is made against a customer for the container, with the understanding that such charge will be canceled or rebated when the container is returned, the amount charged is deemed to be made as security for the return of the container and is not part of the selling price for tax purposes. However, refer to the comments below for sales of containers for beverages and foods.

(c) Title to containers, whether designated as returnable or nonreturnable, for beverages and food sold at retail, including beer, milk, soft drinks, mixers and the like, will be deemed to pass to the customer along with the contents. In such cases, amounts charged for the containers are part of the selling price of the food or beverage and subject to retailing tax when sold to consumers. Sales to persons who will resell the food or beverages are wholesale sales.

(d) Persons who perform custom or commercial packing for others are generally taxable under the service B&O tax classification on the income from the packing activity.

(i) Under RCW 82.04.190, persons taxable under the service B&O tax classification are consumers of any materials used in performing the service. Sales of packing materials to persons engaged in the business of custom or commercial packing are sales for consumption and are subject to the retail sales tax. However, there is a specific statutory exemption from the B&O tax for persons who perform packing of fresh perishable horticultural products for the grower. These persons are also exempt from retail sales tax on the purchase of any materials and supplies used in performing the packing service.

(ii) Persons who perform custom or commercial packing for others and who also manufacture the boxes, containers, or other packaging materials used by them in the packing are subject to the manufacturing tax and use tax on the value of the packing materials which they manufacture. Refer to WAC 458-20-136 Manufacturing, processing for hire, fabricating.

(e) Persons who operate cold storage warehouses or who perform processing for hire for others, which includes packaging the processed items, are not the consumers of the containers or other packaging materials. Sales of boxes, cartons, and packaging materials to these persons are taxable under the wholesaling tax classification. Refer to WAC 458-20-136 and 458-20-133 Frozen food lockers.

(f) Persons who manufacture packing materials for delivery outside Washington or for their own commercial or industrial use are manufacturers and should refer to WAC 458-20-136, 458-20-134 Commercial or industrial use, and WAC 458-20-112 Value of products.

(4) **Retail sales tax.**

(a) All sales taxable under the retailing classification of the business and occupation tax as indicated above are also subject to retail sales tax except those specifically distinguished hereafter in this subsection.

(b) Retail sales tax does not apply to sales of returnable food and beverage containers, and vendors may take a deduction from gross retail sales for the amount of such sales in reporting sales tax due, providing (i) the seller separately states the charge for the container and (ii) the separately stated charge is the amount the vendor will pay for a repurchase of the container. Return of the containers is a repurchase by the vendor, and sales tax is not due on amounts paid to the customer on such repurchases, since the vendor will resell the containers in the regular course of business. (RCW 82.08.0282.)

(c) No deduction is allowed in computing tax under the retail sales tax classification where the retail sales tax is collected from the customer upon the charge for the container.

(d) Sales of packing materials to cooperative marketing associations, agents, or independent contractors for the purpose of packing fresh perishable horticultural products for the growers thereof, are not subject to retail sales tax. See also WAC 458-20-214 Cooperative marketing associations and independent dealers acting as agents of others with respect to the sale of fruit and produce.

(5) **Use tax.**

(a) The use tax applies to uses of packing materials and containers to which retail sales tax would apply but, for any reason, was not paid at the time such materials and containers were acquired.

(b) The use tax applies to the use of packing materials, such as boxes, cartons, and strapping materials, by a manufacturer in Washington where the packing materials are used to protect materials while being transported to another site of the manufacturer for further processing.

(c) The use tax applies to the use of pallets by a manufacturer or seller where the pallets will not be sold with the product, but are for use in the manufacturing plant or warehouse.

(6) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(a) ABC Packing Co. does custom packing of small parts for a Washington manufacturer. The parts are sent by truck to ABC who then places the parts into plastic bags and seals the bags through a heat fusion process. ABC is the consumer of the bags and must pay either retail sales tax or use tax on the use of the bags. This is true even though the bags will remain with the parts until delivered to the ultimate user of the parts.

(b) XY manufactures paper products in Washington. The paper is placed on large rolls. These large rolls are shipped to another of its own plants where the paper goes through a slitter for conversion into reams of paper. These large rolls involve the use of "cores" made of heavy fiber board on which the paper is rolled. "Plugs" are placed in the ends to give additional support. The rolls are also wrapped and banded with steel banding. The cores, plugs, wrapping materials, and banding are all eventually removed during the additional processing. XY is the consumer of the plugs, cores, and other packing materials and must pay retail sales or use tax on these items.

(c) XY uses three types of pallets in its manufacturing operation. One type of pallet is used strictly for storing paper which is in the manufacturing process. A second type of pallet is returnable and the customer is charged a deposit which is refunded at the time the pallet is returned. The third type of pallet is nonreturnable and is sold with the product. XY is required to pay retail sales or use tax on the first two types of pallets. The third type of pallets may be purchased by XY without the payment of retail sales or use tax since these pallets are sold with the paper products.

(d) Cold Storage Co. does custom fish processing for various customers. The processing involves cutting whole fish into fillets or steaks, vacuum packaging the pieces, and freezing the packages. The packing activity is considered to be part of a processing for hire activity. As a processor for hire, Cold Storage Co. is not the consumer of the packing materials.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-115, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 93-19-017, § 458-20-115, filed 9/2/93, effective 10/3/93; WSR 88-20-014 (Order 88-6), § 458-20-115, filed 9/27/88; Order 74-2, § 458-20-115, filed 6/24/74; Order ET 70-3, § 458-20-115 (Rule 115), filed 5/29/70, effective 7/1/70.]

WAC 458-20-116 Sales and/or use of labels, name plates, tags, premiums, and advertising material. (1) **Introduction.** This section explains Washington's B&O and retail sales tax applications to the sale of labels, name plates, tags, and advertising material. It also gives tax reporting information to persons offering premiums at reduced or no cost to customers.

(2) **Definitions.** For the purposes of this section, the following definitions apply:

(a) "Labels," "name plates," and "tags" are slips, generally made of paper or cloth, which are affixed to articles or containers for identification or description.

(b) A "premium" is an item offered free of charge or at a reduced price to prospective customers as an inducement to buy.

(3) **Sales for resale.** Sales of labels, name plates, tags, premiums, and advertising material to persons for use in the following manner are sales for resale (wholesale sales) and not subject to retail sales tax:

(a) Sales of labels, name plates, and tags to persons who will attach these items to articles or containers sold by them, or enclose these items with articles sold by them. However, the labels, name plates, or tags may not be purchased for resale if they will be put to intervening use by such persons.

(b) Sales of premiums to persons who pass title to the premium along with other articles which are sold by them, when the passing of title to the premiums is not contingent upon the returning of coupons or other evidence of prior purchase.

(c) Sales of premiums to persons who in turn sell the same to customers at a reduced price.

(d) Sales of advertising material to persons who enclose the advertising material with articles sold by them, when such advertising material relates primarily to the articles with which it is enclosed. Persons who enclose advertising material with articles being sold for the purpose of promoting sales of other products are consumers and may not purchase this advertising material for resale. (See RCW 82.12.010(5).)

(4) **Retail sales tax.** Sales of labels, name plates, tags, premiums, and advertising material to consumers are retail sales. The retail sales tax applies to the following:

(a) Sales of labels, name plates, and tags to persons who attach the same to containers enclosing articles sold by them, when such persons retain title to the containers which are to be returned. Such sales are sales for consumption and subject to the retail sales tax. Since the container is not being resold, any labels, name plates, tags, or similar items attached to the container are also not being resold.

(b) Sales of labels, name plates, and tags to persons who use them for inventory, statistical, or other business purposes. Such sales are sales for consumption and the retail sales tax

applies, notwithstanding the labels, name plates, or tags remain attached to the articles or containers delivered to the customer.

(c) Sales of premiums to persons who do not pass title thereto with other articles which are sold by them, but which are given as an inducement to perform a service, or are given upon the returning of coupons or other evidence of prior purchase. Such sales are sales for consumption and are subject to the retail sales tax.

(d) Sales of premiums to persons who offer them as an inducement to potential customers at no charge and with no requirement that the customer purchase any other article or service as a condition to receive the premium. Such sales are sales for consumption and subject to the retail sales tax.

(5) **Business and occupation tax.** The B&O tax applies to the sale of labels, name plates, tags, premiums, and advertising material as follows:

(a) **Wholesaling.** Persons who sell labels, name plates, tags, premiums, and advertising material to persons who will resell these items as described in subsection (3) of this section are subject to the wholesaling B&O tax on the gross proceeds of these sales. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(b) **Retailing.** Persons who sell labels, name plates, tags, premiums, and advertising material to consumers are subject to the retailing B&O tax on such sales.

(6) **Deferred sales or use tax.** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

(7) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(a) ABC Timber purchases log tags which are attached to logs as they are received in ABC's yard. These tags are used by ABC to keep track of the logs for inventory purposes. These tags remain on the logs after sale, and are also used by ABC's customers to verify receipt of the logs. ABC must remit retail sales or use tax upon the purchase of the log tags, notwithstanding they remain attached to the logs after sale to ABC's customers. The use of these tags for inventory purposes by ABC prior to actual sale is intervening use as a consumer.

(b) MT Gas, a gasoline and service station, offers customers a free set of stemware with any gasoline purchase of ten gallons or more. Customer purchasing seven to nine gallons of gasoline may purchase the same set of stemware for a nominal amount. MT Gas may purchase the stemware without paying retail sales tax. The stemware is offered as a premium, and is considered to be resold along with the gasoline. It is immaterial that the sale of gasoline is exempt from the retail sales tax. MT Gas must report the retailing B&O tax and collect and remit retail sales tax on the price charged for the stemware sold to those customers purchasing seven to nine gallons of gasoline.

(c) KMP Company is a camping club which purchases gift items which are used as premiums. These gift items are offered free of charge to potential customers on condition that the potential customer attend a sales presentation. No purchase of a membership or anything else is required to receive the premium. KMP must remit retail sales or use tax upon the purchase of the premiums. KMP is the consumer of premiums given away free of charge where the recipient has no requirement to purchase any service or article as a condition of receiving the premium.

(d) BC Bank offers a choice of various premiums to customers opening new savings accounts. In some cases, a charge may be made to the customer for the premium, with the amount of the charge based on the amount of deposit the customer makes in the new savings account. BC Bank may give a resale certificate (WAC 458-20-102A) for purchases made before January 1, 2010, or a reseller permit (WAC 458-20-102) for purchases made on or after January 1, 2010, to its suppliers for those premiums which will be resold to its new customers. For those premiums which will be given to customers without charge, BC Bank must pay either the retail sales tax to its suppliers or use tax to the department on the cost of the premiums. It also must report the retailing B&O tax and collect and remit retail sales tax on any amounts charged to its customers.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-116, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 93-19-018, § 458-20-116, filed 9/2/93, effective 10/3/93; WSR 83-07-034 (Order ET 83-17), § 458-20-116, filed 3/15/83; Order ET 70-3, § 458-20-116 (Rule 116), filed 5/29/70, effective 7/1/70.]

WAC 458-20-117 Sales and/or use of dunnage. (1) **Introduction.** This rule explains Washington's B&O tax, retail sales tax, and use tax to the sale or use of dunnage.

(a) The term "dunnage" means any material used for the purpose of protecting or holding in place cargo or freight during transportation by any carrier of property, and which is not an integral part of the carrier itself. Dunnage includes, but is not limited to, wood blocks, stakes, separating strips, timber, double decks, false floors, door shields, bulkheads, and other bracing. Dunnage generally does not remain with the cargo that is being transported and will not be delivered to the person who will ultimately receive the cargo. On the other hand, packing materials are generally part of the total package containing the cargo and are ultimately delivered to the customer as part of the cargo or merchandise.

(b) Persons selling dunnage to air, rail, or water carriers operating in interstate or foreign commerce should also refer to WAC 458-20-175. Persons selling or purchasing packing materials should refer to 458-20-115 (Sales of packing materials and containers).

(2) **Business and occupation tax.** The B&O tax applies as follows to sales of dunnage.

(a) **Wholesaling.** The wholesaling tax applies to the gross proceeds derived from sales of dunnage to persons who resell the dunnage, without intervening use.

(b) **Retailing of interstate transportation equipment.** This B&O tax classification applies to sales of dunnage to air,

rail, and water carriers. These sales are exempt from retail sales tax because of the provisions of RCW 82.08.0261.

(c) **Retailing.** The retailing tax applies to sales of dunnage to motor carriers and all other consumers.

(3) **Retail sales tax.** The retail sales tax generally applies to the sale of dunnage to consumers. This includes situations in which the purchaser may initially use the materials for dunnage and then resell the materials after they have served that purpose. RCW 82.08.0261 does provide a retail sales tax exemption for sales of tangible personal property, including dunnage, to air, rail, and water carriers operating in interstate or foreign commerce. To substantiate a claim for this exemption, the seller must retain as part of its records the completed exemption certificate(s) prescribed by WAC 458-20-175. However, air, rail, and water carriers are subject to use tax on dunnage used in Washington. (See below.)

(4) **Deferred sales or use tax.** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

(a) Air, rail, and water carriers engaged in interstate or foreign commerce should note that while the purchase of dunnage may qualify for the retail sales tax exemption provided by RCW 82.08.0261, the subsequent use in Washington of that dunnage is subject to use tax. These carriers should refer to WAC 458-20-175 to determine any potential use tax liability.

(b) Persons who manufacture the materials they will use for dunnage, such as lumber manufacturers, are subject to use tax on the value of the dunnage and are also subject to the manufacturing B&O tax. These persons should refer to WAC 458-20-136 and WAC 458-20-112.

(5) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all facts and circumstances. Unless stated otherwise, these examples presume both seller and purchaser are located in Washington.

(a) BCD, Inc. provides stevedoring services within the State of Washington. BCD routinely acquires lumber for use in securing cargo within the holds of ships during transport. While this lumber may be bolted or nailed to the ship, it is removed at the destination port when the cargo is off-loaded. BCD provides the lumber as a part of its overall stevedoring services, and does not make retail sales of the lumber to its customers.

BCD Inc. must pay retail sales tax when purchasing all such lumber. The lumber is used as dunnage and does not become an integral part of the ship, despite being bolted or nailed to the ship. If BCD has not paid retail sales tax on the acquisition of the lumber, it must remit the deferred sales or use tax directly to the department.

(b) D Company sells lumber and wood blocks to FG Engineering. FG is a manufacturer of equipment parts and uses the lumber and wood blocks as dunnage for the transportation of parts by rail to Montana. The lumber and wood blocks are salvaged and sold by FG after the transportation of the parts is completed.

The sale of the lumber and wood blocks to FG Engineering is a sale at retail, notwithstanding FG resells the dunnage materials in Montana. The use of the lumber and wood blocks as dunnage by FG Engineering is considered use as a consumer. D Company must collect and remit the retail sales tax, and report the gross proceeds of the sale under the retailing B&O tax classification.

(c) RB Lumber manufactures lumber in Washington which it ships by rail to customers in other states. RB Lumber takes irregular sized and other low quality lumber and uses it as dunnage in loading rail cars. Arrangements have been made with the rail carrier for the dunnage to be given away as firewood at the destination.

RB Lumber is subject to manufacturing B&O tax and also use tax on the value of the dunnage. If there is a comparable retail selling price for these materials, the value will be determined on that basis. If there is no comparable selling price, the value may be determined on the basis of cost of production as provided in WAC 458-20-112.

(d) KMB, Inc. sells lumber for use as dunnage to Western Rail, a common carrier operating by rail in multiple states. Some of the lumber will be first used in Washington and some will be transported to other states without intervening use for use in those states as dunnage. Western Rail may purchase the dunnage without payment of retail sales tax by giving the seller an exemption certificate as explained in WAC 458-20-175.

KMB, Inc. must report this sale under the retailing of interstate equipment B&O tax classification since Western Rail has claimed exemption for payment of the retail sales tax under RCW 82.08.0261. The seller must retain copies of the exemption certificates for five years. Western Rail must report use tax on the dunnage which is used in Washington.

[Statutory Authority: RCW 82.32.300. WSR 00-01-068, § 458-20-117, filed 12/13/99, effective 1/13/00; WSR 93-19-019, § 458-20-117, filed 9/2/93, effective 10/3/93; Order ET 70-3, § 458-20-117 (Rule 117), filed 5/29/70, effective 7/1/70.]

WAC 458-20-118 Sale or rental of real estate, license to use real estate. (1) Amounts derived from the sale and rental of real estate are exempt from taxation under the business and occupation tax. However, there is no exemption of amounts derived from engaging in any business wherein a mere license to use or enjoy real property is granted. Amounts derived from the granting of a license to use real property are taxable under the service B&O tax classification unless otherwise taxed under another classification by specific statute, e.g., sale of lodging taxed under retailing. (See RCW 82.04.050 and 82.04.290.) Further, no exemption is allowed for amounts received as commissions for the sale or rental of real estate (RCW 82.04.390) nor for interest received by persons engaged in the business of selling real estate on time or installment contracts. For purposes of distinguishing the lease or rental of real estate from the granting of a license to use real estate the department of revenue will be guided by the following principles.

(2) **Lease or rental of real estate.** A lease or rental of real property conveys an estate or interest in a certain designated area of real property with an exclusive right in the lessee of continuous possession against the world, including the owner, and grants to the lessee the absolute right of control and occupancy during the term of the lease or rental agreement. An agreement will not be construed as a lease of real estate unless a relationship of "landlord and tenant" is created thereby. It is presumed that the sale of lodging by a hotel,

motel, tourist court, etc., for a continuous period of thirty days or more is a rental of real estate. It is further presumed that all rentals of mini-storage facilities, apartments and leased departments constitute rentals of real estate. The rental of a boat moorage slip or an airplane hangar/tie down site is presumed to be a rental of real estate only if a specific space, slip, or site is assigned and the rental is for a period of thirty days or longer.

(3) **License to use real estate.** A license grants merely a right to use the real property of another but does not confer exclusive control or dominion over the same. Usually, where the grant conveys only a license to use, the owner controls such things as lighting, heating, cleaning, repairing, and opening and closing the premises.

(a) Persons who are involved in more than one kind of business activity are required to segregate their income and report under the appropriate tax classification based on the nature of the specific activity (see RCW 82.04.440).

(b) It will be presumed that a taxable license to use or enjoy real property is granted in the rental of the following:

(i) Hotel rooms (for periods of less than 30 continuous days; see WAC 458-20-166).

(ii) Motels, tourist courts and trailer parks (for periods of less than 30 continuous days; see WAC 458-20-166).

(iii) Cold storage lockers (see WAC 458-20-133).

(iv) Safety deposit boxes and private mail boxes.

(v) Storage space (see WAC 458-20-182).

(vi) Space within park or fair grounds to a concessionaire.

(vii) Hairdressers, barbers, or manicurists who lease space within another business (see WAC 458-20-200 Leased departments).

(viii) Use of boat launch facilities for recreational purposes.

(ix) Space on a building for the attachment of advertising signs, including for periods in excess of 30 continuous days.

(c) RCW 82.04.050 (2)(f) specifically defines all services of a hotel, motel, or similar businesses as being retail sales. Thus, the rentals of meeting rooms, display rooms, or ball rooms are retail sales when rented out by such businesses. Persons who are not in the business of selling lodging are taxable under the service B&O tax classification on income from the rental of meeting rooms.

[Statutory Authority: RCW 82.32.300. WSR 91-02-056, § 458-20-118, filed 12/28/90, effective 1/28/91; WSR 83-07-034 (Order ET 83-17), § 458-20-118, filed 3/15/83; Order ET 70-3, § 458-20-118 (Rule 118), filed 5/29/70, effective 7/1/70.]

WAC 458-20-119 Sales by caterers and food service contractors. (1) **Introduction.** This section explains Washington's business and occupation (B&O) tax and retail sales tax applications for sales by caterers and food service contractors.

(a) **Examples.** This section contains examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(b) **What other sections might apply?** The following sections may contain additional relevant information:

• WAC 458-20-107 Requirement to separately state sales tax—Advertised prices including sales tax.

• WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses.

• WAC 458-20-166 Hotels, motels, boarding houses, rooming houses, resorts, summer camps, trailer camps, etc.

• WAC 458-20-167 Educational institutions, school districts, student organizations, and private schools.

• WAC 458-20-168 Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities.

• WAC 458-20-175 Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce.

• WAC 458-20-189 Sales to and by the state of Washington, counties, cities, towns, school districts, and fire districts.

• WAC 458-20-190 Sales to and by the United States—Doing business on federal reservations—Sales to foreign governments.

• WAC 458-20-244 Food and food ingredients.

(2) **Sales by caterers.** Sales of meals and prepared food by caterers are subject to the retailing B&O and retail sales taxes when sold to consumers. "Caterer" means a person who provides, prepares, and serves meals for immediate consumption at a location selected by the customer. The tax liability is the same whether the meals are prepared at the customer's site or the caterer's site. The retailing B&O and retail sales taxes also apply when caterers prepare and serve meals using ingredients provided by the customer.

(3) **Food service contractors.** The term "food service contractor" means a person who operates a food service at a kitchen, cafeteria, dining room, or similar facility owned by an institution or business. Food service contractors may manage the food service operation on behalf of the institution or business, or may actually make sales of meals or prepared foods.

(a) **Sales of meals.** Food service contractors who sell meals or prepared foods to consumers are subject to the retailing B&O and retail sales taxes on their gross proceeds of sales. For example, the operation of a cafeteria which provides meals to employees of a manufacturing or financial business is generally a retail activity. The food service contractor is considered to be making retail sales of meals, whether payment for the meal is made by the employees or the business, unless the business itself is reselling the meals to the employees.

In all cases where the meals are prepared at off-site facilities not owned by the institution or business, the food service contractor is considered to be making sales of meals and the retailing B&O and retail sales taxes apply to the gross proceeds of sale, or gross income for sales to consumers.

(b) **Food service management.** The gross proceeds derived from the management of a food service operation are subject to the service and other business activities B&O tax. These tax reporting provisions apply whether the staff actually preparing the meals or prepared foods is employed by the institution or business hiring the food service contractor, or by the food service contractor itself. If the food service contractor merely manages the food service operation on behalf of an institution or business, that institution or business is considered to be selling meals or providing the meals as a part of the services the institution or business renders to its

customers. These institutions and businesses should refer to subsections (4) and (5) in this section to determine their B&O tax and retail sales tax liabilities.

Food service management includes, but is not limited to, the following activities:

(i) Food service contractors operating a cafeteria or similar facility which provides meals and prepared food for employees and/or guests of a business, but only where the business owning the facility is the one actually selling the meals to its employees.

(ii) Food service contractors managing and/or operating a cafeteria, lunch room, or similar facility for the exclusive use of students or faculty at an educational institution or private school. The educational institution or private school provides these meals to the students and faculty as a part of its educational services. The food service contractor is managing a food service operation on behalf of the institution, and is not making retail sales of meals to the students, faculty, or institution. Sales of meals or prepared foods to guests in such areas are, however, subject to the retailing B&O and retail sales taxes.

(iii) Food service contractors managing and/or operating the dietary facilities of a hospital, nursing home, or similar institution, for the purpose of providing meals or prepared foods to patients or residents thereof. These meals are provided to the patients or residents by the hospital, nursing home, or similar institution as a part of the services rendered by the institution. The food service contractor is managing a food service operation on behalf of the institution, and is not considered to be making retail sales of meals to the patients, residents, or institution. Sales of meals to doctors, nurses, visitors, and other employees through a cafeteria or similar facility are, however, subject to the retailing B&O and retail sales taxes.

(c) **Examples.**

(i) GC Inc. is a food service contractor managing and operating an on-site cafeteria for B College. This cafeteria is operated for the exclusive use of students and faculty. Guests of students or faculty members, however, are allowed to use the facilities. All moneys collected in the cafeteria are retained by B College. B College pays GC's direct costs for managing and operating the cafeteria, including the costs of the unprepared food products, employee salaries, and overhead expenses. GC also receives a management fee.

GC Inc. is managing a food service operation. The measure of tax is the gross proceeds received from B College. GC Inc. may not claim a deduction on account of cost of materials, salaries, or any other expense. GC Inc.'s proceeds are subject to the service and other activities B&O tax classification. B College is considered to be making retail sales of meals to the guests and must collect and remit retail sales tax on the gross proceeds of these sales. B College should refer to WAC 458-20-167 to determine whether the retailing B&O tax applies.

(ii) DF Food Service contracts with Hospital A to manage and operate Hospital A's dietary and cafeteria facilities. DF is to receive a per meal fee for meals provided to Hospital A's patients. DF Food Service retains all proceeds for sales of meals to physicians, nurses, and visitors in the cafeteria.

The gross proceeds received from Hospital A in regards to the meals provided to the patients are derived from the management of a food service operation. These proceeds are subject to the service and other activities B&O tax classification. DF, however, is making retail sales of meals to physicians, nurses, and visitors in the cafeteria. DF Food Service must pay retailing B&O tax, and collect and remit retail sales tax, on the gross proceeds derived from the cafeteria sales.

(4) **Retailing B&O and retail sales taxes.** The sales of meals to consumers are subject to the retailing B&O tax and generally subject to retail sales tax. However, a retail sales tax exemption is available for the following sales of meals:

(a) Prepared meals sold under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040(6).

(b) Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW. However, this exemption does not apply to purchases of prepared meals by not-for-profit organizations, such as hospitals, which provide the meals to patients as a part of the services they render.

(c) Prepared meals sold to the federal government. (See WAC 458-20-190.) However, meals sold to federal employees are taxable, even if the federal employee will be reimbursed for the cost of the meals by the federal government.

(5) **Wholesale sales of prepared meals.** Persons making sales of prepared meals to persons who will be reselling the meals are subject to the wholesaling B&O tax classification. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(6) **When is deferred sales or use tax due?** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

(a) Purchases of dishes, kitchen utensils, linens, and items which do not become an ingredient of the meal, are subject to retail sales tax.

(b) Retail sales tax or use tax applies to purchases of equipment, repairs, appliances, and construction.

(c) The retail sales or use tax does not apply to purchases of food or beverage products which are ingredients of meals being sold at retail or wholesale.

(d) Purchases of food products and prepared meals by persons who are not in the business of selling meals at retail or wholesale are subject to the retail sales tax. However, certain food products are statutorily exempt of retail sales or use tax. (See WAC 458-20-244.)

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and 2011 c 55. WSR 12-07-060, § 458-20-119, filed 3/19/12, effective 4/19/12. Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-119, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 99-11-107, § 458-20-119, filed 5/19/99, effective 6/19/99; WSR 93-23-019, § 458-20-119, filed 11/8/93, effective 12/9/93; WSR 86-03-016 (Order ET 86-1), § 458-20-119, filed 1/7/86; WSR 82-16-061 (Order ET 82-7), § 458-20-119, filed 7/30/82. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order

ET 78-4), § 458-20-119, filed 6/27/78; Order ET 74-1, § 458-20-119, filed 5/7/74; Order ET 70-3, § 458-20-119 (Rule 119), filed 5/29/70, effective 7/1/70.]

WAC 458-20-120 Sales of ice. Sales of ice to fishermen for the purpose of packing and preserving their fish during the trip from the fishing banks to their port of discharge are sales for consumption and are taxable under the retail sales tax.

Sales of ice to persons, other than railroad companies, for use in icing refrigerator cars are sales for consumption and are taxable under the retail sales tax.

The use of ice purchased or manufactured by interstate railroad companies for the purpose of icing within this state perishables or refrigerator cars or car cooling systems, is subject to use tax. (See WAC 458-20-175.)

Sales of ice to persons who sell fish, fruit, vegetables and other commodities are sales for resale and not subject to the retail sales tax when such ice is used for packing during shipment and title thereto passes to the purchaser along with the property sold.

Sales of ice to persons operating restaurants, soda fountains and the like are sales for resale and are not subject to the retail sales tax when such ice is used exclusively as crushed ice in drinks sold by such persons.

Sales of ice to persons operating creameries, beer parlors, restaurants, soda fountains and the like are sales for consumption and are taxable under the retail sales tax when such ice is used primarily for the purpose of cooling food products and is not for resale to customers.

Revised May 1, 1949.

[Order ET 70-3, § 458-20-120 (Rule 120), filed 5/29/70, effective 7/1/70.]

WAC 458-20-121 Sales of heat or steam—Including production by cogeneration. (1) **Introduction.** This section provides tax reporting information to persons who sell heat and/or steam. Because heat and steam are often the product of a cogeneration facility, this section also provides tax information for persons operating cogeneration facilities. Persons generating electrical power should also refer to WAC 458-20-179 (Public utility tax).

(2) **Sale of heat or steam - business and occupation (B&O) tax.** Persons engaging in the business of operating a plant for the production, extraction, or storage of heat or steam for distribution, for hire or sale, are taxable under the service and other business activities classification. This includes heat or steam produced by a biomass system, cogeneration, geothermal sources, fossil fuels, or any other method.

(3) **Sale or production of electricity - cogeneration.** The production of steam, heat, or electricity is not a manufacturing activity within the definition of RCW 82.04.120. Persons who operate a plant or system for the generation, production or distribution of electrical energy for hire or sale are subject to the provisions of the public utility tax under the light and power tax classification. Persons who generate electrical energy should refer to WAC 458-20-179 (Public utility tax). A deduction may be taken for:

(a) Power generated in Washington and delivered out-of-state. (See RCW 82.16.050(6).)

(b) Amounts derived from the sale of electricity to persons who are in the business of selling electricity and are purchasing the electricity for resale. (See RCW 82.16.050(2).)

(4) **Tax incentive programs - cogeneration.** There were tax incentive programs available for cogeneration projects begun before January 1, 1990. Sales and use tax deferrals may apply under certain conditions for power generation facilities, even though the production of power is not specifically subject to a manufacturing tax. For example, if the cogeneration facilities are part of a manufacturing plant for the production of new articles of tangible personal property and the requirements for tax deferral are met, the business may apply for tax deferral programs. These incentive programs are discussed in WAC 458-20-240 (Manufacturer's new employee tax credits), 458-20-24001 (Sales and use tax deferral—Manufacturing and research/development activities in rural counties—Applications filed after March 31, 2004), and 458-20-24002 (Sales and use tax deferral—New manufacturing and research/development facilities).

(5) **Fuel.** Persons who produce their own fuel to generate heat, steam, or electricity are subject to the manufacturing B&O tax on the value of the fuel. This includes the value of fuel which is created at the same site as a by-product of another manufacturing process, such as production of hog fuel. The taxable value should be determined based on comparable sales, or on the basis of all costs in the absence of comparable sales. Refer to WAC 458-20-112 (Value of products).

(a) Fuel does not become an ingredient or component of power, steam, or electricity. The sale of fuel to be used by the purchaser to generate heat, steam, or electricity is a retail sale. In most cases, the purchase of fuel for such purposes is subject to payment of retail sales tax to the supplier. (See (b) of this subsection for discussion of a sales and use tax exemption specific to hog fuel.)

In the event retail sales tax is not paid to the supplier, and no exemption from retail sales tax is available, deferred sales or use tax must be paid. However, the law provides a specific exemption from the use tax for fuel which is used in the same manufacturing plant which produced the fuel. For example, if a lumber manufacturer produces wood waste which is used in the same plant to produce heat for drying lumber and also electricity which is sold to a public utility district, the wood waste is not subject to use tax even though the manufacturing tax will apply. (See RCW 82.12.0263.)

(b) Effective July 1, 2009:

• Sales of hog fuel used to produce electricity, steam, heat, or biofuel are exempt from retail sales tax when the purchaser provides the seller with a properly filled out "buyer's retail sales tax exemption certificate." RCW 82.08.956.

• The use of hog fuel for production of electricity, steam, heat, or biofuel is exempt from use tax. RCW 82.12.956. For these exemptions, "hog fuel" means wood waste and other wood residuals including forest derived biomass, but not including firewood or wood pellets. "Biofuel" has the same meaning as provided in RCW 43.325.010.

(6) **Equipment and supplies.** Persons who are in the business of producing heat, steam, or electricity are required to pay retail sales tax to suppliers of all equipment and supplies. If the supplier fails to collect retail sales tax, deferred sales or use tax must be paid.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-10-031, § 458-20-121, filed 4/26/10, effective 5/27/10. Statutory Authority: RCW 82.32.300. WSR 94-13-033, § 458-20-121, filed 6/6/94, effective 7/7/94; WSR 83-07-034 (Order ET 83-17), § 458-20-121, filed 3/15/83; Order ET 70-3, § 458-20-121 (Rule 121), filed 5/29/70, effective 7/1/70.]

WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses. (1) **Introduction.** This rule explains Washington's business and occupation (B&O) tax and retail sales tax applications to sales by restaurants and similar businesses. It discusses the sales of meals, beverages, and foods at prices inclusive of the retail sales tax. This rule also explains how discounted and promotional meals are taxed. Caterers and persons who merely manage the operations of a restaurant or similar business should refer to WAC 458-20-119 to determine their tax liability.

(a) **Restaurants, cocktail bars, and taverns.** The term "restaurants, cocktail bars, taverns, and similar businesses" means every place where prepared foods and beverages are sold and served to individuals, generally for consumption on the premises where sold.

(b) **Examples.** This rule contains examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(c) **What other rules might apply?** In addition to information available on the department's web site pertaining to prepared food and beverage sales, the following rules may contain additional relevant information:

• WAC 458-20-107 Requirement to separately state sales tax—Advertised prices including sales tax.

• WAC 458-20-119 Sales by caterers and food service contractors.

• WAC 458-20-131 Gambling activities.

• WAC 458-20-183 Amusement, recreation, and physical fitness services.

• WAC 458-20-187 Coin operated vending machines, amusement devices and service machines.

• WAC 458-20-189 Sales to and by the state of Washington, counties, cities, towns, school districts, and fire districts.

• WAC 458-20-190 Sales to and by the United States—Doing business on federal reservations—Sales to foreign governments.

• WAC 458-20-243 Litter tax.

• WAC 458-20-244 Food and food ingredients.

(2) **Retailing B&O and retail sales taxes.** Sales to consumers of meals and prepared foods by restaurants, cocktail bars, taverns and similar businesses are subject to the retailing tax classification and generally subject to retail sales tax. A retail sales tax exemption is available for the following sales of meals:

(a) Prepared meals sold under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040 (6);

(b) Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW;

(c) Prepared meals sold to the federal government. (See WAC 458-20-190.) However, meals sold to federal employees are taxable, even if the federal employee will be reimbursed for the cost of the meals by the federal government;

(d) Effective July 1, 2011, RCW 82.08.9995 exempts meals from retail sales tax when provided without specific charge to employees by a restaurant. Such meals also are exempt from B&O tax and use tax. (RCW 82.04.750 and 82.12.9995.) If any charge is made for meals to employees, retailing B&O tax and retail sales tax apply.

For the purposes of (d) of this subsection, the following definitions apply:

(i) "Meal" means one or more items of prepared food or beverages other than alcoholic beverages. For the purposes of (d) of this subsection, "alcoholic beverage" and "prepared food" have the same meanings as provided in RCW 82.08.-0293.

(ii) "Restaurant" means any establishment having special space and accommodation where food and beverages are regularly sold to the public for immediate, but not necessarily on-site, consumption, but excluding grocery stores, minimarkets, and convenience stores. Restaurant includes, but is not limited to, lunch counters, diners, coffee shops, espresso shops or bars, concession stands or counters, delicatessens, and cafeterias. It also includes space and accommodations where food and beverages are sold to the public for immediate consumption that are located within:

• Hotels, motels, lodges, boarding houses, bed and breakfast facilities;

• Hospitals, office buildings, movie theaters; and

• Schools, colleges, or universities, if a separate charge is made for such food or beverages.

Restaurants also include:

• Mobile sales units that sell food or beverages for immediate consumption within a place, the entrance to which is subject to an admission charge; and

• Public and private carriers, such as trains and vessels, that sell food or beverages for immediate consumption if a separate charge is made for such food or beverages.

A restaurant is open to the public for purposes of this subsection if members of the public can be served as guests. "Restaurant" does not include businesses making sales through vending machines or through mobile sales units such as catering trucks or sidewalk vendors of food or beverage items.

(3) **Wholesaling B&O tax.** Persons making sales of prepared meals to persons who will be reselling the meals are subject to the wholesaling B&O tax classification. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(4) **Service B&O tax.** Compensation received from owners of vending machines for allowing the placement of those machines at the restaurant, cocktail bar, tavern, or similar business is subject to the service and other business activities tax. Persons operating games of chance should refer to WAC 458-20-131.

(5) **Exemptions.** Effective October 1, 2013, chapter 13 (ESSB 5882), Laws of 2013, provides retail sales tax and use tax exemptions for sales to restaurants of products that impart flavor to food during the cooking process; and

• Are completely or substantially consumed by combustion during the cooking process; or

• That support the food during the cooking process and are comprised entirely of wood.

The exemption includes products such as wood chips, charcoal, charcoal briquettes, grapevines, and cedar grilling planks. The exemptions do not apply to any type of gas fuel. For the purpose of these exemptions, "restaurant" has the same meaning as found in RCW 82.08.9995. These exemptions are scheduled to expire July 1, 2017.

(6) **Deferred sales or use tax.** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

(a) Purchases of dishes, kitchen utensils, linens, and items which do not become an ingredient of the meal, are subject to retail sales tax.

(b) Retail sales tax or use tax applies to purchases of equipment, repairs, appliances, and construction.

(c) The retail sales or use tax does not apply to purchases of food or beverage products which are ingredients of the meals being sold.

(d) Purchases of paper plates, paper cups, paper napkins, toothpicks, or any other articles which are furnished to customers, the first actual use of which renders such articles unfit for further use, are not subject to retail sales tax when purchased by restaurants and similar businesses making actual sales of meals.

(7) **Combination business.** Persons operating a combination of two kinds of food sales, of which one is the sale of prepared food (i.e., an establishment, such as a deli, selling food products ready for consumption and in bulk quantities), should refer to WAC 458-20-244 for taxability information.

(8) **Discounted meals, promotional meals, and meals given away.** Persons who sell meals on a "two for one" or similar basis are not giving away a free meal, but rather are selling two meals at a discounted price. Both the retailing B&O and retail sales taxes should be calculated on the reduced price actually received by the seller.

Persons who provide meals free of charge to persons other than employees are consumers of those meals. Persons operating restaurants or similar businesses are not required to report use tax on food and food ingredients given away, even if the food or food ingredients are part of prepared meals. For example, a restaurant providing meals to the homeless or hot dogs free of charge to a little league team will not incur a retail sales or use tax liability with respect to these items given away. A sale has not occurred, and the food and food ingredients exemption applies. Should the restaurant provide the little league team with soft drinks free of charge, the restaurant will incur a deferred retail sales or use tax liability with respect to those soft drinks. Soft drinks are excluded from the exemption for food and food ingredients. (See WAC 458-20-244.)

(9) **Sales of meals, beverages and food at prices including retail sales tax.** Persons may advertise and/or sell meals, beverages, or any kind of food product at prices including sales tax. Any person electing to advertise and/or make sales in this manner must clearly indicate this pricing method on the menus and other price information.

(10) **Spirits, beer, and wine restaurant licensees.** Restaurants operating under the authority of a license from the liquor control board to sell spirits, beer, and wine by the glass for on-premises consumption generally have both dining and cocktail lounge areas. Customers purchasing beverages or food in lounge areas are generally not given sales invoices, sales slips, or dinner checks, nor are they generally provided with menus.

(a) Many spirits, beer, and wine restaurant licensees elect to sell beverages or food at prices inclusive of the sales tax in the cocktail lounge area. If this pricing method is used, notification that retail sales tax is included in the price of the beverages or foods must be posted in the lounge area in a manner and location so that customers can see the notice without entering employee work areas. It will be presumed that no retail sales tax has been collected or is included in the gross receipts when a notice is not posted and the customer does not receive a sales slip or sales invoice separately stating the retail sales tax.

(b) The election to include retail sales tax in the selling price in one area of a location does not preclude the restaurant operator from selling beverages or food at a price exclusive of sales tax in another. For example, a spirits, beer, and wine restaurant licensee may elect to include the retail sales tax in the price charged for beverages in the lounge area, while the price charged in the dining area is exclusive of the sales tax.

(c) Spirits, beer, and wine restaurant licensees are not required to post actual drink prices in the cocktail lounge areas. However, if actual prices are posted, the advertising requirements expressed in WAC 458-20-107 must be met.

(11) **Gratuities.** Tips or gratuities representing donations or gifts by customers under circumstances which are clearly voluntary are not part of the selling price and not subject to tax. However, mandatory additions to the price by the seller, whether labeled service charges, tips, gratuities or otherwise must be included in the selling price and are subject to both the retailing B&O and retail sales taxes.

(12) **Examples.**

(a) XYZ Restaurant operates both a cocktail bar and a dining area. XYZ has elected to sell drinks and appetizers in the bar at prices including the retail sales tax while selling drinks and meals served in the dining area at prices exclusive of the sales tax. There is a sign posted in the bar area advising customers that all prices include retail sales tax. Customers in the dining area are given sales invoices which separately state the retail sales tax. As an example, a typical well drink purchased in the bar for $2.50 inclusive of the sales tax, is sold for $2.50 plus sales tax in the dining area. The pricing requirements have been satisfied and the drink and food totals are correctly reflected on the customers' dinner checks. XYZ may factor the retail sales tax out of the cocktail bar gross receipts when determining its retailing and retail sales tax liability.

(b) RBS Restaurant operates both a cocktail bar and a dining area. RBS has elected to sell drinks at prices inclusive of retail sales tax for all areas where drinks are served. It has a sign posted to inform customers in the bar area of this fact and a statement is also on the dinner menu indicating that any charges for drinks includes retail sales tax. Dinner checks are

given to customers served in the dining area which state the price of the meal exclusive of sales tax, sales tax on the meal, and the drink price including retail sales tax. Because the business has met the sign posting requirement in the bar area and has indicated on the menu that sales tax is included in the price of the drinks, RBS may factor the sales tax out of the gross receipts received from its drink sales when determining its taxable retail sales.

(c) Z Tavern sells all foods and drinks at a price inclusive of the retail sales tax. However, there is no mention of this pricing structure on its menus or reader boards. The gross receipts from Z Tavern's food and drink sales are subject to the retailing and retail sales taxes. Z Tavern has failed to meet the conditions for selling foods and drinks at prices including tax. Z Tavern may not assume that the gross receipts include any sales tax and may not factor the retail sales tax out of the gross receipts.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.08.050, and 2013 2nd sp.s. c 13. WSR 14-01-050, § 458-20-124, filed 12/12/13, effective 1/12/14. Statutory Authority: RCW 82.32.300, 82.01.060(2), and 2011 c 55. WSR 12-07-060, § 458-20-124, filed 3/19/12, effective 4/19/12. Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-124, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 93-23-018, § 458-20-124, filed 11/8/93, effective 12/9/93; WSR 83-07-034 (Order ET 83-17), § 458-20-124, filed 3/15/83; Order ET 70-3, § 458-20-124 (Rule 124), filed 5/29/70, effective 7/1/70.]

WAC 458-20-12401 Special stadium sales and use tax. (1) **Introduction.** RCW 82.14.360 provides for a special stadium sales and use tax that applies to sales of food and beverages by restaurants, taverns, and bars in counties with a population of one million or more. The tax applies only to those food and beverage sales that are already subject to the retail sales tax. Grocery stores, mini-markets, and convenience stores were specifically excluded from the definition of a restaurant and are not required to collect the tax. However, a restaurant located within a grocery store, mini-market, or convenience store is subject to this tax if the restaurant is owned or operated by a different legal entity from the store or market. The special stadium tax applied only in King County and was effective through September 30, 2011.

(2) **Definitions.** The following definitions apply to this section.

(a) "Restaurant" means any establishment having special space and accommodation where food and beverages are regularly sold to the public for immediate, but not necessarily on-site, consumption, but excluding grocery stores, mini-markets, and convenience stores. Restaurant includes, but is not limited to, lunch counters, diners, coffee shops, espresso shops or bars, concession stands or counters, delicatessens, and cafeterias. It also includes space and accommodations where food and beverages are sold to the public for immediate consumption that are located within hotels, motels, lodges, boarding houses, bed-and-breakfast facilities, hospitals, office buildings, movie theaters, and schools, colleges, or universities, if a separate charge is made for such food or beverages. Mobile sales units that sell food or beverages for immediate consumption within a place, the entrance to which is subject to an admission charge, are "restaurants" for purposes of this tax. So too are public and private carriers, such as trains and vessels, that sell food or beverages for immediate consumption on trips that both originate and terminate within the county imposing the special stadium tax if a separate charge for the food and/or beverages is made. A restaurant is open to the public for purposes of this section if members of the public can be served as guests. "Restaurant" does not include businesses making sales through vending machines or through mobile sales units such as catering trucks or sidewalk vendors of food or beverage items.

(b) "Tavern" has the same meaning here as in RCW 66.04.010 and means any establishment with special space and accommodation for the sale of beer by the glass and for consumption on the premises.

(c) "Bar" means any establishment selling liquor by the glass or other open container and includes, but is not limited to, establishments that have been issued a class H license by the liquor control board.

(d) "Grocery stores, mini-markets, and convenience stores," have their ordinary and common meaning.

(3) **Tax application.** This special stadium sales and use tax applied only to food and beverages sold by restaurants, bars, and taverns in King County through September 30, 2011. The tax is in addition to any other sales or use tax that applies to these sales. This special tax only applies if the regular sales or use tax imposed by chapters 82.08 or 82.12 RCW applies.

(a) The tax applies to the total charge made by the restaurant, tavern, or bar, for food and beverages. If a mandatory gratuity is included in the charge that, too, is subject to the tax.

(b) Catering provided by a restaurant, tavern, or bar is also subject to the tax. However, when catering is done by a business that does not meet the definition of restaurant in subsection (2) of this section, has no facilities for preparing food, and all food is prepared at the customer's location, the charge is not subject to the tax.

(c) In the case of catering subject to the tax, if a separate charge is made for linens, glassware, tables, tents, or other items of tangible personal property that are not required for the catering, those separate charges are not subject to the tax. However, separately stated charges for items that are required as a part of the catering service, such as waitpersons or mandatory gratuities, are subject to the tax.

(4) **Examples.** The following examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances. For these examples, assume the transactions occurred in King County prior to October 1, 2011.

(a) The Hot Bakery operates a coffee shop where customers may purchase baked goods and coffee for consumption on the premises. When utensils are provided with the bakery goods, the sale of bakery goods, along with the coffee is considered prepared food. The sale of prepared food is subject to the retail sales tax and special stadium tax. If the bakery products are bagged or boxed without utensils, the retail sales and special stadium taxes do not apply under the provisions of RCW 82.08.0293. See WAC 458-20-244 Food and food ingredients, for information about the sales of prepared foods.

(b) Charlie operates a "fast food" business. Customers may consume the food and beverages on the premises or may take the food "to go" for consumption elsewhere. All sales of

food and beverages by this business are subject to the special stadium tax, including the food and beverages sold "to go."

(c) Jane operates carts that may be set up on a sidewalk or within parks from which customers may purchase hot dogs and beverages. The cart includes heating facilities for preparation of hot dogs at the cart site. No seating is provided by the business. The site location is not owned or leased by Jane. These sales are not subject to the special stadium sales tax because the business does not have a designated space for the preparation of the food it sells. This business does not fit the definition of "restaurant." However, if Jane operates a mobile food service unit selling food or beverages for immediate consumption at fixed locations within the grounds of a stadium, arena, fairgrounds, or other place, admission to which is subject to an admission charge, then the special stadium tax applies.

(d) Bill operates a combination gas station and convenience store. The convenience store sells some groceries and also some prepared foods such as hot dogs and hamburgers. Customers may also purchase soft drinks or coffee by the cup. None of these sales are subject to the special stadium sales tax because of the specific language in the statute exempting convenience stores from the tax.

(e) Peter operates a business that sells prepared pizza. The business prepares and bakes the pizza at its premises. The business has no seating. Customers may order the pizzas by either entering Peter's place of business or by telephone. Customers may either take delivery at the seller's site or the business will deliver the pizza to the customer's residence or other site. These sales are subject to the special stadium sales tax because the business does have a designated site and facilities for the preparation of food for sale for immediate consumption, even though no seating is available. The regular retail sales tax applies to these sales since these sales are not exempt food products under RCW 82.08.0293(2).

(f) Jack has the exclusive concession rights to prepare and sell hot dogs within a sports facility. Customers place their orders and take delivery of the prepared food and beverages at Jack's site in the sports facility. Jack provides no seating that he controls. Customers generally take the food and beverage to their seats and consume the items while watching the sports event. Jack will also prepare hot dogs and soft drinks at his food bar and use his employees or agents to sell these products to customers in the stands while the sports event is in progress. All of the sales of food and beverages by Jack are subject to the special stadium sales tax. Jack's business operation meets the definition of "restaurant." Jack has set aside space that he controls for the purpose of preparing food and beverages for immediate consumption for sale to the public.

(g) Jinny operates a cafe within Abe's grocery store, for the sale of food or beverages for immediate consumption on the premises. Abe's grocery store is a separate entity from Jinny's cafe, and it leases the space for the cafe to Jinny. Sales of food and beverages by Abe's grocery store are exempt from the special stadium tax, but sales at the cafe by Jinny are subject to retail sales tax and the special stadium sales tax.

[Statutory Authority: RCW 82.32.300, 82.01.060(2) and 82.14.360(1). WSR 12-01-026, § 458-20-12401, filed 12/12/11, effective 1/12/12; WSR 10-01-050, § 458-20-12401, filed 12/9/09, effective 1/9/10. Statutory Authority: RCW 82.32.300 and 82.14.080. WSR 96-16-086, § 458-20-12401, filed 8/7/96, effective 9/7/96.]

WAC 458-20-126 Sales of motor vehicle fuel, special fuels, and nonpollutant fuel. (1) **Introduction.** This section explains the retail sales and use taxes for motor vehicle fuel, special fuels, and fuels commonly referred to as natural gas and propane. This section also provides documentation requirements to buyers and sellers of fuel for both on and off highway use.

(2) **What are motor vehicle fuel and special fuels, and how are they taxed?** "Motor vehicle fuel" as used in this section means gasoline or any other inflammable gas or liquid the chief use of which is as fuel for the propulsion of motor vehicles. (See RCW 82.36.010.) "Special fuels" as used in this section mean all combustible gases and liquids suitable for the generation of power for propulsion of motor vehicles, except that it does not include motor vehicle fuel as defined above. (See RCW 82.38.020.) Diesel fuel is an example of a special fuel.

The retail sales tax or use tax applies to sales and uses of motor vehicle fuel or special fuel, unless an exemption applies, when the taxes of chapter 82.36 or 82.38 RCW have not been paid or have been refunded. Generally the fuel taxes apply to sales of fuel for highway consumption and the sales or use tax applies to fuel sold for consumption off the highways (e.g., boat fuel, or fuel for farm machinery or construction equipment, etc.).

(3) **What motor vehicle fuel and special fuels exemptions are available?**

(a) **Passenger-only ferries.** RCW 82.08.0255 and 82.12.0256 provide exemptions from the retail sales tax and use tax for motor vehicle fuel or special fuel, purchased on or after April 27, 2007, for use in passenger-only ferry vessels. This exemption applies only to public transportation benefit areas created under chapter 36.57A RCW, county owned ferries, or county ferry districts created under chapter 36.54 RCW.

(b) **Nonprofit transportation providers.** RCW 82.08.0255 and 82.12.0256 provide retail sales tax and use tax exemptions for sales of or uses of motor vehicle fuel or special fuels purchased by private, nonprofit transportation providers certified under chapter 81.66 RCW, who are entitled to fuel tax refund or exemption under chapter 82.36 or 82.38 RCW.

(c) **Public transportation.** RCW 82.08.0255 and 82.12.0256 provide exemptions for the retail sales tax and use tax when motor vehicle fuel or special fuels are purchased or used for the purpose of public transportation, and the purchaser is entitled to a refund or an exemption under RCW 82.36.275 or 82.38.080(3).

(d) **Special fuels used in interstate commerce.** The retail sales tax does not apply to sales of special fuels delivered in this state which are later transported and used outside this state by persons engaged in interstate commerce. (RCW 82.08.0255(2).) This exemption also applies to persons hauling their own goods in interstate commerce.

Exemption certificate. Persons selling special fuels to interstate carriers must obtain a completed exemption certificate "Certificate of Special Fuel Sales to Interstate Carriers" from the purchaser in order to document the entitlement to

the exemption. The exemption certificate can be obtained from the department of revenue (department) on the internet at http://www.dor.wa.gov/, or by contacting the department's taxpayer services division at:

Taxpayer Services
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478
1-800-647-7706

The provisions of the exemption certificate may be limited to a single sales transaction, or may apply to all sales transactions as long as the seller has a recurring business relationship with the buyer. A "recurring business relationship" means at least one sale transaction within a period of twelve consecutive months.

(e) **Farm fuel users of diesel or aircraft fuels.** For the purpose of this section, a "farm fuel user" means either a farmer or a person who provides horticultural services for farmers, such as soil preparation, crop cultivation, or crop harvesting services.

(i) Effective March 6, 2006, RCW 82.08.865 and 82.12.-865 exempt farm fuel users from retail sales and use taxes for diesel and aircraft fuel purchased for nonhighway use.

(ii) Substitute Senate Bill (SSB) 5009, chapter 443, Laws of 2007, added biodiesel fuel as exempt from retail sales and use taxes when purchased or used by farm fuel users for nonhighway use. This exemption, effective May 11, 2007, also applies to a fuel blend if all the component fuels of the blend would otherwise be exempt under RCW 82.08.865 and 82.12.865 if the component fuels were sold as separate products. The exemptions do not apply to fuel used for residential heating purposes.

(iii) When purchasing an eligible fuel, a farm fuel user must provide the seller with a completed "Farmers' Retail Sales Tax Exemption Certificate," which can be obtained from the department on the internet at http://www.dor.wa.gov/, or by contacting the department's taxpayer services division at:

Taxpayer Services
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478
1-800-647-7706

Sellers of eligible fuels to farm fuel users must document the tax exempt sales of red-dyed diesel, biodiesel, or aircraft fuel by accepting the certificate mentioned above and retaining it in their records for five years.

(4) **Nonpollutant fuels.** Nonpollutant fuels are described as natural gas and liquefied petroleum gas, commonly called propane. Nonpollutant fuels can be purchased for either highway or "off-highway" use. Sales of nonpollutant fuels for highway use are normally subject to taxes under either chapter 82.36 or 82.38 RCW. Nonpollutant fuels purchased for "off-highway" use are subject to retail sales tax or use tax

(a) **Highway fuel used by Washington licensed vehicle owners.** RCW 82.38.075 provides for payment of an annual fee by users of nonpollutant fuel in lieu of the motor vehicle fuel tax. This fee is paid at the time of original and annual renewals of vehicle license registrations. A decal or other identifying device must be displayed as prescribed by the department of licensing as authority to purchase these nonpollutant fuels.

Fuel dealers should not collect sales or use tax on any nonpollutant fuel sold to Washington licensed vehicle owners for highway use when the vehicle displays a valid decal or other identifying device issued by the department of licensing.

(b) **"Off-highway" fuel use.** Nonpollutant fuels purchased for "off-highway" use are not subject to the taxes of chapter 82.36 or 82.38 RCW, and therefore the retail sales tax applies.

(c) **Bulk purchases of fuel.** The department recognizes that certain licensed special fuel users may find it more practical to accept deliveries of nonpollutant fuels into a bulk storage facility rather than into the fuel tanks of motor vehicles. Persons selling nonpollutant fuels to such bulk purchasers must obtain from the purchaser an exemption certificate in order to document entitlement to the exemption. The "Certificate for Purchase of Nonpollutant Special Fuels" must certify the amount of fuel which will be consumed by the purchaser in using motor vehicles upon the highways of this state. This procedure is limited, however, to persons duly registered with the department. The registration number given on the certificate ordinarily will be sufficient evidence that the purchaser is properly registered. The "Certificate for Purchase of Nonpollutant Special Fuels" can be obtained from the department on the internet at http://www.dor.wa.gov/, or by contacting the department's taxpayer services division at:

Taxpayer Services
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478
1-800-647-7706

(i) When fuel is purchased for both on and off highway use, and it is not possible for a special fuel user licensee to determine the exact proportion purchased for highway use in this state, the amount of the off-highway use special fuel may be estimated. In the event such an estimate is used and retail sales tax is not paid, the purchaser must make an adjustment on the next excise tax return and remit use tax on the portion of the fuel used for off-highway purposes.

(ii) Nonpollutant fuel not placed in vehicle fuel tanks by the seller are subject to retail sales tax, unless a "Certificate for Purchase of Nonpollutant Special Fuels" is obtained from the purchaser. The seller must collect and remit the retail sales tax to the department, or retain the certificate as part of his permanent records. When nonpollutant fuel is delivered by the seller into the bulk storage facilities of a special fuel user licensee or is otherwise sold to such buyers under conditions where it is not delivered into the fuel tanks of motor vehicles, it will be presumed that the entire amount of fuel sold is subject to retail sales tax unless the seller has obtained a completed certificate.

(d) **Vehicles licensed outside the state of Washington.** Owners of out-of-state licensed vehicles are exempt from the requirement to purchase an annual license as provided in RCW 82.38.075. In lieu of taxes of chapters 82.36 and 82.38

RCW, retail sales tax is due on their purchases of nonpollutant fuel, for either highway or off-highway use.

(5) **Refunds are available for fuel taxes paid when fuel is consumed off the highway.** If a person purchases motor vehicle fuel or special fuels and pays the fuel taxes of chapter 82.36 or 82.38 RCW, and then consumes the fuel off the highway, the person is entitled to a refund of these taxes under the procedures of chapter 82.36 or 82.38 RCW. However, a person receiving a refund of vehicle fuel taxes because of the off-highway consumption of the fuel in this state is subject to use tax on the value of the fuel. The department of licensing administers the fuel tax refund provisions and will deduct from the amount of a refund the amount of use tax due.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.08.0255, 82.12.-0256, 82.08.865, and 82.12.865. WSR 10-01-051, § 458-20-126, filed 12/9/09, effective 1/9/10; WSR 08-16-045, § 458-20-126, filed 7/29/08, effective 8/29/08. Statutory Authority: RCW 82.32.300. WSR 91-15-022, § 458-20-126, filed 7/11/91, effective 8/11/91; WSR 83-17-099 (Order ET 83-6), § 458-20-126, filed 8/23/83; WSR 83-07-034 (Order ET 83-17), § 458-20-126, filed 3/15/83; Order ET 73-1, § 458-20-126, filed 11/2/73; Order ET 70-3, § 458-20-126 (Rule 126), filed 5/29/70, effective 7/1/70.]

WAC 458-20-127 Sales of newspapers, magazines and periodicals. (1) **Introduction.** This section explains the application of the business and occupation (B&O) tax, retail sales tax, and use tax to sales and/or use of newspapers, magazines, and periodicals. The tax reporting information in the section is limited to persons that purchase and resell these publications. The department of revenue (department) has adopted other sections providing tax reporting information to persons printing and/or publishing these publications and other printed materials.

• Persons printing and/or publishing newspapers, magazines, and periodicals should also refer to WAC 458-20-143.

• For information regarding the printing industry in general, see WAC 458-20-144.

• Persons duplicating printed materials for others should also refer to WAC 458-20-141.

• For information regarding potential litter tax liability, see WAC 458-20-243.

(2) **General tax application.** This subsection explains the B&O tax and retail sales tax responsibilities of persons selling newspapers, magazines, and periodicals to consumers, when the seller is not also the printer or publisher of the publication. Refer to subsection (4) of this section for information about tax reporting responsibilities of persons selling through organizers, captains, or others selling from house to house.

Where subscriptions or renewals of subscriptions are mailed directly by purchasers to publishers outside the state, the guidelines contained in WAC 458-20-193 and 458-20-221 apply to the obligation of sellers to collect retail sales or use tax.

(a) **Sales of printed magazines and periodicals.** Sales of magazines and periodicals to consumers by persons operating newsstands, book stores, department stores, drug stores and the like are sales at retail and are subject to the retailing B&O tax and retail sales tax. Refer to WAC 458-20-143 for the definition of "periodical or magazine."

(b) **Magazines and periodicals sold as digital products.** Sales of magazines and periodicals that are transferred electronically to the end user are subject to the retailing B&O tax and retail sales tax regardless of how they are accessed. For more information on the application of tax on digital products, refer to RCW 82.04.050, 82.04.192, and 82.04.257.

(c) **Sales of newspapers.** Sales of printed newspapers to consumers by persons operating newsstands, book stores, department stores, drug stores and the like are sales at retail and are subject to the retailing B&O tax. Sales of newspapers are specifically exempt from the retail sales tax per RCW 82.08.0253. Refer to WAC 458-20-143 for the definition of "newspaper."

(3) **Retail sales tax exemptions.** The retail sales tax does not apply to the following:

(a) Newspapers (refer to WAC 458-20-143 for a definition of "newspaper"); and

(b) Subscription sales of magazines and periodicals, including those transferred electronically to the buyer, if these sales are for the purpose of fund-raising by:

• Educational institutions as defined in RCW 82.04.170; or

• Nonprofit organizations engaged in activities primarily for the benefit of boys and girls nineteen years of age and younger. (RCW 82.08.02535.)

(4) **Sales by distributors.** When magazines or periodicals are distributed to the final purchaser by a news company or distributor who effects such distribution through organizers, captains, or others selling from house to house or upon the streets, the news company or distributor is responsible for the collection and payment of the retail sales tax.

(a) Such news companies or distributors must collect from those selling the magazines or periodicals the retail sales tax upon the gross retail selling price of all magazines and periodicals taken by such persons.

(b) Tax registration endorsements are not required for organizers, captains, or other persons selling magazines or other periodicals if they meet the conditions of WAC 458-20-101 (2)(a). Separate registration and license documents will be issued to the news company or magazine distributor for each of the local stations operated by such company. Such registration and license documents will reflect the same tax reporting account number as the news company or magazine distributor. For more information, refer to WAC 458-20-101 (10).

(5) **Buyer's responsibility to remit deferred sales or use tax.** Where no retail sales tax is paid upon the purchase of, or subscription to, a magazine or periodical, the buyer or subscriber must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law.

Deferred sales or use tax should be reported on the use tax line of the buyer's excise tax return. For detailed information about use tax, refer to WAC 458-20-178 (Use tax).

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-21-043, § 458-20-127, filed 10/13/10, effective 11/13/10. Statutory Authority: RCW 82.32.300. WSR 89-21-001, § 458-20-127, filed 10/5/89, effective 11/5/89; WSR 83-07-034 (Order ET 83-17), § 458-20-127, filed 3/15/83; Order ET 70-3, § 458-20-127 (Rule 127), filed 5/29/70, effective 7/1/70.]

WAC 458-20-128 Real estate brokers and salesmen.

Definitions

As used herein:

The terms "real estate broker" and "real estate salesman" mean, respectively, a person licensed as such under the provisions of chapter 18.85 RCW.

Business and Occupation Tax

A real estate broker is engaged in business as an independent contractor and is taxable under the service and other activities classification upon the gross income of the business.

The measure of the tax on real estate commissions earned by the real estate broker shall be the gross commission earned by the particular real estate brokerage office including that portion of the commission paid to salesmen or associate brokers in the same office on a particular transaction: Provided, however, That where a real estate commission is divided between an originating brokerage office and a cooperating brokerage office on a particular transaction, each brokerage office shall pay the tax only upon their respective shares of said commission; and provided further, that where the brokerage office has paid the tax as provided herein, salesmen or associated brokers within the same brokerage office shall not be required to pay a similar tax upon the same transaction. RCW 82.04.255.

Thus, with the exception of cooperating brokerage offices, no deduction is allowed for commissions, fees or salaries paid by a broker to another broker or salesman, nor for other expenses of doing business.

The term "gross income of the business" includes gross income from commissions, fees and other emoluments however designated which the agent receives or becomes entitled to receive, but does not include amounts held in trust for others. (See also WAC 458-20-111, advances and reimbursements.) No deductions are allowed for dues, charges, and fees paid to multiple listing associations.

Real estate salesmen are presumed to be independent contractors. They are subject to the service and other activities classification of the business and occupation tax on gross income from real estate commissions and fees earned where the brokerage office at which the real estate salesman's license is posted has not paid the tax on the gross commission.

[Statutory Authority: RCW 82.32.300. WSR 83-07-034 (Order ET 83-17), § 458-20-128, filed 3/15/83; Order ET 70-3, § 458-20-128 (Rule 128), filed 5/29/70, effective 7/1/70.]

WAC 458-20-129 Gasoline service stations.

Gasoline Service Stations
Business and Occupation Tax

Retailing. Persons operating gasoline service stations are taxable under the retailing classification upon the gross proceeds of sales of tangible personal property, from services rendered with respect to the cleaning or repair of such property, gross income from towing and gross income from automobile parking and storage. On computing tax there may be deducted from gross proceeds of sales the amount of state and federal gallonage tax on motor vehicle fuel included therein.

Retail Sales Tax

The retail sales tax applies upon the sale of tangible personal property (except vehicle fuel) on which the tax of either chapters 82.36 or 82.38 RCW is paid and upon charges for towing, automobile parking and storage and the sale of services rendered with respect to the cleaning or repairing of tangible personal property.

Thus the tax applies upon the sale of tires, accessories, etc., upon sales of labor and materials in respect to lubricating, greasing, tire changing, etc., and also upon washing, battery charging and repair work. (See also WAC 458-20-126.)

[Order ET 73-1, § 458-20-129, filed 11/2/73; Order ET 70-3, § 458-20-129 (Rule 129), filed 5/29/70, effective 7/1/70.]

WAC 458-20-131 Gambling activities. (1) **Introduction.** This section explains the business and occupation (B&O), retail sales, and use tax reporting requirements of persons operating contests of chance such as pull-tab and punch board games, card games, bingo games, raffles, and persons operating amusement games such as dart-toss games, ball-throw or ball-roll games, and crane games. It also explains the B&O tax reporting requirements of persons engaged in the business of conducting parimutuel wagering, which became effective July 1, 2005. Nonprofit organizations conducting activities for fund-raising purposes should also refer to RCW 82.04.3651, 82.08.02573, and WAC 458-20-169 (Religious, charitable, benevolent, nonprofit service organizations, and sheltered workshops) to determine if a B&O, retail sales, or use tax exemption is available for their activities.

Persons conducting the types of activities described above should also be aware that the Washington state gambling commission regulates these activities. These persons should refer to chapter 9.46 RCW (Gambling—1973 Act), Title 230 WAC (Gambling commission), and/or contact the Washington state gambling commission with any questions regarding their licensing and reporting responsibilities with the commission. Persons engaging in the business of parimutuel wagering should refer to chapter 67.16 RCW (Horse racing) and/or contact the Washington horse racing commission for additional reporting responsibilities.

(2) **Parimutuel wagering.** Effective July 1, 2005, persons engaging within this state in the business of conducting race meets for which a license must be obtained from the Washington horse racing commission are taxable under the parimutuel wagering B&O tax classification. Chapter 369, Laws of 2005. This tax is in addition to any tax imposed under chapter 67.16 RCW. Unlike the parimutuel tax, the B&O tax applies to both in-state and out-of-state parimutuel wagering. The measure of tax is the gross income of the business derived from parimutuel wagering. For purposes of this classification, "gross income" does not include amounts paid to players for winning wagers, or taxes imposed or other distributions required under chapter 67.16 RCW (i.e., RCW 67.16.102 owners bonus, RCW 67.16.105 fair fund, RCW 67.16.175 breeders award).

(3) **Contests of chance.** Contests of chance means any contests, games, gaming schemes, or gaming devices, other than the state lottery as defined in RCW 67.70.010, in which the outcome depends in a material degree upon an element of

chance, notwithstanding that skill of the contestants may also be a factor in the outcome. The term includes social card games, bingo, raffle, and punch board games, and pull-tabs as those terms are defined in chapter 9.46 RCW. Contests of chance does not include race meets for the conduct of which a license must be secured from the Washington horse racing commission, or "amusement game" as defined in RCW 9.46.0201.

(a) **Taxability of contests of chance on or after July 1, 2005.** Effective July 1, 2005, persons operating contests of chance are taxable under one of two new B&O tax classifications on their total gross income for all contests of chance. Chapter 369, Laws of 2005. Persons whose gross income from contests of chance is less than fifty thousand dollars in a calendar year will report all such income under the "gambling contests of chance (less than $50,000 a year)" tax classification. Income from amusement games should not be combined with income from contests of chance for purposes of determining if the "less than fifty thousand dollar" threshold is met. (See subsection (4) of this section for tax-reporting information about amusement games.)

Persons whose gross income from contests of chance is fifty thousand dollars or more in a calendar year will report all such income under the "gambling contests of chance ($50,000 a year or greater)" tax classification.

(b) **Taxability of contests of chance before July 1, 2005.** Before July 1, 2005, persons operating contests of chance were taxable on their gross income under the service and other activities B&O tax classification.

(c) **Measure of tax.** Persons operating contests of chance are subject to B&O tax on the gross income of the business derived from contests of chance. With respect to income from contests of chance, "gross income" of the business does not include the monetary value or actual cost of any prizes that are awarded, amounts paid to players for winning wagers, accrual of prizes for progressive jackpot contests, or repayment of amounts used to seed guaranteed progressive jackpot prizes. In the case of donated merchandise, the operator may deduct the fair-market value of the merchandise. Costs of operating the game, including the amount paid for the purchase of the actual game (e.g., a punch board), may not be deducted.

(d) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(i) **Example 1.** Persons operating for-profit weekly bingo games at the Town & Country Social Club are taxable upon gross income arising from the operation of their games. As their annual gross income from the bingo games is $30,000, they will report under the gambling contests of chance (less than $50,000 a year) tax classification.

(ii) **Example 2.** The Lucky Card Room (LCR) charges a fee to all card players as a condition for participating in their card games. Depending on the game, the LCR may charge a fee based on time, on a per-hand basis, or on a percentage of the wagered amount (commonly referred to as a "rake"). Their annual gross income from card game fees and percentages of wagers is $120,000, and thus they will report under the gambling contests of chance ($50,000 a year or greater) tax classification.

(iii) **Example 3.** Take A Chance (TAC) is a business offering customers several types of gambling activities, such as pull-tabs, bingo, and punch board games. Based on last year's income and this year's anticipated income, TAC started the year out reporting their gross income under the gambling contests of chance (less than $50,000 a year) tax classification. As their income from gambling activities was better than anticipated, they passed the $50,000 threshold. TAC must now start reporting their gross income under the gambling contests of chance ($50,000 a year or greater) tax classification. They must also reclassify, by filing amended excise tax returns, all income reported for the year under the tax classification for less than $50,000 a year to $50,000 a year or greater.

(4) **Amusement games.** Chapter 369, Laws of 2005, made no change to the taxability of income derived from amusement games as defined in RCW 9.46.0201. The gross receipts derived from the operation of these games are subject to the service and other activities B&O tax. The cost of any prizes awarded may not be deducted from the measure of tax.

For example. The Flying High Club provides amusement games for customers to play. Prizes, such as free or discounted meal vouchers or home appliances, are awarded to the winners. The cost of these prizes is not allowed as an adjustment to computing the Flying High Club's gross income.

(a) **What is an amusement game?** The term "amusement game" is defined in RCW 9.46.0201 as a game played for entertainment in which:

(i) The contestant actively participates;

(ii) The outcome depends in a material degree upon the skill of the contestant;

(iii) Only merchandise prizes are awarded;

(iv) The outcome is not in the control of the operator;

(v) The wagers are placed, the winners are determined, and a distribution of prizes or property is made in the presence of all persons placing wagers at such game; and

(vi) The game is conducted or operated by any agricultural fair, person, association, or organization in such manner and at such locations as may be authorized by rules adopted by the gambling commission under chapter 9.46 RCW.

(b) **Examples of amusement games.** Crane machines, coin-toss and dart-toss games at fairs and carnivals, and skill-stop games are examples of games qualifying as amusement games under RCW 9.46.0201. For additional examples of amusement games, refer to WAC 230-20-508 (Authorized amusement games—Types, standards and classifications) issued by the gambling commission.

(c) **Coin-operated games are not amusement games.** Persons operating coin-operated games that do not qualify under the definition of amusement games in RCW 9.46.0201 (e.g., pinball, video, and pool games) should refer to WAC 458-20-187 (Coin-operated vending machines, amusement devices and service machines) for an explanation of their tax reporting responsibilities.

(5) **Sales of foods and beverages.** Sales of foods, beverages, and other tangible personal property by persons operating or conducting any of the activities described above are retail sales and subject to the retailing B&O and retail sales

taxes, unless a specific exemption applies (e.g., see WAC 458-20-124 regarding sales of food and beverages by restaurants, taverns, and similar businesses and WAC 458-20-244 for exemptions available for certain food products). Persons conducting dice games to determine the amount that the customer will pay for food or beverages are subject to tax upon the amount the customer actually pays for the food or drink.

(6) **Merchandise prizes.** Persons operating or conducting any of the activities described above are the consumers of any merchandise delivered to the players in the form of prizes or awards. Purchases of this merchandise are purchases at retail and subject to the retail sales tax, unless a specific exemption applies (e.g., see WAC 458-20-244 for exemptions available for certain food products). Purchases of supplies, devices, and other equipment used in the conduct of these activities are also subject to the retail sales tax.

If retail sales tax is not collected by the seller, the person conducting these activities must remit the retail sales tax (often referred to as deferred retail sales tax) or use tax directly to the department of revenue. See also WAC 458-20-178 (Use tax).

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 07-02-072, § 458-20-131, filed 12/29/06, effective 1/29/07. Statutory Authority: RCW 82.32.300. WSR 99-08-090, § 458-20-131, filed 4/6/99, effective 5/7/99; WSR 83-07-034 (Order ET 83-17), § 458-20-131, filed 3/15/83; Order ET 70-3, § 458-20-131 (Rule 131), filed 5/29/70, effective 7/1/70.]

WAC 458-20-132 Automobile dealers/demonstrator and executive vehicles. (1) Introduction. This section accounts for the unique practices of the retail automobile dealer's industry and reflects administrative notice of the customs of this trade. The tax reporting formulas explained in this rule represent a compromise of tax liabilities and offsetting deductions. It recognizes that demonstrators and vehicles used by executives or persons associated with a dealer are actually used for limited periods of time without significantly affecting their marketability or retail selling value, and that such used vehicles have a high trade-in value when returned to inventory for sale.

(2) Definitions. The following definitions apply to this section.

(a) The terms "demonstration" and "demonstrator" mean the use of automobiles provided by dealers to their sales staff, without charge, for any personal or business reason other than (or in addition to) the mere display of such vehicles to prospective purchasers.

(b) The term "display" means the showing for sale of vehicles to prospective purchasers, at or near the dealer's premises, including the short term test driving, operating, and examining by prospective purchasers.

(c) The term "executive use vehicle" means any vehicle from sales inventory, used by any person associated with the automobile dealership for personal driving, other than for demonstration or display purposes as defined above, when such person does not have a recent model vehicle registered and licensed in that person's own name on which retail sales tax was paid.

(d) The term "recent model vehicle" refers to a car of the current model year or either of the two preceding model years.

(e) The terms "purchase price" and "total cost" mean the amount charged to the dealer for the purchase of a vehicle and includes any additional charges for accessories installed on the vehicle. If the vehicle was acquired through a trade-in by a customer, these terms then mean the trade-in value given to the customer by the dealer (with consideration of underallowances and overallowances) as well as any costs of refurbishing and repairs in preparing the vehicle for resale or use. These values will generally be the amounts shown as the vehicle cost within the dealer's inventory records.

(f) The phrase "pickup truck" refers only to trucks having a commercial pickup body rated at three-quarter ton capacity or less.

(3) Business and occupation tax. Automobile dealers are taxable under the retailing classification upon the sale or lease of automobiles to their employees or other representatives for personal use, including demonstration. The business and occupation tax does not apply upon the transfer of vehicles to employees or other representatives for their personal use, including demonstration where no sale occurs.

(4) Retail sales tax. The retail sales tax applies upon the sale or lease of automobiles, parts, and accessories by dealers to their employees or other representatives for the personal use by such persons. The retail sales tax does not apply to the display of automobiles where no sale takes place.

(5) Use tax. The use tax does not apply to the display of new or used automobiles by dealers, their employees or other representatives. Neither does use tax apply upon the personal use or demonstration of automobiles which have been sold or leased to dealers' employees or other representatives and upon which the retail sales tax has been paid. Also, use tax does not apply upon demonstrator vehicles if no such vehicles are actually used. However, where an automobile dealer purchases a passenger car or pickup truck without paying a retail sales tax and uses such car or truck for personal use or demonstration purposes, the use tax applies even if such personal car or demonstrator may later be sold by the dealer.

(6) Computation of use tax. For practical purposes, automobile dealers may elect to compute the use tax upon the use of demonstrators by sales staff on either a "one per one hundred vehicles sold" basis or on an "actual number of demonstrators used" basis. Use of the one per one hundred vehicles sold method will satisfy the use tax liability for personal or business use of demonstrators by sales staff employed by a new car dealer. However, the one per one hundred vehicles sold method will not satisfy the use tax liability for the personal or business use of vehicles by persons other than sales staff employed by the dealership.

(a) One per one hundred demonstrator reporting basis. The use of demonstrators is subject to the use tax on the basis of one demonstrator for each one hundred new automobiles and pickup trucks, or fractional part of such number, of all makes or models sold at retail including lease transactions during a calendar year. The use tax on each such demonstrator is measured by twenty-five percent of the average selling price, including dealer preparation, transportation, and factory or dealer installed accessories, of all makes and models of new passenger cars and new pickup trucks sold during the preceding calendar year divided by the number of such units sold: Provided, That the first such vehicle reported during

any calendar year shall be subject to use tax measured by the full average retail selling price.

(i) The average retail selling price is computed by dividing the total retail sales of new passenger cars and trucks in the preceding year by the total units sold in the preceding year. Thus, for example, a dealer with $3,000,000.00 in gross sales for the previous year, who sold 250 units that year derives an average selling price of $12,000.00. The very first demonstrator use in the current year will be $12,000.00 multiplied by the prevailing use tax rate. All subsequent demonstrators reported in the current year, based upon the formula of one demonstrator for each one hundred units sold, will be $3,000.00 multiplied by the prevailing use tax rate.

(ii) The use tax is paid as of the date of the first sale in any calendar year and subsequently upon the sale of the one hundred and first automobile or pickup truck. If a dealer sold 340 units in the current year, use tax would be due on four units (the first at one hundred percent of the average retail selling price of all new vehicles sold in the preceding year and the remaining three at twenty-five percent of the previous year's average selling price of new vehicles).

(b) Actual demonstrator reporting basis. Dealers who decide to report use tax on demonstrators on an actual basis are required to report use tax on each vehicle assigned to demonstrator use. The value is computed in the same manner as under the one per one hundred basis. The first vehicle in the current year which is used for demonstrator use is taxable on the full average selling price of all new vehicles sold in the preceding year. Additional vehicles during the year which are put to use as demonstrators are taxable at twenty-five percent of the average selling price of new vehicles sold in the preceding year.

(c) The above method of computation applies only in respect to use by sales staff of demonstrator vehicles operated under dealer plates issued to the dealership. Vehicles which are required to be licensed other than to the dealership are presumed to be used substantially for purposes other than demonstration and are subject to the use tax measured by the actual value (purchase price) of such vehicles.

(d) Change in reporting method. When an automobile dealer has elected to report the use tax under the "one per one hundred basis," or upon the actual number of demonstrators used, it will not be permitted to change the manner of reporting without the written consent of the department of revenue.

Dealers are required to provide reasonably accurate records reflecting the use of dealer plates.

(7) Executive vehicles - personal use of vehicles by executives and persons associated with a dealer. When a dealer or a person associated with a dealer (firm executive, corporate officer, partner, or manager) does not have a recent model car registered and licensed in its own name and regularly uses either one or various new cars from inventory for personal driving (whether or not such cars are also used for demonstration purposes) the use tax applies to the value of one such car for each two calendar years in addition to the tax which applies to demonstrator use by sales staff. The measure of the use tax is the same as the measure for the computation of use tax on subsequently used demonstrator vehicles, that is, twenty-five percent of the average selling price of all makes and models of new passenger cars and pickup trucks sold at retail during the preceding year.

(a) The dealer may not include within the executive car reporting method the use of a new vehicle which is not of the type or model of new vehicles authorized to be sold by the dealer's franchise agreement. The executive car reporting method applies only to vehicles removed from inventory for use by the executives. Vehicles purchased specifically for use by the executives are taxable on the purchase price of each vehicle.

(b) No use tax in addition to that outlined above will be due if members of the immediate family of the executive also use a vehicle from inventory which is not otherwise licensed or required to be licensed. "Immediate family" includes only the executive's spouse or state registered domestic partner and children or state registered domestic partner's children, who live in the same household as the executive.

(8) Vehicles used by automobile manufacturers or distributors. Automobile manufacturers or distributors will often assign vehicles to their employee representatives for demonstration purposes, sales solicitation and personal use in the state. It is common practice to replace these vehicles frequently so that several vehicles may be used by a company representative during the course of the year. Under these circumstances, the department of revenue will allow computation of the use tax based on the average selling price of all new cars sold in the preceding year multiplied by the maximum complement of cars of each model year in use at any time during the year. The tax is due at the start of the model year. No use tax is due on the usual turnover or replacement of cars within the model year.

(9) Vehicles loaned to nonprofit or other organizations. The use tax applies to the value of vehicles that are required to be licensed and are loaned or donated to civic, religious, nonprofit or other organizations. The use tax may be computed for loaned vehicles on a value of two percent per month multiplied by the purchase price of the vehicle. Such tax is in addition to the tax on the use of demonstrators as provided in this rule. Vehicles that are not required to be licensed which are used for the purpose of promoting or participating in an event such as a parade, pageant, convention, or other community activity are not subject to the use tax provided the dealer obtains a temporary letter of authority or a special plate in accordance with RCW 46.16.048.

(10) Service department vehicles. Vehicles removed from inventory and committed to use as service vehicles, parts trucks, or service department loaner cars are subject to use tax. Dealers will often use vehicles for this purpose for only short periods of time. In recognition of this, dealers may elect to report use tax on either the purchase price of the vehicle or on two percent per month of the purchase price for each month or any fraction thereof that the vehicle is being used as a service vehicle or loaner. If use tax is reported based on total purchase price rather than on the two percent method, a trade-in deduction is allowed if the vehicle is returned to inventory and concurrently another vehicle replaces this vehicle for use as a loaner or service vehicle. The trade-in value is the wholesale value and generally will be the value recorded by the dealer in the inventory records exclusive of any refurbishing costs at the time the vehicle is returned to inventory.

(11) Personal use of used vehicles. Used vehicle dealers who provide used cars for personal use to their sales staff or managers without charge are subject to use tax on one vehicle per year for each sales person or manager to whom a used vehicle is provided. The value for use tax reporting is the average selling price of all used vehicles sold in the preceding year multiplied by twenty-five percent. The use tax is due in the month in which the vehicle is first used for personal use. New vehicle dealers will also be taxable in this manner for used cars furnished to sales staff or managers, but only if no new cars are provided during the course of the year to the manager or sales person. If both new and used cars are provided by a new vehicle dealer to a manager or sales person, use tax liability is as provided in subsections (6) and (7) of this section.

Where used car dealers satisfy the criteria for executive car use (no current model vehicle registered in the user's name) they are deemed to be using one executive or personal use vehicle per calendar year. In such cases use tax must be reported under the same formula as for subsequently used new demonstrator cars, that is, measured by twenty-five percent of the average selling price of all used cars sold during the preceding calendar year. Use tax also is due on all vehicles that are capitalized for accounting purposes or removed from inventory and used for personal use. In such cases, the use tax measure is the purchase price of the vehicle. If the vehicle was acquired through a trade-in by a customer, the value will generally be that recorded by the dealer in the inventory records including any costs incurred in repairing or refurbishing the vehicle. Purchase of a new car by a used car dealer and used personally by the dealer or person associated with the dealer is subject to use tax measured by the purchase price of the vehicle.

(12) Examples. The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(a) Dealer A makes a specific charge each month to its sales person for the use of a vehicle. The sales person uses the vehicle for personal use as well as displaying the vehicle to potential customers. The dealer is required to report the gross charges under the retailing and retail sales tax classifications. No use tax is due on this vehicle.

(b) Dealer A assigns a vehicle from its new vehicle inventory for personal and business use to each of its new vehicle sales staff. No charge is made to the sales staff for the use of the vehicle. Dealer A is subject to use tax and may elect to report the tax on each vehicle assigned to the sales staff or may report on the "one per one hundred" method discussed above. Once a method is elected, the dealer may not change methods without approval from the department.

(c) Dealer A assigns a vehicle from its new vehicle inventory for personal use to its service manager. The service manager will use the vehicle for approximately ninety days when it will be replaced with another new vehicle. The service manager does not have a recent model car registered and licensed in his/her name. The dealer is subject to use tax on the vehicles assigned to the service manager. The tax will apply on only one vehicle every second year and will be measured by twenty-five percent of the average selling price of all new passenger cars and trucks sold in the previous year.

(d) Dealer A has the franchise to sell Chevrolets. Dealer A purchases a new Mercedes Benz for its personal use. The dealer attaches a "dealer plate" to this vehicle. Dealer A is subject to use tax on the purchase price of this vehicle. The dealer may not report use tax on the method authorized for reporting executive cars for this vehicle since the dealer is not an authorized dealer for this make of vehicle and the vehicle was not removed from the dealer's new vehicle inventory.

(e) Vehicle Manufacturer A has five employees who live and work from their homes in Washington. These employees call on dealers in Washington to resolve warranty disputes. Each employee is given a new vehicle at the start of the model year. The vehicle will be replaced every sixty days. Manufacturer A owes use tax on five vehicles at the start of the model year. No additional use tax will be due when these vehicles are replaced during the same model year. However, should a sixth employee be added during the course of the year, an additional vehicle will be subject to use tax.

(f) Dealer A uses a vehicle from inventory as a service truck. This vehicle is used to pick up parts from local suppliers, transportation for making emergency repairs on customer's vehicles, and similar activities. The dealer is liable for use tax on this vehicle. At its option, the dealer may report use tax on two percent per month of the purchase price of the vehicle or may report use tax on the full value of the vehicle at the time it is put to use.

(g) Dealer A uses a new vehicle from inventory for his/her own personal use. Dealer A's spouse also uses a new vehicle. Dealer A's son who lives in the same household will occasionally use a new vehicle. All of these vehicles are operated with dealer plates attached. Dealer A does not have a recent model car licensed in Washington. Dealer A is subject to use tax on one vehicle as an "executive" car every second year as provided above.

(h) Dealer A loans a vehicle to a civic organization for a thirty-day period. The dealer is unable to obtain a temporary letter of authority for use of the vehicle under RCW 46.16.-048. The dealer is liable for use tax, but the dealer may report the use tax based on two percent of the purchase price of the vehicle per month as the measure of the tax. No use tax would be due if the dealer had obtained a letter of authority under RCW 46.16.048 for the use of the vehicle.

(i) Dealer A, who sells new and used vehicles, assigns a used vehicle to the used car sales manager for personal use. However, if the sales manager exceeds the sales goals for the preceding quarter, the manager will be assigned a new vehicle for personal use for the following quarter. The manager will generally exceed the sales goal at least once during the year. Since the manager uses both a new and used car from inventory during the course of a year, use tax will be computed based on twenty-five percent of the average selling price of all new cars and trucks sold in the preceding year. The use tax will be due on one such vehicle every second year.

(j) Dealer A, who sells new and used vehicles, regularly assigns a used vehicle from inventory to its service manager for personal use. This vehicle is replaced approximately every sixty days. Use tax is due on one vehicle every year

measured by twenty-five percent of the average selling price of all used vehicles sold in the preceding year.

[Statutory Authority: 2009 c 521. WSR 10-07-133, § 458-20-132, filed 3/23/10, effective 4/23/10. Statutory Authority: RCW 82.32.300. WSR 92-05-066, § 458-20-132, filed 2/18/92, effective 3/20/92; WSR 86-09-002 (Order ET 86-5), § 458-20-132, filed 4/3/86; WSR 83-07-034 (Order ET 83-17), § 458-20-132, filed 3/15/83; Order ET 70-3, § 458-20-132 (Rule 132), filed 5/29/70, effective 7/1/70.]

WAC 458-20-133 Frozen food lockers.

Business and Occupation Tax

Persons engaged in the business of renting frozen food lockers are taxable under the service and other business activities classification upon the gross income from rentals thereof.

When such persons also engage in the activities of curing, smoking, cutting or wrapping meat of and for consumers, or do any other act through which such meat is altered or improved, they become taxable under the retailing classification upon the gross charges made therefor.

Retail Sales Tax

The retail sales tax applies upon the charges made for curing, smoking, cutting or wrapping meat of and for consumers, or for any act through which such meat is altered or improved, and sellers are required to collect such tax from their customers.

The retail sales tax does not apply upon the charges made for the rental of frozen food lockers.

Issued May 1, 1949.

[Order ET 70-3, § 458-20-133 (Rule 133), filed 5/29/70, effective 7/1/70.]

WAC 458-20-134 Commercial or industrial use. (1) **Introduction.** "The term 'commercial or industrial use' means the following uses of products, including by-products, by the same person that extracted or manufactured them:

(a) Any use as a consumer; and

(b) The manufacturing of articles, substances or commodities." (RCW 82.04.130.)

(2) **Examples of commercial or industrial use.** The following are examples of commercial or industrial use:

(a) The use of lumber by the manufacturer of that lumber to build a shed for its own use.

(b) The use of a motor truck by the manufacturer of that truck as a service truck for itself.

(c) The use by a boat manufacturer of patterns, jigs and dies which it has manufactured.

(d) The use by a contractor building or improving a publicly owned road of crushed rock or pit run gravel which it has extracted.

(3) **Business and occupation tax.** Persons manufacturing or extracting tangible personal property for commercial or industrial use are subject to tax under the manufacturing or extracting B&O tax classifications, as the case may be. The tax is measured by the value of the product manufactured or extracted and used. (See WAC 458-20-112 for definition and explanation of value of products.)

(4) **Use tax.** Persons manufacturing or extracting tangible personal property for commercial or industrial use are subject to use tax on the value of the articles used, unless a specific exemption is provided. (See WAC 458-20-178 for further explanation of the use tax and definition of value of the article used.)

(5) **Exemptions.** The following uses of articles produced for commercial or industrial use are expressly exempt of use tax.

(a) RCW 82.12.0263 exempts from the use tax the use of fuel by the same person that extracted or manufactured that fuel when it is used directly in the operation of the particular extractive operation or manufacturing plant which produced or manufactured the same.

(b) Property produced for use in manufacturing ferrosilicon which is subsequently used to make magnesium for sale is exempt of use tax if the primary purpose is to create a chemical reaction directly through contact with an ingredient of ferrosilicon. (RCW 82.04.190(1).)

(c) Effective July 1, 2009, hog fuel used to produce electricity, steam, heat, or biofuel is exempt from use tax. RCW 82.12.956. For the purposes of this exemption, "hog fuel" means wood waste and other wood residuals including forest derived biomass, but not including firewood or wood pellets. "Biofuel" has the same meaning as provided in RCW 43.325.010.

(6) **Special provisions regarding value of article used.** RCW 82.12.010 provides the following special valuation provisions to persons manufacturing products for commercial or industrial use:

(a) In the case of articles manufactured or produced by the user and used in the manufacture or production of products sold or to be sold to the United States Department of Defense, the value of the articles used is determined according to the value of the ingredients of those articles.

(b) In the case of an article manufactured or produced for purposes of serving as a prototype for the development of a new or improved product, the value of the article used is determined by:

- The retail selling price of such new or improved product when first offered for sale; or
- The value of materials incorporated into the prototype in cases in which the new or improved product is not offered for sale.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-10-031, § 458-20-134, filed 4/26/10, effective 5/27/10. Statutory Authority: RCW 82.32.300. WSR 86-20-027 (Order 86-17), § 458-20-134, filed 9/23/86; WSR 83-07-032 (Order ET 83-15), § 458-20-134, filed 3/15/83; Order ET 70-3, § 458-20-134 (Rule 134), filed 5/29/70, effective 7/1/70.]

WAC 458-20-135 Extracting natural products. (1) **Introduction.** This section explains the application of the business and occupation (B&O), retail sales, and use taxes to persons extracting natural products. Persons extracting natural products often use the same extracted products in a manufacturing process. The section provides guidance for determining when an extracting activity ends and the manufacturing activity begins. In addition to all other taxes, commercial fishermen may be subject to the enhanced food fish excise tax levied by chapter 82.27 RCW (Tax on enhanced food fish).

Persons engaging in activities associated with timber harvest operations should refer to WAC 458-20-13501 (Timber harvest operations). Persons engaged in a manufacturing activity should also refer to WAC 458-20-136 (Manufactur-

ing, processing for hire, fabricating) and 458-20-13601 (Manufacturers and processors for hire—Sales and use tax exemptions for machinery and equipment).

(2) **Who is an "extractor"?** RCW 82.04.100 defines the term "extractor" to mean every person who, from the person's own land or from the land of another under a right or license granted by lease or contract, either directly or by contracting with others for the necessary labor or mechanical services, for sale or for commercial or industrial use mines, quarries, takes or produces coal, oil, natural gas, ore, stone, sand, gravel, clay, mineral, or other natural resource product. The term includes a person who fells, cuts, or takes timber, Christmas trees other than plantation Christmas trees, or other natural products. It also includes any person who takes fish, shellfish, or other sea or inland water foods or products.

(a) **Persons excluded from the definition of "extractor."** The term "extractor" does not include:

(i) Persons performing under contract the necessary labor or mechanical services for others (these persons are extractors for hire, see subsection (4) of this section); or

(ii) Persons who are farmers as defined in RCW 82.04.-213. Refer to WAC 458-20-209 and 458-20-210 for tax-reporting information for farmers and persons selling property to or performing horticultural services for farmers.

(b) **When an extractor is also a manufacturer.** An extractor may subsequently take an extracted product and use it as a raw material in a manufacturing process. The following examples explain when an extracting process ends and a manufacturing process begins for various situations. These examples should be used only as a general guide. A determination of when extracting ends and manufacturing begins for other situations can be made only after a review of all of the facts and circumstances.

(i) **Mining and quarrying.** Mining and quarrying operations are extracting activities, and generally include the screening, sorting, and piling of rock, sand, stone, gravel, or ore. For example, an operation that extracts rock, then screens, sorts, and with no further processing places the rock into piles for sale, is an extracting operation.

(A) The crushing and/or blending of rock, sand, stone, gravel, or ore are manufacturing activities. These are manufacturing activities whether or not the materials were previously screened or sorted.

(B) Screening, sorting, piling, or washing of the material, when the activity takes place in conjunction with crushing or blending at the site where the materials are taken or produced, is considered a part of the manufacturing operation if it takes place after the first screen. If there is no separate first screen, only those activities subsequent to the materials being deposited into the screen are considered a part of the manufacturing operation.

(ii) **Commercial fishing.** Commercial fishing operations, including the taking of any fish in Washington waters (within the statutory limits of the state of Washington) and the taking of shellfish or other sea or inland water foods or products, are extracting activities. These activities often include the removal of meat from the shell and the icing of fish or sea products.

(A) A person growing, raising, or producing a product of aquaculture as defined in RCW 15.85.020 on the person's own land or on land in which the person has a present right of possession is considered a farmer. RCW 82.04.213.

(B) Cleaning (removal of the head, fins, or viscera), filleting, and/or steaking fish are manufacturing activities. The cooking of fish or seafood is also a manufacturing activity. Refer to RCW 82.04.260 and WAC 458-20-136 for information regarding the special B&O tax rate/classification that applies to the manufacturing of seafood products that remain in a raw, raw frozen, or raw salted state.

(C) The removal of meat from the shell or the icing of fish or sea products, when the activity is performed in conjunction with and at the site where manufacturing takes place (e.g., cooking the fish or seafood), is considered a part of the manufacturing operation.

(3) **Tax-reporting responsibilities for income received by extractors.** Extractors are subject to the extracting B&O tax upon the value of the extracted products. (See WAC 458-20-112 regarding "value of products.") Extractors who sell the products at retail or wholesale in this state are subject to either the retailing or wholesaling B&O tax, as the case may be. In such cases, the extractor must report under both the "production" (extracting) and "selling" (wholesaling or retailing) classifications of the B&O tax, and claim a tax credit under the multiple activities tax credit (MATC). See also WAC 458-20-19301 (Multiple activities tax credits) for a more detailed explanation of the MATC reporting requirements.

For example, Corporation quarries rock without further processing. Corporation sells and delivers the rock to Landscaper, who is located in Washington. Landscaper provides Corporation with a resale certificate (WAC 458-20-102A) for purchases made before January 1, 2010, or a reseller permit (WAC 458-20-102) for purchases made on or after January 1, 2010. Corporation should report under both the extracting and wholesaling B&O tax classifications, and claim a MATC per WAC 458-20-19301. Had Corporation delivered the quarried rock to an out-of-state location, Corporation would have incurred only an extracting B&O tax liability.

(a) **When extractors use their products in a manufacturing process.** Persons who extract products, use these extracted products in a manufacturing process, and then sell the products all within Washington are subject to both "production" taxes (extracting and manufacturing) and the "selling" tax (wholesaling or retailing), and may claim the appropriate credits under the MATC. (See also WAC 458-20-136 on manufacturing.)

For example, Company quarries rock (an extracting activity), crushes and blends the rock (a manufacturing activity), and sells the resulting product at retail. The taxable value of the extracted rock is $50,000 (the amount subject to the extracting B&O tax). The taxable value of the crushed and blended rock is $140,000 (the amount subject to the manufacturing B&O tax). The crushed and blended rock is sold for $140,000 (the amount subject to the retailing B&O tax). Assume the tax rates for the extracting and manufacturing B&O taxes are .00484, and the tax rate for the retailing B&O tax is .00471. Company should compute its tax liability as follows:

(i) **Reporting B&O tax on the combined excise tax return:**

(A) Extracting B&O tax liability of $242 ($50,000 x .00484);

(B) Manufacturing B&O tax liability of $678 ($140,000 x .00484); and

(C) Retailing B&O tax liability of $659 ($140,000 x .00471).

(ii) **Completing the multiple activities tax credit (Part II of Schedule C):**

Activity which results in a tax credit	Taxable Amount	Business and Occupation Tax Reported				
		Extracting	Manufacturing	Wholesaling	Retailing	Total Credit
Washington extracted products manufactured in Washington	50,000	242	242			242
Washington extracted products sold in Washington						
Washington manufactured products sold in Washington	140,000		678		659	659
			Multiple Activities Tax Credit Subtotal of taxes paid to Washington state			901
					Credit ID 800	901

Schedule C helps taxpayers calculate and claim the multiple activities tax credit provided by RCW 82.04.440. In the Schedule C example above, materials that a person extracts and then uses in a manufacturing process in Washington are entered at their value when extracting ceases and manufacturing begins ($50,000 shown on the "Washington extracted products manufactured in Washington" line of the Schedule C). The taxable amount reported on the "Washington manufactured products sold in Washington" line of the Schedule C is the value of products at the point that manufacturing ceases ($140,000), not simply the value added by the manufacturing activity. For more information and examples that are helpful in determining the value of products, refer to WAC 458-20-112 (Value of products).

(b) **When extractors sell their products at retail or wholesale.** An extractor making retail sales must collect and remit retail sales tax on all sales to consumers, unless the sale is exempt by law (e.g., see WAC 458-20-244 regarding sales of certain food products). Extractors making wholesale sales must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to document the wholesale nature of any transaction as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(4) **Tax-reporting responsibilities for income received by extractors for hire.** Persons performing extracting activities for extractors are subject to the extracting for hire B&O tax upon their gross income from those services.

For example, a person removing ore, waste, or overburden at a mining pit for the operator of the mining operation is an extractor for hire. Likewise, a person drilling to locate or provide access to a satisfactory grade of ore at the mining pit for the operator is also an extractor for hire. The gross income derived from these activities is subject to the extracting for hire B&O tax classification.

(5) **Mining or mineral rights.** Royalties or charges in the nature of royalties for granting another the privilege or right to remove minerals, rock, sand, or other natural resource product are subject to the service and other activities B&O tax. The special B&O tax rate provided by RCW 82.04.2907 does not apply because this statute specifically excludes compensation received for any natural resource. Refer also to RCW 82.45.035 and WAC 458-61-520 (Mineral rights and mining claims) for more information regarding the sale of mineral rights and the real estate excise tax.

Income derived from the sale or rental of real property, whether designated as royalties or another term, is exempt of the B&O tax.

(6) **Tax liability with respect to purchases of equipment or supplies and property extracted and/or manufactured for commercial or industrial use.** The retail sales tax applies to all purchases of equipment, component parts of equipment, and supplies by persons engaging in extracting or extracting for hire activities unless a specific exemption applies. If the seller fails to collect the appropriate retail sales tax, the buyer is required to remit the retail sales tax (commonly referred to as "deferred retail sales tax") or use tax directly to the department.

(a) **Exemption available for certain manufacturing equipment.** RCW 82.08.02565 and 82.12.02565 provide retail sales and use tax exemptions for certain machinery and equipment used by manufacturers and processors for hire. While this exemption does not extend to extractors or extractors for hire, persons engaged in both extracting and manufacturing activities should refer to WAC 458-20-13601 for an explanation of how these exemptions may apply to them.

(b) **Property manufactured for commercial or industrial use.** Persons manufacturing tangible personal property for commercial or industrial use are subject to both the man-

ufacturing B&O and use taxes upon the value of the property manufactured, unless a specific exemption applies. (See also WAC 458-20-134 on commercial or industrial use.)

If the person also extracts materials used in the manufacturing process, the extracting B&O tax is due on the value of the extracted materials and a MATC may be taken. For example, Quarry extracts rock, crushes the rock into desired size, and then uses the crushed rock in its parking lot. The use of the crushed rock by Quarry in its parking lot is a commercial or industrial use. Quarry is subject to the extracting and manufacturing B&O taxes and may claim a MATC. Quarry is also responsible for remitting use tax on the value of the crushed rock applied to the parking lot.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-135, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 04-01-126, § 458-20-135, filed 12/18/03, effective 1/18/04. Statutory Authority: RCW 82.32.300. WSR 00-11-096, § 458-20-135, filed 5/17/00, effective 6/17/00; WSR 86-09-058 (Order ET 86-7), § 458-20-135, filed 4/17/86; WSR 83-07-034 (Order ET 83-17), § 458-20-135, filed 3/15/83. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order ET 78-4), § 458-20-135, filed 6/27/78; Order ET 70-3, § 458-20-135 (Rule 135), filed 5/29/70, effective 7/1/70.]

WAC 458-20-13501 Timber harvest operations. (1) **Introduction.** Timber harvest operations generally consist of a variety of different activities. These activities are subject to different tax rates and/or classifications under the Revenue Act, depending on the nature of the activity.

(a) **Scope of rule.** This rule explains the application of the business and occupation (B&O), public utility, retail sales, and use taxes to persons performing activities associated with timber harvest operations. This rule explains how the public utility tax deduction available for the transportation of commodities to an export facility (RCW 82.16.050) applies to the transportation of logs (subsection (13)). It also explains how the B&O tax exemption provided by RCW 82.04.333 for small timber harvesters applies (subsection (14)).

(b) **Additional information sources for activities associated with timber harvest operations.** In addition to the taxes addressed in this rule, the forest excise and real estate excise taxes often apply to certain activities or sales associated with timber harvest operations. Persons engaged in timber harvest operations should refer to the following rules for additional information:

(i) WAC 458-20-135 (Extracting natural products);

(ii) WAC 458-20-136 (Manufacturing, processing for hire, fabricating);

(iii) WAC 458-20-13601 (Manufacturers and processors for hire—Sales and use tax exemption for machinery and equipment);

(iv) Chapter 458-40 WAC (Taxation of forest land and timber); and

(v) Chapter 458-61 WAC (Real estate excise tax).

(c) **Information regarding short-rotation hardwoods.** Effective July 22, 2001, persons cultivating short-rotation hardwoods are considered farmers. Refer to WAC 458-20-122, 458-20-209, and 458-20-210 for tax-reporting information for farmers and persons selling property to or performing horticultural services for farmers. "Short-rotation hardwoods" are hardwood trees, such as, but not limited to, hybrid cottonwoods, cultivated by agricultural methods in growing cycles shorter than fifteen years. Chapter 97, Laws of 2001.

(2) **Timber harvesters.** Timber harvesters may engage in business activities that require them to report under the extracting, manufacturing, and/or wholesaling or retailing B&O tax classifications.

The definition of "extractor" (RCW 82.04.100) as it relates to the harvesting of trees (other than plantation Christmas trees) is generally identical to the definition of "harvester" (RCW 84.33.035). An exception is the specific provisions in the definition of "harvester" relating to trees harvested by federal, state, and local government entities. Both definitions include every person who from the person's own land or from the land of another under a right or license granted by lease or contract, either directly or by contracting with others for the necessary labor or mechanical services, fells, cuts (severs), or takes timber for sale or for commercial or industrial use. Both definitions exclude persons performing under contract the necessary labor or mechanical services for the extractor/harvester.

(a) **Timber purchasers to file information report.** A purchaser must report to the department of revenue purchases of privately owned timber in an amount exceeding two hundred thousand board feet, if purchased in a voluntary sale made in the ordinary course of business. The report must contain the purchaser's name and address, purchase information (dates, price, descriptions of land, acreage, and required improvements, the volume purchased, and cruise and thinning data) and all relevant information to the value of the timber purchased.

This report must be filed on or before the last day of the month following the purchase of the timber. A two hundred fifty dollar penalty may be imposed against a purchaser for each failure to satisfy the requirements for filing this report. These filing requirements become effective July 1, 2001, and are scheduled to expire July 1, 2004. Chapter 320, Laws of 2001.

(b) **Extracting.** The felling, cutting (severing from land), or taking of trees is an extracting activity. RCW 82.04.100. The extracting B&O tax applies to the value of the products, which is the value of the severed trees prior to any manufacturing activity.

(c) **Manufacturing.** The cutting into length (bucking), delimbing, and measuring (for bucking) of felled, cut (severed), or taken trees is a manufacturing activity. RCW 82.04.-120. The manufacturing B&O tax applies to the value of the products, which is generally the gross proceeds of sale, whether the manufactured product is sold at retail or wholesale. Refer also to RCW 82.04.450 and WAC 458-20-112 for more information regarding the value of products.

If the product is delivered to a point outside the state, transportation costs incurred by the seller from the last point at which manufacturing takes place within Washington may be deducted from the gross proceeds of sale when determining the value of the product. For example, in each situation below presume that the timber harvester delivers the product to the customer at a point outside the state:

(i) If there is no further manufacturing subsequent to manufacturing conducted at the harvest site, the measure of tax is the gross proceeds of the sale of the logs less transpor-

tation costs incurred by the seller from the harvest site to delivery to the customer;

(ii) If logs are hauled to a facility for processing into lumber, poles, or piles, the measure of tax is the gross proceeds of sale of the lumber, poles, or piles less transportation costs incurred by the seller from the facility to delivery to the customer; and

(iii) If logs are hauled to a facility that only removes the bark, the measure of tax is the gross proceeds of sale of the logs less transportation costs incurred by the seller from the harvest site to the customer. This is because the mere removal of bark is not a manufacturing activity.

However, if at that facility the debarking is a part of a manufacturing process (e.g., cutting the logs into lumber), the entire process, including the debarking, is a manufacturing activity. In such a case, the measure of tax is the gross proceeds of sale of the products manufactured from the logs less transportation costs incurred by the seller from the facility to the customer.

(d) **Selling.** The sale of the logs is subject to either the wholesaling or retailing B&O tax, as the case may be, unless exempt by law. The measure of tax is the gross proceeds of sale without any deduction for transportation costs.

(i) When determining the gross proceeds of sale, the timber harvester may not deduct amounts paid to others. For example, a timber harvester enters into a contract with another person to perform the necessary labor and mechanical services for the harvesting of timber. The harvester is to receive sixty percent of the log sale proceeds, and the person contracting to perform the services is to receive forty percent. The log buyer purchases the logs for five hundred thousand dollars. The buyer pays three hundred thousand dollars to the harvester and two hundred thousand dollars to the person performing the harvesting services. The harvester's gross proceeds of sale is five hundred thousand dollars.

(ii) Retail sales tax must be collected and remitted on all sales to consumers, again unless exempt by law. Sellers must obtain resale certificates from their customers to document the wholesale nature of any transaction. (Refer to WAC 458-20-102 on resale certificates.)

(e) **Multiple activities tax credit (MATC).** An extractor and/or manufacturer who sells the product he or she extracts and/or manufactures must report under each of the appropriate "production" (extracting and/or manufacturing) and "selling" (wholesaling or retailing) classifications of the B&O tax. RCW 82.04.440. The extractor and/or manufacturer may then claim a multiple activities tax credit (MATC) for the extracting tax (RCW 82.04.230) or manufacturing tax (RCW 82.04.240), provided the credit does not exceed the wholesaling or retailing tax liability. See WAC 458-20-19301 (Multiple activities tax credits) for a more detailed explanation of the MATC reporting requirements.

(3) **Extractors for hire.** Persons performing extracting activities (labor or mechanical services) for timber harvesters are subject to the extracting for hire B&O tax upon the gross income from those services. RCW 82.04.280(3). For example, a person severing trees owned by a timber harvester is performing an extracting activity, and is considered an extractor for hire with respect to those services. (See also WAC 458-20-135 for more information regarding extractors for hire.) The measure of tax is the gross income from the services. This income is not subject to the retail sales tax.

Extracting activities commonly performed by extractors for hire include, but are not limited to:

(a) Cutting or severing trees;

(b) Logging road construction or maintenance;

(c) Activities related to and performed on timber-producing property that are necessary and incidental to timber operations, such as:

(i) Slash cleanup and burning;

(ii) Scarification;

(iii) Stream and pond cleaning or rebuilding;

(iv) Restoration of logging roadways to a natural state;

(v) Restoration of wildlife habitat; and

(vi) Fire trail work.

(4) **Processors for hire.** Persons performing labor or mechanical services for timber harvesters during the manufacturing portion of a timber harvest operation are subject to the processing for hire B&O tax. RCW 82.04.280(3). (See also WAC 458-20-136 for more information regarding processors for hire.) For example, a person delimbing and bucking severed trees at the harvest site is a processor for hire if another person owns the severed trees. A person transporting logs by helicopter from where the logs were severed to a landing from which the logs will be transported to a mill is generally a processor for hire. However, if the manufacturing process on those logs has not yet begun the helicopter operator is an extractor for hire. The measure of tax is the gross income from the services.

Persons performing processing for hire activities for consumers must collect retail sales tax on those services unless otherwise exempt by law.

(5) **Hauling activities.** Persons performing services for timber harvesters are often required to haul logs by motor vehicle from the harvest site exclusively or in part over public roads. The income attributable to this hauling activity is subject to the public utility tax. While the appropriate tax rate will generally be the motor transportation tax rate, refer to WAC 458-20-180 for more information regarding the distinction between the motor and urban transportation tax rates and classifications. If the hauling is exclusively performed over private roads, the service and other activities B&O tax applies. For example, Hauler A hauls logs over private roads from the harvest site to transfer site, at which the logs are unloaded. Hauler B hauls these logs over both private and public roads from the transfer site to a mill. The income received by Hauler A is subject to the service and other activities B&O tax. The income received by Hauler B is subject to the appropriate classification of the public utility tax.

(a) **Subcontracting hauls to a third party.** If the person subcontracts all of the hauling to a third party, the amount paid to the third party is subject to the appropriate tax classification for the hauling activity. If the hauling is subject to the public utility tax, a deduction for the amount paid to the third party may be claimed as jointly furnished services. RCW 82.16.050(3). The law provides no similar deduction for hauls subject to the service and other activities B&O tax.

For example, EFH is hired by a timber harvester to perform the necessary labor and services to fell trees, delimb and buck these trees to length, and haul the logs to a mill. EFH is paid two hundred fifty thousand dollars. EFH hires Trucking

to haul all of the logs from the woods to the mill, in part over public roads. Trucking is paid one hundred thousand dollars. The amount of income received by EFH attributable to felling the trees is fifty-five thousand dollars, while ninety-five thousand dollars is attributable to delimbing and bucking the trees. EFH will report fifty-five thousand dollars and ninety-five thousand dollars under the extracting for hire and processing for hire B&O tax classifications, respectively. EFH will report one hundred thousand dollars under the appropriate public utility tax classification, and claim a deduction for the full one hundred thousand dollars as "jointly furnished services."

(b) **Hauls using own equipment.** If the person hauls the product using his or her own equipment, and has established hauling rates that he or she pays to third-parties for comparable hauls, these rates may be used to establish the measure of tax for the hauling activity. Otherwise, the measure of the tax should be all costs attributable to the hauling activity including, but not limited to, the following costs relative to the hauling equipment: Depreciation; repair parts and repair labor; and wages and benefits for employees or compensation to contractors driving or maintaining the equipment. If appropriate records are not maintained to document these costs, the department will accept one-third of the gross income derived from a contract for all labor or mechanical services beginning with the cutting or severance of trees through the hauling services as the measure of the motor transportation tax.

(c) **Deduction for hauls to export facilities.** Refer also to subsection (13) below for information regarding the deduction available for certain log hauls to export facilities.

(6) **Common timber sale arrangements.** Persons who sell and/or take timber may incur either a B&O, timber excise, or real estate excise tax liability, or possibly both a B&O and a timber excise tax liability. There are a number of ways in which harvesting activities are conducted and timber is sold. The timing of the transfer of ownership of or the contractual right to sever standing timber determines which taxes are due and who is liable for remitting tax.

The following examples briefly identify two common types of timber sale arrangements and then state a conclusion as to the taxes that apply. These examples are not an all-inclusive list of the different types of timber sale arrangements, or the variations that may occur. This information should only be used as a general guide. The tax results of other types of arrangements must be determined only after a review of all the facts and circumstances. These examples presume that the trees being harvested are not Christmas trees, and that no participant is a federal, state, or local government entity.

(a) **Sale of standing timber (stumpage sales).** In this type of arrangement, Seller (landowner or other owner of the rights to standing timber) sells standing timber to Buyer. Buyer receives title to the timber from Seller before it is severed from the stump. Buyer may hire Contractor to perform the harvesting activity.

The tax consequences are:

(i) Seller is liable for real estate excise tax. A sale of real property has occurred under RCW 82.45.060. Refer to chapter 458-61 WAC for information on remitting the real estate excise tax.

(ii) Buyer is liable for both timber excise tax and B&O tax. Buyer is a "harvester" under RCW 84.33.035 and an "extractor" under RCW 82.04.100 because Buyer "from the...land of another under a right or license...fells, cuts (severs), or takes timber for sale or for commercial or industrial use." (See subsection (2).)

(iii) Contractor is liable for B&O tax and possibly public utility tax because Contractor "is performing under contract the necessary labor or mechanical services for the extractor/harvester." (See subsections (3), (4), and (5).)

(b) **Sale of harvested timber (logs).** In this type of sales transaction, Seller (landowner or other owner of the rights to standing timber) hires Contractor to perform the harvesting activity. Contractor obtains all the necessary cutting permits, performs all of the harvesting activities from severing the trees to delivering the logs for scaling, and makes all the arrangements for the sale of the logs. Contractor, in effect, is performing the harvesting and marketing services for Seller. Seller retains title to the logs until after they are scaled, at which time title transfers to Buyer.

The tax consequences are:

(i) Seller is liable for both timber excise tax and B&O tax. Seller is a "harvester" under RCW 84.33.035 and an "extractor" under RCW 82.04.100 because Seller is "the person who from the person's own land or from the land of another under a right or license granted by lease or contract...fells, cuts (severs), or takes timber for sale or for commercial or industrial use." (See subsection (2).)

(ii) Contractor is liable for B&O tax and possibly public utility tax because Contractor "is performing under contract the necessary labor or mechanical services for the extractor/harvester." (See subsections (3), (4), and (5).)

(iii) There is no real estate excise tax liability because there is no sale of real property under chapter 82.45 RCW.

(7) **Equipment and supplies used in timber harvest operations.** The retail sales tax applies to all purchases of equipment, component parts of equipment, and supplies by persons engaging in timber operations unless a specific exemption applies. Purchases of fertilizer and spray materials (e.g., pesticides) for use in the cultivating of timber are also subject to the retail sales tax, unless purchased for resale as tangible personal property. If the seller fails to collect the appropriate retail sales tax, the buyer is required to remit the retail sales tax (commonly referred to as "deferred retail sales tax") or use tax directly to the department.

If a person using property in Washington incurs a use tax liability, and prior to that use paid a retail sales or use tax on the same property to another state or foreign country (or political subdivision of either), that person may claim a credit for those taxes against the Washington use tax liability.

(a) **Exemption available for certain manufacturing equipment.** RCW 82.08.02565 and 82.12.02565 provide a retail sales and use tax exemption for certain machinery and equipment used by manufacturers. Persons engaged in both extracting and manufacturing activities should refer to WAC 458-20-13601 for an explanation of how these exemptions may apply to them.

(b) **Property manufactured for commercial use.** Persons manufacturing tangible personal property for commercial or industrial use are subject to both the manufacturing B&O and use taxes upon the value of the property manufactured, unless a specific exemption applies. (See also WAC 458-20-134 on commercial or industrial use and WAC 458-

20-112 on the value of products.) If the person also extracts the product, the extracting B&O tax is also due and a MATC may be taken.

For example, ABC Company severs trees, manufactures the logs into lumber, and then uses the lumber to construct an office building. The use of the lumber by ABC in constructing its office building is a commercial or industrial use. ABC is subject to the extracting and manufacturing B&O taxes and may claim a MATC. ABC is also responsible for remitting use tax on the value of the lumber incorporated into the office building.

(8) **Seeds and seedlings.** Persons cultivating timber often purchase or collect tree seeds that are raised into tree seedlings. The growing of the seed may be performed by the person cultivating timber, or through the use of a third-party grower. In the case of a third-party grower, the seed is provided to the grower and tree seedlings are received back after a specified growing period.

(a) **Responsibility to remit retail sales or use tax.** The purchase of seeds or seedlings by a person cultivating timber is subject to the retail sales tax. If the seller fails to collect retail sales tax, the buyer must remit retail sales tax (commonly referred to as "deferred sales tax") or use tax, unless otherwise exempt by law. The use of seed collected by a person cultivating timber is subject to use tax. In the case of seed provided to third-party growers in Washington, the seed owner, and not the third-party grower, incurs any use tax liability upon the value of the seed. The value of seedlings brought into and used in Washington is subject to the use tax, unless retail sales or use tax was previously paid on the seedlings or on the seed from which the seedlings were grown.

(b) **Limited sales and use tax exemptions for conifer seeds.** Chapter 129, Laws of 2001, provides retail sales and use tax exemptions for certain sales and/or uses of conifer seeds. A deferral mechanism is also available if the buyer cannot at the time of purchase determine whether the purchase is in whole or in part eligible for the sales tax exemption.

(i) **Retail sales tax exemption.** Retail sales tax does not apply to the sale of conifer seed that is immediately placed into freezer storage operated by the seller if the seed is to be used for growing timber outside Washington. This exemption also applies to the sale of conifer seed to an Indian tribe or member and is to be used for growing timber in Indian country, again only if the seed is immediately placed into freezer storage operated by the seller. For the purposes of this exemption, "Indian country" has the meaning given in RCW 82.24.010.

This exemption applies only if the buyer provides the seller with an exemption certificate in a form and manner prescribed by the department. The seller must retain a copy of the certificate to substantiate the exempt nature of these sales.

(ii) **Deferring payment of retail sales tax if unable to determine whether purchase qualifies for the retail sales tax exemption.** If a buyer of conifer seed is normally engaged in growing timber both within and outside Washington and is not able to determine at the time of purchase whether the seed acquired, or the seedlings germinated from the seed acquired, will be used for growing timber within or outside Washington, the buyer may defer payment of the sales tax until it is determined that the seed, or seedlings germinated from the seed, will be planted for growing timber in Washington. A buyer that does not pay sales tax on the purchase of conifer seed and subsequently determines that the sale did not qualify for the tax exemption must remit to the department the amount of sales tax that would have been paid at the time of purchase. It is important to note that the sales tax liability may be deferred only if the seller immediately places the conifer seed into freezer storage operated by the seller.

(iii) **Tax paid at source deduction.** A buyer who pays retail sales tax on the purchase of conifer seed and subsequently determines that the sale qualifies for this tax exemption may claim a tax paid at source deduction on the buyer's tax return. The deduction is allowed only if the buyer keeps and preserves records that show from whom the seed was purchased, the date of the purchase, the amount of the purchase, and the tax that was paid.

(iv) **Use tax exemption.** Use tax does not apply to the use of conifer seed to grow seedlings if the seedlings are grown by a person other than the owner of the seed. This exemption applies only if the seedlings will be used for growing timber outside Washington, or if the owner of the conifer seed is an Indian tribe or member and the seedlings will be used for growing timber in Indian country. If the owner of conifer seed is not able to determine at the time the seed is used in a growing process whether the use of the seed qualifies for this exemption, the owner may defer payment of the use tax until it is determined that the seedlings will be planted for growing timber in Washington. For the purposes of this exemption, "Indian country" has the meaning given in RCW 82.24.010.

(9) **Activities and/or income incidental to timber operations.** The following activities or income, and the applicable tax classifications are often associated with timber operations. These tax-reporting requirements apply even if these activities are incidental to the person's primary business activity.

(a) **Taking other natural products from timberland.** The taking of natural products such as boughs, mushrooms, seeds, and cones for sale or commercial or industrial use is subject to the extracting B&O tax. The sale of these products is subject to the wholesaling or retailing B&O tax, as the case may be. Persons both extracting and selling natural products should refer to WAC 458-20-19301 (Multiple activities tax credit) for an explanation of the MATC reporting requirements. The retail sales tax applies to sales to consumers, unless a specific exemption applies.

(b) **Timber cruising, scaling, and access fees.** Charges for timber cruising, scaling services, and to allow others to use private roads are subject to the service and other activities B&O tax. This tax classification also applies to access fees for activities such as hunting, taking firewood, bough cutting, mushroom picking, or grazing. Charges to allow a person to take an identified quantity of tangible personal property are considered sales of that property (see subsection (9)(d) below).

(c) **Planting, thinning, and spraying.** The service and other activities B&O tax applies to the gross proceeds of sale received for planting trees or other vegetation, precommercial thinning, and spraying or applying fertilizers, pesticides, or herbicides.

(d) **Sales of firewood and Christmas trees.** Sales of firewood, Christmas trees, and other tangible personal property are either wholesale (subject to the wholesaling B&O tax) or retail (subject to the retailing B&O and retail sales taxes) sales, depending on the nature of the transaction. (See WAC 458-20-102 for an explanation of the documentation requirements for wholesale sales.) These sales are often made in the nature of charges allowing the buyer to select and take an identified quantity of the property (e.g., six cords of firewood or two Christmas trees).

(e) **Unloading logs from logging trucks.** The unloading of logs from logging trucks onto rail cars at transfer points is subject to the retailing B&O and retail sales taxes when the activity is a rental of equipment with operator. RCW 82.04.050. (See also WAC 458-20-211 for more information regarding the rental of equipment with an operator.) If this activity is not a rental of equipment with operator, the activity is subject to the service and other activities B&O tax. The unloading of logs from logging trucks is subject to the stevedoring B&O tax if performed at an export facility as a part of or to await future movement in waterborne export. (See also WAC 458-20-193D for additional tax-reporting information regarding services associated with interstate or foreign commerce.)

(f) **Transporting logs by water.** Gross income received for transporting logs by water (e.g., log booming and rafting) or log patrols is subject to the "other public service business" classification of the public utility tax.

This tax classification applies to the gross income from this activity even if the person segregates a charge for boomsticks used while transporting the logs. In many cases logs will be towed to a location specified by the customer for storage. Any charges for boomsticks while the logs are stored are rentals of tangible personal property and subject to the retailing B&O and retail sales tax if to a consumer. (See also WAC 458-20-211 for more information regarding the rental of tangible personal property.)

(g) **Export sorting yard operations.** Export sorting yard operations generally consist of multiple activities. These activities can include, but are not necessarily limited to, services such as weighing, tagging, banding, appraising, and sorting of logs. Other incidental activities, such as the debarking, removal of imperfections such as crooks, knots, splits, and seams, and trimming of log ends to remove defects, are also performed as needed. Income received by persons performing the export sorting yard activities as identified in this subsection is subject to the service and other activities B&O tax.

(10) **Harvesting Christmas trees.** Persons growing, producing, or harvesting Christmas trees are either farmers or extractors under the law, as explained below. Activities generally associated with the harvesting of Christmas trees, such as cutting, trimming, shearing, and bailing (packaging) are not manufacturing activities because they are not the "cutting, delimbing, and measuring of felled, cut, or taken trees" under RCW 82.04.120.

(a) **Plantation Christmas tree operations.** Persons growing or producing plantation Christmas trees on their own lands or upon lands in which they have a present right of possession are farmers. RCW 82.04.213. Plantation Christmas trees are Christmas trees that are exempt from the timber excise tax under RCW 84.33.170. This requires that the Christmas trees be grown on land prepared by intensive cultivation and tilling, such as irrigating, plowing, or turning over the soil, and on which all unwanted plant growth is controlled continuously for the exclusive purpose of raising Christmas trees. RCW 82.04.035, 84.33.170, and 84.33.035.

(i) Wholesale sales of plantation Christmas trees by farmers are exempt from B&O tax. RCW 82.04.330. Retail sales of plantation Christmas trees by farmers are subject to the retailing B&O and retail sales taxes. See also WAC 458-20-210 (Sales of agricultural products by farmers).

(ii) Farmers growing or producing plantation Christmas trees may purchase seeds, seedlings, fertilizer, and spray materials at wholesale. RCW 82.04.050 and 82.04.060. See also WAC 458-20-122 (Sales of feed, seed, fertilizer, spray materials, and other tangible personal property for farm use).

(iii) Persons performing cultivation or harvesting services for farmers are generally subject to the service and other activities B&O tax upon the gross income from those services. See also WAC 458-20-209 (Farming for hire and horticultural services performed for farmers).

(b) **Other Christmas tree operations.** Persons who either directly or by contracting with others for the necessary labor or mechanical services fell, cut, or take Christmas trees other than plantation Christmas trees are extractors. RCW 82.04.100. The tax-reporting instructions regarding extracting and extracting for hire activities provided elsewhere in this rule apply.

(11) **Timber harvest operations in conjunction with other land clearing or construction activities.** Persons sometimes engage in timber harvest operations in conjunction with the clearing of land for and/or the construction of residential communities, golf courses, parks, or other development. In such cases, these persons are engaging in separate business activities, each of which may be subject to different tax liabilities. Income attributable to the timber harvest operations is subject to the tax classifications as described elsewhere in this rule. Income attributable to the clearing of land for and/or the construction of the residential community, golf course, park, or other development is subject to the wholesaling, retailing, retail sales, or public road construction taxes, as the case may be. Refer to WAC 458-20-170, 458-20-171, and/or 458-20-172 for tax-reporting information regarding these construction activities. Persons cutting and/or trimming trees after the land is developed should refer to WAC 458-20-226 (Landscape and horticultural services).

(12) **Logging road construction and maintenance.** Constructing or maintaining logging roads (whether active or inactive) is considered an extracting activity. Income derived from this activity is subject to the extracting or extracting for hire B&O tax, as the case may be. This income is not subject to the retail sales tax. A person constructing or maintaining a logging road is a consumer of all materials incorporated into the logging road. The purchase and/or use of these materials is subject to either the retail sales or use tax.

(a) **Logging road materials provided without charge.** Landowners/timber harvesters may provide materials (e.g., crushed rock) without charge to persons constructing or maintaining logging roads. In such cases, while both the person providing the materials without charge and the person applying the materials to the road are consumers under the

law, tax is due only once on the value of the materials. The person constructing or maintaining the roads is responsible for remitting use tax on the value of the materials, unless that person documents that the landowner and/or timber harvester previously remitted the appropriate retail sales or use tax.

Alternatively, the person may take a written statement from the landowner/timber harvester certifying that the landowner/timber harvester has remitted (for past periods) and/or will remit (for future periods) all applicable retail sales or use taxes due on materials provided without charge. This statement must identify the period of time, not to exceed four years, for which it is effective. The statement must identify the landowner/timber harvester's tax reporting account number and must be signed by a person who is authorized to make such a representation.

(b) **Extracted and/or manufactured logging road materials.** Persons constructing or maintaining logging roads are subject to the B&O and use taxes on the value of applied materials they extract and/or manufacture from private pits, quarries, or other locations. The measure of tax is the value of the extracted or manufactured products, as the case may be. See WAC 458-20-112 for additional information regarding how to determine the "value of products."

(i) If the person either directly or by contracting with others extracts and crushes, washes, screens, or blends materials to be incorporated into the road, extracting B&O tax is due on the value of the extracted product before any manufacturing. The manufacturing B&O and use taxes are also due upon the value of manufactured product. If the "cost basis" is the appropriate method for determining the value of products under WAC 458-20-112, this value includes the cost of transportation to a processing point, but does not include any transportation from the processing point to the road site. A MATC may be taken under the B&O tax classification as explained in WAC 458-20-19301.

(ii) In the case of fill dirt, sand, gravel, or rock that is extracted from a location away from the logging road site, but not further processed, extracting B&O and use taxes are due upon the value of the extracted product. If the "cost of production basis" is the appropriate method for determining the value of products under WAC 458-20-112, this value does not include transportation costs to the road site.

(iii) The mere severance of fill dirt, sand, gravel, or rock from outcroppings at the side of a logging road for placement in the road is a part of the logging road construction or maintenance activity. The person incorporating these materials into the road does not incur an extracting and/or use tax liability with respect to these materials.

(13) **Deduction for hauling logs to export yards.** RCW 82.16.050 provides a public utility tax deduction for amounts derived from the transportation of commodities from points of origin within this state to an export elevator, wharf, dock, or shipside ("export facility") on tidewater or navigable tributaries of tidewaters. The commodities must be forwarded from the facility, without intervening transportation, by vessel and in their original form, to an interstate or foreign destination. No deduction is allowed when the point of origin and the point of delivery are located within the corporate limits of the same city or town.

(a) **Conditions for deduction.** This deduction is available only to the person making the last haul, not including hauls within the export facility, before the logs are put on the ship. This deduction is not available if the haul starts in the same city or town where the export facility is located.

The deduction is available only if:

(i) The logs eventually go by vessel to another state or country; and

(ii) The form of the logs does not change between the time the logs are delivered to the export facility and the time the logs are put on the ship. The mere removal of bark from the logs (debarking) and/or the incidental removal of imperfections (see subsection (9)(g), above) while the logs are at the export facility is not itself a manufacturing activity, nor does it result in a change in the "original form" of the logs as contemplated by RCW 82.16.050.

(b) **Documentation requirements for deduction.** The log hauler must prove entitlement to the deduction. Delivery tickets that show delivery to an export facility are not, alone, sufficient proof. A certificate from the export facility operator is acceptable additional proof if it is substantially in the following form. Rather than a certificate covering each haul, a "blanket certificate" may be used for a one-year period of time if no significant changes in operation will occur within this period of time.

Exemption certificate for logs delivered to an export facility

The undersigned export facility operator hereby certifies:

That _____ percentage or more of all logs hauled to the storage facilities at _____, the same located on tidewater or navigable tributaries thereto, will be shipped by vessel directly to an out-of-state or foreign destination and the following conditions will be met:

1. The logs will not go through a process to change the form of the logs before shipment to another state or country.

2. There will be no intervening transportation of these logs from the time of receipt at the export facility until loaded on the vessel for the interstate or foreign journey.

Trucking Firm _____

Trucking Firm Address _____

Trucking Firm UBI# _____

Export Facility Operator _____

Operator UBI# _____

Person Giving Statement _____

Title of Person Giving Statement _____

Date _____

(c) **Examples.** The following examples identify a number of facts and then state a conclusion regarding the deductibility of income derived from hauling logs to export facilities. Unless specifically provided otherwise, presume that the logs are shipped directly to another country from the export facility. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(i) Logs are hauled from the harvest site to an export facility. While the bark will be removed from fifty percent of the logs, no other processing takes place. Because the mere removal of bark is not considered a change in the form of the logs, the export facility may provide a certificate in the above form indicating that all logs at this facility will ultimately be shipped to another country. The hauler may then claim a deduction for one hundred percent of this haul.

(ii) Logs are hauled from the harvest site to an export sorting area. At this location further sorting takes place and eighty percent of the logs are hauled approximately one mile on public roads to shipside and shipped to another country. The other twenty percent of the logs are sold to local sawmills. The haul to the sorting yard is subject to tax because there is another haul from the sorting yard to shipside. It is immaterial that the hauler may be paid based on an "export" rate.

The haul from the sorting yard to shipside is deductible if it does not start and end within the corporate limits of the same city or town, and the hauler obtains the appropriate exemption certificate. The haul to the local sawmills is not deductible.

(iii) Logs are hauled from the harvest site to an export facility. The hauler is aware that all logs will need to be hauled a distance of approximately one-half mile across the export facility yard to reach the ship when it arrives at the dock. The dock is located next to the export facility. The hauler may take the deduction, provided the appropriate exemption certificate is obtained. Movement of the logs within the export facility is not an intervening haul.

(14) **Small timber harvesters—Business and occupation tax exemption.** RCW 82.04.333 provides a limited exemption from B&O tax for small harvesters whose value of product harvested, gross proceeds of log sales, or gross income of the timber harvesting business is less than one hundred thousand dollars per year.

A "small harvester" is a harvester who takes timber in an amount not exceeding two million board feet in a calendar year. It is important to note that whenever the United States or any instrumentality thereof, the state, including its departments and institutions and political subdivisions, or any municipal corporation therein, fells, cuts, or takes timber for sale or for commercial or industrial use, not exceeding these amounts, the small harvester is the first person other than the United States or any instrumentality thereof, the state, including its departments and institutions and political subdivisions, or any municipal corporation therein, who acquires title to or a possessory interest in such timber. RCW 84.33.073.

(a) **Registration - tax return.** A person whose only business activity is as small harvester of timber and whose gross income in a calendar year from the harvesting of timber is less than one hundred thousand dollars, is not required to register with the department for B&O tax purposes. This person must nonetheless register with the forest tax division of the department for payment of the timber excise tax. (See also chapters 84.33 RCW and 458-40 WAC for more information regarding the timber excise tax.)

An unregistered small harvester of timber is required to register with the department for B&O tax purposes in the month when the gross proceeds received during a calendar year from the timber harvested exceed the exempt amount. The harvester must then file and report on a return all proceeds received during the calendar year to the time when the filing of a return is required.

(b) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances. In each example, the harvester must register with the department's forest tax division for the payment of timber excise tax, and must report under the appropriate tax classifications as described above in this rule.

(i) A small harvester not currently registered with the department for B&O tax purposes harvests timber in June and again in August, receiving fifty thousand dollars in June and two hundred thousand dollars in August from the sale of the logs harvested.

B&O tax is due on the entire two hundred fifty thousand dollars received from the sale of logs. The small harvester must register with the department in August when the receipts from the timber harvesting business exceed the one hundred thousand dollars exemption amount. A tax return is to be filed in the appropriate period as provided in WAC 458-20-22801.

(ii) A person is primarily engaged in another business that is currently registered with the department for B&O tax purposes and has monthly receipts of two hundred fifty thousand dollars. The person is a small harvester under RCW 84.33.073 and receives sixty thousand dollars from the sale of the timber harvested.

B&O tax remains due on two hundred fifty thousand dollars from the other business activities. The sixty thousand dollars received from the sale of logs is exempt and is not reported on the person's combined excise tax return. The exemption applies to the activity of harvesting timber and receipts from the sale of logs are not combined with the receipts from other business activities to make the sale of logs taxable.

(iii) A small harvester not otherwise registered with the department for B&O tax purposes contracts with a logging company to provide the labor and mechanical services of the harvesting. The small harvester is to receive sixty percent and

the logging company forty percent of the log sale proceeds. The log purchaser pays two hundred fifty thousand dollars for the logs during the calendar year, paying one hundred fifty thousand dollars to the small harvester and one hundred thousand dollars to the logging company.

For the small harvester, B&O tax is due on the entire two hundred fifty thousand dollars paid for the logs. The small harvester is taxed upon the gross sales price of the logs without deduction for the amount paid to the logging company. RCW 82.04.070. The small harvester must register with the department for B&O tax purposes in the month when, for the calendar year, the proceeds from all timber harvested exceed one hundred thousand dollars. The logging company is taxed on the one hundred thousand dollars it received under the appropriate business tax classification(s). The logging company is not a small harvester as defined in RCW 84.33.073.

[Statutory Authority: RCW 82.32.300. WSR 01-13-042, § 458-20-13501, filed 6/14/01, effective 7/15/01.]

WAC 458-20-136 Manufacturing, processing for hire, fabricating. (1) **Introduction.** This section explains the application of the business and occupation (B&O), retail sales, and use taxes to manufacturers. It identifies the special tax classifications and rates that apply to specific manufacturing activities. The law provides a retail sales and use tax exemption for certain machinery and equipment used by manufacturers. Refer to RCW 82.08.02565, 82.12.02565, and WAC 458-20-13601 (Manufacturers and processors for hire—Sales and use tax exemption for machinery and equipment) for more information regarding this exemption. Persons engaging in both extracting and manufacturing activities should also refer to WAC 458-20-135 (Extracting natural products) and 458-20-13501 (Timber harvest operations).

(2) **Manufacturing activities.** RCW 82.04.120 explains that the phrase "to manufacture" embraces all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different, or useful substance or articles of tangible personal property is produced for sale or commercial or industrial use. The phrase includes the production or fabrication of special-made or custom-made articles.

(a) "To manufacture" includes, but is not limited to:

(i) The production or fabrication of dental appliances, devices, restorations, substitutes, or other dental laboratory products by a dental laboratory or dental technician;

(ii) The cutting, delimbing, and measuring of felled, cut, or taken trees;

(iii) The crushing and/or blending of rock, sand, stone, gravel, or ore; and

(iv) The cleaning (removal of the head, fins, or viscera) of fish.

(b) "To manufacture" does not include:

(i) The conditioning of seed for use in planting;

(ii) The cubing of hay or alfalfa;

(iii) The growing, harvesting, or producing of agricultural products;

(iv) The cutting, grading, or ice glazing of seafood which has been cooked, frozen, or canned outside this state;

(v) The packing of agricultural products, including sorting, washing, rinsing, grading, waxing, treating with fungicide, packaging, chilling, or placing in controlled atmospheric storage; and

(vi) The repairing and reconditioning of tangible personal property for others.

(3) **Manufacturers and processors for hire.** RCW 82.04.110 defines "manufacturer" to mean every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or for commercial or industrial use from his or her own materials or ingredients any articles, substances, or commodities. However, a nonresident of the state of Washington who is the owner of materials processed for it in this state by a processor for hire is not deemed to be a manufacturer in this state because of that processing. Additionally, any owner of materials from which a nuclear fuel assembly is fabricated in this state by a processor for hire is also not deemed to be a manufacturer because of such processing.

(a) The term "processor for hire" means a person who performs labor and mechanical services upon property belonging to others so that as a result a new, different, or useful article of tangible personal property is produced for sale or commercial or industrial use. Thus, a processor for hire is any person who would be a manufacturer if that person were performing the labor and mechanical services upon his or her own materials.

(b) If a particular activity is excluded from the definition of "to manufacture," a person performing the labor and mechanical services upon materials owned by another is not a processor for hire. For example, the cutting, grading, or ice glazing of seafood that has been cooked, frozen, or canned outside this state is excluded from the definition of "to manufacture." Because of this exclusion, a person who performs these activities on seafood belonging to others is not a "processor for hire."

(c) A person who produces aluminum master alloys, regardless of the portion of the aluminum provided by that person's customer, is considered a "processor for hire." RCW 82.04.110. For the purpose of this specific provision, the term "aluminum master alloy" means an alloy registered with the Aluminum Association as a grain refiner or a hardener alloy using the American National Standards Institute designating system H35.3.

(d) In some instances, a person furnishing the labor and mechanical services undertakes to produce an article, substance, or commodity from materials or ingredients furnished in part by the person and in part by the customer. Depending on the circumstances, this person will either be considered a manufacturer or a processor for hire.

(i) If the person furnishing the labor and mechanical services furnishes materials constituting less than twenty percent of the value of all of the materials or ingredients which become a part of the produced product, that person will be presumed to be processing for hire.

(ii) The person furnishing the labor and mechanical services will be presumed to be a manufacturer if the value of the materials or ingredients furnished by the person is equal to or greater than twenty percent of the total value of all materials or ingredients which become a part of the produced product.

(iii) If the person furnishing the labor and mechanical services supplies, sells, or furnishes to the customer, before

processing, twenty percent or more in value of the materials or ingredients from which the product is produced, the person furnishing the labor and mechanical services will be deemed to be the owner of the materials and considered a manufacturer.

(e) There are occasions where a manufacturing facility and ingredients used in the manufacturing process are owned by one person, while another person performs the actual manufacturing activity. The person operating the facility and performing the manufacturing activity is a processor for hire. The owner of the facility and ingredients is the manufacturer.

(4) **Tax-reporting responsibilities for income received by manufacturers and processors for hire.** Persons who manufacture products in this state are subject to the manufacturing B&O tax upon the value of the products, including by-products (see also WAC 458-20-112 regarding "value of products"), unless the activity qualifies for one of the special tax rates discussed in subsection (5) of this section. See also WAC 458-20-193 (Inbound and outbound interstate sales of tangible personal property).

For example, Corporation A stains door panels that it purchases. Corporation A also affixes hinges, guide wheels, and pivots to unstained door panels. Corporation B shears steel sheets to dimension, and slits steel coils to customer's requirements. The resulting products are sold and delivered to out-of-state customers. Corporation A and Corporation B are subject to the manufacturing B&O tax upon the value of these manufactured products. These manufacturing activities take place in Washington, even though the manufactured product is delivered out-of-state. A credit may be available if a gross receipts tax is paid on the selling activity to another state. (See also WAC 458-20-19301 on multiple activities tax credits.)

(a) Manufacturers who sell their products at retail or wholesale in this state are also subject to either the retailing or wholesaling B&O tax, as the case may be. In such cases, the manufacturer must report under both the "production" (manufacturing) and "selling" (wholesaling or retailing) classifications of the B&O tax, and claim a multiple activities tax credit (MATC). See also WAC 458-20-19301 for a more detailed explanation of the MATC reporting requirements.

For example, Incorporated purchases raw fish that it fillets and/or steaks. The resulting product is then sold at wholesale in its raw form to customers located in Washington. Incorporated is subject to both the manufacturing raw seafood B&O tax upon the value of the manufactured product, and the wholesaling B&O tax upon the gross proceeds of sale. Incorporated is entitled to claim a MATC.

(b) Processors for hire are subject to the processing for hire B&O tax upon the total charge made to those services, including any charge for materials furnished by the processor. The B&O tax applies whether the resulting product is delivered to the customer within or outside this state.

(c) The measure of tax for manufacturers and processors for hire with respect to "cost-plus" or "time and material" contracts includes the amount of profit or fee above cost received, plus the reimbursements or prepayments received on account of materials and supplies, labor costs, taxes paid, payments made to subcontractors, and all other costs and expenses incurred by the manufacturer or processor for hire.

(d) A manufacturing B&O tax exemption is available for the cleaning of fish, if the cleaning activities are limited to the removal of the head, fins, or viscera from fresh fish without further processing other than freezing. RCW 82.04.2403. Processors for hire performing these cleaning activities remain subject to the processing for hire B&O tax.

(e) Amounts received by hop growers or dealers for hops shipped outside the state of Washington for first use, even though the hops have been processed into extract, pellets, or powder in this state are exempt from the B&O tax. RCW 82.04.337. However, a processor for hire with respect to hops is not exempt on amounts charged for processing these products.

(f) Manufacturers and processors for hire making retail sales must collect and remit retail sales tax on all sales to consumers, unless the sale is exempt by law (e.g., see WAC 458-20-244 regarding sales of certain food products). A manufacturer or processor for hire making wholesale sales must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from the customers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(5) **Manufacturing—Special tax rates/classifications.** RCW 82.04.260 provides several special B&O tax rates/classifications for manufacturers engaging in certain manufacturing activities. In all such cases the principles set forth in subsection (4) of this section concerning multiple activities and the resulting credit provisions are also applicable.

Special tax classifications/rates are provided for the activities of:

(a) Manufacturing wheat into flour, barley into pearl barley, soybeans into soybean oil, canola into canola oil, meal, or canola by-products, or sunflower seeds into sunflower oil;

(b) Splitting or processing dried peas;

(c) Manufacturing seafood products, which remain in a raw, raw frozen, or raw salted state;

(d) Manufacturing by canning, preserving, freezing, processing, or dehydrating fresh fruits and vegetables;

(e) Slaughtering, breaking, and/or processing perishable meat products and/or selling the same at wholesale and not at retail; and

(f) Manufacturing nuclear fuel assemblies.

(6) **Repairing and/or refurbishing distinguished from manufacturing.** The term "to manufacture" does not include the repair or refurbishing of tangible personal property. To be considered "manufacturing," the application of labor or skill to materials must result in a "new, different, or useful article." If the activity merely restores an existing article of tangible personal property to its original utility, the activity is considered a repair or refurbishing of that property. (See WAC 458-20-173 for tax-reporting information on repairs.)

(a) In making a determination whether an activity is manufacturing as opposed to a repair or reconditioning activity, consideration is given to a variety of factors including, but not limited to:

(i) Whether the activity merely restores or prolongs the useful life of the article;

(ii) Whether the activity significantly enhances the article's basic qualities, properties, or functional nature; and

(iii) Whether the activity is so extensive that a new, different, or useful article results.

(b) The following example illustrates the distinction between a manufacturing activity resulting in a new, different, or useful article, and the mere repair or refurbishment of an existing article. This example should only be used as a general guide. The tax results of other situations must be determined after a review of all the facts and circumstances. In cases of uncertainty, persons should contact the department for a ruling.

(i) Corporation rebuilds engine cores. When received, each core is assigned an individual identification number and disassembled. The cylinder head, connecting rods, crankshaft, valves, springs, nuts, and bolts are all removed and retained for reassembly into the same engine core. Unusable components are discarded. The block is then baked to burn off dirt and impurities, then blasted to remove any residue. The cylinder walls are rebored because of wear and tear. The retained components are cleaned, and if needed straightened and/or reground. Corporation then reassembles the cores, replacing the pistons, gaskets, timing gears, crankshaft bearings, and oil pumps with new parts. The components retained from the original engine core are incorporated only into that same core.

(ii) Corporation is under these circumstances not engaging in a manufacturing activity. The engine cores are restored to their original condition, albeit with a slightly larger displacement because of wear and tear. The cores have retained their original functional nature as they run with approximately the same efficiency and horsepower. The rebuilding of these cores is not so extensive as to result in a new, different, or useful article. Each engine core has retained its identity because all reusable components of the original core are reassembled in the same core. Corporation has taken an existing article and extended its useful life.

(7) **Combining and/or assembly of products to achieve a special purpose as manufacturing.** The physical assembly of products from various components is manufacturing because it results in a "new, different, or useful" product, even if the cost of the assembly activity is minimal when compared with the cost of the components. For example, the bolting of a motor to a pump, whether bolted directly or by using a coupling, is a manufacturing activity. Once physically joined, the resulting product is capable of performing a pumping function that the separate components cannot.

(a) In some cases the assembly may consist solely of combining parts from various suppliers to create an entirely different product that is sold as a kit for assembly by the purchaser. In these situations, the manufacturing B&O tax applies even if the person combining the parts does not completely assemble the components, but sells them as a package. For example, a person who purchases component parts from various suppliers to create a wheelbarrow, which will be sold in a "kit" or "knock-down" condition with some assembly required by purchaser, is a manufacturer. The purchaser of the wheelbarrow kit is not a manufacturer, however, even though the purchaser must attach the handles and wheel.

(b) The department considers various factors in determining if a person combining various items into a single package is engaged in a manufacturing activity. Any single one of the following factors is not considered conclusive evidence of a manufacturing activity, though the presence of one or more of these factors raises a presumption that a manufacturing activity is being performed:

(i) The ingredients are purchased from various suppliers;

(ii) The person combining the ingredients attaches his or her own label to the resulting product;

(iii) The ingredients are purchased in bulk and broken down to smaller sizes;

(iv) The combined product is marketed at a substantially different value from the selling price of the individual components; and

(v) The person combining the items does not sell the individual items except within the package.

(c) The following examples should be used only as a general guide. The specific facts and circumstances of each situation must be carefully examined to determine if the combining of ingredients is a manufacturing activity or merely a packaging or marketing activity. In cases of uncertainty, persons combining items into special purpose packages should contact the department for a ruling.

(i) Combining prepackaged food products and gift items into a wicker basket for sale as a gift basket is not a manufacturing activity when:

(A) The products combined in the basket retain their original packaging;

(B) The person does not attach his or her own labels to the components or the combined basket;

(C) The person maintains an inventory for sale of the individual components and does sell these items in this manner as well as the combined baskets.

(ii) Combining bulk food products and gift items into a wicker basket for sale as a gift basket is a manufacturing activity when:

(A) The bulk food products purchased by the taxpayer are broken into smaller quantities; and

(B) The taxpayer attaches its own labels to the combined basket.

(iii) Combining components into a kit for sale is not a manufacturing activity when:

(A) All components are conceived, designed, and specifically manufactured by and at the person's direction to be used with each other;

(B) The person's label is attached to or imprinted upon the components by supplier;

(C) The person packages the components with no further assembly, connection, reconfiguration, change, or processing.

(8) **Tax liability with respect to purchases of equipment or supplies and property manufactured for commercial or industrial use.** The retail sales tax applies to purchases of tangible personal property by manufacturers and processors for hire unless the property becomes an ingredient or component part of a new article produced for sale, or is a chemical used in the processing of an article for sale. If the seller fails to collect the appropriate retail sales tax, the buyer is required to remit the retail sales tax (commonly referred to as "deferred retail sales tax") or use tax directly to the department. Refer to WAC 458-20-113 for additional information

about what qualifies as an ingredient or component or a chemical used in processing.

(a) RCW 82.08.02565 and 82.12.02565 provide a retail sales and use tax exemption for certain machinery and equipment used by manufacturers and/or processors for hire. Refer to WAC 458-20-13601 for additional information regarding how these exemptions apply.

(b) Persons manufacturing tangible personal property for commercial or industrial use are subject to both the manufacturing B&O and use taxes upon the value of the property manufactured, unless a specific exemption applies. (See also WAC 458-20-134 on commercial or industrial use.) Persons who also extract the product used as an ingredient in a manufacturing process should refer to WAC 458-20-135 for additional information regarding their tax-reporting responsibilities.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-136, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 00-11-096, § 458-20-136, filed 5/17/00, effective 6/17/00; WSR 88-21-014 (Order 88-7), § 458-20-136, filed 10/7/88; WSR 86-20-027 (Order 86-17), § 458-20-136, filed 9/23/86; WSR 83-07-032 (Order ET 83-15), § 458-20-136, filed 3/15/83. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order ET 78-4), § 458-20-136, filed 6/27/78; Order ET 71-1, § 458-20-136, filed 7/22/71; Order ET 70-3, § 458-20-136 (Rule 136), filed 5/29/70, effective 7/1/70.]

WAC 458-20-13601 Manufacturers and processors for hire—Sales and use tax exemption for machinery and equipment. (1) **Introduction.** This section explains the retail sales and use tax exemption provided by RCW 82.08.02565 and 82.12.02565 for sales to or use by manufacturers or processors for hire of machinery and equipment (M&E) used directly in a manufacturing operation or research and development operation. This section explains the requirements that must be met to substantiate a claim of exemption. For information regarding the distressed area sales and use tax deferral refer to WAC 458-20-24001 and chapter 82.60 RCW. For the high technology business sales and use tax deferral refer to chapter 82.63 RCW.

(2) **Definitions.** For purposes of the manufacturing machinery and equipment tax exemption the following definitions will apply.

(a) "Cogeneration" means the simultaneous generation of electrical energy and low-grade heat from the same fuel. See RCW 82.08.02565.

(b) "Device" means an item that is not attached to the building or site. Examples of devices are: Forklifts, chainsaws, air compressors, clamps, free standing shelving, software, ladders, wheelbarrows, and pulleys.

(c) "Industrial fixture" means an item attached to a building or to land. Fixtures become part of the real estate to which they are attached and upon attachment are classified as real property, not personal property. Examples of "industrial fixtures" are fuel oil lines, boilers, craneways, and certain concrete slabs.

(d) "Machinery and equipment" means industrial fixtures, devices, and support facilities, and tangible personal property that becomes an ingredient or component thereof, including repair parts and replacement parts. "Machinery and equipment" includes pollution control equipment installed and used in a qualifying operation to prevent air pollution, water pollution, or contamination that might otherwise result from the operation. "M&E" means "machinery and equipment."

(e) "Manufacturer" has the same meaning as provided in chapter 82.04 RCW.

(f) "Manufacturing" has the same meaning as "to manufacture" in chapter 82.04 RCW.

(g) "Manufacturing operation" means the manufacturing of articles, substances, or commodities for sale as tangible personal property. A manufacturing operation begins at the point where the raw materials enter the manufacturing site and ends at the point where the processed material leaves the manufacturing site. The operation includes storage of raw materials at the site, the storage of in-process materials at the site, and the storage of the processed material at the site. The manufacturing operation is defined in terms of a process occurring at a location. To be eligible as a qualifying use of M&E, the use must take place within the manufacturing operation, unless specifically exempted by law. Storage of raw material or other tangible personal property, packaging of tangible personal property, and other activities that potentially qualify under the "used directly" criteria, and that do not constitute manufacturing in and of themselves, are not within the scope of the exemption unless they take place at a manufacturing site. The statute specifically allows testing to occur away from the site.

The term "manufacturing operation" also includes that portion of a cogeneration project that is used to generate power for consumption within the manufacturing site of which the cogeneration project is an integral part. The term does not include the production of electricity by a light and power business as defined in RCW 82.16.010 or the preparation of food products on the premises of a person selling food products at retail.

(i) Neither duration or temporary nature of the manufacturing activity nor mobility of the equipment determine whether a manufacturing operation exists. For example, operations using portable saw mills or rock crushing equipment are considered "manufacturing operations" if the activity in which the person is engaged is manufacturing. Rock crushing equipment that deposits material onto a roadway is not used in a manufacturing operation because this is a part of the constructing activity, not a manufacturing activity. Likewise, a concrete mixer used at a construction site is not used in a manufacturing operation because the activity is constructing, not manufacturing. Other portable equipment used in nonmanufacturing activities, such as continuous gutter trucks or trucks designed to deliver and combine aggregate, or specialized carpentry tools, do not qualify for the same reasons.

(ii) Manufacturing tangible personal property for sale can occur in stages, taking place at more than one manufacturing site. For example, if a taxpayer processes pulp from wood at one site, and transfers the resulting pulp to another site that further manufactures the product into paper, two separate manufacturing operations exist. The end product of the manufacturing activity must result in an article, substance, or commodity for sale.

(h) "Processor for hire" has the same meaning as used in chapter 82.04 RCW and as explained in WAC 458-20-136 Manufacturing, processing for hire, fabricating.

(i) "Qualifying operation" means a manufacturing operation, a research and development operation, or a testing operation.

(j) "Research and development operation" means engaging in research and development as defined in RCW 82.63.010 by a manufacturer or processor for hire. RCW 82.63.010 defines "research and development" to mean: Activities performed to discover technological information, and technical and nonroutine activities concerned with translating technological information into new or improved products, processes, techniques, formulas, inventions, or software. The term includes exploration of a new use for an existing drug, device, or biological product if the new use requires separate licensing by the Federal Food and Drug Administration under chapter 21, C.F.R., as amended. The term does not include adaptation or duplication of existing products where the products are not substantially improved by application of the technology, nor does the term include surveys and studies, social science and humanities research, market research or testing, quality control, sale promotion and service, computer software developed for internal use, and research in areas such as improved style, taste, and seasonal design.

(k) "Sale" has the same meaning as "sale" in chapter 82.08 RCW, which includes by reference RCW 82.04.040. RCW 82.04.040 includes by reference the definition of "retail sale" in RCW 82.04.050. "Sale" includes renting or leasing, conditional sale contracts, leases with option to purchase, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price.

(l) "Site" means the location at which the manufacturing or testing takes place.

(m) "Support facility" means a part of a building, or a structure or improvement, used to contain or steady an industrial fixture or device. A support facility must be specially designed and necessary for the proper functioning of the industrial fixture or device and must perform a function beyond being a building or a structure or an improvement. It must have a function relative to an industrial fixture or a device. To determine if some portion of a building is a support facility, the parts of the building are examined. For example, a highly specialized structure, like a vibration reduction slab under a microchip clean room, is a support facility. Without the slab, the delicate instruments in the clean room would not function properly. The ceiling and walls of the clean room are not support facilities if they only serve to define the space and do not have a function relative to an industrial fixture or a device.

(n) "Tangible personal property" has its ordinary meaning.

(o) "Testing" means activities performed to establish or determine the properties, qualities, and limitations of tangible personal property.

(p) "Testing operation" means the testing of tangible personal property for a manufacturer or processor for hire. A testing operation begins at the point where the tangible personal property enters the testing site and ends at the point where the tangible personal property leaves the testing site. The term also includes that portion of a cogeneration project that is used to generate power for consumption within the site of which the cogeneration project is an integral part. The term does not include the production of electricity by a light and power business as defined in RCW 82.16.010 or the preparation of food products on the premises of a person selling food products at retail. The testing operation is defined in terms of a process occurring at a location. To be eligible as a qualifying use of M&E, the use must take place within the testing operation, unless specifically excepted by law.

(3) **Sales and use tax exemption.** The M&E exemption provides a retail sales and use tax exemption for machinery and equipment used directly in a manufacturing operation or research and development operation. Sales of or charges made for labor and services rendered in respect to installing, repairing, cleaning, altering, or improving qualifying machinery and equipment are also exempt from sales tax. However, because the exemption is limited to items with a useful life of one year or more, some charges for repair, labor, services, and replacement parts may not be eligible for the exemption. In the case of labor and service charges that cover both qualifying and nonqualifying repair and replacement parts, the labor and services charges are presumed to be exempt. If all of the parts are nonqualifying, the labor and service charge is not exempt, unless the parts are incidental to the service being performed, such as cleaning, calibrating, and adjusting qualifying machinery and equipment.

The exemption may be taken for qualifying machinery and equipment used directly in a testing operation by a person engaged in testing for a manufacturer or processor for hire.

Sellers remain subject to the retailing B&O tax on all sales of machinery and equipment to consumers if delivery is made within the state of Washington, notwithstanding that the sale may qualify for an exemption from the retail sales tax.

(a) Sales tax. The purchaser must provide the seller with an exemption certificate. The exemption certificate must be completed in its entirety. The seller must retain a copy of the certificate as a part of its records. This certificate may be issued for each purchase or in blanket form certifying all future purchases as being exempt from sales tax. Blanket certificates are valid for as long as the buyer and seller have a recurring business relationship. A "recurring business relationship" means at least one sale transaction within a period of twelve consecutive months. RCW 82.08.050 (7)(c).

The form must contain the following information:

(i) Name, address, and registration number of the buyer;

(ii) Name of the seller;

(iii) Name and title of the authorized agent of the buyer/user;

(iv) Authorized signature;

(v) Date; and

(vi) Whether the form is a single use or blanket-use form.

A copy of a M&E certificate form may be obtained from the department of revenue (department) on the internet at http://www.dor.wa.gov/, or by contacting the department's taxpayer services division at:

Department of Revenue
Taxpayer Services
P.O. Box 47478
Olympia, WA 98504-7478
1-800-647-7706

(b) Use tax. The use tax complements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer of any tangible personal property purchased at retail, where the user has not paid retail sales tax with respect to the purchase of the property used. (See also chapter 82.12 RCW and WAC 458-20-178 Use tax.) If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the retail sales tax (commonly referred to as "deferred sales tax") or the use tax directly to the department unless the purchase and/or use is exempt from the retail sales and/or use tax. A qualifying person using eligible machinery and equipment in Washington in a qualifying manner is exempt from the use tax. If an item of machinery and equipment that was eligible for use tax or sales tax exemption fails to overcome the majority use threshold or is totally put to use in a nonqualifying manner, use tax is due on the fair market value at the time the item was put to nonqualifying use. See subsection (9) of this section for an explanation of the majority use threshold.

(4) **Who may take the exemption.** The exemption may be taken by a manufacturer or processor for hire who manufactures articles, substances, or commodities for sale as tangible personal property, and who, for the item in question, meets the used directly test and overcomes the majority use threshold. (See subsection (8) of this section for a discussion of the "used directly" criteria and see subsection (9) of this section for an explanation of the majority use threshold.) However, for research and development operations, there is no requirement that the operation produce tangible personal property for sale. A processor for hire who does not sell tangible personal property is eligible for the exemption if the processor for hire manufactures articles, substances, or commodities that will be sold by the manufacturer. For example, a person who is a processor for hire but who is manufacturing with regard to tangible personal property that will be used by the manufacturer, rather than sold by the manufacturer, is not eligible. See WAC 458-20-136 and RCW 82.04.110 for more information. Persons who engage in testing for manufacturers or processors for hire are eligible for the exemption. To be eligible for the exemption, the taxpayer need not be a manufacturer or processor for hire in the state of Washington, but must meet the Washington definition of manufacturer.

(5) **What is eligible for the exemption.** Machinery and equipment used directly in a qualifying operation by a qualifying person is eligible for the exemption, subject to overcoming the majority use threshold.

There are three classes of eligible machinery and equipment: Industrial fixtures, devices, and support facilities. Also eligible is tangible personal property that becomes an ingredient or component of the machinery and equipment, including repair parts and replacement parts. "Machinery and equipment" also includes pollution control equipment installed and used in a qualifying operation to prevent air pollution, water pollution, or contamination that might otherwise result from the operation.

(6) **What is not eligible for the exemption.** In addition to items that are not eligible because they do not meet the used directly test or fail to overcome the majority use threshold, there are four categories of items that are statutorily excluded from eligibility. The following property is not eligible for the M&E exemption:

(a) Hand-powered tools. Screw drivers, hammers, clamps, tape measures, and wrenches are examples of hand-powered tools. Electric powered, including cordless tools, are not hand-powered tools, nor are calipers, plugs used in measuring, or calculators.

(b) Property with a useful life of less than one year. All eligible machinery and equipment must satisfy the useful life criteria, including repair parts and replacement parts. For example, items such as blades and bits are generally not eligible for the exemption because, while they may become component parts of eligible machinery and equipment, they generally have a useful life of less than one year. Blades generally having a useful life of one year or more, such as certain sawmill blades, are eligible. See subsection (7) of this section for thresholds to determine useful life.

(c) Buildings, other than machinery and equipment that is permanently affixed to or becomes a physical part of a building. Buildings provide work space for people or shelter machinery and equipment or tangible personal property. The building itself is not eligible, however some of its components might be eligible for the exemption. The industrial fixtures and support facilities that become affixed to or part of the building might be eligible. The subsequent real property status of industrial fixtures and support facilities does not affect eligibility for the exemption.

(d) Building fixtures that are not integral to the manufacturing operation, testing operation, or research and development operation that are permanently affixed to and become a physical part of a building, such as utility systems for heating, ventilation, air conditioning, communications, plumbing, or electrical. Examples of nonqualifying fixtures are: Fire sprinklers, building electrical systems, or washroom fixtures. Fixtures that are integral to the manufacturing operation might be eligible, depending on whether the item meets the other requirements for eligibility, such as the used directly test.

(7) **The "useful life" threshold.** RCW 82.08.02565 has a per se exception for "property with a useful life of less than one year." Property that meets this description is not eligible for the M&E exemption. The useful life threshold identifies items that do not qualify for the exemption, such as supplies, consumables, and other classes of items that are not expected or intended to last a year or more. For example, tangible personal property that is acquired for a one-time use and is discarded upon use, such as a mold or a form, has a useful life of less than one year and is not eligible. If it is clear from taxpayer records or practice that an item is used for at least one year, the item is eligible, regardless of the answers to the four threshold questions. A taxpayer may work directly with the department to establish recordkeeping methods that are tailored to the specific circumstances of the taxpayer. The following steps should be used in making a determination whether an item meets the "useful life" threshold. The series of questions progress from simple documentation to complex documentation. In order to substantiate qualification under any step, a taxpayer must maintain adequate records or be able to establish by demonstrating through practice or routine that the threshold is overcome. Catastrophic loss, damage, or destruction of an item does not affect eligibility of machinery and equipment that otherwise qualifies. Assuming the machinery and equipment meets all of the other M&E requirements and does not have a single one-time use or is

not discarded during the first year, useful life can be determined by answering the following questions for an individual piece of machinery and equipment:

(a) Is the machinery and equipment capitalized for either federal tax purposes or accounting purposes?

- If the answer is "yes," it qualifies for the exemption.
- If the answer is "no,"

(b) Is the machinery and equipment warranted by the manufacturer to last at least one year?

- If the answer is "yes," it qualifies for the exemption.
- If the answer is "no,"

(c) Is the machinery and equipment normally replaced at intervals of one year or more, as established by industry or business practice? (This is commonly based on the actual experience of the person claiming the exemption.)

- If the answer is "yes," it qualifies for the exemption.
- If the answer is "no,"

(d) Is the machinery and equipment expected at the time of purchase to last at least one year, as established by industry or business practice? (This is commonly based on the actual experience of the person claiming the exemption.)

- If the answer is "yes," it qualifies for the exemption.
- If the answer is "no," it does not qualify for the exemption.

(8) The "used directly" criteria. Items that are not used directly in a qualifying operation are not eligible for the exemption. The statute provides eight descriptions of the phrase "used directly." The manner in which a person uses an item of machinery and equipment must match one of these descriptions. If M&E is not "used directly" it is not eligible for the exemption. Examples of items that are not used directly in a qualifying operation are cafeteria furniture, safety equipment not part of qualifying M&E, packaging materials, shipping materials, or administrative equipment. Machinery and equipment is "used directly" in a manufacturing operation, testing operation, or research and development operation, if the machinery and equipment meets any one of the following criteria:

(a) Acts upon or interacts with an item of tangible personal property. Examples of this are drill presses, concrete mixers (agitators), ready-mix concrete trucks, hot steel rolling machines, rock crushers, and band saws. Also included is machinery and equipment used to repair, maintain, or install tangible personal property. Computers qualify under this criteria if:

(i) They direct or control machinery or equipment that acts upon or interacts with tangible personal property; or

(ii) If they act upon or interact with an item of tangible personal property.

(b) Conveys, transports, handles, or temporarily stores an item of tangible personal property at the manufacturing site or the testing site. Examples of this are wheelbarrows, handcarts, storage racks, forklifts, tanks, vats, robotic arms, piping, and concrete storage pads. Floor space in buildings does not qualify under this criteria. Not eligible under this criteria are items that are used to ship the product or in which the product is packaged, as well as materials used to brace or support an item during transport.

(c) Controls, guides, measures, verifies, aligns, regulates, or tests tangible personal property at the site or away from the site. Examples of "away from the site" are road testing of trucks, air testing of planes, or water testing of boats, with the machinery and equipment used off site in the testing eligible under this criteria. Machinery and equipment used to take readings or measurements is eligible under this criteria.

(d) Provides physical support for or access to tangible personal property. Examples of this are catwalks adjacent to production equipment, scaffolding around tanks, braces under vats, and ladders near controls. Machinery and equipment used for access to the building or to provide a work space for people or a space for tangible personal property or machinery and equipment, such as stairways or doors, is not eligible under this criteria.

(e) Produces power for or lubricates machinery and equipment. A generator providing power to a sander is an example of machinery and equipment that produces power for machinery and equipment. An electrical generating plant that provides power for a building is not eligible under this criteria. Lubricating devices, such as hoses, oil guns, pumps, and meters, whether or not attached to machinery and equipment, are eligible under this criteria.

(f) Produces another item of tangible personal property for use in the manufacturing operation, testing operation, or research and development operation. Machinery and equipment that makes dies, jigs, or molds, and printers that produce camera-ready images are examples of this.

(g) Places tangible personal property in the container, package, or wrapping in which the tangible personal property is normally sold or transported.

(h) Is integral to research and development as defined in RCW 82.63.010.

(9) **The majority use threshold.**

(a) Machinery and equipment both used directly in a qualifying operation and used in a nonqualifying manner is eligible for the exemption only if the qualifying use satisfies the majority use requirement. Examples of situations in which an item of machinery and equipment is used for qualifying and nonqualifying purposes include: The use of machinery and equipment in manufacturing and repair activities, such as using a power saw to make cabinets in a shop versus using it to make cabinets at a customer location; the use of machinery and equipment in manufacturing and constructing activities, such as using a forklift to move finished sheet rock at the manufacturing site versus using it to unload sheet rock at a customer location; and the use of machinery and equipment in manufacturing and transportation activities, such as using a mixer truck to make concrete at a manufacturing site versus using it to deliver concrete to a customer. Majority use can be expressed as a percentage, with the minimum required amount of qualifying use being greater than fifty percent compared to overall use. To determine whether the majority use requirement has been satisfied, the person claiming the exemption must retain records documenting the measurement used to substantiate a claim for exemption or, if time, value, or volume is not the basis for measurement, be able to establish by demonstrating through practice or routine that the requirement is satisfied. Majority use is measured by looking at the use of an item during a calendar year using any of the following:

(i) Time. Time is measured using hours, days, or other unit of time, with qualifying use of the M&E the numerator, and total time used the denominator. Suitable records for time

measurement include employee time sheets or equipment time use logs.

(ii) Value. Value means the value to the person, measured by revenue if the qualifying and nonqualifying uses both produce revenue. Value is measured using gross revenue, with revenue from qualifying use of the M&E the numerator, and total revenue from use of the M&E the denominator. If there is no revenue associated with the use of the M&E, such as in-house accounting use of a computer system, the value basis may not be used. Suitable records for value measurement include taxpayer sales journals, ledgers, account books, invoices, and other summary records.

(iii) Volume. Volume is measured using amount of product, with volume from qualifying use of the M&E the numerator and total volume from use of the M&E the denominator. Suitable records for volume measurement include production numbers, tonnage, and dimensions.

(iv) Other comparable measurement for comparison. The department may agree to allow a taxpayer to use another measure for comparison, provided that the method results in a comparison between qualifying and nonqualifying uses. For example, if work patterns or routines demonstrate typical behavior, the taxpayer can satisfy the majority use test using work site surveys as proof.

(b) Each piece of M&E does not require a separate record if the taxpayer can establish that it is reasonable to bundle M&E into classes. Classes may be created only from similar pieces of machinery and equipment and only if the uses of the pieces are the same. For example, forklifts of various sizes and models can be bundled together if the forklifts are doing the same work, as in moving wrapped product from the assembly line to a storage area. An example of when not to bundle classes of M&E for purposes of the majority use threshold is the use of a computer that controls a machine through numerical control versus use of a computer that creates a camera ready page for printing.

(c) Typically, whether the majority use threshold is met is decided on a case-by-case basis, looking at the specific manufacturing operation in which the item is being used. However, for purposes of applying the majority use threshold, the department may develop industry-wide standards. For instance, the aggregate industry uses concrete mixer trucks in a consistent manner across the industry. Based on a comparison of selling prices of the processed product picked up by the customer at the manufacturing site and delivery prices to a customer location, and taking into consideration the qualifying activity (interacting with tangible personal property) of the machinery and equipment compared to the nonqualifying activity (delivering the product) of the machinery and equipment, the department has determined that concrete trucks qualify under the majority use threshold. Only in those limited instances where it is apparent that the use of the concrete truck is atypical for the industry would the taxpayer be required to provide recordkeeping on the use of the truck in order to support the exemption.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.08.02565, and 82.12.02565. WSR 08-14-024, § 458-20-13601, filed 6/20/08, effective 7/21/08. Statutory Authority: RCW 82.32.300. WSR 00-11-096, § 458-20-13601, filed 5/17/00, effective 6/17/00.]

WAC 458-20-138 Personal services rendered to others. The term "personal services," as used herein, refers generally to the activity of rendering services as distinct from making sales of tangible personal property or of services which have been defined in the law as "sales" or "sales at retail." (See RCW 82.04.040 and 82.04.050.)

The following are illustrative of persons performing personal services which are within the scope of this rule: Attorneys, doctors, dentists, architects, engineers, public accountants, public stenographers, barbers, beauty shop operators. (See also WAC 458-20-224.)

Business and Occupation Tax

Persons engaged in the business of rendering personal services to others are taxable under the service and other activities classification upon the gross income of such business.

There must be included within gross amounts reported for tax all fees for services rendered and all charges recovered for expenses incurred in connection therewith, such as transportation costs, hotel, restaurant, telephone and telegraph charges, etc.

Retail Sales Tax

The retail sales tax does not apply to the amount charged or received for the rendition of personal services to others, even though some tangible personal property in the form of materials and supplies is furnished or used in connection with such services.

Persons performing such services are consumers of all materials and supplies used in connection therewith and must pay the retail sales tax upon the purchase of such material and supplies.

If persons engaged in a personal service business sell articles of tangible personal property apart from the rendition of personal services, the retail sales tax must be collected upon the sale of such articles.

Revised June 1, 1970.

[Order ET 70-3, § 458-20-138 (Rule 138), filed 5/29/70, effective 7/1/70.]

WAC 458-20-139 Trade shops—Printing plate makers, typesetters, and trade binderies. The term "printing plate makers" includes, among others, photoengravers, electrotypers, stereotypers, and lithographic plate makers.

Business and Occupation Tax

Printing plate makers, typesetters and trade binderies (referred to in the trade as "trade shops") are primarily engaged in the business of altering or improving tangible personal property owned by them for sale or altering or improving tangible personal property owned by their customers. In either case the gross proceeds (including the value of any property exchanged by the customer in kind) from sales of, or services rendered to, plates, mats, engravings, type, etc., which are delivered in this state are taxable under retailing if the sale is to a "consumer" or wholesaling-all others if the sale is to one who will resell the property in the regular course of business without intervening "use." (See WAC 458-20-102A Resale certificates and WAC 458-20-102 Reseller permits.) Neither of these classifications is applicable however, if the article sold is delivered to an out-of-state customer at an

out-of-state point or if an article is produced for commercial or industrial use (see WAC 458-20-134). In these cases tax is due under the manufacturing classification on the "value of products."

Retail Sales Tax

Sales to the printing industry and others of tangible personal property, or of services of altering or improving tangible personal property, by printing plate makers, typesetters, and trade binderies are sales at retail and subject to the retail sales tax unless the purchaser resells the article in the regular course of business without any intervening "use." For example, a trade shop must collect and account for the retail sales tax where a printing plate is sold to a printer who uses the plate to produce copy for a customer, even though he subsequently sells and delivers both the plate and the copy to the customer. In this situation the printer has made "intervening use" of the plate as a printing tool and is a "consumer" liable for payment of the retail sales tax to the trade shop.

Sales of plates, engravings, etc., to advertising agencies are retail sales and subject to the retail sales tax.

Sales by supply houses to trade shops of metal or other materials becoming a component part of an article produced for sale are not subject to the retail sales tax. As evidence of this, trade shops are required to furnish their vendors resale certificates for purchases made before January 1, 2010, or reseller permits for purchases made on or after January 1, 2010, to document the wholesale nature of any purchase as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). On the other hand, sales to trade shops of items for use such as machinery, equipment, tools, and other articles or materials, including chemicals which are used in the production of plates, mats, engravings, type, etc., are retail sales subject to the retail sales tax.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-139, filed 2/25/10, effective 3/28/10; Order ET 70-3, § 458-20-139 (Rule 139), filed 5/29/70, effective 7/1/70.]

WAC 458-20-140 Photofinishers and photographers.

Business and Occupation Tax

Retailing. The gross proceeds of all sales taxable under the retail sales tax are taxable under the retailing classification.

Wholesaling. Taxable under the wholesaling classification upon the gross proceeds from sales for resale.

Manufacturing. Photofinishers who produce negatives, prints, or slides in Washington and who transfer or deliver such articles to points outside this state are subject to business tax under the manufacturing classification upon the value of products (see Rule 112) [WAC 458-20-112] and are not subject to tax under the retailing or wholesaling classification.

Processing for hire. Photofinishers who develop film for others and who make delivery of the film to points outside the state are subject to business tax under the processing for hire classification upon the total charge for the work done. It is immaterial that the customers are located outside the state or that the film was sent in from outside the state for processing.

Service. Taxable under the service and other activities classification upon gross income from sales to publishers of newspapers, magazines and other publications of the right to publish photographs.

Retail Sales Tax

Photofinishers. Photofinishers developing films and selling to consumers the prints made therefrom are making taxable retail sales, and the retail sales tax must be collected upon the full charge made to the customer. Photofinishers developing films and selling to other than consumers the prints made therefrom are sales for resale and not subject to the retail sales tax.

Sales by supply houses to photofinishers of paper upon which prints are made and of chemicals which are to be used in making the prints are sales for resale and are not taxable under the retail sales tax. Sales by supply houses to photofinishers of equipment and materials which do not become a component part of the prints are taxable under the retail sales tax.

Portrait and commercial photographers. Photographers who make negatives on special order and sell photographs to customers (other than dealers for resale) must collect the retail sales tax upon such sales.

Sales by supply houses to a portrait or commercial photographer of the paper upon which such photographs are printed are not taxable because such material becomes an ingredient of the final product sold for consumption. Sales of chemicals, such as developing agents, fixing solutions, etc., for use in such process are also nontaxable. However, sales to a photographer of materials and equipment used in processing, whenever such materials do not become a component part of the final photograph or are not chemicals used in processing are taxable under the retail sales tax.

Sales to consumers by photographers of pictures, frames, camera films and other articles are subject to the retail sales tax.

Sales by photographers of the right to publish photographs are primarily licenses to use and not sales of tangible personal property. Such sales are not subject to the retail sales tax.

Photographers tinting and coloring pictures or prints belonging to customers are making retail sales upon which the retail sales tax applies to the total charge made therefor. Sales of oil and water colors to a photographer for use in tinting and coloring pictures or prints belonging to a customer are sales for resale and are not subject to the retail sales tax.

[Statutory Authority: RCW 82.32.300. WSR 83-07-034 (Order ET 83-17), § 458-20-140, filed 3/15/83; Order ET 70-3, § 458-20-140 (Rule 140), filed 5/29/70, effective 7/1/70.]

WAC 458-20-141 Duplicating activities and mailing bureaus.

(1) **Introduction.** This rule discusses the business and occupation (B&O) tax and retail sales and use tax reporting responsibilities of persons who engage in duplicating activities or who provide mailing bureau services in Washington. Persons engaged in printing activities should refer to WAC 458-20-144 (Printing industry).

(2) **Duplicating activities.** Duplicating is the copying of typed, written, drawn, photographed, previously duplicated,

or printed materials using a photographic process such as photocopying, color copying, or blueprinting.

(a) **Sales of duplicated products.** Income from the sale of photostats, photocopies, blueprint copies and other duplicated tangible personal property to consumers is subject to the retailing B&O tax. The measure of tax is the gross proceeds of sale. The seller is also responsible for collecting and remitting retail sales tax on the selling price when making sales to consumers, unless a specific exemption applies. The wholesaling B&O tax applies to the gross proceeds of sale when the buyer purchases the duplicated property for resale without intervening use. The seller must obtain a resale certificate from the buyer to document the wholesale nature of any sale as provided in WAC 458-20-102 (Resale certificates).

If the seller is also the manufacturer of the duplicated products, the seller may be eligible for a multiple activities tax credit. Refer to WAC 458-20-19301 (Multiple activities tax credits) for more information about the credit.

(b) **Duplicating as a manufacturing activity.** A person duplicating tangible personal property for sale or commercial or industrial use (the use of manufactured property as a consumer) is subject to the manufacturing B&O tax classification. For further information about manufacturing activities, refer to WAC 458-20-112 (Value of products), WAC 458-20-134 (Commercial or industrial use), and WAC 458-20-136 (Manufacturing, processing for hire, fabricating).

(c) **Self-service copying.** Some persons provide consumers with access to duplicating equipment to make their own copies (frequently referred to "self-service copying"). These customers are generally charged on a per page basis. The gross proceeds of sales made to consumers for self-service copying is subject to the retailing B&O tax. The seller is also responsible for collecting retail sales tax, unless a specific exemption applies. In such cases, the person providing access to duplicating equipment is not engaged in a manufacturing activity and charges for self-service copying are not subject to the manufacturing B&O tax.

(d) **Potential litter tax liability.** Chapter 82.19 RCW imposes a litter tax on manufacturers (including duplicators), wholesalers, and retailers of certain products. These products include, but are not limited to, newspapers, magazines, and household paper and paper products. Thus, persons who duplicate tangible personal property for sale or who provide facilities for self-service copying may incur a litter tax liability. The measure of the litter tax is the gross proceeds of sale. For further information about the litter tax, refer to chapter 82.19 RCW and WAC 458-20-243 (Litter tax).

(e) **Purchases for resale**. The purchase of tangible personal property for resale as tangible personal property or as a component or ingredient of duplicated property is a purchase at wholesale. Examples of items that may be purchased at wholesale include paper, ink, toner, and staples. Refer to WAC 458-20-113 (Ingredients or components, chemicals used in processing new articles for sale). Wholesale purchases are not subject to retail sales tax when the buyer provides a resale certificate to the seller as provided by WAC 458-20-102 (Resale certificates).

(f) **Purchases subject to retail sales or use tax.** A person who engages in duplicating activities and acquires tangible personal property for use as a consumer must pay retail sale tax (commonly referred to as "deferred sales tax") or use tax directly to the department when the seller fails to collect retail sales tax. Examples of purchases by a person engaged in duplicating activities that are subject to retail sales tax or use tax include photocopiers, cutting boards, computers, cash registers, and office furniture. For further information about the use tax, refer to WAC 458-20-178 (Use tax).

Persons who engage in duplicating products for sale should refer to WAC 458-20-13601 (Manufacturers and processors for hire—Sales and use tax exemption for machinery and equipment) for information about the sales and use tax exemptions for certain machinery and equipment used directly in a manufacturing operation.

(g) **Example.** Copy Company provides a public area with photocopying equipment and materials (paper, toner, and staples) to allow customers to make their own copies. Copy Company has a separate area where Copy Company employees make copies for customers. The income attributable to copies made both by the customers and by Copy Company employees is subject to the retailing B&O and retail sales taxes. The value of the copies made by Copy Company employees is also subject to the manufacturing B&O tax, and Copy Company may claim a multiple activities tax credit as described above in subsection (2)(a). Litter tax may be due as explained above in subsection (2)(d).

Copy Company may purchase the paper, toner, and staples that are used or provided in both areas at wholesale, if the seller receives a resale certificate. Retail sales or use tax applies to the purchase of photocopying equipment in both areas. The purchase and/or use of the equipment where Copy Company employees make copies may qualify for the machinery and equipment exemption described in WAC 458-20-13601.

(3) **Mailing bureau services.** Mailing bureaus, also referred to as mail houses, prepare for distribution mail pieces such as bulletins, form letters, advertising material, political publications, and flyers as directed by their customers. The customer may provide the mail pieces to be prepared for distribution or the mailing bureau itself may sell the material to the customer. Mailing bureaus that duplicate the material being prepared should also refer to subsection (2), above. Mailing bureaus that print the material being prepared should also refer to WAC 458-20-144.

(a) **Mailing bureau activities.** Activities conducted by mailing bureaus include, but are not limited to, picking up, addressing, labeling, binding, folding, enclosing, sealing, tabbing, and mailing the mail pieces. The mailing bureau generally charges the customer on a per-piece basis for each separate service provided plus the actual cost of any postage.

Charges for labor and services rendered in respect to altering, imprinting, or improving tangible personal property of or for consumers are retail sales. RCW 82.04.050 (2)(a). Thus, the retailing B&O tax applies to income received from consumers for services that include addressing, labeling, binding, folding, enclosing, sealing, and/or tabbing. Mailing bureau businesses are also responsible for collecting and remitting retail sales tax when making sales to consumers, unless a specific exemption applies.

(b) **Measure of tax.** The measure of the B&O and retail sales taxes is the gross proceeds of sale and selling price, respectively. These terms include all consideration paid by

the buyer, however identified, without any deduction for costs of doing business, such as material, labor, and delivery costs. RCW 82.04.070 and 82.08.010.

(i) **Postage.** Charges for postage or other delivery costs are included in the measure of tax for both B&O tax and retail sales tax if the costs are part of the consideration paid by the customer. It is immaterial if the amounts charged for postage are stated or shown separately on the sales invoice or reflect actual mailing costs to the mailing bureau. Amounts charged for postage and other delivery costs are not included in the measure of tax only if the amounts are not part of the consideration paid by the customer.

(A) **When is postage part of the consideration paid?** Charges for postage costs are considered part of the consideration paid if the permit to use precancelled stamps, a postage meter, or an imprint account for bulk mailings is in the name of the mailing bureau. The mailing bureau is liable to the post office for payment and the customer's payment of such amounts represents a payment on the sale of tangible personal property or the services provided. For further information, refer to WAC 458-20-111 (Advances and reimbursements).

(B) **When is postage not part of the consideration paid?** Charges for postage are not considered part of the consideration paid if the permit to use precancelled stamps or a permit imprint account for bulk mailings is in the customer's name. The mailing bureau in these cases has no primary or secondary liability for payment of the postage costs. (Refer to WAC 458-20-111 for information about advances and reimbursements.)

(ii) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of any situation must be determined after a review of all facts and circumstances. For purposes of the following examples, sales invoices to the customer separately identify charges for postage.

(A) **Example 1.** Mailing Bureau receives mail pieces from Department Store to prepare and mail. Mailing Bureau advises Department Store of the estimated amount of postage. Department Store deposits an amount equal to the estimated cost of postage in its own permit imprint account. The estimated postage is not part of the total consideration paid because the Department Store is personally liable to the post office for postage. The total charge, excluding postage, is the consideration paid by Department Store and subject to tax.

(B) **Example 2.** Assume facts as described above in Example 1. The post office determines that the actual cost of postage exceeds the estimated amount deposited by Department Store in its permit imprint account. Post office transfers the additional amount for postage from Mailing Bureau's account. Mailing Bureau invoices Department Store for the additional amount. The additional amount for postage is not part of the consideration paid and is not included in the measure of tax because Mailing Bureau's liability for payment of the additional postage is limited to that of an agent.

(C) **Example 3.** Mailing Bureau receives from Political Candidate B mail pieces to prepare and mail. Mailing Bureau uses its own postage meter to apply metered postage. Postage is a part of the consideration paid by Candidate B and is included in the measure of tax.

(D) **Example 4.** Mailing Bureau receives prestamped mail pieces from Medical Clinic to prepare and mail. The mail pieces qualify for the lower bulk mail rates after Mailing Bureau prepares the mail pieces. The post office refunds the difference between the single piece rate and the bulk mail rate to Mailing Bureau. Mailing Bureau retains the amount due for services rendered and in turn remits the balance of the refunded postage to Medical Clinic. Postage is not a part of the consideration paid and is not included in the measure of tax.

(E) **Example 5.** Mailing Bureau prints, prepares, and mails mail pieces for Non-Profit Organization's fund-raising drive. Mailing Bureau applies metered postage using its own postage meter. The charge for postage is a part of the consideration paid and included in the measure of tax.

(F) **Example 6.** Mailing Bureau duplicates, prepares, and mails advertising for Restaurant. Mailing Bureau applies precancelled stamps that it purchases from the post office. The charge for postage is a part of the consideration paid and included in the measure of tax.

(G) **Example 7.** Mailing Bureau picks up mail pieces from Washington City to prepare and mail. Mailing Bureau applies metered postage using its own postage meter. The charge for postage is a part of the consideration paid by Washington City and included in the measure of tax.

(H) **Example 8.** Mailing Bureau prepares and mails advertising for Insurance Company. To apply postage, Mailing Bureau uses a postage meter leased by Insurance Company from a third party vendor. Insurance Company is liable to the third party vendor for payment of postage. The consideration does not include charges for postage.

(I) **Example 9.** Assume same facts as described in Example 8 above. The postage meter account contains insufficient funds required for mailing pieces. Mailing Bureau advances sufficient funds to Insurance Company's metering account. Mailing Bureau invoices Insurance Company for the additional amount. The consideration does not include postage because Mailing Bureau's liability for payment is limited to that of an agent.

(c) **Retail sales tax exemptions.** Certain sales tax exemptions may apply to the sale of tangible personal property or labor and services rendered to tangible personal property.

(i) **Interstate sales of tangible personal property.** The sale of tangible personal property is not subject to retail sales tax when the seller agrees to and does deliver the property outside the state. Refer to WAC 458-20-193 (Inbound and outbound interstate sales of tangible personal property) for further information about interstate sales.

(ii) **Labor and services rendered in respect to tangible personal property of or for a nonresident.** RCW 82.08.-0265 provides a retail sales tax exemption for charges made for labor and services rendered in respect to any installing, repairing, cleaning, altering, or improving tangible personal property of or for a nonresident when the seller agrees to and does deliver the property to the purchaser at a point outside this state or delivers the property to a common or bona fide private carrier consigned to the purchaser at a point outside this state. For further information about this exemption, refer to WAC 458-20-173 (Installing, cleaning, repairing or otherwise altering or improving personal property of consumers).

(d) **Purchases for resale.** The purchase of tangible personal property for resale as tangible personal property or to become a component or ingredient of property upon which mailing bureau services will be performed is a purchase at wholesale. Examples of items that may be purchased at wholesale include paper, printing ink, envelopes, and staples. Wholesale purchases are not subject to retail sales tax when the buyer provides a resale certificate to the seller as provided by WAC 458-20-102 (Resale certificates). Refer to WAC 458-20-113 (Ingredients or components, chemicals used in processing new articles for sale) for further information regarding ingredients and components.

(e) **Purchases subject to retail sales or use tax.** A mailing bureau business that purchases, leases, or otherwise acquires tangible personal property for use as a consumer must pay retail sale tax (commonly referred to as "deferred sales tax") or use tax directly to the department when the seller fails to collect the retail sales tax. Examples of such property include photocopiers, cutting boards, computers, office furniture, and equipment to address, label, fold, seal, insert, meter, stamp, or sort. For further information about the use tax, refer to WAC 458-20-178 (Use tax).

(f) **Purchases of mailing lists.** Persons acquiring mailing lists are purchasing an information service regardless of the medium used to provide or transfer the information. Thus, the purchase of a mailing list by a mailing bureau business is not subject to either retail sales or use tax.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 05-03-053, § 458-20-141, filed 1/11/05, effective 7/1/05. Statutory Authority: RCW 82.32.300. WSR 83-07-034 (Order ET 83-17), § 458-20-141, filed 3/15/83; Order ET 70-3, § 458-20-141 (Rule 141), filed 5/29/70, effective 7/1/70.]

WAC 458-20-142 Photographic equipment and supplies. Sales of tangible personal property by a photographic supply house to persons who purchase such property for personal consumption or use are subject to the retail sales tax. Illustrative of such sales are the following:

Photographic films, paper, chemicals, frames, repair parts for cameras and other equipment sold to customers for personal use.

X-ray materials and equipment sold to doctors, dentists, hospitals, dental and X-ray laboratories.

Equipment sold to photofinishers, portrait and commercial photographers and photoengravers such as cameras, lenses, backgrounds, graduates, trays, utensils, lamps, retouching dope, leads, pencils and sundry materials which do not become an ingredient or component part of the pictures produced for sale.

Photographic films, chemicals and equipment sold to a newspaper publisher.

Photographic films sold to portrait and commercial photographers for use in their business.

Sales of tangible personal property by a photographic supply house to persons who resell such property in the regular course of business or consume the same in producing for sale a new article of which such property is an ingredient or component, or a chemical used in processing the same, are not subject to the retail sales tax. Illustrative of such sales are the following:

Photographic films, photo mailers, cameras, art-corners, etc., sold to a dealer or photographer for the purpose of resale;

Photographic paper, mounts, frames, adhesives, card board, oil and water colors, India ink sold to a photofinisher, portrait or commercial photographer or photoengraver to be used in producing photographic prints for sale.

Envelopes, paper and twine sold to a photographer or photofinisher for use in delivering photographic prints sold.

Chemicals, such as developing agents, fixing agents, etc., sold to a photofinisher, portrait or commercial photographer or photoengraver, which chemicals are used in producing pictures for sale.

The retail sales tax applies upon the charge made for repairing cameras and other equipment, the retouching or alteration of photographs or films, when done for consumers.

[Statutory Authority: RCW 82.32.300. WSR 83-07-034 (Order ET 83-17), § 458-20-142, filed 3/15/83; Order ET 70-3, § 458-20-142 (Rule 142), filed 5/29/70, effective 7/1/70.]

WAC 458-20-143 Printers and publishers of newspapers, magazines, and periodicals. (1) **Introduction.** This section explains the application of the business and occupation (B&O), retail sales, and use taxes to printers and/or publishers of newspapers, magazines, periodicals, and other printed materials. The department of revenue (department) has adopted other sections providing tax reporting information to persons printing, publishing, or selling these publications and other printed materials.

• Persons selling newspapers, magazines, and periodicals that are not printed and/or published by the seller should also refer to WAC 458-20-127;

• For information regarding the printing industry in general, see WAC 458-20-144;

• For information regarding the tax-reporting responsibilities of persons selling direct mail or engaging in business as a mailing bureau, see WAC 458-20-141;

• For information regarding the tax-reporting responsibilities of persons duplicating printed materials for others, see WAC 458-20-141;

• For information regarding potential litter tax liability, see WAC 458-20-243.

(2) **Definitions.** The following definitions apply throughout this section:

(a) **"Newspaper."**

(i) Effective July 1, 2008, "newspaper" means a publication issued regularly at stated intervals at least twice a month and printed on newsprint in tabloid or broadsheet format folded loosely together without stapling, glue, or any other binding of any kind, including any supplement of a printed newspaper; and an electronic version of a printed newspaper that:

• Shares content with the printed newspaper; and

• Is prominently identified by the same name as the printed newspaper or otherwise conspicuously indicates that it is a complement to the printed newspaper. See RCW 82.04.214.

(ii) Prior to July 1, 2008, "newspaper" means a publication issued regularly at stated intervals at least twice a month and printed on newsprint in tabloid or broadsheet format

folded loosely together without stapling, glue, or any other binding of any kind.

(b) **"Supplement"** means a printed publication, including a magazine or advertising section, that is:

(i) Labeled and identified as part of the printed newspaper; and

(ii) Circulated or distributed:

• As an insert or attachment to the printed newspaper; or

• Separate and apart from the printed newspaper so long as the distribution is within the general circulation area of the newspaper.

(c) **"Periodical or magazine"** means a printed publication, other than a newspaper, issued regularly at stated interval at least once every three months, including any supplement or special edition of the publication.

(d) For purposes of this section, **"other printed material"** refers to printed materials other than newspapers, magazines, or periodicals.

(3) **General tax guidance.**

(a) **Publishing newspapers.** Effective July 1, 2009, publishers of newspapers are taxable under the publication of newspapers classification of the B&O tax upon the gross income (including advertising income) derived from publishing newspapers. See (d) of this subsection and RCW 82.04.-260(13). Prior to July 1, 2009, publishers of newspapers are taxable under the printing and publishing classification of the B&O tax upon the gross income (including advertising income) derived from publishing newspapers.

Persons reporting income under the publication of newspapers classification of the B&O tax must file a complete annual report with the department. In addition, such persons must electronically file with the department all surveys, reports, returns, and any other forms. Refer to RCW 82.32.600 and WAC 458-20-267 for the specific guidelines and requirements.

Retail sales of newspapers, whether by publishers or others, are exempt from retail sales tax. See RCW 82.08.0253.

(b) **Publishing periodicals or magazines.** Publishers of periodicals or magazines are taxable under the printing and publishing classification of the B&O tax upon the gross income (including advertising income) derived from publishing periodicals or magazines. See (d) of this subsection and RCW 82.04.280(1).

Retail sales of printed magazines and periodicals are subject to retail sales tax. Magazines and periodicals transferred electronically to the end user are also subject to the retail sales tax regardless of how they are accessed. For more information on the sale of digital products, refer to RCW 82.04.050, 82.04.192, and 82.04.257.

(c) **Publishing other printed materials.** Retail and wholesale sales of other printed materials by persons who both print and publish the items, are taxable under the printing and publishing classification. Persons who publish but do not print other printed materials, are subject to:

• Either the wholesaling or retailing B&O tax, measured by gross sales of the other printed materials; and

• The service and other activities B&O tax, measured by the gross income received from advertising.

(d) **Doing business inside and outside the state.** RCW 82.04.460 requires that advertising income earned by printers and by publishers of newspapers, periodicals, and magazines derived from business activities performed within Washington be apportioned to this state for tax purposes. Refer to chapter 23 (E2SSB 6143), Laws of 2010 1st sp. sess. Part I for information on apportioning advertising income.

(e) **Wholesale sales of printed materials.** Sales of magazines, periodicals, and other printed materials by the publisher to newsstands, book stores, department stores, and others who resell such items are wholesale sales. Such sales are not subject to retail sales tax when the buyer provides a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, to the seller.

(4) **Sales to publishers.**

(a) Sales to newspaper, magazine and periodical publishers of paper and printers ink which become a part of the publications sold, and sales by printers of printed publications to publishers for sale, are wholesale sales and are not subject to the retail sales tax when the buyer provides a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, to the seller.

(b) With respect to community newspapers which are distributed free of charge, where the publisher has a contract with his advertisers to distribute the newspaper to the subscriber in consideration for the payments made by the advertisers, it will be construed that the publisher sells the newspaper to the advertiser, and, therefore, the retail sales tax will not apply with respect to the charge made by the printer to the publisher for printing the newspaper or with respect to the purchase of ink and paper when the publisher prints his own newspaper.

(c) Sales to newspaper, magazine or periodical publishers of equipment and of supplies and materials which do not become a part of the finished publication that is sold are subject to the retail sales tax unless specifically exempt (see subsection (5) of this section). This includes, among others, sales of fuel, furniture, lubricants, and office supplies.

(d) Sales to newspaper, magazine or periodical publishers of baseball bats, bicycles, dolls and other articles of tangible personal property which are to be distributed by the publisher as gifts, premiums or prizes are sales for consumption and subject to the retail sales tax.

(e) Sales by authors and artists to publishers of the right to publish scripts, paintings, illustrations and cartoons are mere licenses to use, not sales of tangible personal property and are not subject to the retail sales tax.

(5) **Exemption for sales of computer equipment to printers and/or publishers.** RCW 82.08.806 and 82.12.806 provide printers and publishers retail sales and use tax exemptions for computer equipment that is used primarily in the printing or publishing of any printed material. The exemption includes repair parts and replacement parts for such equipment and sales of or charges made for labor and services rendered in respect to installing, repairing, cleaning, altering, or improving the computer equipment. The exemption also includes maintenance agreements (service contracts), as defined in WAC 458-20-257, on such equipment. This exemption applies only to computer equipment not otherwise exempt under RCW 82.08.02565.

(6) **Use tax.** Publishers of newspapers, magazines and periodicals are subject to tax upon the value of articles

printed or produced for use in conducting such business. Tax also applies to materials, supplies, and other items which do not become part of the finished publication or which are not resold. Where retail sales tax is not paid, the publisher must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law. Deferred sales or use tax should be reported on the use tax line of the buyer's excise tax return. For detailed information about use tax, refer to WAC 458-20-178, Use tax.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-18-067, § 458-20-143, filed 8/30/10, effective 9/30/10. Statutory Authority: RCW 82.32.300. WSR 83-16-053 (Order ET 83-5), § 458-20-143, filed 8/1/83; WSR 83-07-034 (Order ET 83-17), § 458-20-143, filed 3/15/83; Order ET 70-4, § 458-20-143 (Rule 143), filed 6/12/70, effective 7/12/70.]

WAC 458-20-144 Printing industry. (1) **Introduction.** This section discusses the taxability of the printing industry. For information on the taxability of mailing bureau services and a discussion of direct mail, refer to WAC 458-20-141. For information on the taxability of printers and publishers of newspapers, magazines, and periodicals, refer to WAC 458-20-143.

(2) **Definition.** The phrase "printing industry" includes letterpress, offset-lithography, and gravure processes as well as multigraph, mimeograph, autotyping, addressographing and similar activities.

(3) **Business and occupation tax.**

(a) Printers are subject to the business and occupation tax under the printing and publishing classification upon the gross income of the business.

(b) Effective July 1, 2009, printers of newspapers are taxable under the publication of newspapers classification of the B&O tax upon the gross income of the business. Persons reporting income under the publication of newspapers classification of the B&O tax must file a complete annual report with the department. In addition, such persons must electronically file with the department all surveys, reports, returns, and any other forms. Refer to RCW 82.32.600 and WAC 458-20-267 for the specific guidelines and requirements.

(c) **Doing business inside and outside the state.** RCW 82.04.460 requires that advertising income earned by printers derived from business activities performed within Washington be apportioned to this state for tax purposes. Refer to chapter 23 (E2SSB 6143), Laws of 2010 1st sp. sess. Part I for information on apportioning advertising income.

(4) **Retail sales tax.**

(a) The printing or imprinting of advertising circulars, books, briefs, envelopes, folders, posters, racing forms, tickets, and other printed matter, whether upon special order or upon materials furnished either directly or indirectly by the customer is a retail sale and subject to the retail sales tax, providing the customer either consumes, or distributes such articles free of charge, and does not resell such articles in the regular course of business. The retail sales tax is computed upon the total charge for printing, and the printer may not deduct the cost of labor, author's alterations, or other service charges in performing the printing, even though such charges may be stated or shown separately on invoices.

(b) Sales of printed matter to advertising agencies who purchase for their own use or for the use of their clients, and not for resale in the regular course of business, are sales for consumption and subject to the retail sales tax.

(c) Sales of tickets to theater owners, amusement operators, transportation companies and others are sales for consumption and subject to the retail sales tax. Such tickets are not resold by the theater owners or amusement proprietors as tangible personal property but are used merely as a receipt to the patrons for payment and as evidence of the right to admission or transportation.

(d) Sales of school annuals and similar publications by printers to school districts, private schools or student organizations therein are subject to the retail sales tax.

(e) Sales by printers of books, envelopes, folders, posters, racing forms, stationery, tickets and other printed matter to dealers for resale in the regular course of business are wholesale sales. Such sales are not subject to retail sales tax when seller obtains a resale certificate for sales made before January 1, 2010, or a reseller permit for sales made on or after January 1, 2010, from the buyer to document the wholesale nature of the sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(f) Charges made by bookbinders or printers for imprinting, binding or rebinding of materials for consumers are subject to the retail sales tax.

(g) Sales to printers of equipment, supplies and materials which do not become a component part or ingredient of the finished printed matter sold or which are put to "intervening use" before being resold are subject to the retail sales tax unless specifically exempt (see subsection (5) of this section). This includes, among others, sales of fuel, furniture, and lubricants.

(h) Sales to printers of paper stock and ink which become a part of the printed matter sold are sales for resale and are not subject to retail sales tax when the buyer provides a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, to the seller.

(5) **Exemption for sales of computer equipment to printers.** RCW 82.08.806 and 82.12.806 provide a retail sales and use tax exemption to a printer or publisher, of computer equipment, including repair parts and replacement parts for such equipment, when the computer equipment is used primarily in the printing or publishing of any printed material, or to sales of or charges made for labor and services rendered in respect to installing, repairing, cleaning, altering, or improving the computer equipment. This exemption applies only to computer equipment not otherwise exempt under RCW 82.08.02565.

(6) **Commissions and discounts.**

(a) There is a general trade practice in the printing industry of making allowances to advertising agencies of a certain percentage of the gross charge made for printed matter ordered by the agency either in its own name or in the name of the advertiser. This allowance may be a "commission" or may be a "discount."

(b) A "commission" paid by a seller constitutes an expense of doing business and is not deductible from the measure of tax under either business and occupation tax or

retail sales tax. On the other hand, a "discount" is a deduction from an established selling price allowed to buyers, and a bona fide discount is deductible under both these classifications.

(c) In order that there may be a definite understanding, printers, advertising agencies and advertisers are advised that tax liability in such cases is as follows:

(i) The allowance taken by an advertising agency will be deductible as a discount in the computation of the printer's liability only in the event that the printer bills the charge on a net basis; i.e., less the discount.

(ii) Where the printer bills the gross charge to the agency, and the advertiser pays the sales tax measured by the gross charge, no deduction will be allowed, irrespective of the fact that in payment of the account the printer actually receives from the agency the net amount only; i.e., the gross billing, less the commission retained by the agency. In all cases the commission received is taxable to the agency.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 11-04-010, § 458-20-144, filed 1/21/11, effective 2/21/11; WSR 06-04-033, § 458-20-144, filed 1/26/06, effective 2/26/06; WSR 05-03-052, § 458-20-144, filed 1/11/05, effective 7/1/05; Order ET 70-4, § 458-20-144 (Rule 144), filed 6/12/70, effective 7/12/70.]

WAC 458-20-145 Local sales and use tax. (1) **Introduction.** Effective July 1, 2008, Washington implements new rules governing how local retail sales taxes are sourced within Washington. See RCW 82.32.730 and 82.14.490. These rules govern where the local retail sales tax attributable to the sale of tangible personal property, retail services, extended warranties, and the lease of tangible personal property is sourced.

"Source," "sourced," or "sourcing" refer to the location (as in a local taxing district, jurisdiction, or authority) where a sale or lease is deemed to occur and is subject to retail sales tax. The department assigns location codes to identify the specific taxing locations that receive the local taxes. These location codes are used on tax returns to accurately identify the correct taxing location and tax rate.

Sellers and their agents are responsible for determining the appropriate tax rate for all their retail sales taxable in Washington. Sellers and their agents are also responsible for collecting from their purchasers the correct amount of tax due upon each sale and remitting that tax to the department.

Throughout this section the department provides a number of examples that identify facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined separately after a review of all of the facts and circumstances.

This section is divided into four subsections. Subsection (1) contains this introduction, a description of department resources available to assist taxpayers in performing local sales tax sourcing, and certain key terms. Subsection (2) describes Washington's sourcing rules that become effective July 1, 2008. Subsection (3) provides information relating to the sourcing of telecommunication services. Finally, subsection (4) briefly explains Washington's use tax rule.

(a) **What resources does the department offer to help sellers determine their local retail sales tax sourcing?** The department offers a number of resources to assist taxpayers in sourcing retail sales. These resources include:

(i) **The "*Local Sales & Use Tax Flyer*."** This publication is updated every quarter and is mailed to select taxpayers reporting on paper returns. It is also available online on the department's web site at www.dor.wa.gov under "get a form or publication." It provides a listing of all local taxing jurisdictions, location codes, and their corresponding tax rates.

(ii) **The online sales and use tax rate look up application (GIS).** This is an online application that provides current and past sales and use tax rates and location codes based on an address or a selected location on a map. It also allows users to download data that they can incorporate into their own systems to retrieve the proper tax rate for a specific address.

(iii) **Taxing jurisdiction maps.** The department has a selection of maps of various taxing jurisdictions that identify the boundaries of a specific taxing jurisdiction.

(b) **Of what key terms should I be aware when reading this section?**

(i) **"Receipt"** and **"receive"** mean taking possession of tangible personal property and making first use of services. "Receive" and "receipt" do not include possession by a shipping company on behalf of the purchaser. See RCW 82.32.730 (8)(d).

(ii) **"Retail sale"** has the same meaning as provided in RCW 82.04.050 and includes the following three types of retail sales: Sales and leases of tangible personal property; sales of retail services; and sales of extended warranties.

(iii) **"Retail service"** means those services described in RCW 82.04.050 as retail sales. This definition includes retail sales of labor and services rendered with respect to tangible personal property.

The following is a nonexclusive list of retail services, many of which are addressed in detail in other rules adopted by the department:

- Constructing, remodeling, or painting buildings (e.g., see WAC 458-20-170);
- Land clearing and earth moving (e.g., see WAC 458-20-172);
- Landscape maintenance and horticultural services (e.g., see WAC 458-20-226);
- Repairing or cleaning equipment (e.g., see WAC 458-20-173);
- Lodging provided by hotels and motels (e.g., see WAC 458-20-166);
- Amusement and recreation services such as golf, bowling, swimming, and tennis (e.g., see WAC 458-20-183);
- Physical fitness services such as exercise classes, personal trainer services, and the use of exercise equipment (e.g., see WAC 458-20-183); and
- Abstract, title insurance, or escrow services (e.g., see WAC 458-20-156).

(iv) **"Tangible personal property"** means property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses and includes prewritten software. See RCW 82.08.010(7), 82.08.950, and 82.12.950 for more information.

(v) **"Extended warranty"** is an agreement for a specified duration to perform the replacement or repair of tangible personal property at no additional charge or a reduced charge for tangible personal property, labor, or both, or to provide indemnification for the replacement or repair of tangible per-

sonal property, based on the occurrence of specified events. The term "extended warranty" does not include an agreement, otherwise meeting the definition of extended warranty in this subsection, if no separate charge is made for the agreement and the value of the agreement is included in the sales price of the tangible personal property covered by the agreement. See RCW 82.04.050(7).

(vi) **"Motor vehicle"** generally means every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails. Motor vehicles are vehicles capable of being moved upon public ways. "Motor vehicle" includes a neighborhood electric vehicle as defined in RCW 46.04.357. "Motor vehicle" includes a medium-speed electric vehicle as defined in RCW 46.04.295. An electric personal assistive mobility device is not considered a motor vehicle. A power wheelchair is not considered a motor vehicle. For more information see RCW 46.04.320 "Motor vehicle" and RCW 46.04.670 "Vehicle."

(vii) **"Primary property location"** is the property's physical address as provided by the lessee and kept in the lessor's records maintained in the ordinary course of business, provided use of this address does not constitute bad faith. The primary property location will not change merely by intermittent use of the leased property in different local jurisdictions, e.g., use of leased business property on business trips or service calls to multiple jurisdictions.

(viii) **"Transportation equipment"** refers to:

(A) Locomotives and railcars used to carry people or property in interstate commerce; and

(B) Trucks and truck tractors with gross vehicle weight ratings of 10,000 pounds or greater, trailers, and semi-trailers, or passenger buses registered through an international registration plan and operated under authority of a carrier authorized and certificated by the U.S. Department of Transportation (or other federal authority) to engage in carrying people or property in interstate commerce (International Registration Plan is a reciprocity agreement among states of the United States and provinces of Canada providing for payment of license fees on the basis of total distance operated in all jurisdictions); and

(C) Aircraft operated by air carriers authorized and certificated by the U.S. Department of Transportation (or other federal or foreign authority) to carry people or property by air in interstate or foreign commerce; and

(D) Containers designed for use on and component parts attached or secured on the items described in (b)(viii)(A) through (C) of this subsection (1). RCW 82.32.730 (8)(e).

(2) **Local retail sales tax sourcing.** This subsection describes Washington's retail sales tax sourcing rules. Subsection (2)(a) of this section lists the general sourcing rules applicable to the sale of tangible personal property, retail services, and extended warranties. Subsection (2)(b) of this section provides special sourcing rules related to certain "florist sales" and the sale of watercraft; mobile, modular, and manufactured homes; and motor vehicles, trailers, semi-trailers, and aircraft that do not qualify as transportation equipment. Subsection (2)(c) of this section addresses the sourcing rules applicable to leases of tangible personal property.

(a) **Sales of tangible personal property, retail services, and extended warranties.** This subsection describes the sourcing rules applicable to the sale of tangible personal property, retail services, and extended warranties.

These rules apply in a descending order of priority. This means that the seller first should determine if (a)(i) of this subsection (Rule 1 below) applies. If it does apply, then the seller must source the sale under Rule 1. If Rule 1 does not apply, then the seller must source the sale to the location required under sourcing Rule 2 (below), and so forth until the applicable sourcing rule is determined.

If the seller ships or delivers tangible personal property to a customer who receives that property outside Washington, the sale is deemed to have taken place outside Washington and is not subject to Washington state or local retail sales tax.

The following rules apply when sourcing retail sales in Washington:

(i) **Rule 1: Seller's business location.** If a purchaser receives tangible personal property, a retail service, or an extended warranty at the seller's business location, the sale is sourced to that business location.

In the case of retail services, this sourcing rule will generally apply where a purchaser receives retail services at the seller's place of business, e.g., an auto repair shop, a hotel or motel, a health club providing physical fitness services, an auto parking service, a dry-cleaning service, and a storage garage. While these types of retail services are usually received at the seller's place of business, if services are received at a location other than the seller's place of business, then alternate sourcing rules will apply.

(A) **Examples: Rule 1 - Tangible Personal Property.**

(1) Bill, a Tacoma resident, travels to Renton and purchases a ring from a jeweler located in Renton. Bill receives the ring at the Renton location. The seller must source the sale to the Renton location.

(2) Mary, a Walla Walla resident, buys a prewritten software program from a store located in Cheney. Mary receives a compact disc containing the software at the Cheney location. The seller must source the sale to the Cheney location.

(3) Trains, Inc., an Auburn business, buys a locomotive that qualifies as transportation equipment. Trains, Inc. receives the locomotive in Fife at the seller's place of business. The seller must source the sale to the Fife location.

(B) **Examples: Rule 1 - Retail Services.**

(1) Barbara, a Longview resident, takes her car to a mechanic shop located in Centralia. The mechanic services the car at the Centralia location. Several days later Barbara picks up the car from the Centralia location. The services are received in Centralia. The mechanic must source the sale to the Centralia location.

(2) Rex, a Seattle resident, drops off a roll of film at a photo developer located in Bellevue. Rex picks up the developed film from the Bellevue location. The services are received in Bellevue. The developer must source the sale to the Bellevue location.

(3) Bob, a Pasco resident, takes shirts to a drycleaner located in Kennewick. The drycleaner cleans and presses the shirts. Bob then picks up the shirts in Kennewick the following week. The services are received in Kennewick. The seller must source the sale to the Kennewick location.

(C) **Example: Rule 1 - Extended Warranties.**

(1) Saffron, a Des Moines resident, buys a computer from a Burien computer outlet. When purchasing the com-

puter Saffron also purchases and receives a five-year extended warranty for the computer at the Burien outlet. The seller must source the sale of the extended warranty and computer to the Burien location.

(ii) **Rule 2: Tangible personal property, retail services, or extended warranties received at a location other than the seller's place of business.** If the purchaser receives tangible personal property, retail services, or an extended warranty at a location other than the seller's place of business (and sourcing Rule 1 therefore does not apply), then the sale must be sourced to the location where the purchaser, or the purchaser's donee (e.g., a gift), receives such property, retail service, or extended warranty. This location can be a location indicated in instructions, known to the seller, for delivery to the purchaser or donee.

Construction contractors, painters, plumbers, carpet layers (retailers who install what they sell), earth movers, and house wreckers are the types of retail service providers that typically will source sales under this sourcing Rule 2 (presuming they provide their services at a location other than their place of business).

(A) **Examples: Rule 2 - Tangible Personal Property.**

(1) Wade, a Seattle resident, buys furniture from a store located in Everett. Wade has the furniture delivered to his Seattle residence. Wade receives the furniture at his location in Seattle. The seller must source the sale to Wade's Seattle residence.

(2) Joanne, a Port Angeles business owner, purchases a prewritten software program online from a store located in Sequim. Joanne receives the software at her home address in Port Angeles. The seller has information identifying the location where the software is electronically received by Joanne in Port Angeles. The seller must source the sale to Joanne's Port Angeles home location.

(3) Jean, a Tumwater resident, buys prewritten software to detect online security threats. The seller is a store located in Bothell. As part of the purchase price, Jean receives prewritten software updates. All software is electronically delivered. The seller does not know where the software is electronically delivered. However, the purchase order discloses a ship-to address where the software will be received in Tumwater. The seller must source the sale to Jean's ship-to address as this address represents a delivery location indicated in instructions for delivery to Jean. The seller must source the sale to the Tumwater location according to the ship-to address.

(4) Karl, a Spokane Valley resident, buys a mattress at a store in Spokane. The merchant delivers the mattress from its warehouse located in Deer Park to Karl's home in Spokane Valley. Karl receives the mattress at his home location in Spokane Valley. The seller must source the sale to the Spokane Valley home location.

(5) George, an Olympia resident, orders a pizza from a restaurant located in Tumwater. The restaurant obtains George's Olympia address when taking the order. George receives the pizza at the Olympia address. The seller must source the sale to Olympia according to George's Olympia address.

(6) Gunther, a Sumner resident, places an order for towels with a catalog mail order outlet located in Tacoma. The seller delivers the towels to Gunther's home at a Sumner location from a warehouse in Fife. Gunther receives the towels at the Sumner location. The seller must source the sale to Gunther's Sumner home location.

(B) **Examples: Rule 2 - Retail Services.**

(1) Brett, a Tacoma resident, contracts with an Olympia painting firm to have his house repainted. The Olympia firm sends employees to Brett's home in Tacoma where they perform the painting. Brett receives the painting services at his home in Tacoma. The painting firm must source the sale of painting services to Brett's Tacoma home location.

(2) Julie, an Aberdeen resident, hires a construction contractor to build a new business facility in Kelso. Julie receives the construction services at the Kelso location. The contractor must source the services to the Kelso construction location.

(3) Gabe, a Shoreline resident, sends a clock to a repair business located in Auburn. The business repairs the clock and then delivers the clock to Gabe's home in Shoreline. Gabe receives the services at the Shoreline location. The repair service must source the sale to Gabe's Shoreline home location.

(C) **Example: Rule 2 - Extended Warranties.**

(1) Tara, a Chelan resident, buys a computer over the internet. The retailer offers a five year extended warranty. Tara decides to purchase the extended warranty and sends the seller the appropriate paperwork. The seller then sends the extended warranty documents to Tara's home in Chelan. The sale of the extended warranty is sourced to the Chelan home location where Tara receives the warranty documents.

(D) **Additional Examples: Rule 2 - Delivery Outside Washington, Gifts, and Receipt by a Shipping Company.**

(1) Alan, a Spokane resident, buys a mattress at a store in Spokane. The merchant delivers the mattress from its warehouse located in Deer Park to Alan's vacation home in Idaho. The mattress was received outside of Washington and is not subject to Washington state and local sales tax. The seller does not source the sale to Washington.

(2) Sandra, a Vancouver, Washington resident, buys a computer online from a merchant in Seattle. The computer is a gift for Tim, a student attending college in Pullman. The purchaser directs the seller to ship the computer to Tim's home address in Pullman. Tim receives the computer at the Pullman location. The merchant will source the sale based on the ship-to address in Pullman.

(3) Martha, a Wenatchee resident, travels to a gift shop in Leavenworth. Martha buys five (5) items for herself and five (5) gifts for friends. Martha takes possession of the five (5) items for herself at the gift shop. Martha then has the gift shop deliver the five (5) gifts to addresses located in Wenatchee. The seller will source the sale of the five (5) items purchased by Martha for herself to Leavenworth. The seller must source the five (5) gifts to Wenatchee according to the ship-to address where each donee receives its gift.

(4) Sheila, a Yakima resident, buys equipment from a Pasco retailer. Sheila arranges to have a shipping company pick up the equipment and deliver that equipment to Sheila in Yakima. In the purchase order Sheila notifies the seller that the equipment will be received at a ship-to address in Yakima. Tangible personal property is not considered received at the seller's place of business in cases where the purchaser arranges to have the goods picked up by a shipping company on its behalf. The seller must source this sale to

Sheila's ship-to Yakima location where the equipment is received.

(iii) **Rule 3: Purchaser's address maintained in the seller's ordinary business records.** If neither sourcing Rule 1 nor Rule 2 apply, a retail sale is sourced to the purchaser's address as indicated in the seller's records maintained in the ordinary course of the seller's business, provided use of this address does not constitute bad faith.

Example - Rule 3.

(1) Shannon buys prewritten software from a Bellevue seller by downloading the software from the seller's web site. Shannon's location is unknown at the time of sale. However, the seller maintains a Seabeck address for Shannon in its business records. Because Shannon does not receive the software at the seller's place of business and the location of receipt is unknown, sourcing Rules 1 and 2 do not apply. The seller must source the sale to the address maintained in its ordinary business records for Shannon (the Seabeck address).

(iv) **Rule 4: Purchaser's address obtained at the consummation of sale.** If any of sourcing Rules 1 through 3 do not apply, the sale is sourced to the purchaser's address obtained during the consummation of sale. If no other address is available, this address may be the address included on the purchaser's payment instrument (e.g., check, credit card, or money order), provided use of this address does not constitute bad faith.

Example - Rule 4.

(1) Eric buys prewritten software over the internet from a retail outlet located on Vashon Island. The seller transmits the prewritten software to an e-mail address designated by Eric. The e-mail address does not disclose Eric's location. Eric pays for the software by credit card. When entering the relevant credit card information, Eric discloses a residential address in Port Angeles to which the credit card is billed. Sourcing Rules 1 and 2 do not apply because Eric does not receive the software at the seller's business location and the seller does not know where the software is being received. Sourcing Rule 3 does not apply because the retail outlet does not have Eric's address on file in its ordinary business records. Therefore, the retail outlet must source the sale to the address related to the customer's credit card information given during the consummation of the sale. The retail outlet must source the sale to Eric's Port Angeles location.

(v) **Rule 5: Origin sourcing default rule.** If a seller is unable to source a sale under any of the sourcing Rules 1 through 4 above, or the seller has insufficient information to apply those rules, the default origin sourcing rule applies. Subsection (2)(b)(v)(A) through (C) of this section describes sourcing Rule 5 as it applies to the sale of tangible personal property, retail services, and extended warranties.

(A) **Origin sourcing: Tangible personal property.** If any of sourcing Rules 1 through 4 do not apply, the seller must source sales of tangible personal property to the address from which the property was shipped.

(B) **Origin sourcing: Electronically delivered prewritten software.** If any of the sourcing Rules 1 through 4 do not apply, the seller must source sales of electronically delivered prewritten computer software to the address location from which the computer software was first available for transmission by the seller. Locations that merely provide for the transfer of computer software are not address locations from which the computer software is first available for transmission.

(C) **Origin sourcing: Retail services and extended warranties.** If any of sourcing Rules 1 through 4 do not apply, the seller must source retail services and extended warranties to the address from which it provides the service or warranty.

(D) **Examples: Rule 5 - Prewritten Software.**

(1) Rebecca purchases prewritten computer software electronically and requests that the software be delivered to a specified e-mail address. The seller operates from a retail store located in Tacoma. The seller does not know the location where the software will be received and further does not have information about Rebecca's location in its ordinary business records. Additionally, Rebecca does not supply the seller with address information during the consummation of the sale. Thus, none of sourcing Rules 1 through 4 apply. This sale must be sourced under the default sourcing rule. The seller first made the prewritten software available for transmission at its Tacoma location. The seller will source the sale to that Tacoma location from which the prewritten software was first available for transmission. This result will not change if the software is routed from a Tacoma server through a second server (either operated by the seller or some third party) located outside of the Tacoma location. Routing as used in this context refers to the transfer of prewritten software from one location to another location for retransmission to a final destination, and does not include transfers to another location where additional services or products may be added.

(2) Assume the facts in Example (1) directly above, except that Rebecca's order is submitted to the Tacoma location and the prewritten software is first available for transmission from a Bellevue location. The seller will source the sale to the Bellevue location.

(b) **Special sourcing rule: Florist sales and sales of watercraft; modular, mobile, and manufactured homes; and motor vehicles, trailers, semi-trailers, and aircraft that do not qualify as transportation equipment.** If you are a "florist" making sales or you are making a retail sale of watercraft; modular, mobile, or manufactured homes; or motor vehicles, trailers, semi-trailers, and aircraft that do not qualify as transportation equipment (excluding leases and rentals), you must source the sale to the location at or from which delivery is made. For specific information concerning "florist sales," who qualifies as a "florist," and the related sourcing rules see RCW 82.32.730 (6)(d) and (8)(c) as amended by Senate Bill No. 6799, chapter 324, Laws of 2008.

When the sale of goods is delivered into Washington from a point outside the state and a local in-state facility, office, outlet, agent or other representative (even though not formally characterized as a "salesperson") of the seller participates in the transaction in some way, such as by taking the order, then the location of the local facility, etc., will determine the place of sale for purposes of the local sales tax. However, if the seller, the seller's agent or the seller's representative maintains no local in-state facility, office, outlet or residence from which business in some manner is conducted, the local tax must be determined by the location of the customer.

Example: Special Sourcing Rule.

(1) Ben, a Federal Way purchaser, buys a car from a dealer in Fife. The customer has the option of picking up the car on the lot in Fife or having it delivered to his residential address in Federal Way. Ben asks to have the car delivered to the Federal Way location. The dealer must source the sale of the car to the dealer's location in Fife from which the car was delivered.

(c) **Leases of tangible personal property.** "Lease" and "rental" mean any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. For more information concerning "leases" and "rentals" see RCW 82.04.040. The terms "lease" and "rental" are used interchangeably throughout this subsection (2)(c). This subsection (2)(c) provides local retail sales tax sourcing guidance for lessors who lease tangible personal property.

(i) **How do I source lease payments attributable to the lease of transportation equipment?** If you are leasing transportation equipment, you must source the lease payments attributable to that transportation equipment under sourcing Rules 1 through 5 above as a retail sale. See subsection (1)(b)(viii) of this section for a description of transportation equipment.

(ii) **How should I source lease payments attributable to the lease of motor vehicles, trailers, semi-trailers, and aircraft that do not qualify as transportation equipment?** If you are leasing a motor vehicle, trailer, semi-trailer, or aircraft that does not qualify as transportation equipment, you must source the lease payments under this subsection (2)(c)(ii).

(A) **Leases that require recurring periodic payments.** If the lease requires recurring periodic payments, you must source each periodic payment to the primary property location of the leased property. See subsection (1)(b)(vii) of this section for a description of primary property location. The primary property location will not change by intermittent use of the leased property in different jurisdictions, e.g., use of leased business property on business trips or service calls to multiple local jurisdictions.

(B) **Leases that do not require recurring periodic payments.** If the lease does not require recurring periodic payments, you must source the single lease payment under sourcing Rules 1 through 5 above as a retail sale.

(C) **Examples:**

(1) Rich, a Fall City customer, leases a car from a dealer in Duvall. Rich leases the car for a period of one year. The car does not qualify as transportation equipment. Rich provides the dealer with his residential address in Fall City where he keeps the car. Rich makes monthly periodic payments throughout the term of the lease. Rich indicates the primary property location for the car is his residence in Fall City. The Fall City location is recorded in the store's business records. The periodic lease payments will be sourced to the residential primary property location in Fall City. If Rich were to move to Seattle during the term of the lease and notify the dealer of a change in the car's primary property location, the dealer would source any lease payments subsequent to that change in primary property location to Seattle.

(2) Amanda, a Tacoma business owner, rents a trailer for a period of one week and no periodic payments are required under the lease. The trailer does not qualify as transportation equipment. Amanda receives the trailer at a business location in Tacoma. The seller will source the sale to the Tacoma business location.

(iii) **How do I source lease payments for all other tangible personal property?** If you lease tangible personal property not described in subsection (2)(c)(i) or (ii) of this section, you must source your lease payments under this subsection (2)(c)(iii).

(A) **Lease that requires recurring periodic payments.** If the lease requires recurring periodic payments, you must source the first periodic payment on that lease under sourcing Rules 1 through 5 as a retail sale. You must then source all subsequent periodic payments to the primary property location for each period covered by such periodic payments. See subsection (1)(b)(vii) of this section for a description of primary property location. The primary property location will not change by intermittent use of the leased property in different local jurisdictions, e.g., use of leased business property on business trips or service calls to multiple local jurisdictions.

(B) **Leases that do not require recurring periodic payments.** If the lease does not require recurring periodic payments, you must source the single payment under sourcing Rules 1 through 5 as a retail sale.

(C) **Examples:**

(1) Mark, a Gig Harbor resident, leases furniture from a store in Bremerton. The furniture will be leased for twelve months. The store delivers the furniture to Mark's home address in Gig Harbor. Mark indicates the primary property location for the equipment is his home address in Gig Harbor. The Gig Harbor location is recorded in the store's business records. The customer makes monthly periodic payments for the term of the lease. The first periodic payment must be sourced to Gig Harbor where Mark receives the furniture. The store must then source all subsequent periodic payments to Gig Harbor, which represents the primary property location recorded in the store's ordinary business records.

(2) Brad, a Pasco business owner, leases furniture from a store in Spokane. Brad picks up the furniture in Spokane and makes the initial periodic payment on the lease. The furniture is leased for a period of twelve months. Brad indicates the primary property location for the equipment is a business address in Pasco. The Pasco location is recorded in the store's business records. Brad then makes monthly periodic payments for the term of the lease. The first periodic payment must be sourced to Spokane where Brad received the furniture. The store must source the subsequent periodic payments to the Pasco primary property location.

(3) Alison, a Seattle business owner, leases equipment from a store in Issaquah. Alison picks up the equipment in Issaquah and makes an initial periodic payment on the lease. The equipment is used in work primarily performed in Washington, but the equipment is also taken out intermittently on a number of service calls made in Oregon. Alison indicates the primary property location for the equipment is a business address in Seattle. The Seattle location is recorded in the store's business records. The equipment is leased for a period of one year. Alison makes monthly periodic payments for the term of the lease. The first periodic payment must be sourced to Issaquah where the equipment is received. The store must source the subsequent periodic payments to Seattle, which

represents the primary property location. Alison's intermittent use of the equipment in other jurisdictions does not change the primary property location of the equipment.

(4) Amelia, a Pasco business owner, leases equipment from a store located in Pasco. Amelia picks up the equipment in Pasco, making an initial periodic payment on the lease. The lease is for a period of one year. During the first six months of the lease, Amelia indicates the primary property location for the equipment is a business address in Walla Walla. For the second six months of the lease, Amelia indicates the primary property location is a business address in Leavenworth. The store records the primary property locations in its business records. The store must source the initial periodic payment to Pasco where Amelia received the equipment. The store must source all other periodic lease payments covering the first six months of the lease to the primary property location recorded for Walla Walla. The store must source those periodic lease payments covering the last six months of the lease to the primary property location in Leavenworth.

(5) Brian, a North Bend business owner, rents a backhoe from Construction Rentals located in Lynnwood. The lease period is 45 days and the lease requires a single lease payment. Brian pays the entire lease amount at the time of pickup. The customer picks up the equipment in Lynnwood and takes it to a job site in DuPont. Construction Rentals must source the sale to the location in Lynnwood where Brian receives the backhoe.

(6) Lisa, an Olympia business owner, rents a pressure washer from Rental Co. located in Lacey. The rental period is one day and no periodic payments are required under the lease. Lisa picks up the equipment in Lacey and takes it to a job site in Yelm. Sales tax is sourced to the seller's location in Lacey. If Rental Co. delivered the pressure washer directly to Lisa at the job site in Yelm, the sale would have been sourced to the location of the job site in Yelm.

(3) **Telecommunications services.**

Where can I find information related to the sourcing and sale of telecommunication services? Sales of telecommunication services and ancillary services are defined as retail sales in RCW 82.04.050. Sellers must source these services under the sourcing provisions located in RCW 82.32.-520. See RCW 82.04.065 for more information about telecommunication services and ancillary services.

(4) **Use tax. How is use tax sourced in Washington?** Where a seller does not have an obligation to collect Washington sales tax, the tangible personal property or service sold by that person may be subject to use tax under chapter 82.12 RCW et seq. This use tax is sourced to the place of first use and is payable by the purchaser. The seller may be required to collect use tax pursuant to the requirements of RCW 82.12.-040.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 08-12-035, § 458-20-145, filed 5/30/08, effective 6/30/08. Statutory Authority: RCW 82.32.300. WSR 83-07-032 (Order ET 83-15), § 458-20-145, filed 3/15/83; Order ET 75-1, § 458-20-145, filed 5/2/75; Order ET 70-3, § 458-20-145 (Rule 145), filed 5/29/70, effective 7/1/70.]

WAC 458-20-146 National and state banks, mutual savings banks, savings and loan associations and other financial institutions.

Business and Occupation Tax

The gross income of national banks, states banks, mutual savings banks, savings and loan associations, and certain other financial institutions is subject to the business and occupation tax according to the following general principles.

Services and other activities. Generally, the gross income from engaging in financial businesses is subject to the business and occupation tax under the classification service and other activities. Following are examples of the types of income taxable under this classification: Interest earned (including interest on loans made to nonresidents unless the financial institution has a business location in the state of the borrower's residence which rendered the banking service), commissions earned, dividends earned, fees and carrying charges, charges for bookkeeping or data processing, safety deposit box rentals. See WAC 458-20-14601 Financial institutions—Income apportionment.

The term "gross income" is defined in the law as follows:

"Gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

The law allows certain deductions from gross income to arrive at the taxable amount (the amount upon which the business and occupation tax is computed). Deductible gross income should be included in the gross amount reported on the excise tax return and should then be shown as a deduction and explained on the deduction schedules. The deductions generally applicable to financial businesses include the following:

(1) Dividends received by a parent from its subsidiary corporations (RCW 82.04.4281).

(2) Interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties. (See WAC 458-20-166 for definition of "transient.") (RCW 82.04.4292.)

(3) Interest received on obligations of the state of Washington, its political subdivisions, and municipal corporations organized pursuant to the laws thereof. (RCW 82.04.4291.) A deduction may also be taken for interest received on direct obligations of the federal government, but not for interest attributable to loans or other financial obligations on which the federal government is merely a guarantor or insurer.

(4) Gross proceeds from sales or rentals of real estate (RCW 82.04.390). These amounts may be entirely excluded from the gross income reported and need not be shown on the return as a deduction.

Retailing. Sales of tangible personal property and certain services are defined as "retail sales" and are subject to the business and occupation tax under the classification retailing. Such sales are also subject to the retail sales tax which the seller must collect and remit to the department of revenue

(department). Transactions taxable as sales at retail are not subject to tax under service and other activities.

Following are examples of transactions subject to the retailing classification of the business and occupation tax and to the retail sales tax: Sales of meals or confections, sales of repossessed merchandise, sales of promotional material, leases of tangible personal property, sales of check registers, coin banks, personalized checks (note: When the financial institution is not the seller of these items but simply takes orders as agent for the supplier, the supplier is responsible for reporting as the retail seller. The financial institution has liability for reporting the retail sales tax on sales made as an agent only if the supplier is an out-of-state firm not registered with the department), escrow fees, casual sales (occasional sales of depreciated assets such as used furniture and office equipment—subject to retail sales tax but deductible from the business and occupation tax; see WAC 458-20-106 Casual or isolated sales—Business reorganizations).

Sales for resale. When a financial institution buys tangible personal property for resale to its customers without intervening use, the sales tax is not applicable. In this case the financial institution should give the vendor a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

Use Tax

The use tax complements the retail sales tax by imposing a tax of like amount on the use of tangible personal property purchased or acquired without payment of the retail sales tax. Thus, when office equipment or supplies are purchased or leased from an unregistered out-of-state vendor who does not collect the Washington state retail sales tax, the use tax must be paid directly to the department. Space for the reporting of this tax will be found on the excise tax return. (For more information, see WAC 458-20-178 Use tax.)

When tax liability arises. Tax should be reported during the reporting period in which the financial institution receives, becomes legally entitled to receive, or in accord with the system of accounting regularly employed enters the consideration as a charge against the client, purchaser or borrower. Financial institutions may prepare excise tax returns to the department reporting income in periods which correspond to accounting methods employed by each institution for its normal accounting purposes in reporting to its supervisory authority.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-146, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 83-07-032 (Order ET 83-15), § 458-20-146, filed 3/15/83; Order ET 70-3, § 458-20-146 (Rule 146), filed 5/29/70, effective 7/1/70.]

WAC 458-20-14601 Financial institutions—Income apportionment. (1) **Introduction.**

(a) This section provides tax reporting instructions for financial institutions doing business both inside and outside the state of Washington, and applies to tax liability incurred through May 31, 2010. Chapter 23, Laws of 2010 sp. sess. (2ESSB 6143) changed the apportionment reporting requirements for financial institutions effective June 1, 2010. Refer to WAC 458-20-19404 (Financial institutions—Income apportionment) for tax liability incurred on and after June 1, 2010.

Financial businesses that do not meet the definition of "financial institution" in subsection (3)(j) of this section and other businesses taxable under RCW 82.04.290 should refer to WAC 458-20-194 (Doing business inside and outside the state) for tax liability incurred on or before May 31, 2010.

(b) Financial institutions engaged in making interstate sales of tangible personal property should also refer to WAC 458-20-193 (Inbound and outbound interstate sales of tangible personal property).

(2) **Apportionment and allocation.**

(a) Except as otherwise specifically provided, a financial institution taxable under RCW 82.04.290 and taxable in another state shall allocate and apportion its apportionable income as provided in this section. All gross income that is not includable in apportionable income shall be allocated pursuant to the provisions of chapter 82.04 RCW. A financial institution organized under the laws of a foreign country, the Commonwealth of Puerto Rico, or a territory or possession of the United States, except such institutions that are exempt under RCW 82.04.315, whose effectively connected income (as defined under the Federal Internal Revenue Code) is taxable both in this state and another state, other than the state in which it is organized, shall allocate and apportion its gross income as provided in this section.

(b) The apportionment percentage is determined by adding the taxpayer's receipts factor (as described in subsection (4) of this section), property factor (as described in subsection (5) of this section), and payroll factor (as described in subsection (6) of this section) together and dividing the sum by three. If one of the factors is missing, the two remaining factors are added together and the sum is divided by two. If two of the factors are missing, the remaining factor is the apportionment percentage. A factor is missing if both its numerator and denominator are zero, but it is not missing merely because its numerator is zero.

(c) Each factor shall be computed according to the method of accounting (cash or accrual basis) used by the taxpayer for Washington state tax purposes for the taxable period. Persons should refer to WAC 458-20-197 (When tax liability arises) and WAC 458-20-199 (Accounting methods) for further guidance on the requirements of each accounting method. Generally, financial institutions are required to file returns on a monthly basis. To enable financial institutions to more easily comply with the provisions of this section, financial institutions will file returns using factors calculated based on the most recent calendar year for which information is available. A reconciliation shall be filed for each year within thirty days of the time that the taxpayer files its federal income tax returns for that year, but not later than October 30th of the following year. For example, for returns filed for taxable activities occurring during calendar [year] 1998, a taxpayer would use factors calculated based on its 1996 information. A reconciliation would be filed for 1998 using factors based on 1998 information as soon as the information

was available to the taxpayer, but not later than thirty days after the time federal income tax returns were due for 1998, or October 30, 1999. In the case of consolidations, mergers, or divestitures, a taxpayer shall make the appropriate adjustments to the factors to reflect its changed operations.

(d) If the allocation and apportionment provisions of this section do not fairly represent the extent of its business activity in this state, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's business activity:

(i) Separate accounting;

(ii) A calculation of tax liability utilizing the cost of doing business method outlined in RCW 82.04.460(1);

(iii) The exclusion of any one or more of the factors;

(iv) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(v) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's receipts.

(3) **Definitions.** The following definitions apply throughout this section:

(a) **"Apportionable income"** means the gross income of the business taxable under RCW 82.04.290, including income received from activities outside this state if the income would be taxable under RCW 82.04.290 if received from activities in this state, less the exemptions and deductions allowable under chapter 82.04 RCW.

(b) **"Billing address"** means the location indicated in the books and records of the taxpayer on the first day of the taxable period (or on such later date in the taxable period when the customer relationship began) as the address where any notice, statement and/or bill relating to a customer's account is mailed.

(c) **"Borrower or credit card holder located in this state"** means:

(i) A borrower, other than a credit card holder, that is engaged in a trade or business which maintains its commercial domicile in this state; or

(ii) A borrower that is not engaged in a trade or business or a credit card holder, whose billing address is in this state.

(d) **"Commercial domicile"** means:

(i) The headquarters of the trade or business, that is, the place from which the trade or business is principally managed and directed; or

(ii) If a taxpayer is organized under the laws of a foreign country, or of the Commonwealth of Puerto Rico, or any territory or possession of the United States, such taxpayer's commercial domicile is deemed for the purposes of this section to be the state of the United States or the District of Columbia from which such taxpayer's trade or business in the United States is principally managed and directed. It is presumed, subject to rebuttal by a preponderance of the evidence, that the location from which the taxpayer's trade or business is principally managed and directed is the state of the United States or the District of Columbia to which the greatest number of employees are regularly connected or out of which they are working, irrespective of where the services of such employees are performed, as of the last day of the taxable period.

(e) **"Compensation"** means wages, salaries, commissions and any other form of remuneration paid to employees for personal services that are included in such employee's gross income under the Federal Internal Revenue Code. In the case of employees not subject to the Federal Internal Revenue Code, e.g., those employed in foreign countries, the determination of whether such payments would constitute gross income to such employees under the Federal Internal Revenue Code shall be made as though such employees were subject to the Federal Internal Revenue Code.

(f) **"Credit card"** means credit, travel or entertainment card.

(g) **"Credit card issuer's reimbursement fee"** means the fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit card has charged merchandise or services to the credit card.

(h) **"Department"** means the department of revenue.

(i) **"Employee"** means, with respect to a particular taxpayer, any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee of that taxpayer.

(j) **"Financial institution"** means:

(i) Any corporation or other business entity chartered under Titles 30, 31, 32, 33 RCW, or registered under the Federal Bank Holding Company Act of 1956, as amended, or registered as a savings and loan holding company under the Federal National Housing Act, as amended;

(ii) A national bank organized and existing as a national bank association pursuant to the provisions of the National Bank Act, 12 U.S.C. §§21 et seq.;

(iii) A savings association or federal savings bank as defined in the Federal Deposit Insurance Act, 12 U.S.C. §1813 (b)(1);

(iv) Any bank or thrift institution incorporated or organized under the laws of any state;

(v) Any corporation organized under the provisions of 12 U.S.C. §§611 to 631;

(vi) Any agency or branch of a foreign depository as defined in 12 U.S.C. §3101 that is not exempt under RCW 82.04.315;

(vii) Any credit union, other than a state or federal credit union exempt under state or federal law;

(viii) A production credit association organized under the Federal Farm Credit Act of 1933, all of whose stock held by the Federal Production Credit Corporation has been retired;

(ix) Any corporation or other business entity who receives gross income taxable under RCW 82.04.290, and whose voting interests are more than fifty percent owned, directly or indirectly, by any person or business entity described in (j)(i) through (viii) of this subsection other than an insurance company liable for the insurance premiums tax under RCW 48.14.020 or any other company taxable under chapter 48.14 RCW;

(x) A corporation or other business entity that derives more than fifty percent of its total gross income for federal income tax purposes from finance leases. For purposes of this subsection, a "finance lease" means a lease which meets two requirements:

(A) It is the type of lease permitted to be made by national banks (see 12 U.S.C. 24(7), 12 U.S.C. 24(10),

Comptroller of the Currency-Regulations, Part 23-Leasing (added by 56 Fed. Reg. 28314, June 20, 1991, effective July 22, 1991), and Regulation Y of the Federal Reserve System 12 C.F.R. 225.25, as amended); and

(B) It is the economic equivalent of an extension of credit, i.e., the lease is treated by the lessor as a loan for federal income tax purposes. In no event does a lease qualify as an extension of credit where the lessor takes depreciation on such property for federal income tax purposes.

For this classification to apply, the average of the gross income in the current tax year and immediately preceding two tax years must satisfy the more than fifty percent requirement;

(xi) Any other person or business entity, other than an insurance general agent taxable under RCW 82.04.280(5), an insurance business exempt from the business and occupation tax under RCW 82.04.320, a real estate broker taxable under RCW 82.04.255, a securities dealer or international investment management company taxable under RCW 82.04.290 (2), that derives more than fifty percent of its gross receipts from activities that a person described in (j)(ii) through (viii) and (x) of this subsection is authorized to transact. For purposes of this subparagraph, the computation of apportionable income shall not include income from nonrecurring, extraordinary items;

(xii) The department is authorized to exclude any person from the application of (j)(xi) of this subsection upon such person proving, by clear and convincing evidence, that the activity producing the receipts of such person is not in substantial competition with those persons described in (j)(ii) through (viii) and (x) of this subsection.

(k) **"Gross income of the business," "gross income," or "income"** has the same meaning as in RCW 82.04.080 and means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

(l) **"Gross rents"** means the actual sum of money or other consideration payable for the use or possession of real property. "Gross rents" includes, but is not limited to:

(i) Any amount payable for the use or possession of real property whether designated as a fixed sum of money or as a percentage of receipts, profits or otherwise;

(ii) Any amount payable as additional rent or in lieu of rent, such as interest, taxes, insurance, repairs or any other amount required to be paid by the terms of a lease or other arrangement; and

(iii) A proportionate part of the cost of any improvement to real property made by or on behalf of the taxpayer which reverts to the owner or grantor upon termination of a lease or other arrangement. The amount to be included in gross rents is the amount of amortization or depreciation allowed in computing the taxable income base for the taxable period. However, where a building is erected on leased land by or on behalf of the taxpayer, the value of the land is determined by multiplying the gross rent by eight and the value of the building is determined in the same manner as if owned by the taxpayer.

(iv) The following are not included in the term "gross rents":

(A) Reasonable amounts payable as separate charges for water and electric service furnished by the lessor;

(B) Reasonable amounts payable as service charges for janitorial services furnished by the lessor;

(C) Reasonable amounts payable for storage, provided such amounts are payable for space not designated and not under the control of the taxpayer; and

(D) That portion of any rental payment which is applicable to the space subleased from the taxpayer and not used by it.

(m) **"Loan"** means any extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such extension of credit from another. "Loan" includes participations, syndications, and leases treated as loans for federal income tax purposes. "Loan" does not include: Properties treated as loans under Section 595 of the Federal Internal Revenue Code; futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; noninterest bearing balances due from depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a REMIC, or other mortgage-backed or asset-backed security; and other similar items.

(n) **"Loan secured by real property"** means that fifty percent or more of the aggregate value of the collateral used to secure a loan or other obligation was real property, when valued at fair market value as of the time the original loan or obligation was incurred.

(o) **"Merchant discount"** means the fee (or negotiated discount) charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit card is accepted in payment for merchandise or services sold to the card holder.

(p) **"Participation"** means an extension of credit in which an undivided ownership interest is held on a *pro rata* basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.

(q) **"Person"** has the meaning given in RCW 82.04.030.

(r) **"Principal base of operations"** with respect to transportation property means the place of more or less permanent nature from which said property is regularly directed or controlled. With respect to an employee, the "principal base of operations" means the place of more or less permanent nature from which the employee regularly:

(i) Starts his or her work and to which he or she customarily returns in order to receive instructions from his or her employer; or

(ii) Communicates with his or her customers or other persons; or

(iii) Performs any other functions necessary to the exercise of his or her trade or profession at some other point or points.

(s) **"Real property owned"** and **"tangible personal property owned"** mean real and tangible personal property, respectively:

(i) On which the taxpayer may claim depreciation for federal income tax purposes; or

(ii) Property to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes (or could claim depreciation if subject to federal income tax).

Real and tangible personal property do not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure.

(t) **"Regular place of business"** means an office at which the taxpayer carries on its business in a regular and systematic manner and which is continuously maintained, occupied and used by employees of the taxpayer.

(u) **"State"** means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States or any foreign country.

(v) **"Syndication"** means an extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.

(w) **"Taxable in another state"** means either:

(i) That a taxpayer is subject in another state to a gross receipts or franchise tax for the privilege of doing business, a franchise tax measured by net income, a corporate stock tax (including a bank shares tax), a single business tax, or an earned surplus tax, or any other tax which is imposed upon or measured by gross or net income; or

(ii) That another state has jurisdiction to subject the taxpayer to any of such taxes regardless of whether, in fact, the state does or does not.

(x) **"Taxable period"** means the calendar year during which tax liability is incurred.

(y) **"Transportation property"** means vehicles and vessels capable of moving under their own power, such as aircraft, trains, water vessels and motor vehicles, as well as any equipment or containers attached to such property, such as rolling stock, barges, trailers or the like.

(4) **Receipts factor.**

(a) **General.** Except as provided in subsection (7) of this section, the receipts factor is a fraction, the numerator of which is the gross income of the taxpayer in this state during the taxable period and the denominator of which is the gross income of the taxpayer inside and outside this state during the taxable period. The method of calculating receipts for purposes of the denominator is the same as the method used in determining receipts for purposes of the numerator.

(b) **Receipts from the lease of real property.** The numerator of the receipts factor includes income from the lease or rental of real property owned by the taxpayer if the property is located within this state or income from the sublease of real property if the property is located within this state.

(c) **Receipts from the lease of tangible personal property.**

(i) Except as described in (c)(ii) of this subsection, the numerator of the receipts factor includes income from the lease or rental of tangible personal property owned by the taxpayer if the property is located within this state when it is first placed in service by the lessee.

(ii) Income from the lease or rental of transportation property owned by the taxpayer is included in the numerator of the receipts factor to the extent that the property is used in this state. The extent an aircraft is used in this state and the amount of income that is to be included in the numerator of this state's receipts factor is determined by multiplying all the income from the lease or rental of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft. If the extent of the use of any transportation property within this state cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

(d) **Interest from loans secured by real property.**

(i) The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans secured by real property if the property is located within this state. If the property is located both within this state and one or more other states, the income described in this subparagraph is included in the numerator of the receipts factor if more than fifty percent of the fair market value of the real property is located within this state. If more than fifty percent of the fair market value of the real property is not located within any one state, then the income described in this subparagraph shall be included in the numerator of the receipts factor if the borrower is located in this state.

(ii) The determination of whether the real property securing a loan is located within this state shall be made as of the time the original agreement was made and any and all subsequent substitutions of collateral shall be disregarded.

(e) **Interest from loans not secured by real property.** The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans not secured by real property if the borrower is located in this state.

(f) **Net gains from the sale of loans.** The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans includes income recorded under the coupon stripping rules of Section 1286 of the Federal Internal Revenue Code.

(i) The amount of net gains (but not less than zero) from the sale of loans secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (4)(d) and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(ii) The amount of net gains (but not less than zero) from the sale of loans not secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to (e) of this subsection and the denominator of which is the total amount of

interest and fees or penalties in the nature of interest from loans not secured by real property.

(g) **Receipts from credit card receivables.** The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from credit card receivables and income from fees charged to card holders, such as annual fees, if the billing address of the card holder is in this state.

(h) **Net gains from the sale of credit card receivables.** The numerator of the receipts factor includes net gains (but not less than zero) from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to (g) of this subsection and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(i) **Credit card issuer's reimbursement fees.** The numerator of the receipts factor includes all credit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to (g) of this subsection and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(j) **Receipts from merchant discount.** The numerator of the receipts factor includes receipts from merchant discount if the commercial domicile of the merchant is in this state. Such receipts shall be computed net of any cardholder charge backs, but shall not be reduced by any interchange transaction fees or by any issuer's reimbursement fees paid to another for charges made by its card holders.

(k) **Loan servicing fees.**

(i)(A) The numerator of the receipts factor includes loan servicing fees derived from loans secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor under (d) of this subsection and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(B) The numerator of the receipts factor includes loan servicing fees derived from loans not secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor under (e) of this subsection and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(ii) If the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, the numerator of the receipts factor includes such fees if the borrower is located in this state.

(l) **Receipts from services.** The numerator of the receipts factor includes receipts from services not otherwise apportioned under this subsection if the service is performed in this state. If the service is performed both inside and outside this state, the numerator of the receipts factor includes receipts from services not otherwise apportioned under this section, if a greater proportion of the activity producing the receipts is performed in this state based on cost of performance.

(m) **Receipts from investment assets and activities and trading assets and activities.**

(i) Interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities are included in the receipts factor. Investment assets and activities and trading assets and activities include but are not limited to: Investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options; futures contracts; forward contracts; notional principal contracts such as swaps; equities; and foreign currency transactions. With respect to the investment and trading assets and activities described in (m)(i)(A) and (B) of this subsection, the receipts factor includes the following:

(A) The receipts factor includes the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under repurchase agreements.

(B) The receipts factor includes the amount by which interest, dividends, gains and other receipts from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, exceed amounts paid in lieu of interest, amounts paid in lieu of dividends, and losses from such assets and activities.

(ii) The numerator of the receipts factor includes interest, dividends, net gains (but not less than zero) and other receipts from investment assets and activities and from trading assets and activities described in (m)(i) of this subsection that are attributable to this state.

(A) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the average value of such assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in (m)(i)(A) of this subsection from such funds and such securities by a fraction, the numerator of which is the average value of federal funds sold and securities purchased under agreements to resell which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such funds and such securities.

(C) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions, (but excluding amounts described in (m)(ii)(A) or (B) of this subsection), attributable to this state and included in the numerator is determined by multiplying the amount described in (m)(i)(B) of this subsection by a fraction, the numerator of which is the average value of such trading assets which are

properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(D) For purposes of this paragraph, average value shall be determined using the rules for determining the average value of tangible personal property set forth in subsection (5) of this section.

(iii) In lieu of using the method set forth in (m)(ii) of this subsection, the taxpayer may elect, or the department may require in order to fairly represent the business activity of the taxpayer in this state, the use of the method set forth in this paragraph.

(A) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the gross receipts from such assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in (m)(i)(A) of this subsection from such funds and such securities by a fraction, the numerator of which is the gross income from such funds and such securities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such funds and such securities.

(C) The amount of interest, dividends, gains and other receipts from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions, (but excluding amounts described in (m)(ii)(a)[A] or (B) of this subsection), attributable to this state and included in the numerator is determined by multiplying the amount described in (m)(i)(B) of this subsection by a fraction, the numerator of which is the gross income from such trading assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(iv) If the taxpayer elects or is required by the department to use the method set forth in (m)(iii) of this subsection, it shall use this method on all subsequent returns unless the taxpayer receives prior permission from the department to use, or the department requires a different method.

(v) The taxpayer has the burden of proving that an investment asset or activity or trading asset or activity was properly assigned to a regular place of business outside of this state by demonstrating that the day-to-day decisions regarding the asset or activity occurred at a regular place of business outside this state. If the day-to-day decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business and one such regular place of business is in this state and one such regular place of business is outside this state, such asset or activity is considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Such policies and guidelines are presumed, subject to rebuttal by preponderance of the evidence, to be established at the commercial domicile of the taxpayer.

(n) **Attribution of certain receipts to commercial domicile.** All receipts which would be assigned under this section to a state in which the taxpayer is not taxable are included in the numerator of the receipts factor, if the taxpayer's commercial domicile is in this state.

(5) **Property factor.**

(a) **General.** Except as provided in subsection (7) of this section, the property factor is a fraction, the numerator of which is the average value of real property and tangible personal property rented to the taxpayer that is located or used within this state during the taxable period, the average value of the real and tangible personal property owned by the taxpayer that is located or used within this state during the taxable period, and the average value of the taxpayer's loans and credit card receivables that are located within this state during the taxable period, and the denominator of which is the average value of all such property located or used inside and outside this state during the taxable period.

(b) **Value of property owned by the taxpayer.**

(i) The value of real property and tangible personal property owned by the taxpayer is the original cost or other basis of such property for federal income tax purposes without regard to depletion, depreciation or amortization.

(ii) Loans are valued at their outstanding principal balance, without regard to any reserve for bad debts. If a loan is charged-off in whole or in part for federal income tax purposes, the portion of the loan charged off is not outstanding. A specifically allocated reserve established under regulatory or financial accounting guidelines which is treated as charged-off for federal income tax purposes shall be treated as charged-off for purposes of this section.

(iii) Credit card receivables are valued at their out-standing principal balance, without regard to any reserve for bad debts. If a credit card receivable is charged-off in whole or in part for federal income tax purposes, the portion of the receivable charged-off is not outstanding.

(c) **Average value of property owned by the taxpayer.** The average value of property owned by the taxpayer is computed on an annual basis by adding the value of the property on the first day of the taxable period and the value on the last day of the taxable period and dividing the sum by two. If averaging on this basis does not properly reflect average value, the department may require averaging on a more frequent basis. The taxpayer may elect to average on a more frequent basis. When averaging on a more frequent basis is required by the department or is elected by the taxpayer, the same method of valuation must be used consistently by the taxpayer with respect to property inside and outside this state and on all subsequent returns unless the taxpayer receives prior permission from the department or the department requires a different method of determining average value.

(d) **Average value of real property and tangible personal property rented to the taxpayer.**

(i) The average value of real property and tangible personal property that the taxpayer has rented from another and

which is not treated as property owned by the taxpayer for federal income tax purposes, shall be determined annually by multiplying the gross rents payable during the taxable year by eight.

(ii) Where the use of the general method described in this subsection results in inaccurate valuations of rented property, any other method which properly reflects the value may be adopted by the department or by the taxpayer when approved in writing by the department. Once approved, such other method of valuation must be used on all subsequent returns unless the taxpayer receives prior approval from the department or the department requires a different method of valuation.

(e) **Location of real property and tangible personal property owned by or rented to the taxpayer.**

(i) Except as described in (e)(ii) of this subsection, real property and tangible personal property owned by or rented to the taxpayer is considered to be located within this state if it is physically located, situated or used within this state.

(ii) Transportation property is included in the numerator of the property factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state and the amount of value that is to be included in the numerator of this state's property factor is determined by multiplying the average value of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft everywhere during the tax reporting period. If the extent of the use of any transportation property within this state cannot be determined, then the property is deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle is deemed to be used wholly in the state in which it is registered. Thus, a motor vehicle will not be considered as used in Washington if there is no requirement for the vehicle to be licensed or registered in Washington.

(f) **Location of loans.**

(i)(A) A loan is located within this state if it is properly assigned to a regular place of business of the taxpayer within this state.

(B) A loan is properly assigned to the regular place of business with which it has a majority of substantive contacts. A loan assigned by the taxpayer to a regular place of business outside the state shall be presumed to have been properly assigned if:

(I) The taxpayer has assigned, in the regular course of its business, such loan on its records to a regular place of business consistent with federal or state regulatory requirements;

(II) Such assignment on its records is based upon substantive contacts of the loan to such regular place of business; and

(III) The taxpayer uses said records reflecting assignment of loans for the filing of all state and local tax returns for which an assignment of loans to a regular place of business is required.

(ii) The presumption of proper assignment of a loan provided in (f)(i)(A) of this subsection may be rebutted by a preponderance of the evidence, showing that the majority of substantive contacts regarding such loan did not occur at the regular place of business to which it was assigned on the taxpayer's records. When such presumption has been rebutted, the loan is located within this state if: The taxpayer had a regular place of business within this state at the time the loan was made; and the taxpayer fails to show, by a preponderance of the evidence, that the majority of substantive contacts regarding such loan did not occur within this state.

(A) If a loan is assigned by the taxpayer to a place outside this state which is not a regular place of business, it is presumed, subject to rebuttal on a preponderance of evidence, that the majority of substantive contacts regarding the loan occurred within this state if, at the time the loan was made the taxpayer's commercial domicile, as defined in subsection (3)(d) of this section, was within this state.

(B) To determine the state in which the majority of substantive contacts relating to a loan have occurred, the facts and circumstances regarding the loan at issue shall be reviewed on a case-by-case basis and consideration shall be given to such activities as the solicitation, investigation, negotiation, approval and administration of the loan. The terms "solicitation," "investigation," "negotiation," "approval" and "administration" are defined as follows:

(I) *Solicitation.* Solicitation is either active or passive. Active solicitation occurs when an employee of the taxpayer initiates the contact with the customer. Such activity is located at the regular place of business which the taxpayer's employee is regularly connected with or working out of, regardless of where the services of such employee were actually performed. Passive solicitation occurs when the customer initiates the contact with the taxpayer. If the customer's initial contact was not at a regular place of business of the taxpayer, the regular place of business, if any, where the passive solicitation occurred is determined by the facts in each case.

(II) *Investigation.* Investigation is the procedure whereby employees of the taxpayer determine the credit worthiness of the customer as well as the degree of risk involved in making a particular agreement. Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed.

(III) *Negotiation.* Negotiation is the procedure whereby employees of the taxpayer and its customer determine the terms of the agreement (e.g., the amount, duration, interest rate, frequency of repayment, currency denomination and security required). Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed.

(IV) *Approval.* Approval is the procedure whereby employees or the board of directors of the taxpayer make the final determination whether to enter into the agreement. Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed. If the board of directors makes the final determination, such activity is located at the commercial domicile of the taxpayer.

(V) *Administration.* Administration is the process of managing the account. This process includes bookkeeping, collecting the payments, corresponding with the customer, reporting to management regarding the status of the agree-

ment and proceeding against the borrower or the security interest if the borrower is in default. Such activity is located at the regular place of business which oversees this activity.

(g) **Location of credit card receivables.** For purposes of determining the location of credit card receivables, credit card receivables are treated as loans and are subject to the provisions of (f) of this subsection.

(h) **Period for which properly assigned loan remains assigned.** A loan that has been properly assigned to a state shall remain assigned to that state for the length of the original term of the loan, absent any change in material fact. If the original term of the loan is modified (extended or reduced), the loan may be properly assigned to another state if the loan has a majority of substantive contact to a regular place of business there.

(6) **Payroll factor.**

(a) **General.** Except as provided in subsection (7) of this section, the payroll factor is a fraction, the numerator of which is the total amount paid in this state during the taxable period by the taxpayer for compensation of employees and the denominator of which is the total compensation paid both inside and outside this state during the taxable period. The payroll factor shall include all compensation paid to employees.

(b) **Compensation relating to independent contractors.** Payments made to any independent contractor or any other person not properly classifiable as an employee is excluded from both the numerator and denominator of the factor.

(c) **When compensation paid in this state.** Compensation is paid in this state if any one of the following tests, applied consecutively, is met:

(i) The employee's services are performed entirely within this state.

(ii) The employee's services are performed both inside and outside the state, but the service performed without the state is incidental to the employee's service within the state. The term "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction.

(iii) If the employee's services are performed both inside and outside this state, the employee's compensation will be attributed to this state:

(A) If the employee's principal base of operations is inside this state; or

(B) If there is no principal base of operations in any state in which some part of the services are performed, but the place from which the services are directed or controlled is in this state; or

(C) If the principal base of operations and the place from which the services are directed or controlled are not in any state in which some part of the service is performed but the employee's residence is in this state.

(7) **Alternative factor calculation.**

(a) **General.** A taxpayer may elect to use the alternative factors calculation as provided in this subsection. The alternative factors calculation requires the use of all three factors provided below. A taxpayer making such an election must keep books and records sufficient to explain the calculations. Such an election, once made, must continue for a full calendar year.

(b) **Receipts factor.** The alternative receipts factor may be calculated by excluding from both the numerator and the denominator of the receipts factor as calculated in subsection (4) of this section gross income attributable to items that would not be subject to tax under the provisions of RCW 82.04.290, whether from activities inside or outside of the state. For example, a taxpayer making the election to use the alternative factors calculation must exclude all receipts from the rental of tangible personal property in Washington from the numerator and all receipts from the rental of tangible personal property, wherever located, in the denominator.

(c) **Property factor.** The alternative property factor may be calculated by excluding from both the numerator and the denominator of the property factor as calculated in subsection (5) of this section property, the income from which would be considered wholesale or retail sales under chapter 82.04 RCW, whether from activities inside or outside the state. For example, a taxpayer making the election to use the alternative factors calculation must exclude all tangible personal property rented to customers in Washington from the numerator and all tangible personal property rented to customers, wherever located, in the denominator.

(d) **Payroll factor.** The alternative payroll factor may be calculated by excluding from both the numerator and the denominator of the payroll factor as calculated in subsection (6) of this section that amount paid to employees in connection with earning gross income which would not be subject to tax under RCW 82.04.290, whether earned from activities inside or outside of the state. For example, a taxpayer making the election to use the alternative factors calculation must exclude all compensation paid to employees in connection with activities that are not taxable under RCW 82.04.290 from the numerator and all compensation paid to employees wherever located that would not be taxable under RCW 82.04.290 if it had been earned in Washington.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-22-089, § 458-20-14601, filed 11/1/10, effective 12/2/10. Statutory Authority: RCW 82.04.460(2) and 82.32.300. WSR 97-11-033, § 458-20-14601, filed 5/15/97, effective 7/1/97.]

WAC 458-20-148 Barber and beauty shops.

Business and Occupation Tax

Barber and beauty shops are subject to the business and occupation tax as follows:

Retailing. Taxable under the retailing classification upon charges for styling of wigs or hairpieces and upon the gross proceeds of sales of shoe shines and of packaged cosmetics, etc., sold apart from the rendition of personal services.

Service and other business activities. Taxable under the service and other business activities classification upon the gross income from charges for the rendition of personal services, such as hair cutting, shaving, shampooing, tinting, bleaching, setting and the like.

Retail Sales Tax

Barber and beauty shops primarily render personal services as to hair cutting, shaving, shampooing, tinting, bleaching, setting and the like and, therefore are not required to collect the retail sales tax from the customers paying for such

services. Sales by supply houses to barber and beauty shops of such articles of equipment as clippers, razors, barber chairs, hair waving machines, etc., and of such supplies as soaps, hair tonics, lotions, cosmetics, dyes, etc., which are used incidentally in the rendering of such personal services are taxable retail sales upon which the retail sales tax must be collected. Shops must collect retail sales tax upon sales and charges shown as taxable under retailing above.

Sales by barber and beauty shops of packaged cosmetics, hair tonics, lotions and like articles are taxable retail sales when sold apart from the rendition of personal services and are subject to the retail sales tax. Sales of such articles by supply houses to barber and beauty shops are sales for resale and are not taxable under the retail sales tax.

Barber shops operating shoe shine stands are required to collect the retail sales tax upon the charges made for shoe shines rendered to customers. Sales by supply houses of shoe polish, dyes, cleaners, etc., which are resold in rendering a shoe shine service are sales for resale and not taxable under the retail sales tax. However, sales to shoe shine stands of brushes, chairs and other equipment which are not resold in rendering such services are taxable retail sales and the retail sales tax must be collected thereon.

[Statutory Authority: RCW 82.32.300. WSR 83-07-034 (Order ET 83-17), § 458-20-148, filed 3/15/83; Order ET 70-3, § 458-20-148 (Rule 148), filed 5/29/70, effective 7/1/70.]

WAC 458-20-150 Optometrists, ophthalmologists, and opticians. (1) **Introduction.** This section explains the application of Washington's business and occupation (B&O), retail sales, and use taxes to the business activities of optometrists, ophthalmologists, and opticians. It explains the tax liability resulting from the rendering of professional services and the sale of prescription lenses, frames, and other optical merchandise. It also discusses the retail sales tax exemption for the sale of prescription lenses and the B&O tax deduction for prescription drugs administered by a medical service provider. The department of revenue (department) has adopted other sections dealing with the taxability of various activities relating to the provision of health care. Readers may want to refer to the following sections for additional information.

(a) WAC 458-20-151 (Dentists and other health care providers, dental laboratories, and dental technicians);

(b) WAC 458-20-168 (Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities);

(c) WAC 458-20-18801 (Prescription drugs, prosthetic and orthotic devices, ostomic items, and medically prescribed oxygen); and

(d) WAC 458-20-233 (Tax liability of medical and hospital service bureaus and associations and similar health care organizations).

(2) **Taxability of professional services.** Optometrists and ophthalmologists are subject to the service and other activities B&O tax on their gross income from providing professional services. For the purposes of this section, "professional services" include the examination of the human eye, the examination, identification, and treatment of any defects of the human vision system, and the analysis of the process of vision. It includes the use of any diagnostic instruments or devices for the measurement of the powers or range of vision, or the determination of the refractive powers of the eye or its functions. It does not include the preparation or dispensing of lenses or eyeglasses.

(3) **Purchases and sales of optical merchandise by optometrists, ophthalmologists, and opticians.** Purchases of optical merchandise by optometrists, ophthalmologists, and opticians for resale without intervening use as a consumer are not subject to the retail sales tax. Thus, optometrists, ophthalmologists, and opticians are not required to pay retail sales or use tax on items which will be given to customers as part of a sale of eyeglasses or contact lenses, such as cleaning supplies, carrying cases, and the like. The department considers these items to be sold along with the eyeglasses or contact lenses. An optometrist, ophthalmologist, or optician purchasing tangible personal property for resale must furnish a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to the seller to document the wholesale nature of the sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

Sales of optical merchandise to consumers are subject to retailing B&O tax. In addition, the seller must collect retail sales tax unless the sale is specifically exempt by law. For the purposes of this section, "optical merchandise" includes prescription lenses, frames, springs, temples, cases, and other items or accessories to be worn or used with lenses. It also includes nonprescription lenses or eyeglasses.

For purposes of this section, "prescription lens" means any lens, including contact lens, with power or prism correction for human vision, which has been prescribed in writing by a physician or optometrist. The term "prescription lens" includes all ingredients and component parts of the lens itself, including color, scratch resistant or ultraviolet coating, and fashion tints.

(a) **Are sales of prescription lenses and frames exempt from retail sales tax?** As a result of legislation to implement the national Streamlined Sales and Use Tax Agreement, effective July 1, 2004, sales of prescription lenses and frames for prescription lenses are exempt from retail sales tax as prosthetic devices under RCW 82.08.0283.

Before July 1, 2004, sales of prescription lenses were exempt from retail sales tax under RCW 82.08.0281 if the lenses were dispensed by an optician licensed under chapter 18.34 RCW or by a physician or optometrist under a prescription written by a physician or optometrist. Sales of frames for prescription lenses did not qualify for a sales tax exemption. Thus, before July 1, 2004, when prescription lenses were sold with frames, only the prescription lenses were exempt from sales tax.

(b) **Are repairs of prescription lenses and frames subject to retail sales tax?** Beginning July 1, 2004, charges for the repair of prescription lenses or to prescription eyeglass frames, whether the frames are the original frames or replacement frames, are exempt from retail sales tax under RCW 82.08.0283. Before July 1, 2004, charges for the repair of prescription lenses were exempt from retail sales tax. Charges for the repair of frames, however, were subject to retail sales tax.

(c) **Segregation of income from different sources.** To claim a retail sales tax exemption under RCW 82.08.0281 or 82.08.0283, persons providing or selling any combination of professional services, prescription lenses, prescription eyeglass frames, or other optical merchandise must segregate and separately account for the income derived from each source.

(d) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(i) Taxpayer is an optometrist who performs eye examinations and sells prescription eyeglasses, contact lenses, and other optical merchandise. All sales of prescription lenses are made under written prescription. Income attributable to the eye examinations, the sale of prescription lenses, and the sale of other optical merchandise is segregated in Taxpayer's books of account.

The income derived from the eye examinations is subject to service and other activities B&O tax. The gross proceeds of sales of the prescription lenses and other optical merchandise are subject to retailing B&O tax. The sales of prescription lenses, including contact lenses, are exempt from retail sales tax. Beginning July 1, 2004, sales of eyeglass frames with prescription lenses are exempt from retail sales tax. Taxpayer, however, must collect retail sales tax on sales of other optical merchandise, including eyeglass frames sold with prescription lenses before July 1, 2004, and remit the tax to the department.

(ii) Taxpayer is a retail drugstore that sells preassembled "off-the-shelf" reading glasses. These eyeglasses have lenses with power or prism correction and are sold without a prescription. In addition, Taxpayer sells magnifiers, binoculars, monoculars, and sunglasses. These items are also sold without a prescription.

The gross proceeds of sales of these items are subject to retailing B&O tax. In addition, Taxpayer must collect retail sales tax on sales of these items and remit the tax to the department. Because these items are not sold under a prescription, nor are they prescribed, fitted, or furnished for the buyer by a person licensed under the laws of this state to prescribe, fit, or furnish prosthetic devices, they are not exempt from retail sales tax under either RCW 82.08.0281 or 82.08.-0283.

(4) **Equipment and supplies used by optometrists, ophthalmologists, and opticians.** Purchases of equipment and supplies used by optometrists, ophthalmologists, and opticians are purchases at retail and are subject to retail sales tax unless specifically exempt by law. If the seller does not collect retail sales tax, the optometrist, ophthalmologist, or optician must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law. Deferred sales or use tax should be reported on the buyer's excise tax return. The excise tax return does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's excise tax return. For detailed information about use tax, refer to WAC 458-20-178 (Use tax).

(a) **Prescription drugs.** "Prescription drugs," as defined in RCW 82.08.0281, may be purchased without payment of retail sales or use tax by optometrists and ophthalmologists if all requirements for the exemption are met. For additional information regarding prescription drugs, refer to WAC 458-20-18801.

(b) Prescription drugs administered by the medical service provider. Effective October 1, 2007, RCW 82.04.620 allows a deduction from the service and other activities classification of the B&O tax (RCW 82.04.290(2)) for amounts received by physicians or clinics for drugs for infusion or injection by licensed physicians or their agents for human use pursuant to a prescription. This deduction only applies to amounts that:

(i) Are separately stated on invoices or other billing statements;

(ii) Do not exceed the then current federal rate; and

(iii) Are covered or required under a health care service program subsidized by the federal or state government.

For purposes of this deduction only, amounts that "are covered or required under a health care service program subsidized by the federal or state government" include any required drug copayments made directly from the patient to the physician or clinic.

(A) "Federal rate" means the rate at or below which the federal government or its agents reimburse providers for prescription drugs administered to patients as provided for in the medicare, Part B drugs average sales price information resource as published by the United States Department of Health and Human Services, or any index that succeeds it.

(B) The deduction is available on an "all or nothing" basis against the total of amounts received for a specific drug charge. If the total amount received by the physician or clinic for a specific drug exceeds the federal reimbursement rate, none of the total amount received qualifies for the deduction (including any required copayment received directly from the patient). In other words, a physician or clinic may not simply take an "automatic" deduction equal to the federal reimbursement rate for each drug.

(c) **Samples.** Optometrists, ophthalmologists, and opticians are required to pay use tax on any samples, with the exception of prescription drug samples that they acquire unless retail sales or use tax has been previously paid on these samples.

(d) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(i) Taxpayer is an ophthalmologist who performs eye examinations, laser surgery, and cataract surgery. Taxpayer purchases equipment and supplies that are used in performing these services such as surgical instruments, eye shields, cotton swabs, sterile dressings, bandages, and gauze. Taxpayer also purchased a computer, technical publications, and magazines by mail order and over the internet.

Taxpayer is subject to retail sales tax on these purchases. If the seller does not collect sales tax, Taxpayer is liable for deferred sales tax or use tax and must remit the tax directly to the department.

(ii) Taxpayer is an optometrist who performs eye examinations and sells prescription eyeglasses, contact lenses, and other optical merchandise. Taxpayer purchases nonprescription saline and cleaning solutions for contact lenses and carrying cases for eyeglasses and contact lenses. The saline and cleaning solutions are consumed when Taxpayer performs eye examinations. The eyeglass and contact lens carrying cases are provided to customers at the time they purchase eyeglasses or contact lenses.

The purchases of the eyeglass and contact lens carrying cases are purchases for resale and are, therefore, not subject to sales tax if Taxpayer provides the seller with a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010. The purchases of the saline and cleaning solutions are, however, subject to the retail sales tax. These solutions are consumed while providing professional services and cannot be considered to be purchased for resale. They also do not qualify for a sales tax exemption under RCW 82.08.0281 as prescription drugs. If retail sales tax was not paid on the saline and cleaning solutions at the time of purchase, Taxpayer must remit deferred sales tax or use tax directly to the department.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-150, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 08-16-055, § 458-20-150, filed 7/30/08, effective 8/30/08; WSR 04-17-023, § 458-20-150, filed 8/9/04, effective 9/9/04. Statutory Authority: RCW 82.32.300. WSR 93-19-020, § 458-20-150, filed 9/2/93, effective 10/3/93; WSR 83-07-034 (Order ET 83-17), § 458-20-150, filed 3/15/83; Order 74-2, § 458-20-150, filed 6/24/74; Order ET 70-3, § 458-20-150 (Rule 150), filed 5/29/70, effective 7/1/70.]

WAC 458-20-151 Dentists and other health care providers, dental laboratories, and dental technicians. (1) **Introduction.** This rule explains the application of business and occupation (B&O), retail sales, and use taxes to the business activities of dentists and other health care providers, dental laboratories, and dental technicians. For purposes of this rule, a "health care provider" is a person who is licensed under the provisions of Title 18 RCW to provide health care services to humans in the ordinary course of business or practice of a profession. The department of revenue (department) has adopted other rules dealing with the taxability of various activities relating to the provision of health care. Readers may want to refer to the following rules for additional information:

(a) WAC 458-20-150 (Optometrists, ophthalmologists, and opticians);

(b) WAC 458-20-168 (Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities);

(c) WAC 458-20-18801 (Prescription drugs, prosthetic and orthotic devices, ostomic items, and medically prescribed oxygen); and

(d) WAC 458-20-233 (Tax liability of medical and hospital service bureaus and associations and similar health care organizations).

(2) **Tax-reporting information for dentists and other health care providers.** This subsection provides specific tax-reporting information for dentists and more generalized tax-reporting information for other health care providers. Dentists who employ dental technicians to produce or fabricate dental appliances, devices, restorations, substitutes, or other dental laboratory products should refer to subsection (3)(b) and (d) of this rule for additional information. Dental appliances, devices, restorations, substitutes, or other dental laboratory products are also referred to as "dental prostheses" throughout this rule.

(a) **Taxability of dental and other health care services.** Dentists and other health care providers are subject to the service and other activities B&O tax on their gross income from performing dental and other health care services. The term "gross income" includes any separate charge for drugs, medicines, and other substances administered or provided to a patient as part of the dental or other health care services delivered to the patient. "Gross income" also includes any separate charges for prosthetic devices, including dental prostheses, that are provided as part of the dental or other health care services delivered to patients.

For purposes of this rule, "prosthetic device" means a replacement, corrective, or supportive device, including repair and replacement parts for a prosthetic device, worn on or in the body to artificially replace a missing portion of the body, prevent or correct a physical deformity or malfunction, or support a weak or deformed portion of the body.

(b) **Sales of tangible personal property apart from dental and other health care services.** A dentist or other health care provider may make sales of tangible personal property such as drugs, medicines, and bandages as a convenience to a buyer apart from any health care services provided to the buyer. These are sales of tangible personal property only when the dentist or other health care provider does not supply or administer the drug, medicine, or other item in the course of delivering health care services to the buyer. The gross proceeds of these retail sales of tangible personal property are subject to the retailing B&O tax. In addition, the dentist or other health care provider must collect and remit retail sales tax, unless the sale is specifically exempt by law. See WAC 458-20-18801 for detailed information regarding retail sales tax exemptions available for sales of items commonly associated with health care services. Adequate records must be kept by the dentist or other health care provider to distinguish items of tangible personal property that are supplied or administered to patients as part of health care services from those that are sold apart from health care services delivered to the buyer.

Purchases of tangible personal property for resale without intervening use are not subject to the retail sales tax. A dentist or other health care provider purchasing tangible personal property for resale must furnish a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to the seller to document the wholesale nature of the sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(c) **Equipment and supplies used by dentists and other health care providers.** Purchases of equipment and supplies used by dentists and other health care providers in performing dental or other health care services are purchases

at retail and subject to retail sales tax unless specifically exempt by law. If the seller does not collect retail sales tax, the dentist or other health care provider must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law. Deferred sales or use tax should be reported on the buyer's excise tax return. However, the excise tax return does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's excise tax return. For detailed information regarding the use tax, refer to WAC 458-20-178 (Use tax).

Dental prostheses are exempt from retail sales and use taxes if the dental prosthesis meets the definition of "prosthetic device" in subsection (2)(a) of this rule. RCW 82.08.-0283 and 82.12.0277. Exempt items include, but are not limited to, full and partial dentures, crowns, inlays, fillings, braces, retainers, collars, wire, screws, bands, splints, night guards, gold, silver, alloys, acrylic materials, filling material, reline material, cement, cavity liner, pins, and endo post.

(d) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(i) Dr. A is a physician who specializes in the treatment of allergies. Dr. A treats many patients with injections of allergy extracts (antigens). Dr. A separately itemizes the charges for the antigen, the administration of the injection, and the office call in patients' billings. Dr. A is subject to service and other activities B&O tax on the entire charge for the antigen, administration of the injection, and office call. Even though Dr. A separately itemizes the charges for antigens, these are not retail sales because Dr. A administers the antigens to the patients.

(ii) Dr. B made mail-order purchases of a computer, books, and magazines for use in Dr. B's dental practice. Dr. B did not pay retail sales tax to the sellers on these purchases. Therefore, Dr. B must remit to the department deferred retail sales or use tax on the computer, books, and magazines.

(3) **Tax-reporting information for dental laboratories and dental technicians.** This subsection provides tax-reporting information for dental laboratories and dental technicians.

(a) **Producing or fabricating dental prostheses for sale.** The production or fabrication of dental appliances, devices, restorations, substitutes, or other dental laboratory products by dental laboratories and dental technicians is a manufacturing activity. RCW 82.04.120. Thus, dental laboratories and dental technicians are subject to manufacturing B&O tax on the value of the dental prostheses they manufacture. The value of products manufactured is generally the gross proceeds of sales of such manufactured products. For additional information about the manufacturing B&O tax, refer to WAC 458-20-136 (Manufacturing, processing for hire, fabricating).

(i) **Sales of dental prostheses manufactured by dental laboratories and dental technicians.** Dental laboratories and dental technicians who make sales within this state of dental prostheses they have manufactured are subject to either the retailing or wholesaling B&O tax, as the case may be. In such cases, the dental laboratory or dental technician must report under the manufacturing B&O tax classification as well as the wholesaling and/or retailing B&O tax classifications. However, a multiple activities tax credit (MATC) may be claimed. For detailed information about the MATC, refer to WAC 458-20-19301 (Multiple activities tax credits). Dental laboratories or dental technicians making wholesale sales must obtain a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, from the buyer to document the wholesale nature of the sale.

As noted above in subsection (2)(c) of this rule, sales of dental prostheses including, but not limited to, full and partial dentures, crowns, inlays, fillings, braces, and retainers are exempt from retail sales tax if the dental prosthesis meets the definition of "prosthetic device" in subsection (2)(a) of this rule. RCW 82.08.0283.

(ii) **Dental casts, models, and other articles of tangible personal property manufactured by dental laboratories and dental technicians for commercial or industrial use.** Dental laboratories and dental technicians may manufacture dental casts, models, or other articles of tangible personal property that they use in producing or fabricating dental prostheses. In such cases, the dental laboratory or dental technician is manufacturing a product for commercial or industrial use and is subject to the manufacturing B&O tax on the value of the dental cast, model, or other article of tangible personal property. (See WAC 458-20-112 (Value of products) for information regarding the value of products.) As the consumer of the dental cast, model, or other article of tangible personal property manufactured for commercial or industrial use, the dental laboratory or dental technician is also liable for use tax on the value of the dental cast, model, or other article of tangible personal property, unless the use is specifically exempt by law.

(b) **In-house manufacturing of dental prostheses by dentists.** As noted in this rule, the production or fabrication of dental prostheses by dental laboratories and dental technicians is a manufacturing activity. However, the production or fabrication of dental prostheses by dentists in the course of providing dental care services to their patients is not a manufacturing activity under the law and, therefore, manufacturing B&O tax does not apply to this activity. A dentist may personally produce or fabricate dental prostheses, or the dentist may have an employee who is a dental technician produce or fabricate the dental prostheses. These dental prostheses are considered a tangible representation of professional services provided to the dentist's patients. Dentists who manufacture impressions, dental casts, models, or other articles of tangible personal property that they use in producing or fabricating dental prostheses should refer to subsection (3)(a)(ii) of this rule for tax reporting instructions applicable to this activity.

The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(i) **Example.** Jane Doe, an employee of Dentist A, fabricates dental prostheses. Dentist A provides these products to patients in the course of rendering dental care services. Dentist A is subject to service and other activities B&O tax on the

gross income received for providing dental care services, including any charge for the dental prostheses even if Dentist A separately charges patients for the dental prostheses. (See subsection (2)(a) of this rule.)

(ii) **Example.** The facts are the same as in the previous example except that Dentist A also sells to Dentist B dental prostheses produced by Jane Doe in the course of Jane's employment with Dentist A. For these sales of dental prostheses to Dentist B, Dentist A is acting as a dental laboratory and, therefore, is liable for both manufacturing B&O tax and retailing B&O tax with respect to the manufacture and sale of dental prostheses to Dentist B. Dentist A may also claim a MATC (see subsection (3)(a) and (a)(i) of this rule.) The sales to Dentist B are exempt from retail sales tax under RCW 82.08.0283 if the items qualify as a prosthetic device as defined above in subsection (2)(a) of this rule.

(c) **Equipment and supplies used by dental laboratories and dental technicians.** Purchases of equipment and supplies by dental laboratories and dental technicians for use in manufacturing dental prostheses are generally purchases at retail and subject to retail sales tax unless specifically exempt by law. If the seller does not collect retail sales tax, the dental laboratory or dental technician must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law. Deferred sales or use tax should be reported on the buyer's excise tax return. However, the excise tax return does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's excise tax return. For detailed information regarding use tax, refer to WAC 458-20-178.

(i) **Components of dental prostheses produced for sale.** Purchases of supplies that become components of dental prostheses that are produced for sale are purchases at wholesale and are not subject to retail sales tax if the buyer provides the seller with a properly completed resale certificate (WAC 458-20-102A) for purchases made before January 1, 2010, or a reseller permit (WAC 458-20-102) for purchases made on or after January 1, 2010, to document the wholesale nature of the transaction.

(ii) **Example.** The following example identifies a number of facts and then states a conclusion. This example should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances. A dental lab purchases equipment and supplies including gold, silver, alloys, artificial teeth, cement, and tools. The purchases of gold, silver, alloys, artificial teeth, and cement that become components of dental prostheses are wholesale purchases and are not subject to retail sales tax if the buyer provides the seller with a resale certificate (WAC 458-20-102A) for purchases made before January 1, 2010, or a reseller permit (WAC 458-20-102) for purchases made on or after January 1, 2010. The tools are subject to retail sales or use tax unless they qualify for the manufacturing machinery and equipment sales and use tax exemption. Additional information about this exemption is provided below in subsection (3)(d) of this rule.

(d) **Sales and use tax exemptions for manufacturing machinery and equipment.** A retail sales and use tax exemption is provided by RCW 82.08.02565 and 82.12.-02565 for sales to or use by manufacturers of certain machinery and equipment used directly in a manufacturing operation. This exemption is limited to machinery and equipment used to manufacture products for sale as tangible personal property. Thus, dental laboratories and dental technicians manufacturing dental prostheses for sale may be eligible for this exemption. The exemption is not available if these products are produced or fabricated by a dentist or an employee of a dentist and are provided to patients in the course of delivering dental care services to the patients (as is the case in the example provided in subsection (3)(b)(i) of this rule). Refer to WAC 458-20-13601 (Manufacturers and processors for hire—Sales and use tax exemption for machinery and equipment) for detailed information regarding this exemption.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-151, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 04-17-022, § 458-20-151, filed 8/9/04, effective 9/9/04; WSR 02-21-080, § 458-20-151, filed 10/17/02, effective 11/17/02. Statutory Authority: RCW 82.32.300. WSR 91-15-023, § 458-20-151, filed 7/11/91, effective 8/11/91; WSR 83-07-032 (Order NET 83-15), § 458-20-151, filed 3/15/83; Order 74-2, § 458-20-151, filed 6/24/74; Order NET 70-3, § 458-20-151 (Rule 151), filed 5/19/70, effective 7/1/70.]

WAC 458-20-153 Funeral directors. Funeral directors commonly quote a lump sum price for a standard funeral service, which includes the furnishing of a casket, professional services, care of remains, funeral coach, floral car and the securing of permits.

Business and Occupation Tax

Retailing. The gross amount subject to the retail sales tax as outlined below, is taxable under the retailing classification of the business and occupation tax except that there may be deducted, for purposes of the business tax only, amounts received as reimbursement for expenditures for goods or services supplied by others who are not persons employed by, affiliated, or associated with the funeral home, when such amounts were advanced by the funeral home as an accommodation to the person paying for a funeral; but this deduction is allowed only if such expenditures advanced are billed to the person paying for the funeral at the exact amount of the expenditure advanced and such amounts are separately itemized in the billing statement to such person.

Service and other business activities. That portion of the gross income derived from engaging in business as a funeral director which is not taxable under the retailing classification is taxable as service and other business activities.

Retail Sales Tax

Where the funeral director quotes a lump sum price for a standard funeral service, which includes both the sale of tangible personal property and a charge for the rendering of service, the retail sales tax is collected upon one-half of such lump sum price. Clothing, outside case (a concrete or metal box into which the casket is placed) and other tangible personal property furnished in addition to the casket must be billed separately and the retail sales tax collected thereon.

The retail sales tax is not applicable to sales made to funeral directors of tangible personal property which is resold separate and apart from the rendition of professional services, provided the vendor receives from the funeral director a resale certificate in the usual form. The property so purchased

includes the casket, clothing, outside case and acknowledgment cards.

The retail sales tax is applicable to sales to funeral directors of tangible personal property which is consumed in the rendition of professional services. The property so purchased includes all preparation room supplies (embalming fluid and other chemicals, solvents, waxes, cosmetics, eye caps, gauze, cotton, etc.). The sales tax is also applicable to sales to such persons of tools and equipment.

Use Tax

The use tax applies upon the use within this state of all articles of tangible personal property used in the performance of professional services when such articles have been purchased or acquired under conditions whereby the Washington retail sales tax has not been paid.

[Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), § 458-20-153, filed 3/15/83; Order ET 70-3, § 458-20-153 (Rule 153), filed 5/29/70, effective 7/1/70.]

WAC 458-20-154 Cemeteries, crematories, columbaria.

Business and Occupation Tax

Retailing. The gross proceeds derived from the sale of tangible personal property taxable under the retail sales tax are also taxable under the retailing classification.

Service and other business activities. Income derived from rendition of interment services is taxable under the service and other business activities classification. Sales or transfers of plots, crypts, and niches for interment of human remains, irrespective of whether the document of transfer is called a deed or certificate of ownership, are charges for the right of interment, an interest similar to a license to use real estate, and the entire gross income therefrom is taxable under the service and other activities classification without any deduction for amounts set aside to funds for perpetual care.

Retail Sales Tax

Cemeteries, crematories and columbaria are subject to the provisions of the retail sales tax with respect to retail sales of boxes, urns, markers, vases, plants, shrubs, flowers, and other tangible personal property.

Revised June 1, 1978.

Effective July 1, 1978.

[Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-06-083 (Order 78-3), § 458-20-154, filed 6/1/78; Order ET 70-3, § 458-20-154 (Rule 154), filed 5/29/70, effective 7/1/70.]

WAC 458-20-15501 Taxation of computer systems and hardware. (1) Taxation of computer systems.

(a) **What is a computer?** A "computer" is an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions. RCW 82.04.215. Examples of a computer include, but are not limited to, mainframe computer, laptop, workstation, and desktop computer. "Computer" also includes automatic data processing equipment, which is a computer used for data processing purposes. "Computer" does not include any computer software or peripheral devices.

(b) **Computer systems and computer networks distinguished.** A "computer system" is a functional unit, consisting of one computer and associated computer software, whereas a computer network is two or more computers and associated computer software that uses common storage. A computer system may or may not include peripheral devices.

(c) **Wholesale sale of computer systems.** Gross proceeds of sales of computer systems to persons other than consumers (e.g., sales for resale without intervening use) are subject to B&O tax under the wholesaling classification. To verify the wholesale nature of the sale, the seller should obtain a reseller permit from the buyer as provided by WAC 458-20-102 (Reseller permits).

(d) **Retail sale of computer systems.** Gross proceeds of sales of computer systems to consumers are subject to B&O tax under the retailing classification. Persons making retail sales are responsible for collecting retail sales tax at the time of sale and remitting the tax to the department, unless the sale is specifically exempt by law. If the seller is required to collect Washington sales tax (such as in the case of the seller having nexus with Washington), but does not collect Washington sales tax, the buyer is responsible for remitting retail sales tax (commonly referred to as deferred sales tax), unless the sale is specifically exempt by law. If the seller is not required to collect Washington sales tax, then the buyer is responsible for remitting use tax, unless the transaction is specifically exempt by law. Separately stated charges for custom software sold with the computer system are subject to service B&O tax.

(e) **Manufacturing of computer systems.** Persons manufacturing computer systems are subject to manufacturing B&O tax upon the value of the products. See WAC 458-20-112 (Value of products) and 458-20-136 (Manufacturing, processing for hire, fabricating). Manufacturers of computer systems who sell their products at retail or wholesale are also subject to either the retailing or wholesaling B&O tax, as the case may be. In such cases the manufacturer must report under both the "production" (manufacturing) and "selling" (wholesaling or retailing) B&O tax classifications and may claim a multiple activities tax credit (MATC). See WAC 458-20-19301 (Multiple activities tax credits) for detailed information about the MATC.

(i) Separately stated charges for custom programming sold with the computer system are not subject to manufacturing B&O tax, but are subject to service B&O tax.

(ii) Separately stated charges for computer software sold and installed after the sale of a computer system are not subject to manufacturing B&O tax.

(iii) The combining of a computer system with certain peripheral devices is considered a packaging activity not subject to manufacturing B&O tax, when the following occurs:

(A) The peripheral devices remain in the original packaging;

(B) The person does not attach its own label to the peripheral devices;

(C) The person maintains a separate inventory of the peripheral devices for sale apart from the sale of the computer system; and

(D) The charge for the sale of peripheral devices is separately stated from the charge for the sale of computer systems.

(2) **Examples.**

(a) ABC Computers, Inc., an in-state manufacturer, manufactures and sells at retail computer systems. ABC sells a computer system to Steve for one flat charge. The computer system includes a disk drive, memory, CPU, keyboard, mouse, monitor, and bundled prewritten computer software. ABC is subject to retailing B&O tax and must collect retail sales tax on the sale to Steve. In addition, ABC is subject to manufacturing B&O tax on the value of the product sold (which is generally the sales price). ABC is entitled to claim a multiple activities tax credit.

(b) ADE Computers, Inc., manufactures and sells computer systems at retail to customers. ADE sells to Julie a computer system with certain peripheral devices at separate charges. The computer system without the peripheral devices consists of a disk drive, memory, CPU, and bundled prewritten computer software. The peripheral devices include a keyboard, mouse, and monitor. All peripheral devices remain in the original packaging of the manufacturers. ADE does not attach its own label to the peripheral devices. Finally, ADE maintains a separate inventory of the peripheral devices for sale apart from the sale of ADE's computer systems. ADE is subject to retailing B&O tax and must collect retail sales tax from Julie on the sales of the computer system including the peripheral devices. ADE is subject to manufacturing B&O tax on the value of the computer system excluding the peripheral devices. ADE is entitled to claim a multiple activities tax credit. ADE is not subject to manufacturing B&O tax on the value of the peripheral devices because the combining of a computer system with the peripheral devices in this case constitutes packaging activities.

(c) AFG Computers, Inc., an in-state company, manufactures and sells at retail computer systems. AFG sells a computer system to Joe for a lump sum. Joe purchases from AFG, as part of the sales package, prewritten computer software developed by a third-party software developer. AFG installs the prewritten computer software to Joe's computer. AFG is subject to retailing B&O tax and must collect retail sales tax from Joe on the sale of the computer system, including the bundled prewritten computer software. Also, AFG is subject to manufacturing B&O tax on the value of the computer system, including the value of the prewritten computer software. AFG is entitled to claim a multiple activities tax credit.

(d) Same facts as (c) of this subsection, except that AFG sells and installs the prewritten computer software after Joe purchases and takes possession of the computer system. AFG is subject to retailing B&O tax and must collect retail sales tax from Joe on the sale of the computer system and the prewritten computer software. Also, AFG is subject to manufacturing B&O tax on the value of the computer system. AFG is entitled to claim a multiple activities tax credit. AFG is not subject to manufacturing B&O tax on the value of the prewritten computer software because the installation of the software by AFG is not a part of AFG's manufacturing activity.

(3) **Taxation of computer hardware, both internal and external peripheral devices.**

(a) **What is computer hardware?** For purposes of this section, "computer hardware" includes, but is not limited to, the mechanical, magnetic, electronic, or electrical components of a computer system such as towers, motherboards, central processing units (CPU), hard disk drives, memory, as well as internal and external peripheral devices such as compact disk read-only memory (CD-ROM) drives, compact disk rewritable (CD-RW) drives, zip drives, internal and external modems, wireless fidelity (Wi-Fi) devices, floppy disks, compact disks (CDs), digital versatile disks (DVDs), cables, mice, keyboards, printers, monitors, scanners, web cameras, speakers, and microphones.

(b) **Wholesale sale of computer hardware.** Gross proceeds of sales of computer hardware to persons other than consumers (e.g., sales for resale without intervening use) are subject to B&O tax under the wholesaling classification. To verify the wholesale nature of the sale, the seller should obtain a reseller permit from the buyer as provided by WAC 458-20-102 (Reseller permits).

(c) **Retail sale of computer hardware.** Gross proceeds of sales of computer hardware to consumers are subject to B&O tax under the retailing classification. Persons making retail sales are responsible for collecting retail sales tax at the time of sale and remitting the tax to the department, unless the sale is specifically exempt by law.

(d) **Manufacturing of computer hardware.** Persons manufacturing computer hardware are subject to manufacturing B&O tax upon the value of the products. See WAC 458-20-112 (Value of products) and 458-20-136 (Manufacturing, processing for hire, fabricating). Manufacturers of computer hardware who sell their products at retail or wholesale are also subject to either the retailing or wholesaling B&O tax, as the case may be. In such cases the manufacturer must report under both the "production" (manufacturing) and "selling" (wholesaling or retailing) B&O tax classifications and may claim a multiple activities tax credit (MATC). See WAC 458-20-19301 (Multiple activities tax credits) for detailed information about the MATC.

(4) **Examples.**

(a) ALM Computers, Inc., purchases used computers. ALM replaces a built-in CD-ROM drive with a CD-RW drive and adds a zip drive, additional memory, and an upgraded CPU. ALM is engaged in manufacturing activity subject to manufacturing B&O tax with respect to that computer.

(b) AJK Computers, Inc., acquires damaged computers for refurbishment and sale. AJK removes damaged hardware components and replaces them with new components without upgrading these components. Refurbishing computers in this manner is not a manufacturing activity. Retail sales of such refurbished computers are subject to retailing B&O tax and retail sales tax.

(c) APQ Computers, Inc., purchases computers for refurbishment and sale. APQ replaces the failed zip drive on one of the computers with an upgraded zip drive because the upgrade is the nearest version of the failed component that is available. The manufacturer has discontinued manufacturing the original version of the zip drive because of a flaw in the design. APQ is not engaged in manufacturing activity with respect to that computer. Retail sale of that refurbished computer is subject to retailing B&O tax and retail sales tax.

(d) ATV Computers, Inc., is hired by a call center company to repair damaged computers. ATV removes damaged hardware components and replaces them with new components without upgrading these components. Refurbishing

computers in this manner is not a manufacturing activity; however, it is a retail service. Refurbishing computers in this manner is subject to retailing B&O tax and retail sales tax must be collected. See WAC 458-20-173 (Installing, cleaning, repairing or otherwise altering or improving personal property of consumers) for more information on repairs and maintenance.

(5) **Taxation of other activities associated with computer hardware.**

(a) **Installing computer hardware.** Gross proceeds of sales for installing computer hardware are subject to wholesaling or retailing B&O tax, as the case may be. Installation of computer hardware for consumers is subject to retail sales tax. See RCW 82.32.730 (sourcing) for more information on sourcing retail sales of computer services. See WAC 458-20-173 (Installing, cleaning, repairing or otherwise altering or improving personal property of consumers) for more information on installations.

(b) **Repairing or maintaining computer hardware.** Gross proceeds of sales for repair or maintenance of computer hardware are subject to wholesaling or retailing B&O tax. Repair of computer hardware for consumers is subject to retail sales tax. See RCW 82.32.730 for more information on sourcing. See WAC 458-20-173 (Installing, cleaning, repairing or otherwise altering or improving personal property of consumers) for more information on repairs and maintenance. Also, see WAC 458-20-257 (Warranties and maintenance agreements) for information about repair performed as part of a warranty or maintenance agreement.

[Statutory Authority: RCW 82.32.200 and 82.01.060. WSR 13-06-015, § 458-20-15501, filed 2/25/13, effective 3/28/13. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 09-01-088, § 458-20-15501, filed 12/16/08, effective 1/16/09.]

WAC 458-20-15502 Taxation of computer software. (1) **What is computer software?** RCW 82.04.215 provides that "computer software" is a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task. All software is classified as either prewritten or custom. "Computer software" includes only those sets of coded instructions intended for use by an end user and specifically excludes retained rights in software and master copies of software. Computer software does not include data.

(a) **How is computer software delivered?** Computer software may be delivered either by intangible means such as electronically downloaded or by tangible means such as tangible storage media.

(b) **What is automatic data processing equipment?** "Automatic data processing equipment" includes computers used for data processing purposes and their peripheral equipment.

(c) **What are retained rights?** "Retained rights" means any and all rights, including intellectual property rights such as those rights arising from copyrights, patents, and trade secret laws, that are owned or are held under contract or license by a software developer, author, inventor, publisher, licensor, sublicensor, or distributor. RCW 82.04.215.

(d) **What are master copies of software?** "Master copies" of software means copies of software from which a software developer, author, inventor, publisher, licensor, sublicensor, or distributor makes copies for sale or license. RCW 82.04.215.

(i) **Development of a master copy of software.** Development of a master copy of software by a software developer, or a third party hired by the software developer, that is used to produce copies of software for sale or commercial or industrial use, is not a manufacturing activity. A third-party charge for development of a master copy of software is a charge for custom software development and is subject to service and other activities B&O tax.

(ii) **Use of prewritten computer software by software developer.** The internal use of prewritten computer software by the developer of that software is not subject to use tax because the software developer is not an end user of its own internally developed software. For example, VV Software, Inc., an in-state software developer, creates accounting software generally used by small businesses. VV plans to sell its newly created software to other companies. VV also plans to make a copy of this software and use it for its accounting operation. The copy of software used by VV for its accounting operation is not subject to use tax.

(2) **What is custom software?** "Custom software" is computer software created for a single person. RCW 82.04.215. The use of library files in software development does not preclude the developed software from being characterized as custom software, as long as the software is created for a single person. The nature of custom software does not change when ownership is transferred to a person with no rights retained by the transferor.

For purposes of this section, "library files" are a collection of precompiled and frequently used routines that a software developer can use in developing the software. The purchase or use of such "library files" may be subject to retail sales or use tax as the sale of prewritten software.

(a) **Creation of custom software.** Gross income received for creating custom software is subject to service and other activities B&O tax.

(b) **Duplication of custom software.** Duplication of custom software for the same person, or by the same person for the person's own use, does not change the character of the custom software. RCW 82.04.29001. Duplication of custom software for the same person, or by the same person for its own use, is not subject to manufacturing B&O tax.

If a person duplicates custom software for sale to or use by another person other than the original purchaser, the software becomes prewritten computer software as defined in subsection (3) of this section and is subject to manufacturing B&O tax if the prewritten computer software is delivered by tangible storage media.

(c) **Sale of custom software.** If custom software is sold to another person other than the original purchaser, the software loses its character as custom software and becomes prewritten computer software as defined in subsection (3) of this section.

(d) **Use of custom software.** Use of custom software is not subject to use tax.

(e) The examples included in this rule identify a number of facts and then state a general conclusion; they should be used only as a general guide. Additionally, each fact pattern in each example is self contained (e.g., "stands on its own") unless otherwise indicated by reference to another example.

The tax consequences of all situations must be determined after a review of all the facts and circumstances. Examples requiring that sales tax be collected by the seller assume that the seller has "tax nexus" with Washington and no exclusions or exemptions apply and the sale is sourced to Washington.

(f) **Example 1.** PFC, Inc., develops software for its client. PFC is not subject to manufacturing B&O tax because the software is custom software. PFC's income from the sale of the custom software to the one specific client is subject to service and other activities B&O tax.

(3) **What is prewritten computer software?** RCW 82.04.215 provides that "prewritten computer software" is computer software, including prewritten upgrades, patches, fixes, etc., that is not designed and developed by the author or other creator to the specifications of a specific purchaser.

The combining of two or more prewritten computer software programs or prewritten portions thereof does not result in custom software. Configuration of prewritten computer software to work with other computer software does constitute customization of prewritten computer software.

Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser.

Where a person, who is not the author or creator, modifies or enhances prewritten computer software, that person is deemed to be the author or creator only of the modifications or enhancements made. Prewritten computer software, or a portion thereof, that is modified or enhanced to any degree, remains prewritten computer software, even though the modification or enhancement is designed and developed to the specifications of a specific purchaser. Where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, the modification or enhancement will not be considered prewritten computer software.

(a) **Wholesale sales of prewritten computer software.** Gross proceeds from sales of prewritten computer software to persons other than consumers (e.g., sales for resale without intervening use) are subject to B&O tax under the wholesaling classification, whether or not ownership or title passes to the buyer, and regardless of any express or implied restrictions upon the buyer. The method of delivery of prewritten computer software does not alter the wholesale nature of the transaction, whether it is through tangible storage media or any electronic means. Delivery of software manuals and backup copies of prewritten computer software does not alter the delivery of the actual copy of prewritten computer software to be used by the buyer in determining when and where the sale takes place. To verify the wholesale nature of the sale, the seller obtains a reseller permit from the buyer as provided by WAC 458-20-102 (Reseller permits).

(i) **Distinction between wholesale sales of prewritten computer software and royalties received for the licensing of prewritten computer software.** Sales of prewritten computer software constitute wholesale sales if the reseller, who has no right to reproduce the software for further sales, sells the same software to its customers. The true object of the sale to the reseller is the sale of the software. On the other hand, income received for granting an intangible right to reproduce and distribute copies of prewritten computer software for sale constitutes royalties. The true object of the transaction that generates royalty income is the right to reproduce and relicense the software. See subsection (8) of this section for more information on royalties.

(ii) **Examples.**

(A) **Example 2.** UM Computers, Inc., develops engineering software. UM sells the prewritten computer software at wholesale to OX Computers, Inc., in shrink-wrapped packages. UM delivers the software to OX. OX then resells the software to customers in the same shrink-wrapped packages. Sales of prewritten computer software by UM are subject to wholesaling B&O tax. Sales by OX to consumers are retail sales subject to retailing B&O tax and retail sales tax.

(B) **Example 3.** GB Computers, Inc., develops engineering software. GB grants SE Computers, Inc., the right to reproduce and distribute copies of the prewritten computer software for sale to end users. GB retains all of its ownership rights to the software and delivers one copy of the software to SE to reproduce and sell. Amounts received by GB from SE for granting the right to reproduce and distribute prewritten computer software are subject to royalties B&O tax. Sales by SE to consumers are retail sales subject to retailing B&O tax and retail sales tax.

(C) **Example 4.** DH Computers, Inc., develops engineering software. DH grants to WK Computers, Inc., the right to copy and redistribute its prewritten computer software. DH delivers the software electronically to WK. WK then sells the software to its customers, who download a copy of the software from WK. Income to DH from WK is subject to royalties B&O tax. Sales of prewritten computer software by WK to its customers are retail sales subject to retail sales tax.

(D) **Example 5.** AJ Soft, Inc., is a software developer of architectural drafting software. AJ Soft enters into an agreement with DJ Sales, Inc., to sell AJ Soft's drafting software. DJ Sales must pay a fee for each copy DJ Sales sells through its web site. AJ Soft does not allow DJ Sales to reproduce the drafting software. Customers download the software, but are unaware the software is downloaded directly from AJ Soft. AJ Soft is making a wholesale sale of software to DJ Sales subject to wholesaling B&O tax. DJ Sales is making a retail sale to its Washington customers subject to retail sales tax.

(E) **Example 6.** Same facts as Example 5, however, instead of customers downloading the prewritten software, DJ Sales' customers access the prewritten software remotely on AJ Soft's servers. AJ Soft is still making a wholesale sale of remotely accessed prewritten software to DJ Sales subject to wholesaling B&O tax. DJ Sales is making a retail sale of remotely accessed prewritten software to its Washington customers subject to retail sales tax.

(b) **Retail sales of prewritten computer software.** Gross proceeds of sales of prewritten computer software to consumers are subject to B&O tax under the retailing classification, whether or not ownership or title passes to the buyer, and regardless of any express or implied restrictions upon the buyer. Regardless of the method of delivery, whether through tangible media or electronic means, prewritten computer software remains subject to retail sales tax and retailing B&O tax. Delivery of software manuals and backup copies of prewritten computer software does not alter the delivery of the actual copy of prewritten computer software to be used by the buyer in determining when and where the sale takes place.

Persons making retail sales are responsible for collecting retail sales tax at the time of sale and remitting the tax to the department, unless the sale is specifically exempt by law.

(c) **Use of prewritten computer software.** Prewritten computer software, regardless of the method of delivery, is generally subject to use tax upon use in this state if Washington retail sales tax was not previously paid. However, use of prewritten computer software is not taxable, if it is provided free of charge, or if it is provided for temporary use in viewing information, or both. RCW 82.12.020. This exception from use tax is limited to prewritten computer software provided free of charge or for temporary use in viewing information, such as free promotional software, donated software, free download of software, and software provided in beta testing to a third-party free of charge.

For purposes of this use tax exception, "beta testing" means the last stage of testing for prewritten computer software prior to its commercial release including the release to manufacturing (RTM). Beta testing may involve sending the software to a third party for the use of the third party. Beta testing is often preceded by a round of testing called alpha testing.

(i) **Example 7.** DS Computers, Inc., is a software developer. In order to perform beta testing of its new accounting software prior to commercial release, DS sends a copy of the software free of charge to KG Technologies, Inc. DS is not subject to use tax for the release of the beta software to KG. KG is not subject to use tax for the use of beta software free of charge.

(ii) **Example 8.** DH, Inc., provides free card games on-line to its customers. The customers, however, must download DH's free software in order to be able to play card games on-line at DH's web site. Wendy downloads the software free of charge. Wendy is not subject to use tax for the use of the software.

(iii) **Example 9.** DW, Inc., provides free software to the public for anyone to watch videos on-line. Roger downloads the software free of charge. Roger is not subject to use tax for the use of the software.

(d) **Manufacturing of prewritten computer software.** Persons engaged in manufacturing prewritten computer software on tangible storage media are subject to manufacturing B&O tax upon the value of the products. See WAC 458-20-112 (Value of products) and WAC 458-20-136 (Manufacturing, processing for hire, fabricating). Manufacturers of prewritten computer software who sell their products at retail or wholesale are also subject to either the retailing or wholesaling B&O tax, as the case may be. In such cases the manufacturer must report under both the "production" (manufacturing) and "selling" (wholesaling or retailing) B&O tax classifications and may claim a multiple activities tax credit (MATC). See WAC 458-20-19301 (Multiple activities tax credits) for detailed information about the MATC. Income from the sale of prewritten software electronically delivered or transferred is not subject to manufacturing B&O tax.

(e) **Duplication of prewritten computer software.** Duplication of prewritten computer software on tangible media for sales to or use by more than one person is subject to manufacturing B&O tax upon the value of products which includes both the value of the tangible media and the software. Duplication of prewritten computer software on tangible media outside this state is not subject to manufacturing B&O tax regardless of where software development takes place.

Duplication of prewritten computer software is a manufacturing activity only if the prewritten computer software is delivered from the seller to the purchaser by means of tangible storage media which is retained by the purchaser. RCW 82.04.120.

When a software developer contracts with a third party to duplicate prewritten computer software, the parties must take into account the value of all tangible and intangible materials or ingredients, including the software code, when determining the relative value of all materials or ingredients furnished by each party. If the third party furnishes less than twenty percent of the total value of all materials or ingredients that become a part of the produced product, then the third party is presumed to be a processor for hire and the software developer is presumed to be a manufacturer. See WAC 458-20-136 (Manufacturing, processing for hire, fabricating) for more information.

(4) **Site license of prewritten computer software.** A site license provides a consumer acquiring prewritten computer software with the right to duplicate prewritten computer software for use on its own computers, based on the number of computers, the number of workers using the computers, or some other criteria. A site license agreement may cover one site or multiple sites of a purchaser.

(a) **Retail sales of a site license.** Gross proceeds of sales of a site license to a consumer are subject to B&O tax under the retailing classification, whether or not ownership or title passes to the consumer, and regardless of any express or implied restrictions upon the consumer. Delivery occurs when and where the prewritten computer software subject to the site license is received by the consumer, whether it is through tangible storage media or any electronic means, regardless of the method of delivery. See RCW 82.32.730 for more information on sourcing prewritten computer software. Delivery of software manuals and backup copies of prewritten computer software does not alter the delivery of the actual copy of prewritten computer software to be used by the consumer in determining when and where the sale takes place. Persons making retail sales are responsible for collecting retail sales tax at the time of sale and remitting the tax to the department, unless the sale is specifically exempt by law.

If the prewritten software is hosted by the licensor or a third party for remote access by the licensee, then see subsection (10) of this section.

(b) **Duplication of prewritten computer software by a person under a site license.** A seller of a site license is subject to manufacturing B&O tax for its own duplication of prewritten computer software. Duplication of prewritten computer software is subject to manufacturing B&O tax only if the prewritten computer software is delivered from the seller to the purchaser by means of tangible storage media which is retained by the purchaser. RCW 82.04.120. Purchaser of a site license is not subject to manufacturing B&O tax for the duplication of prewritten computer software for its own use, pursuant to a site license agreement with the seller.

(c) **Use of a site license partly in this state and partly outside this state.** The part of the site license used by the person in this state is subject to use tax, provided Washington

state sales tax was not previously paid. For example, a person purchases and takes delivery of a site license in California. Pursuant to the multiple site license agreement, this person is licensed to use one thousand copies of prewritten computer software, of which four hundred copies will be used in Washington. Use tax is due on the four hundred copies of prewritten computer software used in this state. If the prewritten software purchased by the licensee is delivered in Washington, then the entire charge for the site license is subject to retail sales tax if purchased from a seller responsible for collecting Washington's sales tax. However, a purchaser can issue a multiple points of use exemption certificate under certain circumstances to minimize Washington tax as discussed below in subsection (11) of this section.

(d) **Sales and use of additional copies of prewritten computer software under the same site license.** In some cases, the buyer of a site license may subsequently purchase additional copies of prewritten computer software under the same site license agreement. The seller may or may not deliver any additional copy of the software to the buyer, because the original copy of the software has already been delivered.

(i) **Retail sales of additional copies of prewritten computer software under the same site license.** Retail sales of the additional copies of software occurs when and where the seller delivers any additional copy of prewritten computer software to the buyer, whether it is through tangible storage media or any electronic means, regardless of the method of delivery. If the seller does not deliver any additional copy of the software to the buyer, then the sales occur when the sales agreements are made to purchase the additional copies and where the original copy or copies of prewritten computer software was delivered. If the original sale of the site license was subject to manufacturing B&O tax, then the sale of additional licenses are also subject to manufacturing B&O tax.

Delivery of software manuals and backup copies of prewritten computer software does not alter the delivery of the actual copy of prewritten computer software to be used by the buyer in determining when and where the sale takes place.

(ii) **Use of additional copies of prewritten computer software under the same site license.** Where the use of the additional copies of software is partly in this state and partly outside this state and was not previously subject to Washington sales tax, the part of the additional copies of software used by the person in this state is subject to use tax.

(e) **Examples.**

(i) **Example 10.** DEF Computers, Inc., is located in Washington and sells in this state, at retail, a multiple site license of its prewritten computer software to P's Design, Inc. A copy of the prewritten computer software is electronically delivered to P's Design in Washington. P's Design then electronically duplicates the software and distributes the software in Washington and several other states for its use. Neither DEF nor P's Design is subject to manufacturing B&O tax. DEF, however, is subject to retailing B&O tax, and it must collect retail sales tax from P's Design for the entire sale of the software unless P's Design provides DEF with a multiple points of use exemption certificate as discussed in subsection (11) of this section.

(ii) **Example 11.** Same facts as Example 10, except that in addition, DEF delivers a backup copy of the software to P's Design outside Washington. The backup copy of the software is for disaster recovery purposes and is not downloaded to any of P's Design's computers for use. There is no separate charge for the delivery of the backup prewritten software. The software manuals are mailed to P's Design in Washington. DEF is still subject to retailing B&O tax, and it must collect retail sales tax from P's Design for the entire sale of the software unless P's Design provides DEF with a multiple points of use exemption certificate as discussed in subsection (11) of this section. Delivery of the software manuals and the backup copy of the software are not relevant in determining when and where the sale takes place. This transaction is not subject to manufacturing B&O tax.

(iii) **Example 12.** Same facts as Example 10 of this subsection, except that in addition, P's Design subsequently purchases 50 additional copies of the software from DEF under the same site license agreement. P's Design merges with another company, and the additional copies are needed for the use of its new employees. No additional copy of the software is delivered to P's Design in fulfilling this new agreement. Neither DEF nor P's Design is subject to manufacturing B&O tax. DEF, however, is subject to retailing B&O tax, and it must collect retail sales tax from P's Design for the subsequent sale of the 50 additional copies of software because the original copy of the software was delivered in Washington unless P's Design provides DEF with a multiple points of use exemption certificate as discussed in subsection (11) of this section. However, if the original sale of the license had included delivery of the prewritten software by a tangible storage device (and was therefore subject to manufacturing B&O tax), then the licensor is also subject to manufacturing B&O tax based on the value of the additional licenses.

(iv) **Example 13.** GH Computers, Inc., sells at retail a multiple site license of its prewritten computer software to Quick, Inc. GH is located outside Washington, while Quick is located in Washington, other states and other countries. The desktop software is licensed on an unlimited basis, which means that there are no restrictions of its use by Quick. The software is delivered to Quick outside Washington. Quick then electronically duplicates the software and distributes the software to all of its 500 employees, of which 100 employees are located in Washington. The software is electronically downloaded into the desktop computers of all employees and is immediately put into use. Use tax is due on the value of the 100 copies of prewritten computer software used in Washington.

(v) **Example 14.** Same facts as Example 13 of this subsection, except that under the original site license agreement, Quick is entitled to reproduce, distribute, and use up to 500 copies of the desktop software. Then Quick merges with another company, and additional copies are needed for the use of its new employees. Quick, therefore, subsequently purchases 100 additional copies of the software from GH under the same site license agreement. No additional copy of the software is delivered to Quick in fulfilling this new agreement. Quick distributes the additional copies of the software to its 100 new employees, of which 50 employees are located in Washington. Use tax is due on the value of the 50 additional copies of prewritten computer software used in Washington.

(5) **Key to activate computer software.** A key, or an enabling or activating code, may be required in some instances to activate computer software and put the software into use, and the key may be delivered to a purchaser after the software is already delivered and in possession of the same purchaser. In such instances, the sale of computer software occurs when both the key and the software are delivered to the purchaser. The sale takes place where the software is received by the purchaser in accordance with RCW 82.32.-730. However, if the place of receipt for the software is unavailable to the vendor because the software was delivered by a third party, then the sale takes place where the key is received in accordance with RCW 82.32.730. There is no separate sale of the key from the software, regardless of how such sale may be characterized by the vendor or by the purchaser.

See subsection (4) of this section for more information if a site license of prewritten computer software is involved. If the sale of the prewritten software is subject to manufacturing B&O tax, then the sale of the key required by that prewritten software is also subject to manufacturing B&O tax. The income from the sale of a key is part of a sale of prewritten computer software, whether the sales transactions are together or separate.

(a) **Example 15.** JKL Computers, Inc., an in-state business, sells at retail prewritten computer software to Rebecca. JKL delivers the software to Rebecca in this state. The prewritten computer software, however, cannot be activated without a key. JKL subsequently delivers the key in this state to Rebecca for a separate price. JKL is subject to retailing B&O tax, and it must collect retail sales tax from Rebecca on the entire sale of the software including the separate charge for the key. The entire sale takes place in this state (where the software is delivered) when both the software and the key are delivered to Rebecca. There is no separate sale of the key, regardless of the fact that JKL delivers the key to Rebecca for a separate charge.

(b) **Example 16.** Same facts as Example 15 of this subsection, except that JKL subsequently delivers the key outside this state to Rebecca for a separate price. JKL is subject to retailing B&O tax, and it must collect retail sales tax from Rebecca on the entire sale of the software including the separate charge for the key. The entire sale takes place in this state (where the software is delivered) when both the software and the key are delivered to Rebecca. There is no separate sale of the key, regardless of the fact that JKL delivers the key to Rebecca for a separate charge.

(c) **Example 17.** MNO Computers, Inc., is an in-state software developer. TKO Computers, Inc., an out-of-state original equipment manufacturer of computers (OEM), agrees in contract with MNO to distribute MNO's prewritten computer software on its computers. TKO delivers MNO's inoperable software to Sally as part of the sale of the computer system. Sally, however, must purchase a key directly from MNO in order to activate and use the software. MNO has no knowledge of where the software was initially delivered to Sally, but MNO knows that the key is delivered to Sally in this state. MNO is subject to retailing B&O tax, and it must collect retail sales tax from Sally on the entire sale of the key and the inoperable software. The entire sale takes place in this state because the key is delivered in this state and MNO has no knowledge of where the inoperable software was initially delivered by TKO.

(6) **Client access license and server license for the server software.** A server license, paid for at the time the server software is purchased, grants the buyer the right to install the server software on the buyer's server. A client access license (CAL) grants the buyer the right to access the server software.

Charges for server licenses and CAL are a part of the sale of the server software, even if the charges are separately stated. The sales take place where the server software is delivered to the buyer.

In cases where server software is delivered to the buyer and used in multiple locations, see subsection (4) of this section on site licenses for more information.

(a) **Example 18.** ZZ Computers, Inc., an in-state business, sells at retail server software to Jack. ZZ delivers the server software to Jack in Washington. ZZ also provides Jack with client access licenses for free allowing Jack the right to access the server software from his personal computers. The sale of server software to Jack is subject to retailing B&O tax, and ZZ must collect retail sales tax from Jack for the same sale.

(b) **Example 19.** Same facts as Example 18 of this subsection, except that ZZ makes two separate sales at retail of two types of prewritten computer software to Jack. One is server software, and the other is client software (which is different from client access licenses). ZZ delivers the server software to Jack in Washington where Jack's server is located. ZZ delivers the client software to Jack outside Washington where all of Jack's personal computers are located. Only the sale of server software to Jack is subject to retailing B&O tax, and ZZ must collect retail sales tax from Jack for the same sale. Jack may use a multiple points of use exemption certificate for the server software. See subsection (11) of this section for more detail on multiple points of use.

(7) **Other activities associated with computer software.**

(a) **Customizing prewritten computer software.** Gross income received for customizing prewritten computer software is subject to service and other activities B&O tax. RCW 82.04.29001.

(i) **What is customizing prewritten computer software?** RCW 82.04.215 provides that "customization of prewritten computer software" is any alteration, modification, or development of applications using or incorporating prewritten computer software for a specific person.

"Customization of prewritten computer software" includes individualized configuration of software to work with other software and computer hardware but does not include routine installation. Customization of prewritten computer software does not change the underlying character or taxability of the original prewritten computer software.

(ii) **One nonitemized price for prewritten computer software, customization, and routine installation.** If prewritten computer software, customization of prewritten computer software, and routine installation are sold for a one nonitemized price, the entire charge is considered to be subject to retail sales tax. See (a)(iv) of this subsection for more information on routine installation.

(iii) **Separately stated charge for customization of prewritten computer software.** Where there is a reasonable separately stated charge on an invoice or other statement of the price given to the purchaser for customization of prewritten computer software (including installation that is not routine, see (a)(i) of this subsection), such customization is subject to service and other activities B&O tax. If a charge for customization of prewritten computer software is not separately stated from a sale of prewritten computer software, the entire charge is considered a retail sale subject to retail sales tax.

(iv) **Customization of prewritten computer software versus routine installation.** Customization of prewritten computer software includes custom installations but does not include routine installation. "Routine installation" means the process of loading program files and installation files onto a computer. Routine installation includes the process of "clicking through" dialog boxes to install prewritten software. Routine installation does not require any specialized knowledge or skills. Custom installation generally requires programming by a programmer to integrate customized elements of prewritten computer software.

(v) **Separately stated charge for routine installation from customization of prewritten computer software.** Where there is a reasonable separately stated charge on an invoice or other statement of the price given to the purchaser for routine installation from customization of prewritten computer software, routine installation is subject to retailing B&O tax and retail sales tax. If a charge for routine installation is not separately stated from customization of prewritten computer software and is de minimis, the transaction would not be subject to retail sales tax, but instead subject to service and other activities B&O tax.

(vi) **Examples.**

(A) **Example 20.** Tee, Inc., needs financial modeling software that can tie into its existing computer systems. Because of its unique business, however, Tee needs the industry-wide computer software offered by PQR Computers, Inc., to be modified to meet the needs of Tee. Both Tee and PQR are in-state corporations, and the software is delivered in this state. PQR provides a separately stated charge to Tee for customization of prewritten computer software performed in this state that is supported by the terms of the sales agreement. PQR is subject to retailing B&O tax, and it must collect retail sales tax from Tee for the sale of prewritten computer software in Washington. PQR, in addition, is subject to service and other activities B&O tax for the customization of prewritten computer software in Washington.

(B) **Example 21.** Same facts as Example 20 of this subsection, except that, in addition, PQR provides a separately stated charge to Tee for routine installation of prewritten computer software in this state. This charge represents installation of only the prewritten portion of the software. In addition to the tax treatments in Example 20 of this subsection, PQR is subject to retailing B&O tax and it must collect retail sales tax from Tee for the routine installation in Washington.

(b) **Installing or uninstalling computer software.**

(i) Gross income received from installing or uninstalling custom software is subject to service and other activities B&O tax.

(ii) Gross proceeds of sales for routine installation of prewritten computer software are subject to retailing B&O tax and retail sales tax. See (a)(iv) of this subsection for more information on routine installation. Routine installation of prewritten computer software includes charges for labor and services in respect to the installation, such as travel costs for the routine installation of the software. As of July 1, 2008, if the routine installation occurs through remote access by someone outside the state of Washington, then the installation is sourced pursuant to RCW 82.32.730.

Example 22. XYZ Computers, Inc., is hired by Dan for routine installation of prewritten software onto Dan's computers. XYZ's out-of-state employee remotely accesses Dan's computers in Washington to install the prewritten software on his computers. If XYZ has nexus with Washington, then it must collect and remit the sales tax. If XYZ does not have nexus, then Dan must pay use tax.

Gross proceeds of sales from uninstalling prewritten computer software are subject to retailing B&O tax and retail sales tax.

Example 23. XYZ Computers, Inc., is hired by Dan to remove prewritten computer software from his computers. Removal of the prewritten computer software requires uninstalling the software from the computer. XYZ sends an employee to Dan's location to remove the software from his computers. Charges for removal of the prewritten computer software are subject to retailing B&O tax and retail sales tax.

(c) **Repairing, altering, or modifying computer software.** Repair of prewritten computer software for more than one person may be distributed as a fix or patch by tangible storage media or electronically in the nature of software upgrades and updates. The sale of prewritten computer software upgrades and updates is a sale of prewritten computer software subject to retailing B&O tax and retail sales tax.

Alteration or modification of prewritten computer software performed for a specific person is subject to the service and other activities B&O tax. Such alteration or modification of prewritten computer software for a specific person constitutes customization of prewritten computer software. See RCW 82.04.215.

(i) **Example 24.** STU Computers, Inc., a Washington company, is hired by Betty to perform repairs (using primarily human effort) via remote access on her prewritten computer software in Washington. STU is performing alteration or modification of prewritten computer software for a specific person and is subject to service and other activities B&O tax.

(ii) **Example 25.** VW Computers, Inc., an out-of-state service provider, is hired by Clyde to perform alterations or modifications (using primarily human effort) via remote access on his prewritten computer software located in this state. VW's facility is located outside this state. VW may be subject to service and other activities B&O tax if it has nexus with Washington.

(d) **Maintaining computer software.** Computer software maintenance agreements typically include, but are not limited to, support activities such as telephone consulting, help desk services, remote diagnostic services, and software upgrades and updates.

(i) **Tax treatment of computer software maintenance agreements in general.** Sales of stand-alone computer software maintenance agreements that include telephone consulting, help desk services, remote diagnostic services, and other professional services only, are taxable under the service and other activities B&O tax. However, if the services are part of a sale of an extended warranty on or after July 1, 2005, then the sale is subject to retailing B&O tax and retail sales tax. See WAC 458-20-257 (Warranties and maintenance agreements) for information about extended warranties.

Stand-alone sales of updates or upgrades to prewritten computer software are retail sales of tangible personal property subject to retailing B&O tax and retail sales tax.

(ii) **Prewritten computer software maintenance agreement with mixed elements.** The sale of a prewritten computer software maintenance agreement for a single nonitemized price that includes professional service components such as telephone consulting and retail components such as upgrades and updates of prewritten computer software is generally considered a retail sale subject to retailing B&O tax and retail sales tax unless charges for the upgrades and updates are de minimis.

In cases where the charges for the professional service component(s) and the retail component(s) are separately stated within a prewritten computer software maintenance agreement and invoice, then each activity is taxed according to the nature of the activity.

(iii) **Duplication of prewritten computer software upgrades and updates.** Duplication of prewritten computer software upgrades and updates is subject to manufacturing B&O tax upon the value of products, if the software upgrades and updates are delivered by means of tangible storage media which is retained by the purchaser. This is the case regardless of any maintenance agreement with mixed elements involved. The measure of tax is presumed to be the contract price of the maintenance agreement, unless the person can prove otherwise. See WAC 458-20-112 (Value of products) for more information.

If the software upgrades and updates are delivered from the seller by means other than tangible storage media which is retained by the purchaser, then the software upgrades and updates are not subject to manufacturing B&O tax.

(iv) **Maintenance agreement on custom software and customized elements of prewritten computer software.** Sales of maintenance or support services relating to custom software or the customized elements of prewritten computer software are subject to the service and other activities B&O tax. Such services, including upgrades and updates, are rendered in respect to the custom or customized software and take on the underlying character and taxability of the custom or customized software.

(v) **Examples.**

(A) **Example 26.** On December 15, 2005, CBA Computers, Inc., sells at retail a prewritten computer software maintenance agreement to Frank for his prewritten software. The software maintenance agreement includes an extended warranty for the software, software upgrades and updates, and telephone consulting services for a single nonitemized price. The consulting services are not offered exclusively in connection with the software, nor are they essential to use of the software. CBA delivers the software upgrades and updates electronically. CBA is subject to retailing B&O tax, and it must collect retail sales tax from Frank for the sale of the mixed agreement.

(B) **Example 27.** Same facts as Example 26 of this subsection, except that CBA delivers the software upgrades and updates on compact disks. CBA is subject to retailing B&O tax, and it must collect retail sales tax from Frank for the sale of the mixed agreement. In addition, CBA is subject to manufacturing B&O tax on duplication of software upgrades and updates. The measure of tax is presumed to be the contract price of the maintenance agreement, unless CBA can prove otherwise.

(C) **Example 28.** Same facts as Example 26 of this subsection, except that CBA provides a separately stated charge for each component of the maintenance agreement. CBA is subject to retailing B&O tax, and it must collect retail sales tax from Frank for the charges on prewritten software upgrades and updates and on the extended warranty purchased after July 1, 2005. CBA is subject to service and other activities B&O tax for the charge on telephone consulting services.

(D) **Example 29.** FED Computers, Inc., sells at retail a computer software maintenance agreement to Greta for her software. The maintenance agreement covers only software upgrades and updates. Greta's software is prewritten computer software with customized elements. FED provides the maintenance services to Greta at one nonitemized charge. FED is subject to retailing B&O tax, and it must collect retail sales tax from Greta for the sale of the entire maintenance agreement of the prewritten computer software.

(E) **Example 30.** Same facts as Example 29 of this subsection, except that FED provides a separately stated charge for maintaining the customized elements. FED is subject to service and other activities B&O tax on the charges for maintaining the customized elements. FED is subject to retailing B&O tax, and it must collect retail sales tax from Greta for the charge on maintaining prewritten computer software.

(e) **Computer software training.** Gross income received for training on the use of custom software is subject to service and other activities B&O tax. Gross income received for training on the use of prewritten computer software is subject to service and other activities B&O tax, if the charge for such training is separately stated from the sale of prewritten computer software. If the charge for software training is not separately stated from the sale of prewritten computer software and the prewritten software value is more than de minimis, the entire charge is considered to be a retail sale subject to retailing B&O tax and retail sales tax.

(8) **Licensing computer software - Royalties.** Income received from charges in the nature of royalties for certain licensing of computer software is taxable under the royalties B&O tax classification.

(a) **What are royalties?** RCW 82.04.2907 provides that "royalties" means compensation for the use of intangible property, such as copyrights, patents, licenses, franchises, trademarks, trade names, and similar items. The true object of a transaction involving royalties is to grant an intangible right to reproduce and distribute copies of computer software for sale. It does not, however, include compensation for the licensing of prewritten computer software to the end user. The manner in which computer software is sold (e.g., volume

of transactions, subscription license, term license, or perpetual license) or the manner in which payment amount is determined (e.g., fixed fee per copy, percentage of receipts, lump sum, etc.) does not alter the royalty nature of the transaction.

(b) **Royalties versus site license.** Regarding royalties, the true object of the transaction is to grant an intangible right to reproduce and distribute copies of computer software for sale. In contrast, the true object of a site license is the sale to an end user of prewritten computer software for use on its computers. See subsection (4) of this section for more information on site licenses.

(c) **Royalties versus wholesale sales of prewritten computer software.** See subsection (3)(a) of this section for more information.

(d) **Examples.**

(i) **Example 31.** HG Computers, Inc., an original equipment manufacturer (OEM), acquires prewritten computer software from LL Software, Inc., under a license to reproduce and distribute the prewritten computer software as part of a bundled computer hardware and software package HG sells to end users. LL retains all of its ownership rights to the software. The gross income received by LL from granting intangible rights to reproduce and distribute prewritten computer software to HG is subject to royalties B&O tax.

(ii) **Example 32.** Same facts as Example 31 of this subsection, except that, in addition, HG acquires a site license from LL for the purposes of copying and using the prewritten computer software as an end user. LL delivers the software to HG. Amounts received by LL for the sale of a site license are subject to retailing B&O tax and retail sales tax.

(9) **Special use tax exemption for computer hardware and computer software donated to certain schools or colleges.** Use tax does not apply to the use of computer hardware and prewritten software irrevocably donated to any public or private nonprofit school or college, as defined under chapter 84.36 RCW. RCW 82.12.0284.

(10) **Sales of remote access software.**

(a) **Remote access custom software.** Sales of remote access custom software on the seller's (or a third-party's) servers are subject to service and other B&O tax.

(b) **Remote access prewritten software.** Sales of remote access prewritten software on the seller's (or a third-party's) servers are subject to retail sales tax, when the sale is sourced to Washington pursuant to RCW 82.32.730. Sale of remote access prewritten software prior to July 26, 2009, were subject to service and other activities B&O tax.

Example 33. BE Software, Inc., a Washington corporation, offers a variety of prewritten software products on-line, but not for download, to its customers for a monthly subscription fee. BE Software must charge Washington customers retail sales tax and is subject to retailing B&O tax for the subscription fees received from its Washington customers.

(c) **Exemptions from retail sales or use tax for remote access prewritten software.** The following exemptions only apply to remote access prewritten software, and not other types of prewritten software sold.

(i) **Offered free.** Purchases of prewritten software that will be offered remotely by the purchaser to its own customers is exempt from retail sales tax. RCW 82.04.190 (2)(f). The purchaser of the prewritten software must provide an exemption certificate to the seller in order to receive the exemption. The income from the sale of the prewritten software is subject to retailing B&O tax.

Example 34. BE Software, a Washington company, purchases prewritten software from Joe's Software Developer Co., that BE will provide remotely to its customers. BE provides an exemption certificate to Joe's for the purchase of prewritten software. Joe's does not collect or remit retail sales tax, but does pay retailing B&O tax on the income from the sale. BE would generally charge and collect retail sales tax and pay retailing B&O tax on income received from the sale of the prewritten software remotely accessed by consumers.

(ii) **Made available free to the general public.** Retail sales and use taxes do not apply to the purchase or use by a business or other organization of remote access prewritten software in order to make that remote access prewritten software available free of charge for the use or enjoyment of the general public. Buyers claiming this exemption must provide the seller with a properly completed "Digital Products and Remote Access Software Exemption Certificate" or other exemption certificate acceptable to the department.

(A) **Available for free. In order to qualify, the remote access prewritten software purchased must be made available for free.** In this context, "free" means that the recipient of the remote access prewritten software does not need to provide anything of significant value. If the purchaser requires something of significant value from the recipient in exchange for the remote access prewritten software, it is not given away for free.

(B) **"General public"** means all persons and is not limited or restricted to a particular class of persons, except that the general public includes:

(I) Certain classes of persons defined by their residency or ownership: The general public includes a class of persons residing or owning property within the boundaries of any state (e.g., Washington), political subdivision of a state (e.g., King County), or a municipal corporation (e.g., Seattle).

(II) Library customers. With respect to libraries, the term general public includes authorized library patrons.

(C) **Purchaser must have the legal rights to provide the remote access prewritten software to the general public:** The exemption provided in subsection (3) of this section does not apply unless the purchaser has the legal right to broadcast, rebroadcast, transmit, retransmit, license, relicense, distribute, redistribute, or exhibit the remote access prewritten software, in whole or in part, to the general public.

(11) **Multiple points of use (MPU) exemptions.**

(a) The retail sales tax does not apply to the sale of prewritten computer software or remote access prewritten software if the buyer correctly provides the seller with an exemption certificate claiming multiple points of use.

(b) If the sale of the prewritten software or the remote access prewritten software (including retail sales of licenses to prewritten software and remote access prewritten software) is sourced to Washington and the purchaser does not provide an exemption certificate, then the entire charge is subject to retail sales tax. Buyers may use the department's "Digital Products and Remote Access Software Exemption Certificate" to claim this exemption.

(i) **Requirements.** A buyer is entitled to use an exemption certificate claiming MPU only if the buyer is a business or other organization and the prewritten software or remote

access prewritten software purchased will be concurrently available for use within and outside Washington. A buyer is not entitled to use an exemption certificate claiming MPU for prewritten software purchased for personal use.

(ii) **Concurrently available.** "Concurrently for use within and outside this state" means that employees or other agents of the buyer may use the prewritten software or remote access prewritten software simultaneously from one or more locations within this state and one or more locations outside this state.

(iii) **Apportionment (allocation) of use tax.** For purposes of this subsection on MPU, "allocation" and "apportionment" will have the same meaning. A business or other organization subject to use tax on prewritten software or remote access prewritten software that is concurrently available for use within and outside this state is entitled to apportion the amount of tax due this state based on users in this state compared to users everywhere. Additionally, the department may authorize or require an alternative method of apportionment supported by the taxpayer's records that fairly reflects the proportion of in-state to out-of-state use by the taxpayer.

(c) **Records requirement.** No allocation under this section is allowed unless the allocation method is supported by the taxpayer's records kept in the ordinary course of business.

(i) **"User"** means an employee or agent of the taxpayer who is authorized by the taxpayer to use the prewritten software or remote access prewritten software purchased in the performance of his or her duties as an employee or other agent of the taxpayer.

(ii) **Example 35.** Neymar operates an accounting firm headquartered in Seattle. Neymar purchases from Lionel prewritten software which Neymar installs on a server in Seattle. The software is accessed and used concurrently by 5 employees at his Seattle office and 5 employees at his California office. Neymar provides Lionel with a sales tax exemption certificate claiming multiple points of use. Neymar is only required to pay use tax for the value attributed to his employee's use at the Seattle office (i.e., 50%). Neymar does not pay use tax to Washington for the value of the software used in his California offices even though the software resides on servers in Seattle.

[Statutory Authority: RCW 82.32.200 and 82.01.060. WSR 13-06-015, § 458-20-15502, filed 2/25/13, effective 3/28/13.]

WAC 458-20-15503 Digital products. This rule provides a structured approach for determining tax liability for digital products and digital codes. For purposes of this rule, a digital product includes digital goods or digital automated services, which are described in detail below. The sale or use of digital products and digital codes is generally subject to retail sales or use tax unless purchased for resale or some other exemption applies.

This rule is organized into six parts. Each part addresses a question or topic relevant to the determination of whether a person is selling or purchasing a digital product or digital code and, if so, what are the tax consequences that follow from such activity. In this respect this rule is intended to function similar to the decision tree provided in ETA 9003.2010.

1. Part 1: Are the products or services transferred electronically? If yes, go to Part 2.

2. Part 2: Does the product or service meet the general definitions of digital product or digital code? If yes, go to Part 3.

3. Part 3: Are there applicable exclusions from the general definitions of the digital product or digital code? If no, go to Part 4.

4. Part 4: Are the sales of the digital product or digital code sourced to Washington? If yes, go to Part 5.

5. Part 5: Are there applicable retail sales or use tax exemptions for the purchase or use of the digital product or digital code? If no, the transaction is likely taxable in Washington.

6. Part 6: Miscellaneous provisions.

Examples included in this rule identify a number of facts and then state a general conclusion; they should be used only as a general guide. The tax consequences of all situations must be determined after a review of all the facts and circumstances. Additionally, each fact pattern in each example is self contained (e.g., "stands on its own") unless otherwise indicated by reference to another example. Examples concluding that sales tax applies to the transaction assume that no exclusions or exemptions apply, and the sale is sourced to Washington.

Part 1. Are the Products or Services Transferred Electronically?

(101) **Introduction.** Products or services must be transferred electronically in order to be digital products. If a product is transferred by means of a tangible storage media (e.g., compact disc, magnetic tape, hard drive, etc.), it is not a digital product. Digital codes need not be transferred electronically in order to be digital codes, but may be obtained by any means, including tangible storage media.

(102) **Transferred electronically.** Means the purchaser obtains the product by means other than tangible storage media. Generally, this means the product is transferred using the public internet, a private network, or some combination. However, it is not necessary that the product be delivered to the purchaser. As long as the purchaser may access the product, it will be considered to have been electronically transferred to the purchaser. For example, whether a digital movie is downloaded by the user or streamed by the user, it is considered to be "transferred electronically." Alternatively, the same movie purchased on tangible media (e.g., DVD, etc.) is the purchase of tangible personal property and is not considered to be either the sale of a digital product or transferred electronically.

Part 2. Does the Product or Service Meet the General Definition of Digital Product or Digital Code?

(201) **Introduction.** The term "digital product" means (1) digital goods and (2) digital automated services. Digital products transferred to an end user are generally subject to retail sales or use tax regardless of whether the purchaser's right of use is permanent, less than permanent (e.g., 24-hour period), or the purchaser is obligated to make continued payments as a condition of the sale (e.g., "subscriptions").

(202) **Digital goods.** Means sounds, images, data, facts, or information, or any combination thereof, transferred electronically, with certain exclusions discussed in Part 3 of this rule. The term "digital goods" includes within it the specific

term "specified digital products" (as required by the Streamline Sales and Use Tax Agreement). The sale of a digital good is generally subject to retail sales tax and retailing business and occupation (B&O) tax.

(a) **Specified digital products.** Means electronically transferred digital audio-visual works, digital audio works, and digital books.

(i) **Digital audio works.** These are products that result from the fixation of a series of musical, spoken, or other sounds. Digital audio works include ringtones, recorded or live music, readings of books or other written materials, speeches, and other sound recordings. For example, a music file in MP3 format accessed or downloaded through the internet is a digital audio work.

(1) A "ringtone" is a digitized sound file that is downloaded onto a communication device (e.g., mobile phone) and may be used to alert the user to an incoming communication such as a call or text message.

(2) A ringtone does not include "ring-back tones" or other digital audio files that are not stored on the purchaser's communication device. In other words a ring-back tone is not a "specified digital product." A ring-back tone may be a digital automated service or a digital good depending on the facts. See analysis for digital automated services in subsection (203) of this section.

(ii) **Digital audio visual works.** These products are a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any. Digital audio visual works include movies, music videos, videos of live events, and news and entertainment programs. For example, a movie downloaded or accessed via the internet is a digital audio visual work.

(iii) **Digital books.** These are books in a digital format that are generally recognized in the ordinary and usual sense as books. A digital book does not include periodicals, magazines, newspapers, chat rooms, or weblogs. For example, a cookbook in a PDF format downloaded or accessed through the internet is a digital book.

(b) **Other digital goods.** The following list illustrates the types of products that are also digital goods in addition to the subclass of "specified digital products" discussed above. This list is merely illustrative and not exhaustive:

(1) A digital schematic of a lawnmower engine transferred electronically.

(2) A digital car history report transferred electronically.

(3) A digital picture transferred electronically.

(4) Digital periodicals or magazines transferred electronically.

(5) A digital presentation that includes still photos and accompanying audio content transferred electronically.

(c) **Digital goods prior to July 26, 2009.** The mere accessing or streaming of a digital good was not a retail sale before July 26, 2009. Instead, accessing or streaming a digital good was subject to the service and other activities B&O tax. The sale of a digital good to a customer who downloaded the digital good was a retail sale. See Part 6, subsection (604) of this section for a discussion of tax amnesty for past periods.

(203) **Digital automated services.** Means services transferred electronically that use one or more software applications. The sale of a digital automated service is generally subject to retail sales tax and retailing B&O tax.

(a) **Digital automated services may include.** One or more software applications either prewritten or custom, as well as components that are similar to stand-alone digital goods. For example, an online information service may contain data, facts, or information the use of which is facilitated by one or more software applications that provide search capabilities and other functionality. Thus, digital automated services will include software and may include elements similar to stand alone digital goods, which operate together in an integrated fashion to provide an electronically transferred service.

Example 1. BFC provides an online service that facilitates apartment building management. The online service lists and advertises apartment vacancies, screens applicants, routes maintenance requests, and accepts and processes rental payments. In this example the software based service facilitates and automates various administrative functions and coordinates third-party services for apartment renting. The service is a digital automated service the sale of which is generally subject to retail sales tax and retailing B&O tax.

Example 2. QPR provides a service that uses one or more software applications to "crawl the internet" in order to identify, gather, and categorize digital information according to specified criteria. In this example software facilitates the gathering, identifying and categorizing of information acquired from the internet. The service is a digital automated service the sale of which is generally subject to retail sales tax and retailing B&O tax.

(i) **Distinguishing a digital good from digital automated services.** A digital good is not a service involving one or more software applications. A digital good consists solely of images, sounds, data, facts, information or any combination thereof. Clear examples of digital goods are digital books, digital music, digital video files, and raw data.

Example 3. XYZ provides an online service that uses one or more software applications to facilitate the use of news and information with features such as: Research history, natural and boolean searching, industry chat forums, chart creation, document and word flagging, and information organizing folders. In this example software features facilitate the search of the news or information. XYZ's service is a digital automated service the sale of which is subject to retail sales tax and retailing B&O tax.

Example 4. Company sells digital music files (i.e., digital goods) on its web site. In order to locate specific digital music files customers may use a free software based search function that is integrated into Company's web site. Customers may also find the digital music file they are seeking by clicking on a series of links to get to the desired music file. Company's software based search function associated with the sale of the digital music file does not transform the sale of the digital music file into a digital automated service. Company is selling a digital good (i.e., music file) subject to retail sales tax and retailing B&O tax.

(ii) **Distinguishing remote access prewritten software from digital automated services.** Remote access prewritten software (defined in RCW 82.04.050 (6)(b)) is solely prewritten software that is made remotely accessible from the vendor's server or other third-party server for a customer. To the extent that components similar to digital goods and/or additional services are supplied with the prewritten software

the sale may be the sale of a digital automated service (see also Part 3, subsection (303)(h) of this section).

Example 5. CFC provides an online gaming service that allows subscribers to play a game with other subscribers in a real time multiplayer environment using software accessed via the internet. In this example the gaming software is combined with additional capabilities that enable a real time multiplayer environment that is not otherwise available. The service is a digital automated service, the sale of which is generally subject to retail sales tax and retailing B&O tax.

Example 6. Company sells prewritten word processing software that is accessed by customers but hosted on Company's computers. The software includes access to clip-art image files that can be inserted into documents created with the remotely accessed prewritten word processing software. Company is selling remote access prewritten software and not a digital automated service or digital goods. The clip art made available with the software does not transform the remotely accessed prewritten software into a digital automated service or a digital good. Company is selling remote access prewritten software subject to retail sales tax and retailing B&O tax.

(b) **Digital automated service prior to July 26, 2009.** The sale of a digital automated service to consumers was not a retail sale before July 26, 2009. Generally, income earned from such sales was subject to B&O tax under the service and other activities classification.

(204) **Digital codes.** These are codes that provide a purchaser with the right to obtain one or more digital products, if all of the digital products to be obtained through the use of the code have the same retail sales and use tax treatment. A digital code may be obtained by any means, including e-mail or by tangible media regardless of its designation as song code, video code, book code, or some other term. For example, a digital code includes the sale of an alphanumeric code that, when entered online at a web site, provides the customer with a digital music file for download.

(a) **Products with mixed tax treatment.** Codes that provide the right to obtain one or more products that do not have the same retail sales and use tax treatment are not digital codes.

(b) **Codes that represent a stored monetary value, redeemable cards, gift cards, or gift certificates.** Codes that represent a stored monetary value that is deducted from a total as it is used by the purchaser or that represent a redeemable card, gift card, or gift certificate that entitles the holder to select digital products of an indicated cash value, are not digital codes.

Example 7. Calvin purchases a code at his local grocery store for use on Joe Seller's (JS) web site. At check out, Calvin tells the grocery store clerk to put $25.00 in value on the plastic card containing the code. Calvin then goes to JS's web site and inputs the code from the card. The $25.00 value of the card is stored in Calvin's "account" and can be used on any purchase by Calvin from JS's web site. Calvin then purchases five digital songs for $5.00 from JS. At check-out from JS's web site, $5.00 is deducted from Calvin's account to pay for the songs. When the transaction is complete, Calvin has a $20.00 balance remaining in his account on JS's web site. Because the code represents a stored monetary value it is not a digital code and the sale of the code is not subject to retail sales tax or retailing B&O tax.

Part 3. Are There Applicable Exclusions from the General Definitions of Digital Product and Digital Code?

(301) **Introduction.** For certain products or services transferred electronically that otherwise meet the definition of digital good or digital automated service (as discussed in Part 2) there may be a specific exclusion from the applicable definition. If an exclusion applies, then the product or service will generally not be considered a digital good or digital automated service for retail sales and use tax purposes. For example, a service that is transferred electronically and that uses one or more software applications will generally be subject to retail sales tax as a digital automated service. However, if the service is an advertising service, then an exclusion applies, and the service will not be a digital automated service subject to retail sales tax; however, the service may still be subject to B&O tax. An excluded service may also still be subject to retail sales tax under certain circumstances. For example, telecommunications services are excluded from the definition of digital automated services, but remain subject to retail sales tax under their own separate definition of retail sale.

(302) **Exclusions from the definition of digital good are:**

(a) **Telecommunications and ancillary services** as defined in RCW 82.04.065. These services may be used to distribute digital goods, digital automated services, and digital codes, but are not themselves any of these products.

(b) **Computer software** as defined in RCW 82.04.215 and WAC 458-20-15502. These are coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

(c) **The internet and internet access** as defined in RCW 82.04.297.

(d) **Professional or personal services** represented in electronic form are not a digital good. This exclusion applies where the service primarily involves the application of human effort by the service provider, and the human effort originated after the customer requested the service. For example, an electronic engineering report created at the customer's request that reflects an engineer's professional analysis, calculations, and judgment, which is sent to the customer electronically, is considered evidence of a professional service and not a digital good.

(i) **Photography.** This exclusion for professional or personal services does not apply to photographers in respect to amounts received for the taking of digital photographs that are transferred electronically to the end user/customer as defined in RCW 82.04.190(11). See Example 39 for an example of a nonend user transaction involving photography that is subject to royalties B&O tax.

(e) **Exclusions listed directly below for digital automated services** are also exclusions from the definition of digital good.

(303) **Exclusions from the definition of digital automated service are:**

(a) **Services that require primarily human effort by the seller** and the human effort originated after the customer requested the service. In this context, "primarily" means greater than fifty percent of the effort to perform the service

involved human labor. To determine whether the fifty percent or greater threshold is satisfied, the average of the time and cost factors is considered. The time factor is determined by dividing the time spent to perform the human effort portion for customers by the total time spent performing the service. The cost factor is determined by dividing the direct costs incurred to perform the human effort portion for customers by the total direct costs incurred to perform the service. Direct costs of the human effort component include salaries, employee benefits and similar direct costs. Direct costs of the automated component include the cost of software, computers, hosting services and other similar direct costs. If the average of the time and cost factors is greater than fifty percent then the service requires primarily human effort and is not a digital automated service in which case the service will generally be subject to service and other activities B&O tax.

Example 8. RepuCo.com performs a reputation monitoring service on the internet for its clients. The service utilizes software and other technology that searches the internet for web sites that allow posting of information that may be harmful to RepuCo.com's client's reputation ("the automated component"). If the automated component finds a web site that is posting erroneous or harmful information about one of RepuCo.com's clients, then a RepuCo.com employee will contact the owner of the web site by phone or e-mail and work with the owner and the client to resolve the matter to the satisfaction of the client ("the human effort component"). If the human effort time factor is 20% and the human effort direct cost factor is 60%, then the average of the two factors is 40% (80%/2 = 40%). Accordingly, the service is performed using 40% human effort which is less than 50% and therefore the service does not require primarily human effort and is subject to retail sales tax as a digital automated service.

Alternative methods. If the time and cost factors in this rule do not fairly represent the extent to which the service is performed using primarily human effort, the taxpayer may ask in writing for, or the department may require, the employment of another reasonable method to equitably determine whether the service is performed using primarily human effort.

(b) **Loaning or transferring money or the purchase, sale, or transfer of financial instruments.** For purposes of this section, "financial instruments" include cash, accounts receivable and payable, loans and notes receivable and payable, debt securities, equity securities, as well as derivative contracts such as forward contracts, swap contracts, and options. For example, the electronic transfer of money from a savings account to a checking account, whether done for the customer by a bank teller or by an ATM machine, is excluded from the definition of digital automated service.

(c) **Dispensing cash or other physical items from a machine.** Includes an ATM that dispenses cash to users.

(d) **Payment processing services,** including services such as electronic credit card processing activities conducted online or in physical retail stores via electronic transmission.

(e) **Parimutuel wagering and handicapping contests** as authorized by chapter 67.16 RCW.

(f) **Telecommunications services and ancillary services** as those terms are defined in RCW 82.04.065. For additional information, refer to the discussion above concerning the comparable exclusion from the definition of digital goods (see Part 3, subsection (302)(a) of this section).

(g) **The internet and internet access** as those terms are defined in RCW 82.04.297.

(h) **Remote access prewritten software.** Remote access prewritten software (defined in RCW 82.04.050 (6)(b)) provided on a standalone basis is excluded from the definition of digital automated service. However, software that is used in connection with a service that is transferred electronically would generally be included in the definition of a digital automated service.

Example 9. Company sells prewritten gaming software that is identical in all substantive respects to the same software available in stores for individual use and installation on home computers except that it is hosted on Company's servers and accessed by customers. Company's sales to consumers would be treated as a sale of remote access prewritten software and therefore is excluded from the definition of digital automated services and generally subject to retail sales tax and retailing B&O tax.

Example 10. Same facts as Example 9 except that Company uses the remote access prewritten software to provide a monthly subscription service that provides a real item multiplayer environment. Company is selling a digital automated service. In this case the customers are not merely receiving the individual use of software, but instead an online gaming service facilitated by the software. Thus, the monthly subscription service is not excluded from the definition of digital automated service and is subject to retail sales tax and retailing B&O tax.

(i) **Online education programs** provided by the following:

(i) Public or private elementary or secondary schools; or

(ii) An institution of higher education as defined in Sections 1001 or 1002 of the federal Higher Education Act of 1965 (Title 20 U.S.C. Sections 1001 and 1002), as existing on July 1, 2009. This would include most colleges and universities. For the purposes of this section, an online educational program must be encompassed within the institution's accreditation.

Example 11. ABC University, a qualifying institution of higher education under the federal Higher Education Act of 1965, provides an accredited online Spanish course for which it charges a quarterly access and use fee to students. The course is remotely accessed by students logging into a web site and accessing a fully interactive program that includes components of video, text, and audio, as well as extensive software code. This service would generally be considered a digital automated service. However, it is specifically excluded from the definition of digital automated service as an online educational program and would generally be subject to service and other activities B&O tax.

(j) **Live presentations** such as lectures, seminars, workshops, or courses, where participants are connected to other participants and presenters via the internet or other networks, allowing the participants and the presenters to provide, receive, and discuss information together in real time.

Example 12. Company provides an online seminar service for Customer. Company provides a panel of live speakers that make a presentation to Customer's employees listening to and viewing the seminar through an internet connec-

tion supplied by a third-party service provider. The seminar allows Customer's employees and panelists to ask and answer questions on a real time basis. Company's online seminar service is transferred electronically and uses one or more software applications and therefore would generally be considered a digital automated service. However, this type of service allowing live interaction is specifically excluded from the definition of digital automated service and would generally be subject to service and other activities B&O tax.

Example 13. Same facts as Example 12 except that Company records the seminar and charges other individuals a fee for accessing the seminar from Company's web site. The recorded presentation allows these customers to watch the presentation but it does not allow them to ask questions on a real time basis. Because the presentation was prerecorded there is no live interaction contemporaneous with the presentation and therefore Company is selling a digital good generally subject to retail sales tax and retailing B&O tax.

Example 14. Company provides online training courses to Steve for a fee. The training courses provide key interactive elements such as study guides, knowledge testing, and automated help, all facilitated by one or more software applications. Such courses are not live presentations and do not provide human interaction. Accordingly, Company is selling a digital automated service generally subject to retail sales tax and retailing B&O tax.

(k) **Travel agent services,** including online travel services, and automated systems used by travel agents to book reservations.

(l) **Online marketplace related activities,** which are services that allow the person receiving the services to make online sales of products or services, digital or otherwise, using either:

(i) The service provider's web site; or

(ii) The service recipient's web site, but only when the service provider's technology is used either to:

(1) Create or host the service recipient's web site; or

(2) Process orders from customers using the service recipient's web site.

Example 15. Company provides an "electronic marketplace" service to Holcomb that allows Holcomb to list and sell his coffee mugs on the internet using Company's web site. This online marketplace service is excluded from the definition of digital automated services and charges for the service would generally be subject to service and other activities B&O tax.

Example 16. Same facts as Example 15, except that now Holcomb decides he no longer wants to be just another seller on Company's web site. Instead, Holcomb wants his own "retailing presence" on the internet so Holcomb contracts with Company to create and host Holcomb's new coffee mug web site, "HolcombsCoffeeWorld.com." This is still an online marketplace service that is excluded from the definition of digital automated services and charges for the service would generally be subject to service and other activities B&O tax.

(iii) **Exclusion limitation.** The services described in this subsection do not include the underlying sale of the products or services, digital or otherwise, by the person receiving the service. For instance, in Examples 15 and 16, the sale by Holcomb of coffee mugs would still generally be subject to retail sales tax and retailing B&O tax as the sale of tangible personal property.

(m) **Advertising services** means all services directly related to the creation, preparation, production, or the dissemination of advertisements. Advertising services include: Layout, art direction, graphic design, mechanical preparation, production supervision, placement, and rendering advice to a client concerning the best methods of advertising that client's products or services. Advertising services also include online referrals, search engine marketing and lead generation optimization, web campaign planning, the acquisition of advertising space in the internet media, and the monitoring and evaluation of web site traffic for purposes of determining the effectiveness of an advertising campaign. Advertising services do not include web hosting services and domain name registration.

Example 17. Company provides marketing services to customers wishing to promote their products using the internet. Amy sells widgets on the internet and hires Company to market her products. Company consults with Amy on her marketing needs and then creates a marketing plan for her business. Company also creates and distributes online banners, links, and targeted "e-mail blasts" that promote Amy's business. All of the services provided by Company are advertising services excluded from the definition of digital automated services and would generally be subject to service and other activities B&O tax.

Example 18. RVP, Inc. creates "sponsored links" on its web site that drive customer traffic to Amy's web site. RVP is paid by Amy for each click on a sponsored link on RVP's web site. The services provided by RVP are advertising services excluded from the definition of digital automated services and charges for such would generally be subject to service and other activities B&O tax.

(n) **Storage, hosting, and back-up.** The mere storage of digital products, digital codes, computer software, or master copies of software is excluded from the definition of digital automated services. This exclusion includes providing space on a server for web hosting or backing-up data or other information.

Example 19. Company charges Rowe a fee for 25 terabytes of storage space under its "basic storage service" offering. Company also charges Rowe an additional and optional fee for its "premium service" package offering, which involves services beyond mere storage. The "basic storage" services are mere storage services and excluded from the definition of digital automated services. These services would generally be subject to service and other activities B&O tax. However, the charges for the optional premium services are more than mere storage or hosting services. As such, the premium services are not excluded from the definition of digital automated services and would generally be subject to retail sales tax and retailing B&O tax.

(o) **Data processing services** means a primarily automated service provided to a business or other organization where the primary object of the service is the systematic performance of operations by the service provider on data supplied in whole or in part by the customer to: (1) extract the required information in an appropriate form, or (2) to convert the data to usable information. Data processing services include check processing, image processing, form process-

ing, survey processing, payroll processing, claim processing, and similar activities. Data processing does not include remote access prewritten software used by the customer to process their own data.

Example 20. Bango Corp., in preparation for litigation, hires Company to use its automated technology to search Bango's computers and gather documents relevant to the lawsuit. Company's service also provides software tools that allow Bango to categorize, copy, store, and notate the gathered documents. Company's service is not data processing. The services performed primarily involve gathering data, and providing software tools that allow the customer to categorize, copy, store and notate documents in preparation for litigation. Accordingly, Company is selling a digital automated service generally subject to retail sales tax and retailing B&O tax.

Example 21: Company provides check processing services to Wallo Corp., a bank operating in Washington. Company accepts scanned checks provided by Wallo and then uses its software and technology to extract the check dollar amount, account number, and verify the check has been signed. Company then provides this extracted and reformatted data back to Wallo allowing it to reconcile its customer's accounts. Company provides data processing services which are excluded from the definition of digital automated services. These services would generally be subject to service and other activities B&O tax.

Example 22. Same facts as Example 21, except that Company accepts checks provided directly by Wallo's customers. Thus, check images come from both Wallo and Wallo's customers. The services provided by Company are still data processing services excluded from the definition of digital automated services even though the data does not come exclusively from Wallo. These services would generally be subject to service and other activities B&O tax.

Part 4. Are the Sales of the Digital Product or Digital Code Sourced to Washington?

(401) **Introduction.** Once it is determined that a transaction involves the sale of a digital product or digital code, the sale must be sourced to Washington in order to be subject to Washington's retail sales tax and B&O tax. If the sale is sourced outside Washington it is not subject to Washington sales tax or B&O tax. Sales of digital products are sourced using the same statute that applies to other retail sales, RCW 82.32.730 as outlined below.

(402) **Sourcing retail sales.**

(a) **Business location.** When a digital product or digital code is received by the buyer at a business location of the seller, the sale is sourced to that business location.

Example 23. Frank goes to BigBox brick-and-mortar store in Washington and purchases a music file from an electronic kiosk in the store. Frank purchases and downloads the music file inside BigBox's store by connecting his digital music player to the kiosk in the store. The sale of the music file is sourced to BigBox's store location in Washington and is generally subject to retail sales tax and retailing B&O tax.

(b) **Place of receipt.** If the first sourcing rule explained above in (a) of this subsection does not apply, the sale is sourced to the location where receipt takes place.

(i) The digital product or digital code may be received by the buyer at the buyer's location or by the buyer's donee (e.g., a gift recipient) at the donee's location.

(ii) In the context of digital products and digital codes, "receive" and "receipt" means: (i) Making first use of digital automated services; or (ii) taking possession or making first use of digital goods or digital codes, whichever comes first.

Example 24. Drogba Inc., located in Olympia, Washington, purchases a digital automated service generally subject to retail sales tax from Company. Drogba's employees access and make first use of the service at their computer workstations located in Olympia. Company knows that the digital automated service is received in Olympia and therefore will source the sale of the digital automated service to that location.

(c) **Address in records.** If the first two sourcing rules explained above in (a) and (b) of this subsection do not apply, the sale is sourced to the location indicated by an address for the buyer that is available from the seller's business records maintained in the ordinary course of business, so long as use of this address does not constitute bad faith. For example, any address of the buyer held by the seller that reasonably estimates the receipt location will be sufficient, including an address contained in a relevant service contract or an address used for accounts receivable purpose.

Example 25. Nani Corp., located in California, purchases a digital automated service generally subject to retail sales tax and retailing B&O tax from Company located in Washington. The purchase contract between Nani and Company provides that Nani may have 5 users access the digital automated service. Company does not know where the digital automated service is actually received. However, Company has Nani's California address in its business records and will therefore source the sale to Nani's California address. Because the sale is sourced outside Washington, it is not subject to Washington's retail sales tax or retailing B&O tax. Note, to the extent that Nani Corp., receives the service at locations in Washington, it may have a use tax liability. See subsection (403) of this section for more on use tax.

(d) **Address obtained during sale.** If the first three sourcing rules explained above in (a), (b), and (c) of this subsection do not apply, the sale is sourced to the location indicated by an address for the buyer obtained during the consummation of the sale. For example, an address obtained during consummation of the sale would include the address of a buyer's payment instrument (e.g., billing address for a credit card), if no other address is available, so long as use of this address does not constitute bad faith.

(i) **Internet protocol (IP) address.** The buyer's IP address is acceptable location information obtained at the time of sale if an address cannot otherwise be obtained during consummation of the sale.

(e) **Origin.** If the first four sourcing rules explained above in (a), (b), (c), or (d) of this subsection do not apply, including the circumstance where the seller is without sufficient information to apply those provisions, then the sale must be sourced to the location determined by the address from which the digital good or digital code was first available for transmission by the seller, or from which the digital automated service was provided. Any location that merely pro-

vided the digital transfer of the product sold shall be disregarded.

(403) **Sourcing for use tax purposes.** The sales sourcing rules above in subsection (402) of this section are for sourcing sales subject to retail sales tax under RCW 82.08.-020 and RCW 82.32.730. What follows below is a discussion of use tax reporting obligations with respect to digital goods, digital automated services, and digital codes. Generally, use tax applies to the use of a digital product or digital code in Washington if retail sales tax has not already been paid and no exemption otherwise applies.

(a) **Digital good or digital code.** "Use" means the first act within this state by which the taxpayer, as a consumer, views, accesses, downloads, possesses, stores, opens, manipulates, or otherwise uses or enjoys the digital good or digital code.

(b) **Digital automated service.** "Use" means the first act within this state by which the taxpayer, as a consumer, uses, enjoys, or otherwise receives the benefit of the service.

Example 26. Company, located in New York, sells a digital automated service generally subject to retail sales tax and retailing B&O tax to Lampard Inc., located in Washington. Lampard's employees in Washington use the internet to access Company's services using an internet web browser. However, Company does not have nexus with Washington and is therefore not required to charge and collect retail sales tax on the sale of its service to Lampard. Lampard has a use tax reporting obligation because it uses, enjoys, or otherwise receives the benefit of Company's digital automated service at its location in Washington.

Part 5. Are there Applicable Retail Sales or Use Tax Exemptions for the Purchase or Use of the Digital Product or Digital Code?

(501) **Introduction.** After determining that a digital product or digital code has been sold or used and the sale or use is sourced to Washington, exemptions from retail sales or use tax should be examined. What follows is not an exhaustive list of exemptions but instead an explanation of the most common exemptions for digital products. Some exemptions may apply only with respect to certain digital products (e.g., some exemptions apply only to digital goods, not digital automated services). Exemptions may also require an exemption certificate or reseller permit.

(502) **Resale.** The purchase of a digital product or digital code for resale with no intervening use is not subject to retail sales or use tax. Sellers should obtain from buyers a copy of the buyer's reseller permit, a properly completed "Digital Products and Remote Access Software Exemption Certificate," or otherwise comply with RCW 82.04.470 to substantiate the wholesale nature of the sale. See RCW 82.32.780.

(503) **Component of a new product.** Generally, purchasing, acquiring, owning, holding, or using any digital product or digital code for purposes of incorporating it into a new product for sale will not be subject to retail sales tax. The digital product or digital code must become a component of the new product for sale. A digital code becomes a component of a new product if the digital good or digital automated service acquired through the use of the digital code becomes incorporated into a new product. RCW 82.04.190(11). This is also discussed in subsection (602) of this section in the context of wholesale sales.

(a) **Product.** For purposes of this subsection, "product" means a digital product, an article of tangible personal property, or remote access prewritten software as defined in RCW 82.04.050 (6)(b). For example, an industrial drill manufacturer and seller combines hardware, software, and data to create a new product, a "smart drill." Software embedded in the drill uses the variance data (also embedded in the drill) to control the hardware during drill operations. The data is a digital good purchased for use as a component of a new product for sale (i.e., the drill). Sellers should obtain from buyers a copy of the buyer's reseller permit, a properly completed "Digital Products and Remote Access Software Exemption Certificate," or otherwise comply with RCW 82.04.470 to substantiate the wholesale nature of the sale.

(504) **Made available free to the general public.** Retail sales and use tax does not apply to the purchase or use by a business or other organization of a digital product (including a digital product acquired through the use of a digital code) in order to make that digital product (1) available free of charge for the use or enjoyment of (2) the general public. Buyers claiming this exemption must provide the seller with a properly completed "Digital Products and Remote Access Software Exemption Certificate" or other exemption certificate acceptable to the department. See RCW 82.08.02082.

(a) **Available for free.** In order to qualify, the digital product purchased must be made available for free. In this context, "free" means that the recipient of the digital product does not need to provide anything of significant value. If the purchaser requires something of significant value from the recipient in exchange for the digital product, it is not given away for free.

Example 27. Mauro purchases 1,000 digital music files from Company to be used for a "give away" to the first 1,000 people to visit Mauro's web site. When people visit Mauro's web site they are required to fill out a marketing survey before they may receive a digital music file. The information gathered from the marketing survey is then sold to a marketing company by Mauro. Thus, Mauro has required that recipients provide something of significant value in exchange for the digital music file. This is not a "free" transaction and therefore, Mauro's purchase of the digital music from Company does not qualify for the exemption and would be subject to retail sales tax and retailing B&O tax. (See also Example 29.)

(b) **"General public"** means all persons and is not limited or restricted to a particular class of persons, except that the general public includes:

(i) **Certain classes of persons defined by their residency or property ownership.** The general public includes a class of persons residing or owning property within the boundaries of any state (e.g., Washington), political subdivision of a state (e.g., King County), or a municipal corporation (e.g., Seattle).

Example 28. The City of Evergreen (a municipal corporation) makes satellite images of land parcels available for free only to persons residing in Evergreen. Residents are required to enter their zip code prior to accessing the images and certify that they are a resident of the City. Accordingly,

the City of Evergreen can purchase the satellite images exempt from retail sales tax.

(ii) **Library customers.** With respect to libraries, the term general public includes authorized library patrons.

(c) **Buyer must have the legal rights to provide the digital product to the general public.** The exemption provided in this subsection does not apply unless the purchaser has the legal right to broadcast, rebroadcast, transmit, retransmit, license, relicense, distribute, redistribute, or exhibit the digital product, in whole or in part, to the general public.

Example 29. Same facts as Example 27, except this time visitors to Mauro's web site are provided free access to the digital music files and no survey information is required in exchange. Additionally, Mauro purchased the digital music files from Company with the right to distribute them to the general public. Mauro also provided the seller with an exemption certificate. Accordingly, Mauro's purchase from Company qualifies for the exemption because he has made the digital audio files available free of charge to the general public pursuant to a contract that gives him rights of distribution. Mauro only purchased 1,000 files and therefore must limit the distribution to the first 1,000 people. Most "giveaways" will have similar quantity limitations but this fact alone will not disqualify such transactions under the "general public" requirement.

(505) **Purchased solely for business purpose.**

(a) **Introduction.** Retail sales and use tax does not apply to the sale to or use by a business of digital goods and services rendered in respect to those digital goods, where the digital goods and services rendered in respect to digital goods are purchased solely for business purposes. This exemption only applies to purchases of digital goods and does not apply to the purchase of digital automated services, prewritten software, or remote access prewritten software. The exemption is only available when the buyer provides the seller with an exemption certificate. Buyers may use the department's "Digital Products and Remote Access Software Exemption Certificate" to claim this exemption. See RCW 82.08.02087.

(b) **Digital codes.** This exemption also applies to the sale to or use by a business of a digital code if all of the digital goods to be obtained through the use of the code will be used solely for business purposes. If the digital code purchased by a business for a business purpose provides access to both digital goods and digital automated services, the purchase of the digital code does not qualify for this exemption.

(c) **"Business purposes"** means the digital good is relevant to the buyer's business needs.

(d) **Personal or household purpose.** This exemption does not apply to the purchase for personal or household purposes.

(e) **Government entities.** This exemption does not apply to purchases by a governmental entity.

(f) **Prior periods.** For the period July 26, 2009, through June 30, 2010, the "business purpose" exemption applied only to "standard digital information." Standard digital information is a subset of digital goods.

(i) **Standard digital information** is a digital good that consists primarily of data, facts, and/or information that is not generated or compiled for a specific client or customer. Standard digital information does not include a digital good that is comprised primarily of sounds or images.

(506) **Multiple points of use (MPU).** Retail sales tax does not apply to the sale of digital products or digital codes concurrently available for use within and outside this state. See RCW 82.12.02088 and 82.08.02088. Note that Washington use tax still applies to the use of the digital product or digital code used in Washington.

(a) **Requirements.** A buyer is entitled to claim the MPU exemption only if:

(i) The buyer is a business or other organization.

(ii) The digital product purchased (or obtained by using the digital code purchased) will be concurrently available for use within and outside this state (not for personal use).

(iii) The buyer provides the seller with a valid exemption certificate acceptable to the department claiming the MPU exemption. Buyers may use the department's "Digital Products and Remote Access Software Exemption Certificate" to claim this exemption.

(b) **Concurrently available.** "Concurrently available for use within and outside this state" means that employees or other agents of the buyer may use the digital product simultaneously from one or more locations within this state and one or more locations outside this state.

Example 30. Company sells an online patent searching service to Iniesta Corp., for simultaneous use at Iniesta's headquarters in Washington and its research and development facility in California. This service would generally be considered the sale of a digital automated service subject to retail sales tax and retailing B&O tax. In this case, the digital automated service is concurrently available for use by Iniesta's employees both within Washington and outside Washington, and therefore Iniesta may claim the MPU exemption from retail sales tax for its purchase of the digital automated service from Company. See (c) of this subsection directly below for an explanation of how to apportion the use tax in this example.

(c) **Apportionment (allocation) of use tax.** For purposes of this subsection on multiple points of use, "allocation" and "apportionment" have the same meaning. A business or other organization subject to use tax on digital products or digital codes that are concurrently available for use within and outside this state is entitled to apportion the amount of tax due this state based on users in this state compared to users everywhere. For example, in the case of Iniesta in Example 30, if we assume Iniesta had five employees in California and five employees in Washington using the service concurrently, Iniesta would allocate one-half of the purchase price to Washington because five of its ten users are in Washington (e.g., 5/10 = 50%). Thus Iniesta would pay use tax to Washington based on fifty percent of the value of the digital automated service. Additionally, the department may authorize or require an alternative method of allocation supported by the taxpayer's records that fairly reflects the proportion of in-state to out-of-state use by the taxpayer.

(i) **Records requirement.** No allocation under this section is allowed unless the allocation method is supported by the taxpayer's records kept in the ordinary course of business.

(ii) **"User"** means an employee or agent of the taxpayer who is authorized by the taxpayer to use the digital product purchased in the performance of his or her duties as an employee or other agent of the taxpayer.

(d) **Application to digital codes.** A digital code is concurrently available for use within and outside this state if users may use the digital goods or digital automated services to be obtained by the code simultaneously at one or more locations within this state and one or more locations outside this state.

(e) **Reporting.** A buyer claiming an exemption under this section must report and pay state and local use tax directly to the department. As explained above in (c) of this subsection, use tax may be reported and paid on an apportioned basis if supported by the buyer's records.

(507) **Machinery and equipment.** Generally retail sales and use tax does not apply to sales to or use by a manufacturer or processor for hire of certain machinery and equipment used directly in a manufacturing or research and development operation. This exemption is commonly referred to as the M&E exemption. (See RCW 82.08.02565 and 82.12.-02565 and WAC 458-20-13601 for information regarding the M&E exemption.) Included within the definition of "machinery and equipment" for purposes of the M&E exemption are digital goods. Accordingly, digital goods acquired by manufacturers and processors for hire and used directly in a manufacturing or research and development operation are exempt from retail sales and use tax, provided all of the requirements for the M&E exemption are met.

(508) **Audio or video programming.** Income received from the sale of regular audio or video programming by a radio or television broadcaster is generally subject to service and other B&O tax and therefore not subject to retail sales tax. However, the sale of audio or video programming sold on a pay per program or subscription on-demand basis is generally subject to retail sales and use tax except as provided in (d) and (e) of this subsection.

(a) **"Radio and television broadcasters"** include satellite radio providers, satellite television providers, cable television providers, and providers of subscription internet television.

(b) **"Pay per program or subscription on-demand basis"** means programming that the buyer pays for on a per program basis or a service that allows the buyer to access a library of programs at any time for a specific charge.

(c) **"Regular programming"** is scheduled programming. The person watching cannot stop, pause, rewind, or otherwise control the broadcast of the scheduled programming, including the time that the scheduled program is broadcast.

(i) The fact that a customer uses a recording device, such as a VCR or DVR, does not result in the broadcaster's programming being characterized as a digital good.

(d) **Cable television providers paying franchise fees.** Cable television providers' sales of programming to consumers on a pay-per-program or subscription on-demand basis are not subject to retail sales and use tax if the cable television provider is subject to a franchise fee (under the authority of Title 47 U.S.C. Sec. 542(a)) on the gross revenue received from such sales. If the cable television provider is not subject to a franchise fee on the income from the sale of programming on a pay-per-program or subscription on-demand basis, then the exemption does not apply and the cable television provider must collect and remit retail sales tax on the retail sale of such programming.

Example 31. XYZ sells video programming to customers using cable technology. XYZ does not pay a franchise fee. Customers of XYZ are charged a monthly subscription fee to receive video programming. Customers are charged additional fees to view selected movies. XYZ must charge and collect retail sales tax on the additional fees charged to view the selected movies, but not on the monthly subscription fee which would generally be subject to service and other activities B&O tax.

(e) Satellite television providers do not generally pay franchise fees and therefore do not qualify for the retail sales and use tax exemption based on payment of franchise fees as described in (d) of this subsection.

(509) **Newspapers.** Generally, retail sales and use tax does not apply to sales of newspapers transferred electronically, provided that the electronic version has a printed counterpart, and the electronic version:

(a) Shares content with the printed newspaper; and

(b) Is prominently identified by the same name as the printed newspaper or otherwise conspicuously indicates that it is a complement to the printed newspaper.

(c) "Printed newspaper" means a publication issued regularly at stated intervals at least twice a month and printed on newsprint in tabloid or broadsheet format folded loosely together without stapling, glue, or any other binding of any kind, including any supplement of a printed newspaper.

(510) **Received for free by end user.** Digital products and digital codes obtained by the end user for free are not subject to use tax.

(a) For example, a person's use of a free search engine is not subject to use tax.

(b) For example, a person reading an online article or viewing an online picture for free is not subject to use tax.

(511) **Other use tax exemptions.** Use tax does not apply to the use of digital goods that are:

(a) Noncommercial in nature, such as personal e-mail communications;

(b) Created solely for an internal audience; or

(c) Created solely for the business needs of the person who created the digital good and is not the type of digital good that is offered for sale, including business e-mail communications.

Example 32. Gary, an employee of Kadabbera Corp., creates a digital audio-visual presentation using presentation authoring software and his innate creative capacity. Gary distributes the presentation internally to various divisions within Kadabbera in order to train employees on changes to company policies. Gary has created and distributed an item that meets the definition of "digital good." However, the distribution and use of this digital good is not subject to use tax as long as it is used solely internally or solely for the business needs of Kadabbera.

Part 6. Miscellaneous Provisions

(601) **Retail services.** Washington imposes retail sales and use tax on certain enumerated services under RCW 82.04.050 ("retail services"). For example, the sale of credit bureau services is subject to retail sales tax. However, when a retail service is transferred electronically and also meets the definition of digital automated service or digital good, such service will be treated as a digital product and is eligible for

all applicable digital products retail sales and use tax exemptions as described above in Part 5 of this rule. Retail services that are not transferred electronically or those retail services that are excluded from the definitions of digital good or digital automated service (e.g., telecommunications services and ancillary services) continue to be taxed as retail services.

Example 33. ABC creates a "canned" digital report on Company X's creditworthiness prepared prior to a customer request for the report. The report may be a credit bureau service and/or a digital good (if transferred electronically). The "canned" report is listed for sale on ABC's web site. An employee of InvestCo, Inc. purchases and downloads a digital copy of the "canned" credit report from ABC's web site for InvestCo's business purpose. ABC is selling a digital good generally subject to retail sales tax. However, the "canned" report is purchased by InvestCo solely for a business purpose and therefore exempt from retail sales tax (see subsection (505) of this section for more on this exemption).

Example 34. Company sells credit reports and credit research services. EPD Corp., requests that Company prepare a credit report for EPD's specialized business purposes. After receiving the request, Company's employee researches, analyzes and generates information from various digital sources to prepare the credit report for EPD. Company then sends the report electronically as a digital file to EPD. Company is not selling a digital good because the digital item supplied to EPD is merely a representation of a professional service performed by EPD's employee. Therefore, Company's services are not a "digital product." However, Company is still required to charge and collect retail sales tax because Company is still providing credit bureau services, a retail service, subject to retail sales tax.

Example 35. Company sells an online credit reporting service. The service includes access to searchable data bases, digital data analysis, and digital data reporting tools. ManageCo investigates the credit worthiness of individuals and therefore purchases access to Company's online service. Company is selling a digital automated service to be used solely for a business purpose by ManageCo. However, the "used solely for a business purpose" exemption is limited to digital goods and is not applicable to digital automated services. As such, Company is required to charge and collect retail sales tax on its sale of the digital automated service to ManageCo.

(602) **Royalties and wholesaling B&O tax on digital products.** The sale of digital products to "nonend users" may be subject to royalties or wholesaling B&O tax depending on the type of transaction and the intangible rights provided to the purchaser. Transactions which provide the right to resell digital products (no copying rights) to consumers will generally be treated as wholesale sales. Additionally, transactions which allow the purchaser the right to incorporate a digital product into a new product for sale will also be treated as wholesale sales. See also subsection (503) of this section. Other nonend user transactions involving digital products or digital codes will generally be treated as royalties transactions.

Example 36. Media Corp., licenses to Rerun Inc., the right to further broadcast a digital movie file on Rerun's web site for a specified period of time. In this case Media Corp. provides Rerun with the right by contract to further commercially broadcast or exhibit a digital movie to its subscribers. This is a nonend user transaction subject to royalties B&O tax. Media Corp. would report its gross receipts from this transaction under the royalties B&O tax classification and not charge and collect retail sales tax on the transaction with Rerun. Rerun's charges for the subscription service provided to consumers are generally subject to retail sales tax and retailing B&O tax.

Example 37. Same facts as Example 36 except Rerun purchases individual digital movie files from Media Corp. with the right to resell those individual files to end users at retail instead of rebroadcasting or exhibiting to the public. In this case Media Corp. has provided Rerun with the right to resell individual digital movie files to end users. Media Corp. would report its gross receipts from this transaction under the wholesaling B&O tax classification and not charge and collect retail sales tax on the transaction with Rerun. Rerun's charges to consumers for the movie files are generally subject to retail sales tax and retailing B&O tax.

Example 38. Same facts as Example 37 except that Rerun purchases a single digital movie file with the right provided by contract to duplicate and sell that movie file. In this case Media Corp. has provided Rerun with the right to duplicate and sell individual digital movie files. Media Corp. would report its gross receipts from this transaction under the royalties B&O tax classification. Media Corp. would not need to charge and collect retail sales or use tax from Rerun. Rerun's charges to consumers for the movie files are generally subject to retail sales tax and retailing B&O tax.

Example 39. Jack is a photographer who creates a digital picture of Mt. Rainier. Jack licenses, by contract, to Cashman the right to duplicate and sell copies of the Mt. Rainier picture in retail stores. Cashman's payment to Jack is for the grant of an intangible right and subject to royalties B&O tax. Cashman's sale of the picture at retail to customers is subject to retail sales tax and retailing B&O tax.

(603) **Substantial nexus** is not established in Washington if a business's only contact with the state of Washington is ownership of, or rights in, computer software as defined in RCW 82.04.215, including computer software used in providing a digital automated service; master copies of software; a digital goods or digital codes residing on servers in Washington. For purposes of this section, "substantial nexus" means the requisite connection that a person must have with a state to allow the state to subject the person to the state's taxing authority, consistent with the commerce clause of the United States Constitution.

(604) **Amnesty.** Before July 26, 2009, retail sales of downloaded digital goods on a permanent or nonpermanent basis were subject to retail sales tax. This did not include accessed or streamed digital goods. However, amnesty is available to those who did not collect or pay retail sales or use tax on digital goods and digital codes during that time. Sales of digital automated services and accessed or streamed digital goods were subject to service and other B&O tax before July 26, 2009, and amnesty does not extend to these transactions because they were not subject to retail sales tax during that time period.

(a) **Refunds and credits of retail sales or use tax.** No refund or credit will be given for state and local retail sales and use taxes properly paid on the sale or use, before July 26,

2009, of digital goods or of installing, repairing, altering, or improving digital goods.

(b) **No B&O tax refund or credit unless sales tax was paid.** If a taxpayer paid B&O tax under the service and other activities classification prior to July 26, 2009, on income received from retail sales of digital products or digital codes, the taxpayer may not receive a refund or credit for the difference between the B&O tax actually paid and the B&O tax that should have been paid under the retailing classification unless the taxpayer has remitted the retail sales tax for those sales.

(605) **Bundled transactions.** A "bundled transaction" is the retail sale of two or more products, which are distinct and identifiable for one nonitemized price. Because retail sales of digital products and digital codes are subject to retail sales tax, the general rules on the taxation of bundled transactions may apply to certain transactions involving digital products and digital codes. See RCW 82.08.190 and 82.08.195 for more information on the tax treatment of bundled transactions.

(606) **Property tax.** The excise tax laws relating to digital products and digital codes do not have any impact in the characterization of digital goods and digital codes as tangible or intangible personal property for purposes of property taxation and may not be used in any way in construing Title 84 RCW. See section 1201, chapter 535, Laws of 2009.

[Statutory Authority: RCW 82.32.200 and 82.01.060. WSR 13-06-015, § 458-20-15503, filed 2/25/13, effective 3/28/13.]

WAC 458-20-156 Abstract, title insurance and escrow businesses. The gross receipts of "abstract," "title insurance" and "escrow" businesses include all service charges representing an abstract fee, a charge for a title insurance fee or premium, or an escrow fee or service charge received by "escrow agents."

The term "escrow" means any transaction wherein any person or persons, for the purpose of effecting and closing the sale, purchase, exchange, transfer, encumbrance, or lease of real or personal property to another person or persons, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by such third person until the happening of a specified event or the performance of a prescribed condition or conditions, when it is then to be delivered by such third person, in compliance with instructions under which he is to act, to a grantee, grantor, promisee, promisor, obligee, obligor, lessee, lessor, bailee, bailor, or any agent or employee thereof.

"Escrow agent" means any sole proprietorship, firm, association, partnership, or corporation engaged in the business of performing for compensation the duties of the third person referred to in the foregoing definition.

Business and Occupation Tax

Abstract, title insurance and escrow businesses are taxable under the classification retailing on gross receipts from fees or premiums charged to consumers for abstract, title insurance or escrow services.

The gross income from collection contracts which do not involve an escrow as above defined is subject to tax under the classification service and other activities.

Retail Sales Tax

The retail sales tax must be collected and reported by abstract, title insurance and escrow businesses on fees or premiums charged for such services. The retail sales tax is applicable to sales to such businesses of forms, office supplies and equipment for use in the conduct of such businesses.

[Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), § 458-20-156, filed 3/15/83; Order ET 70-3, § 458-20-156 (Rule 156), filed 5/29/70, effective 7/1/70.]

WAC 458-20-158 Florists and nurserymen. The word "florist" means a person engaged in the business of selling flowers and ornamental trees, shrubs or vines from an established business location, or one who peddles the same.

The word "nurseryman" means a person who grows, propagates or produces for sale upon his own lands or upon land in which he has a present right of possession, any flowers, trees, shrubs or vines.

Business and Occupation Tax

Retailing. Florists and nurserymen are taxable under the retailing classification upon gross sales made by them to consumers.

Wholesaling. Florists are taxable under the wholesaling classification upon gross sales for resale of articles which were not produced by them as nurserymen. Nurserymen are exempt from business tax with respect to sales at wholesale of articles produced by them in this state, but this exemption does not extend to the taking, cultivating, or raising of Christmas trees or timber.

Retail Sales Tax

Florists and nurserymen must collect the retail sales tax on sales of cut flowers, bulbs, corsages, bouquets, wreaths, floral designs, displays, potted plants, young trees, shrubs, bushes and other such items of tangible personal property to purchasers for use or consumption. However, sales by nurserymen of fruit and nut trees and berry slips or vines to farmers who use the same for producing fruit, nuts or berries for sale are wholesale sales and are not subject to the retail sales tax.

Telegraphic delivery. Where, through the Florist's Telegraphic Delivery Association, one florist takes an order pursuant to which he gives telegraphic instructions to a second florist for delivery of flowers, the sending florist is a retailer of flowers and must collect the retail sales tax from the customer who placed the order on the basis of the total charge. The receiving florist is selling the flowers which he delivers, to the sending florist for resale and is not required to collect the retail sales tax. Thus:

(1) On all orders taken by a Washington florist and telegraphed to a second florist, either in Washington or at a point outside the state of Washington, the florist taking the order will be responsible for the collection of the retail sales tax from the customer placing the order.

(2) In cases where a Washington florist receives telegraphic instructions from a second florist located either within or without Washington for the delivery of flowers, the Washington florist receiving the telegraphic instructions is

making a sale for resale to the sending florist on which no tax is to be collected.

Telephone and telegraph charges. The income derived by a florist from telephone and telegraph charges is construed to be an advance for the customer when such charges are paid by the florist and the amount thereof is billed to the customer as a separate item.

Purchase or supplies, materials, equipment, etc. Sales by supply houses to florists and nurserymen of the following articles are sales for resale upon which the retail sales tax should not be collected:

(1) Sales of paper boxes, wrapping paper, bags, twine, gummed tape or other containers sold to customers along with the flowers, shrubs, etc., sold and contained therein;

(2) Sales of labels, stickers, cards which are permanently affixed to the containers referred to above;

(3) Sales of wire, tin foil, ribbon and other items which are attached to or become a component part of, wreaths, floral displays, bouquets or corsages.

Furthermore, sales to nurserymen of seeds, fertilizers and spray materials for use by them in producing for sale flowers, trees, shrubs or vines, are not subject to the retail sales tax. (See WAC 458-20-122.)

However, sales by supply houses to florists and nurserymen of fuel for heating green houses or for other purposes, and sales of equipment and supplies for use or consumption by them are taxable under the retail sales tax.

Revised June 1, 1965.

[Order ET 70-3, § 458-20-158 (Rule 158), filed 5/29/70, effective 7/1/70.]

WAC 458-20-159 Consignees, bailees, factors, agents and auctioneers. A consignee, bailee, factor, agent or auctioneer, as used in this ruling, refers to one who has either actual or constructive possession of tangible personal property, the actual ownership of such property being in another, or one calling for bids on such property. The term "constructive possession" means possession of the power to pass title to tangible personal property of others.

Business and Occupation Tax

Retailing and wholesaling. Every consignee, bailee, factor, agent or auctioneer having either actual or constructive possession of tangible personal property, or having possession of the documents of title thereto, with power to sell such tangible personal property in his or its own name and, actually so selling, shall be deemed the seller of such tangible personal property and taxable under the retailing or wholesaling classification of the business and occupation tax, depending upon the nature of the transactions. In such case the consignor, bailor, principal or owner shall be deemed a seller of such property to the consignee, bailee, factor or auctioneer and taxable as a wholesaler with respect to such sales.

The mere fact that consignee, bailee or factor makes a sale raises a presumption that such consignee, bailee or factor actually sold in his or its own name. This presumption is controlling unless rebutted by proof satisfactory to the department of revenue.

Agents and brokers. Any person who claims to be acting merely as agent or broker in promoting sales for a principal or in making purchases for a buyer, will have such claim recognized only when the contract or agreement between such persons clearly establishes the relationship of principal and agent and when the following conditions are complied with:

(1) The books and records of the broker or agent show the transactions were made in the name and for the account of the principal, and show the name of the actual owner of the property for whom the sale was made, or the actual buyer for whom the purchase was made.

(2) The books and records show the amount of gross sales, the amount of commissions and any other incidental income derived by the broker or agent from such sales.

Service and other business activities. Every consignee, bailee, factor, agent or auctioneer who makes a sale in the name of the actual owner, as agent of the actual owner, or who purchases as agent of the actual buyer, is taxable under the service and other business activities classification upon the gross income derived from such business.

Retail Sales Tax

Consignees, bailees, factors, agents or auctioneers. Every consignee, bailee, factor, agent or auctioneer authorized, engaged or employed to sell or call for bids on tangible personal property belonging to another, and, so selling or calling, is deemed a seller, and shall collect the retail sales tax upon all retail sales made by him, except sales of certain farm property as hereinafter provided. The tax applies to all such sales even though the sales would have been exempt if made directly by the owner of the property sold.

It shall be the duty of every consignee, bailee, factor, agent or auctioneer to collect and remit the retail sales tax directly to the department with respect to all retail sales made or called by them: Provided, however, That if the owner of the property sold is engaged in the business of selling tangible property and the sale by the consignee, bailee, factor, agent or auctioneer has been made in the owner's name and the owner continues to engage in business, the owner may report and pay the tax collected directly to the department.

If the owner of the property sold discontinues business either before or at the time of the sale, the owner and the consignee, bailee, factor, agent or auctioneer will be held jointly responsible for payment of the tax.

The foregoing does not apply to auction sales made by or through auctioneers of tangible personal property (including household goods) which have been used in conducting a farm activity when the seller thereof is a farmer and the sale is held or conducted upon a farm, since such sales are specifically exempted from the retail sales tax.

Bailees will be relieved from liability for the collection of the sales tax from buyers in those cases where they merely receive a commission on the sale and the entire transaction is closed directly between the owner and the buyer, if such sales are reported to the department by such bailees, within ten days after receipt of the sales commission and such report shows the following:

(1) Name and address of seller;

(2) Name and address of buyer;

(3) Amount for which sold;

(4) Approximate date of sale;

(5) Description of property sold.

Those failing to submit such report to the department within the time stated will be held responsible for payment of the sales tax to the state.

Note: For tax liability of certain independent selling agents for the collection of the use tax, see WAC 458-20-221.

[Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), § 458-20-159, filed 3/15/83; Order ET 70-3, § 458-20-159 (Rule 159), filed 5/29/70, effective 7/1/70.]

WAC 458-20-160 Agricultural commission agents. Any person whose business consists in selling agricultural products both as a dealer and upon a commission-consignment basis is presumed to be conducting business as a seller of tangible personal property either at wholesale or at retail, unless such person segregates upon his books and records between sales of products purchased and sold as a dealer and those handled strictly upon a commission basis.

Business and Occupation Tax

Retailing. Dealers are taxable under the retailing classification upon gross proceeds derived from retail sales. Persons selling upon a commission-consignment basis who do not segregate upon their books and records between sales made as a dealer and those handled upon a commission basis are taxable as sellers upon gross proceeds of all sales.

Wholesaling. Dealers are taxable under the wholesaling classification upon gross proceeds derived from wholesale sales. Persons selling upon a commission-consignment basis who do not segregate upon their books and records between wholesale sales made as a dealer and those handled on a commission basis are taxable as sellers upon gross proceeds of all sales.

Service and other business activities. A person may be classified as engaging in service and other business activities with respect to bona fide commission-consignment sales, even though such consigned sales are credited to the "sales" account, providing he has complied with the Commission Merchants' Law of the state of Washington and has prepared and kept the following records supplementary to the regular books of account:

(1) Lot sheets, cards or similar subsidiary records upon which consigned sales are regularly recorded;

(2) An analysis sheet showing the date, lot number, gross proceeds of sales of consigned goods, remittances to consignor, advances, commissions, other charges and taxable amount with respect to consigned accounts. This sheet shall contain a complete analysis of all consigned sales showing the distribution made from lot sheets, cards or similar subsidiary records. Entries in the consigned sales analysis record shall be made as of the date that final distribution is made on lot sheet, card or similar record;

(3) A detailed record of deductions claimed with respect to sales of products purchased. Such records shall show the date of sale, the lot number and the nature of the deductions claimed.

The subsidiary analysis of consigned accounts and record of deductions shall be kept substantially in the following form:

Principal accounts

Date	Lot Number	Interstate Sales	Other Deductions	Total Deductions

Commission accounts

Date	Lot No.	Gross Proceeds of Sales	Remittances	Advances	Commission Charged	Other Charges	Taxable Amount

Retail Sales Tax

Persons engaged in the business of selling agricultural products at retail either as dealers or upon a commission-consignment basis are required to collect the retail sales tax upon all retail sales made by them.

Revised May 1, 1939.

[Order ET 70-3, § 458-20-160 (Rule 160), filed 5/29/70, effective 7/1/70.]

WAC 458-20-162 Stockbrokers and security houses. (1) **Introduction.** With respect to stockbrokers and security houses, "gross income of the business" means the total of gross income from earnings accounts, specifically gross income from interest, gross income from commissions, gross income from trading, and gross income from all other sources. Provided that:

(a) Gross income from each account is to be computed separately and on a monthly basis;

(b) Loss sustained upon any earnings account may not be deducted from or offset against gross income upon any other account, nor may a loss sustained upon any earnings account during any month be deducted from the gross income upon any account for any other month;

(c) No deductions are allowed on account of salaries or commissions paid to employees or salesmen, rent, or any other overhead or operating expenses paid or incurred, or on account of losses other than under (b) of this subsection;

(d) No deductions are allowed from commissions received from sales of securities which are delivered to buyers outside the state of Washington.

(2) **Gross income from interest.** Gross income from interest includes all interest received upon bonds or other securities held for sale or otherwise, except direct obligations of the federal government and of the state of Washington. No deduction is allowed for interest paid out even though such interest may have been paid to banks, clearing houses or others upon amounts borrowed to carry debit balances of customers' margin accounts.

Interest accrued upon bonds or other securities sold must be included in gross income where such interest is carried in an interest account and not as part of the selling price. Conversely, interest accrued upon bonds or other securities at the time of purchase may be deducted from gross income where such interest is carried in an interest account and not as a part of the purchase price.

(3) **Gross income from commissions.** Gross income from commissions is the amount received as commissions upon transactions for the accounts of customers over and above the amount paid to other established security houses associated in such transactions: Provided, however, That no deduction or offset is allowed on account of salaries or commissions paid to salesmen or other employees.

(4) **Gross income from trading.** Gross income from trading is the amount received from the sale of stocks, bonds and other securities over and above the cost or purchase price of such stocks, bonds and other securities. In the case of short sales gross earnings must be reported in the month during which the transaction is closed, that is, when the purchase is made to cover such sales or the short sale contract is forfeited.

(5) **Gross income from all other sources.** Gross income from all other sources includes all income received by the taxpayer, other than from interest, commissions and trading, such as dividends upon stocks, fees for examinations, fees for reorganizations, etc.

(6) **Services inside and outside the state-apportionment.** Stockbrokers and security houses engaging in business in multiple states are required to apportion income for B&O tax purposes.

(a) **For periods on and after June 1, 2010.** Effective June 1, 2010, RCW 82.04.460 requires that any person, including stockbrokers and security houses, earning apportionable income subject to B&O tax, and who is also taxable in another state, must apportion to this state that portion of the person's apportionable income from business activities pursuant to WAC 458-20-19402.

(b) **For periods prior to June 1, 2010.** RCW 82.04.460 authorized apportionment of income by either a separate accounting method or cost apportionment. (See WAC 458-20-194.)

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 13-04-085, § 458-20-162, filed 2/5/13, effective 3/8/13. Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), § 458-20-162, filed 3/15/83; Order ET 70-3, § 458-20-162 (Rule 162), filed 5/29/70, effective 7/1/70.]

WAC 458-20-163 Insurance companies, including surety companies, fraternal benefit societies, fraternal fire insurance associations, beneficiary corporations or societies and Washington state health insurance pool. (1) **Introduction.** Income earned by insurance companies, including surety companies, fraternal benefit societies, fraternal fire insurance associations, beneficiary corporations or societies, and the Washington state health insurance pool is generally subject to the service and other activities business and occupation (B&O) tax, unless the law provides an exemption or deduction. This section identifies exemptions and deductions available to these businesses. It also explains the reporting responsibilities for retail sales and use taxes for retail purchases and retail services.

(2) **Exemptions.** The law provides the following B&O tax exemptions. These amounts do not need to be reported on the excise tax returns filed with the department of revenue.

(a) RCW 82.04.320 provides an exemption to any person with respect to insurance business upon which a tax based on gross premiums is paid to the state of Washington. It should be noted, however, that the law provides expressly that this exemption does not extend to "any person engaging in the business of representing any insurance company, whether as general or local agent, or acting as broker for such companies" or to "any bonding company … with respect to gross income derived from the completion of any contract as to which it is a surety, or as to any liability as successor to the liability of the defaulting contractor." The exemption also does not apply to any business engaged in by an insurance company other than its insurance business. Thus an insurance company is subject to the retailing or wholesaling B&O tax on sales of salvaged property unless the sales are casual or isolated sales as described in WAC 458-20-106 (Casual or isolated sales—Business reorganizations). Also see WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits) for documentation requirements for wholesale sales.

(b) RCW 82.04.322 provides an exemption to any health maintenance organization, health care service contractor, or certified health plan in respect to premiums or prepayments that are taxable under RCW 48.14.0201.

(c) RCW 82.04.370 provides an exemption to fraternal benefit societies or fraternal fire insurance associations organized or licensed pursuant to Title 48 RCW and as defined in RCW 48.36A.010.

The statute also exempts beneficiary corporations or societies organized under and existing by virtue of Title 24 RCW, if such beneficiary corporations or societies provide in their bylaws for the payment of death benefits.

The exemption provided by RCW 82.04.370, however, is limited to gross income from premiums, fees, assessments, dues, or other charges directly attributable to the insurance or death benefits provided by such persons. It is not intended that all the varied, regular business activities (e.g., sales of food, liquor, admissions, and amusement devices receipts) of these societies or organizations be exempt from B&O tax. Only that portion of income which can be demonstrated as directly attributable to charges made for insurance or providing death benefits is exempt.

(3) **Deductions.** For periods prior to July 1, 2006, a B&O tax deduction was provided by RCW 82.04.4329 to a member of the Washington state health insurance pool for assessments paid by that member to the pool. This deduction did not apply to a member who had deducted such assessments from the insurance premiums tax, RCW 48.14.020.

(4) **Retail sales and use tax responsibilities.** Insurance companies are subject to the retail sales tax or use tax upon retail purchases, certain retail services, or articles acquired for their own use.

When insurance companies make sales to consumers of salvaged property (e.g., from automobile collisions, fire loss, burglary, or theft recoveries) or any other tangible personal property, they must collect and report retail sales tax on those sales.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-163, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 07-17-109, § 458-20-163, filed 8/17/07, effective 9/17/07. Statutory Authority: RCW 82.32.300. WSR 91-05-040, § 458-20-163, filed 2/13/91, effective 3/16/91; WSR 87-19-007 (Order ET 87-5), § 458-20-163, filed 9/8/87; WSR 83-07-033 (Order ET 83-16), § 458-20-163, filed 3/15/83; Order ET 70-3, § 458-20-163 (Rule 163), filed 5/29/70, effective 7/1/70.]

WAC 458-20-164 Insurance producers, adjusters—Title insurance agents—Surplus line brokers. (1) **Introduction.** This section explains the taxability of amounts earned by insurance producers, title insurance agents, and surplus line brokers, which include persons commonly referred to as insurance agents, solicitors, representatives, brokers, or dealers.

(a) **Economic nexus.** Nonresident individuals or business entities organized or commercially domiciled outside the state of Washington and Washington businesses conducting business for customers receiving benefits outside Washington should refer to WAC 458-20-19401, Minimum nexus thresholds for apportionable activities, which include engaging in business as an insurance producer, title insurance agent, or a surplus line broker, to determine if they meet the minimum thresholds for apportionable activities.

(b) **Examples.** This section contains examples which identify a number of facts and then state a conclusion. The examples should be used only as a general guide. Tax results must be determined after a review of all the facts and circumstances.

(2) **Definitions.**

• Insurance producer. An insurance producer is a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance. An insurance producer may receive a license to sell insurance products including, but not limited to, life, disability, property, and/or casualty. "Insurance producer" does not include title insurance agents or surplus line brokers. RCW 48.17.010 and 48.17.170.

• Title insurance agent. A title insurance agent is a business entity licensed under the laws of this state and appointed by an authorized title insurance company to sell, solicit, or negotiate insurance on behalf of the title insurance company.

• Surplus line broker. A surplus line broker is a person specially licensed under chapter 48.15 RCW to procure policies from an insurer not licensed in Washington.

(3) **Business and occupation (B&O) tax.** Persons engaging in business in this state as an insurance producer or a title insurance agent licensed under chapter 48.17 RCW, or a surplus line broker licensed under chapter 48.15 RCW are taxable on gross income earned from such licensed activities, including commissions, fees, and renewals, under the insurance producers/title insurance agents/surplus line broker commissions B&O tax classification. (See WAC 458-20-156, Abstract, title insurance and escrow businesses for taxability of fees/premiums charged to consumers for title insurance.)

Persons engaging in this state as an agent, broker, representative, or solicitor licensed under chapter 48.18A RCW are taxable on gross income earned from such licensed activities under the service and other activities B&O tax classification.

(a) **How is gross income determined?** The gross income of the business is determined by the amount of gross commissions received, not by the gross premiums paid by the insured. The term "gross income of the business" includes gross receipts from commissions, fees, renewals, or other amounts which the insurance producer, title insurance agent, or surplus line broker receives or becomes entitled to receive. RCW 82.04.080. The gross income of the business does not include amounts held in trust for the insurer or the client. (See WAC 458-20-111, Advances and reimbursements.)

(b) **Are commissions and expenses deductible?** No deduction is allowed for commissions, fees, or salaries paid to other insurance producers, title insurance agents, or surplus line brokers or for other expenses of doing business.

(c) **Examples.**

(i) ABC Financial Services (ABC) is a full-service broker-dealer firm with independent contractors, referred to as "representatives," licensed to sell insurance products (chapter 48.17 RCW) and securities (chapter 48.18A RCW). ABC's top selling representative is John. When John sells an insurance policy to a client, ABC receives a commission from the insurer and pays a portion of that commission to John, which John reports under the insurance producers/title insurance agents/surplus line broker commissions B&O tax classification. When John sells securities, ABC charges the purchaser a fee and pays a portion of that fee to John as a commission, which John reports under the service and other activities B&O tax classification. ABC is taxable on the total commissions received from the sale of insurance products (under the insurance producers/title insurance agents/surplus line broker commissions classification) and fees charged for security transactions, (under the service and other activities classification), including the amount in commissions paid to John.

(ii) Tom is an independent contractor with agency agreements with several insurance companies that authorize him to accept applications for insurance. Tom also has an agreement with William, who will market insurance policies for Tom. When William sells a policy for Tom, William collects the entire gross premium from the customer. William deposits the entire amount, and sends Tom a check for the balance remaining after William deducts his commission. Tom deposits the check and writes a check to the insurance company for the net premium. As Tom, not William, has the contractual relationship with the insurance company, Tom owes B&O tax on the gross commission income including the amount retained by William. Tom cannot deduct the amount William kept as it is a cost of doing business for Tom. He will report under the insurance producers/title insurance agent/surplus line broker commissions B&O tax classification. William will also report his commission income on his excise tax return under the insurance producers/title insurance agent/surplus line broker commissions B&O tax classification.

(iii) Lisa sells life insurance and variable annuities. Lisa is not an employee of the insurance company and is taxable under the insurance producers/title insurance agent/surplus line broker commissions B&O tax classification on the commissions she earns from selling insurance. Commissions earned from selling variable annuities are taxable under the service and other business activities B&O tax classification. See RCW 48.18A.030.

(d) **Engaging in business.** Every person acting in the capacity of an insurance producer, title insurance agent, or surplus line broker is presumed to be engaging in business and subject to the B&O tax unless the person can demonstrate he or she is a bona fide employee. The burden is on the person to establish the fact of his or her status as an employee. (See WAC 458-20-105, Employees distinguished from persons engaging in business.)

(e) **How do I apportion my income?** Income earned from engaging in business as insurance producers, title insurance agents, and surplus line brokers is apportionable income. The portion that is taxable income for B&O tax purposes must be determined by using the apportionment method provided in WAC 458-20-19402, Single factor receipts apportionment—Generally.

(4) **Full-time life insurance salespersons.** Persons who sell life insurance on a full-time basis, as provided in section 3121 (d)(3)(B) of the Internal Revenue Code (statutory employee), will be considered employees. These persons will not be subject to the B&O tax on amounts received in their capacity as statutory employees.

(a) **What are the criteria for full-time life insurance salespersons?** For purposes of this subsection (4), a full-time life insurance salesperson is an individual who meets all of the following criteria:

(i) The person's principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one insurance company;

(ii) The contract between the individual and the primary life insurance company contemplates that substantially all of such services are to be performed personally by such individual;

(iii) The individual does not have a substantial investment in facilities used in connection with the sale of life insurance or annuity contracts (other than in facilities for transportation); and

(iv) The sale of life insurance by such individual occurs in the course of a continuing relationship with the primary life insurance company.

(b) **What is a principal business activity?** A person's principal business activity is the activity from which he or she generally receives the greatest remuneration. All business activities, including acting as an employee, will be considered in determining a person's principal business activity.

(c) **What is considered a facility?** The facilities referred to in (a)(iii) of this subsection include such things as office space, office equipment, and secretarial services. The term facilities does not include tools, instruments, or clothing as are commonly furnished by employees. An investment is substantial if a deduction for the item is taken in calculating the person's federal income tax liability.

(d) **What will disqualify a person?** Failure to satisfy any one of the criteria listed in (a) of this subsection will disqualify a person from treatment as an employee under this subsection.

(e) **You can be an employee for only one life insurance company.** A person will be considered an employee under this subsection (4):

(i) With only one company, even if selling on behalf of more than one insurance company; and

(ii) Only as to amounts received as compensation for the sale of life insurance or annuity contracts, or both from one life insurance company.

(f) **Receiving a Form W-2 as a statutory employee.** A person will be presumed to be a full-time life insurance salesperson within the meaning of section 3121 (d)(3)(B) of the Internal Revenue Code if they receive a Form W-2 (federal income tax wage and tax statement) indicating that they are a statutory employee. A person receiving a W-2 as a statutory employee will be presumed to be an employee under this subsection only as to amounts reported on the W-2 as compensation for the sale of life insurance.

A person who does not receive a properly marked W-2 has the burden of establishing that they are a full-time life insurance salesperson as provided in (a) of this subsection.

(g) **Examples.**

(i) A person sells life insurance on a full-time basis on behalf of one company. The company issues a Form W-2 which indicates that the person is a statutory employee. Under these circumstances, the person will be presumed an employee as to amounts reported on the Form W-2 as compensation for the sale of life insurance and will not be taxable under the B&O tax on these amounts.

(ii) A person sells insurance on behalf of several insurance companies two of which are life insurance companies and the others are casualty insurance companies. The person sells both life insurance and casualty insurance. One of the life insurance companies issues a Form W-2 indicating that the person is a statutory employee. The person will be presumed an employee as to amounts reported on the Form W-2 as compensation for the sale of life insurance and will not be taxable under the B&O tax on these amounts.

(iii) A person sells life insurance on behalf of several life insurance companies and does not engage in any other business activity. Most of the policies sold by the person are written with one company. The person does not receive a Form W-2 from any of the companies for which life insurance is sold. The person's sales activities are conducted from an office which he or she leases. The office lease payments are deducted by the salesperson in computing his or her federal income tax liability. In addition, the salesperson has an employee whose salary is also deducted for federal income tax purposes. Because the person does not receive a Form W-2, he or she will not be presumed to be an employee. Instead, the person has the burden of proving the existence of each of the criteria listed in subsection (4)(a) of this section. In this example, the salesperson will not be considered an employee under this subsection (4) of this section because they have a substantial investment in facilities.

(5) **Licensed producer appointed as a managing general agent.** A person representing and performing services for fire or casualty insurance companies as an independent resident managing general agent is subject to tax on the gross income of such business activities and will report under the insurance producers/title insurance agents/surplus line broker commissions B&O tax classification.

Any person claiming to fall within this tax classification must demonstrate:

(a) That the person is licensed as a resident producer by the insurance commissioner; and

(b) That the person performs the following independent manager functions:

(i) Pays all sales and/or production expense; including salaries of special field representatives, underwriters, and inspectors as well as all office expenses of rent, supplies, secretarial help, etc.

(ii) Bills all premiums for the company so represented.

(iii) Directly contracts for or hires all selling agents.

(iv) Exercises final responsibility with respect to selecting risks and underwriting matters.

(v) Makes all arrangements for reinsurance.

(vi) Handles all claims adjustments directly with the insured (by his own staff or through hiring an independent adjuster).

(6) **Insurance adjusters.** For the purpose of this section, adjuster means a person licensed as such under the provisions of chapter 48.17 RCW. Persons engaged in business as insurance adjusters are taxable under the service and other business activities classification upon the gross income of the business.

Gross income includes all fees received for services rendered, and all charges recovered for expenses incurred in performing services, such as transportation costs, hotel, restaurant, and telephone charges, etc.

In computing tax liability, there may be deducted from the gross income (if included therein) money or credits received as reimbursement of advances made for:

• Towing;

• Storage of damaged automobiles;

• Repairs to damaged automobiles;

• Advances for doctor, hospital, and ambulance fees and charges; and

• Other such expenditures made with respect to damaged property or injured persons.

The words "advance" and "reimbursement" apply only when the insurer or the insured alone is liable for the payment of the fees or costs and when the adjuster making the payment has no personal liability therefore, either primarily or secondarily, other than as agent for the insurer or the insured. Refer to WAC 458-20-111, Advances and reimbursements.

(7) **Purchases subject to retail sales tax.** Retail sales tax is owed on purchases of:

• Tangible personal property such as office equipment, supplies, furnishings, computers, prewritten software;

• Digital products, unless specifically exempt; and

• Retail services, such as telephone service, construction services, landscape services, repair services.

If retail sales tax is not paid at the time of purchase, deferred sales tax or use tax is owed by the purchaser. See WAC 458-20-178, Use tax.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 12-11-006, § 458-20-164, filed 5/3/12, effective 6/3/12. Statutory Authority: RCW 82.32.300. WSR 92-19-004, § 458-20-164, filed 9/3/92, effective 10/4/92; WSR 83-17-099 (Order ET 83-6), § 458-20-164, filed 8/23/83; Order 70-5, § 458-20-164 (Rule 164), filed 6/22/70.]

WAC 458-20-165 Laundry, dry cleaning, linen and uniform supply, and self-service and coin-operated laundry services. Introduction. This section discusses the application of the business and occupation (B&O), retail sales, and use taxes to laundries, dry cleaners, laundry pickup and delivery services, self-service laundries and dry cleaners, and linen and uniform supply services. It also discusses the tax treatment of laundry services provided to nonprofit health care facilities and income received from coin-operated laundry facilities.

PART I - LAUNDRY OR DRY CLEANING SERVICES; LINEN OR UNIFORM SUPPLY SERVICES.

(101) **Definitions.**

(a) **Laundry or dry cleaning service.** A "laundry or dry cleaning service" is the activity of laundering, cleaning, dying, and pressing of articles such as clothing, linens, bedding, towels, curtains, drapes, and rugs. It also includes incidental mending or repairing. The term applies to services operating their own cleaning establishments as well as those contracting with other laundry or dry cleaning services. It also includes pickup and delivery laundry services performed by persons operating in their independent capacity and not as agent for another laundry or dry cleaning service.

(b) **Linen and uniform supply services.** "Linen and uniform supply services" is the activity of providing customers with a supply of clean linen, towels, uniforms, gowns, protective apparel, clean room apparel, mats, rugs, and/or similar items whether ownership of the item is in the person operating the linen and uniform supply service or in the customer. RCW 82.08.0202. It also includes the supply of diapers and bedding. "Linen and uniform supply services" includes supply services operating their own cleaning establishments as well as those contracting with other laundry or dry cleaning businesses.

A person providing linen and uniform supply services performs a number of different activities, often at multiple locations. Many of these activities are the same types of activities performed by a person providing laundry or dry cleaning services, such as: Laundering, dry cleaning, pressing, incidental mending, and/or pickup and delivery. Additional activities not generally performed by a person providing laundry or dry cleaning services may include: Providing linen and uniform items customized by application of the customer's business name, company logo, employee names, etc.; measuring and/or issuing uniforms to the customer's employees; repairing or replacing worn or damaged linen and uniform items; and/or performing various administrative functions for the customer, such as inventory control.

(102) **Sales.**

(a) **Services provided to consumers.** The sale of these services is subject to the retailing B&O tax and retail sales tax when the services are provided to consumers. No deduction is available for commissions allowed or amounts paid. RCW 82.04.070 and 82.08.010. The retailing B&O and retail sales taxes also apply to sales of soap, bleach, fabric softener, laundry bags, hangers, and other tangible personal property to consumers.

(b) **Services provided to nonprofit health care facilities.** Persons providing laundry services to nonprofit health care facilities should refer to Part III of this section for reporting instructions.

(c) **Services provided for resale.** The wholesaling B&O tax applies when these services are performed for persons reselling the services. The seller must obtain a resale certificate for sales made before January 1, 2010, or a reseller per-

mit for sales made on or after January 1, 2010, from the buyer to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(d) **Laundry agents collecting and distributing laundry.** Persons who collect and/or distribute laundered or dry cleaned items as an agent for a provider of laundry or dry cleaning services, or linen and uniform supply services are liable for the service and other activities B&O tax on their gross commissions. See WAC 458-20-159 for the recordkeeping requirements for showing agency status. The person providing the laundry or dry cleaning services, or linen and uniform supply services must collect and remit to the department retail sales tax on the total charge made to the customer (see (a) of this subsection).

(103) **Collecting retail sales tax.** For the purposes of determining a seller's responsibility to collect and remit retail sales tax, the retail sales tax is based on where the buyer receives the cleaned items. RCW 82.32.730. It does not matter whether the actual services occur at this location.

(a) **Delivery at service's location.** If the laundered or dry-cleaned items are picked up by the customer at the service's location, the retail sales tax that applies at that location is to be collected. For example, a dry cleaning service located in Vancouver, Washington, must collect sales tax from an Oregon resident who brings clothing items to the business for dry cleaning, if the Oregon resident picks up the clothing items at the Washington location. The Vancouver, Washington, local sales tax applies to this sale.

(b) **Seller hiring third-party to perform services.** A customer may purchase laundry or dry cleaning services, or linen and uniform supply services from a seller who hires another person to perform the actual service. When the customer drops off and picks up the clothing or other articles at the seller's business location, the place of sale is the seller's location.

(c) **Seller using agent for pickup and delivery.** If a person providing laundry or dry cleaning services uses an agent such as a hotel or a driver for pickup and delivery of the articles to be cleaned, the retail sales tax collected is the tax applicable to the location where the articles are delivered.

(d) **Geographic information system (GIS) for identifying appropriate retail sales tax rate.** For assistance with determining appropriate local sales and use tax rates, the department's GIS provides a mapping and address lookup system. The system, along with other taxpayer resources, is available on the department's internet site at: http://dor.wa.gov.

(104) **Purchases.** Laundry, dry cleaning, and linen and uniform supply service businesses make retail and wholesale purchases of products and services.

(a) **Wholesale purchases.** The purchase of tangible personal property for resale or as a component or ingredient of the cleaned article is a wholesale purchase. Such purchases are not subject to retail sales tax when the buyer provides a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to the seller as discussed in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

The following are examples of items that may be generally purchased at wholesale. Persons providing laundry services for nonprofit health care facilities, however, should refer to Part III of this section.

(i) Soap, bleach, fabric softener, laundry bags, hangers, and other tangible personal property that is not used in performing laundry or dry cleaning services but is resold as tangible personal property.

(ii) Dyes, fabric softeners, starches, sizing, and similar articles or substances that become ingredients of the articles being cleaned.

(iii) Linen, uniforms, towels, cabinets, hand soap, and similar property rented or supplied to customers as a part of the laundry and linen supply service.

(b) **Purchases for own use.** A laundry or dry cleaning service, or linen and uniform supply service that purchases, or otherwise obtains, services or tangible personal property for use as a consumer must pay retail sales tax. If the seller does not collect the tax, the purchaser must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department. For further information about the use tax, refer to RCW 82.12.020 and WAC 458-20-178 (Use tax).

The following are examples of purchases by a laundry or dry cleaning service, or linen and uniform supply service that are subject to retail sales tax or use tax:

(i) Soaps, cleaning solvents, and other articles or substances that do not become ingredients of the articles cleaned;

(ii) Equipment such as washing machines, dryers, presses, irons, fixtures, and furniture;

(iii) Supplies such as hand tools, sewing notions, scissors, spotting brushes, and stationery; and

(iv) Items given to customers without charge.

PART II - SELF-SERVICE AND COIN-OPERATED LAUNDRY FACILITIES.

(201) **Self-service and coin-operated laundry facilities.** The definition of "retail sale" excludes charges made for the use of self-service or coin-operated laundry facilities. RCW 82.04.050. Thus, gross income received from charges for the use of such facilities is subject to the service and other activities B&O tax. Retail sales tax does not apply to these charges.

(202) **Sales of tangible personal property.** Sales of soap, bleach, fabric softener and other supplies to consumers are subject to the retailing B&O tax and retail sales tax. For most sales, the law requires a seller to separately state the retail sales tax from the selling price. However, the law allows a seller making sales of tangible personal property to a consumer from a vending machine to deduct the tax from the total amount received to arrive at the net amount that becomes the measure of the tax. RCW 82.08.050 and 82.08.-080.

For the purposes of determining a seller's responsibility to collect and remit retail sales tax, the tax to be collected is determined by the location of the facility.

(203) **Purchases.**

(a) **Wholesale purchases.** The purchase of tangible personal property for resale as tangible personal property is a purchase at wholesale. Such purchases are not subject to retail sales tax when the buyer provides a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to the seller as discussed in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Thus, purchases of soap, bleach, fabric softener, and other supplies for resale to customers separate from charges for the use of the laundry facilities are wholesale purchases. Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(b) **Retail purchases.** A self-service or coin-operated laundry facility that acquires tangible personal property for use as a consumer must pay retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department when the seller fails to collect the appropriate retail sales tax. For further information about use tax, refer to RCW 82.12.020 and WAC 458-20-178 (Use tax).

The following are examples of purchases by a self-service or coin-operated laundry facility that are subject to retail sales tax or use tax:

(i) Washing machines, dryers, fixtures, and furniture; and

(ii) Items given to customers without charge.

PART III - LAUNDRY SERVICES PERFORMED FOR NONPROFIT HEALTH CARE FACILITIES.

(301) **Definition - nonprofit health care facilities.** For the purpose of this section, "nonprofit health care facilities" means facilities operated by nonprofit organizations providing diagnostic, therapeutic, convalescent, or preventive inpatient or outpatient health care services. The term includes, but is not limited to, nonprofit hospitals, nursing homes, and hospices.

(302) **Sales of laundry services to nonprofit health care facilities.** The definition of a retail sale specifically excludes sales of laundry services to nonprofit health care facilities. As a result, charges for laundry services provided to these facilities are not subject to retail sales tax or the retailing B&O tax. However, the gross proceeds of sale received for providing laundry services to nonprofit health care facilities is subject to the service and other activities B&O tax.

(303) **Purchases subject to retail sales or use tax.** Persons providing laundry services to nonprofit health care facilities are considered consumers of all items used in providing such services. RCW 82.04.190. As a result, purchases of items such as dyes, fabric softeners, linens, and uniforms are subject to the retail sales tax. The same is true for purchases of washing machines, dryers, fixtures, furniture, and other items of tangible personal property. The buyer must remit retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department when the seller fails to collect the appropriate retail sales tax. For further information about the use tax, refer to RCW 82.12.020 and WAC 458-20-178 (Use tax).

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-12-052, § 458-20-165, filed 5/26/10, effective 6/26/10; WSR 05-20-018, § 458-20-165, filed 9/26/05, effective 10/27/05; WSR 02-23-034, § 458-20-165, filed 11/13/02, effective 12/14/02. Statutory Authority: RCW 82.32.300. WSR 99-13-052, § 458-20-165, filed 6/9/99, effective 7/10/99. Statutory Authority: RCW 82.32.300 and 82.04.050. WSR 94-09-016, § 458-20-165, filed 4/13/94, effective 5/14/94. Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), § 458-20-165, filed 3/15/83; Order ET 73-1, § 458-20-165, filed 11/2/73; Order ET 70-3, § 458-20-165 (Rule 165), filed 5/29/70, effective 7/1/70.]

WAC 458-20-166 Hotels, motels, boarding houses, rooming houses, resorts, summer camps, trailer camps, etc. (1) **Introduction.** This section explains the taxation of persons operating establishments such as hotels, motels, and bed and breakfast facilities, which provide lodging and related services to transients for a charge. In addition to retail sales tax and business and occupation (B&O) tax, this section explains the special hotel/motel tax, the convention and trade center tax, the tourism promotion area charge, and the taxation of emergency housing furnished to the homeless.

(a) In addition to persons operating hotels or motels, this section applies to persons operating the following establishments:

(i) Trailer camps and recreational vehicle parks which charge for the rental of space to transients for locating or parking house trailers, campers, recreational vehicles, mobile homes, tents, etc.

(ii) Educational institutions which sell overnight lodging to persons other than students. See WAC 458-20-167, Educational institutions, school districts, student organizations, and private schools.

(iii) Private lodging houses, dormitories, bunkhouses, etc., operated by or on behalf of business and industrial firms or schools solely for the accommodation of employees of such firms or students which are not held out to the public as a place where sleeping accommodations may be obtained. As will be discussed more fully below, in some circumstances these businesses may not be making retail sales of lodging.

(iv) Guest ranches or summer camps which, in addition to supplying meals and lodging, offer special recreation facilities and instruction in sports, boating, riding, outdoor living, etc. In some cases these businesses may not be making retail sales, as discussed below.

(b) This section does not apply to persons operating the following establishments:

(i) Hospitals, sanitariums, nursing homes, rest homes, and similar institutions. Persons operating these establishments should refer to WAC 458-20-168, Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities.

(ii) Establishments such as apartments or condominiums where the rental is for longer than one month. See WAC 458-20-118, Sale or rental of real estate, license to use real estate for the distinction between a rental of real estate and the license to use real estate.

(2) **Transient defined.** The term "transient" as used in this section means any guest, resident, or other occupant to whom lodging and other services are furnished under a license to use real property for less than one month, or less than thirty continuous days if the rental period does not begin on the first day of the month. The furnishing of lodging for a continuous period of one month or more to a guest, resident,

or other occupant is a rental or lease of real property. It is presumed that when lodging is furnished for a continuous period of one month or more, or thirty continuous days or more if the rental period does not begin on the first day of the month, the guest, resident, or other occupant purchasing the lodging is a nontransient upon the thirtieth day without regard to a specific lodging unit occupied throughout the continuous thirty-day period. An occupant who contracts in advance and does remain in continuous occupancy for the initial thirty days will be considered a nontransient from the first day of occupancy provided in the contract.

(3) **Business and occupation tax (B&O).** Where lodging is sold to a nontransient, the transaction is a rental of real estate and exempt from B&O tax. (See RCW 82.04.390.) Sales of lodging and related services to transients are subject to B&O tax, including transactions which may have been identified or characterized as membership fees or dues. The B&O tax applies as follows:

(a) **Retailing.** Amounts derived from the following charges to transients are retail sales and subject to the retailing B&O tax: Rental of rooms for lodging; rental of radio and television sets; rental of rooms, space, and facilities not for lodging, such as ballrooms, display rooms, meeting rooms, etc.; automobile parking or storage; and the sale or rental of tangible personal property at retail. See "retail sales tax" below for a more detailed explanation of the charges included in the retailing classification.

(b) **Service and other business activities.** Commissions, amounts derived from accommodations not available to the public, and certain unsegregated charges are taxable under this classification.

(i) Hotels, motels, and similar businesses may receive commissions from various sources which are generally taxable under the service and other business activities classification. The following are examples of such commissions:

(A) Commissions received from acting as a laundry agent for guests when someone other than the hotel provides the laundry service. See WAC 458-20-165, Laundry, dry cleaning, linen and uniform supply, and self-service and coin-operated laundry services.

(B) Commissions received from telephone companies for long distance telephone calls where the hotel or motel is merely acting as an agent (WAC 458-20-159, Consignees, bailees, factors, agents and auctioneers) and commissions received from coin-operated telephones (WAC 458-20-245, Telephone business, telephone service). Refer to the retail sales tax subsection below for a further discussion of telephone charges.

(C) Commissions or license fees for permitting a satellite antenna to be installed on the premises or as a commission for permitting a broadcaster or cable operator to make sales to the guest of the hotel or motel.

(D) Commissions from the rental of videos for use by guests of the hotel or motel when the hotel or motel operator is clearly making such sales as an agent for a seller.

(E) Commissions received from the operation of amusement devices. See WAC 458-20-187, Coin operated vending machines, amusement devices and service machines.

(ii) Taxable under this classification are amounts derived from the rental of sleeping accommodations by private lodging houses, and by dormitories, bunkhouses, etc., operated by or on behalf of business and industrial firms and which are not held out to the public as a place where sleeping accommodations may be obtained.

(iii) Summer camps, guest ranches and similar establishments making an unsegregated charge for meals, lodging, instruction and the use of recreational facilities must report the gross income from such charges under the service and other business activities classification.

(iv) Deposits retained by the business as a penalty charged to a customer for failure to timely cancel a reservation is taxable under the service and other business activities classification.

(4) **Retail sales tax.** Persons providing lodging and other services generally must collect retail sales tax on their charges for lodging and other services as discussed below. They must pay retail sales or use tax on all of the items they purchase for use in providing their services.

(a) **Lodging.** All charges for lodging and related services to transients are retail sales. Included are charges for vehicle parking and storage and for space and other facilities, including charges for utility services, in a trailer camp.

(i) An occupant who does not contract in advance to stay at least thirty days does not become entitled to a refund of retail sales tax where the rental period extended beyond thirty days. For example, a tenant rents the same motel room on a weekly basis. The tenant is considered a transient for the first twenty-nine days of occupancy and must pay retail sales tax on the rental charges. The rental charges become exempt of retail sales tax beginning on the thirtieth day. The tenant is not entitled to a refund of retail sales taxes paid on the rental charges for the first twenty-nine days.

(ii) A business providing transient lodging must complete the "transient rental income" information section of the combined excise tax return. The four digit location code must be listed along with the income received from transient lodging subject to retail sales tax for each facility located within a participating city or county.

(b) **Meals and entertainment.** All charges for food, beverages, and entertainment are retail sales.

(i) Charges for related services such as room service, banquet room services, and service charges and gratuities which are agreed to in advance by customers or added to their bills by the service provider are also retail sales.

(ii) In the case of meals sold under a "two meals for the price of one" promotion, the taxable selling price is the actual amount received as payment for the meals.

(iii) Meals sold to employees are also subject to retail sales tax. See WAC 458-20-119, Sales of meals for retail sales tax applicability on meals furnished to employees.

(iv) Sale of food and other items sold through vending machines are retail sales. See WAC 458-20-187, Coin operated vending machines, amusement devices and service machines for reporting income from vending machine sales and WAC 458-20-244, Food and food ingredients for the distinction between taxable and nontaxable sales of food products.

(v) Except for guest ranches and summer camps, when a lump sum is charged for lodging to nontransients and for meals furnished, the retail sales tax must be collected upon the fair selling price of such meals. Unless accounts are kept showing the fair selling price, the tax will be computed upon

double the cost of the meals served. The cost includes the price paid for food and drinks served, the cost of preparing and serving meals, and all other costs incidental thereto, including an appropriate portion of overhead expenses.

(vi) Cover charges for dancing and entertainment are retail sales.

(vii) Charges for providing extended television reception to guests are retail sales.

(c) **Laundry services.** Charges for laundry services provided by a hotel/motel in the hotel's name are retail sales. Charges to tenants for self-service laundry facilities are not retail sales. These charges are subject to service B&O tax.

(d) **Telephone charges.** Telephone charges to guests, except those subject to service B&O tax as discussed above and in WAC 458-20-245, Telephone business, telephone service, are retail sales. "Message service" charges are also retail sales.

If the hotel/motel is acting as an agent for a telephone service provider who provides long distance telephone service to the guest, the actual telephone charges are not taxable income to the hotel/motel. These amounts are advances and reimbursements. See WAC 458-20-111, Advances and reimbursements and 458-20-159, Consignees, bailees, factors, agents and auctioneers. Any additional handling or other charge which the hotel/motel may add to the actual long distance telephone charge is a retail sale.

(e) **Telephone lines.** If the hotel/motel leases telephone lines and then provides telephone services for a charge to its guests, these charges are taxable as retail sales. In this case the hotel/motel is in the telephone business. See WAC 458-20-245, Telephone business, telephone service. The hotel/motel may give a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to the provider of the leased lines and is not subject to the payment of retail sales tax to the provider of the leased lines. Previously accepted resale certificates must be kept on file by the seller for five years from the date of last use or no longer than December 31, 2014.

(f) **Rentals.** Rentals of tangible personal property such as movies and sports equipment are retail sales.

(g) **Purchases of tangible personal property for use in providing lodging and related services.** All purchases of tangible personal property for use in providing lodging and related services are retail sales. The charge for lodging and related services is for services rendered and not for the resale of any tangible property.

(i) Included are such items as beds and other furnishings, restaurant equipment, soap, towels, linens, and laundry supply services. Purchases, such as small toiletry items, are included even though they may be provided for guests to take home if not used.

(ii) The retail sales tax does not apply to sales of food products to persons operating guest ranches and summer camps for use in preparing meals served to guests. Sales of prepared meals or other prepared items to persons operating guest ranches and summer camps are subject to retail sales tax. See WAC 458-20-244, Food and food ingredients for sales of food products.

(h) **Sales to the United States government**. Sales made directly to the United States government are not subject to retail sales tax. Sales to employees of the federal government are fully taxable notwithstanding that the employee ultimately will be reimbursed for the cost of lodging.

(i) **Payment by government voucher or check.** If the lodging is paid by United States government voucher or United States government check payable directly to the hotel/motel, the sale is presumed to be a tax-exempt sale directly to the federal government.

(ii) **Charges to government credit card.** Various United States government contracted credit cards are used to make payment for purchases of goods and services by or for the United States government. Specific information about determining when a purchase by government credit card is a tax-exempt purchase by the United States government is available via the department's internet web site at http://dor.wa.gov. (See the department's lodging industry guide.) For specific information about determining when payment is the direct responsibility of the United States government or the employee, you may contact the department's taxpayer services division at http://dor.wa.gov/content/ContactUs/ or:

Department of Revenue
Taxpayer Services
P.O. Box 47478
Olympia, WA 98504-7478

(5) **Special hotel/motel tax.** Some locations in the state charge a special hotel/motel tax. (See chapters 67.28 and 36.100 RCW.) If a business is in one of these locations, an additional tax is charged and reported under the special hotel/motel portion of the tax return. The four digit location code, the amount received for the lodging, and the tax rate must be completed for each location in which the lodging is provided. The tax applies without regard to the number of lodging units except that the tax of chapter 36.100 RCW applies only if there are forty or more lodging units. The tax only applies to the charge for the rooms to be used for lodging by transients. Additional charges for telephone services, laundry, or other incidental charges are not subject to the special hotel/motel tax. Neither is the charge for use of meeting rooms, banquet rooms, or other special use rooms subject to this tax. However, the tax does apply to charges for use of camping and recreational vehicle sites.

(6) **Convention and trade center tax.** Businesses selling lodging to transients, having sixty or more units located in King County, must charge their customers the convention and trade center tax and report the tax under the "convention and trade center" portion of the tax return.

(a) A business having more than sixty units which are rented to transients and nontransients will be subject to the convention and trade center tax only if the business has at least sixty rooms which are available or being used for transient lodging. For example, a business with one hundred forty total rooms of which ninety-five are rented to nontransients is not subject to the convention and trade center tax.

(b) The tax only applies to the charge for the rooms to be used for lodging by transients. Additional charges for telephone services, laundry, or other incidental charges are not subject to the convention and trade center tax. Charges for the use of meeting rooms, banquet rooms, or other special use rooms are also not subject to the convention and trade center tax. However, the tax does apply to charges for camping or

recreational vehicle sites. Each camp site is considered a single unit.

(c) The four digit location code, amount received for the lodging, and the tax rate must be completed for each location in which the lodging is provided.

(d) If the property of the King County state convention and trade center is transferred to a King County public facilities district created as provided in RCW 36.100.010, the authority under chapter 67.40 RCW of the state and city to impose the convention and trade center tax will be transferred under RCW 36.100.040 to the public facilities district.

(7) **Tourism promotion area charge.** A legislative authority as defined by RCW 35.101.010, Definitions may impose a charge on the furnishing of lodging by a lodging business located in the tourism promotion area, except that this tourism promotion area charge does not apply to temporary medical housing exempt under RCW 82.08.997, Exemptions—Temporary medical housing. The tourism promotion area charge is administered by the department of revenue and must be collected by lodging businesses from those persons who are subject to retail sales tax on purchases of lodging. The tourism promotion area charge is not subject to the sales tax rate limitations of RCW 82.14.410. To determine whether your lodging business must collect and remit the charge, refer to the special notices for tourism promotion areas at http://dor.wa.gov/content/GetAFormOrPublication/PublicationBySubject/tax_sn_main.aspx or the lodging industry guide at http://dor.wa.gov/content/doingbusiness/BusinessTypes/Industry/lodging/.

(8) **Furnishing emergency lodging to homeless.** The charge made for the furnishing of emergency lodging to homeless persons purchased via a shelter voucher program administered by cities, towns, and counties or private organizations that provide emergency food and shelter services is exempt from the retail sales tax, the convention and trade center tax, and the special hotel/motel tax. This form of payment does not influence the required minimum of transient rooms available for use as transient lodging under the "convention and trade center tax" or under the "special hotel/motel tax."

[Statutory Authority: RCW 82.32.300 and 82.01.060. WSR 10-22-067, § 458-20-166, filed 10/29/10, effective 11/29/10. Statutory Authority: RCW 82.32.300. WSR 94-05-001, § 458-20-166, filed 2/2/94, effective 3/5/94; WSR 92-05-064, § 458-20-166, filed 2/18/92, effective 3/20/92; WSR 88-20-014 (Order 88-6), § 458-20-166, filed 9/27/88; WSR 83-07-033 (Order ET 83-16), § 458-20-166, filed 3/15/83. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order ET 78-4), § 458-20-166, filed 6/27/78; Order ET 70-3, § 458-20-166 (Rule 166), filed 5/29/70, effective 7/1/70.]

WAC 458-20-167 Educational institutions, school districts, student organizations, and private schools. (1) **Introduction.** This section explains the application of Washington's business and occupation (B&O), retail sales, and use taxes to educational institutions, school districts, student organizations, and private schools. It also gives tax reporting information to persons operating nursery schools, preschools, or providing child care. Educational institutions which are institutions of the state of Washington should also refer to WAC 458-20-189 (Sales to and by the state of Washington, etc.). Nonprofit organizations should also refer to WAC 458-20-169 (Religious, charitable, benevolent, nonprofit service organizations, and sheltered workshops).

(2) **Definitions.** For the purposes of this section, the following definitions apply:

(a) The term "tuition fees" includes fees for instruction, library, laboratory, and health services. The term also includes special fees and amounts charged for room and board when the property or service for which such charges are made is furnished exclusively to the students, teachers, or other staff of the institution. RCW 82.04.170.

(b) "Educational institutions" means the following:

(i) Institutions which are established, operated, and governed by this state or its political subdivisions under Title 28A (Common school provisions), 28B (Higher education), or 28C (Vocational education) RCW.

(ii) Nonpublic schools, including parochial or independent schools or school districts, carrying out a program for any or all of the grades one through twelve, which have been approved by the Washington state board of education. (See also chapter 180-90 WAC.)

(iii) Degree-granting institutions offering educational credentials, instruction, or services prerequisite to or indicative of an academic or professional degree or certificate beyond the secondary level, provided the institution is accredited by an accrediting association recognized by the United States Secretary of Education and offers to students an educational program of a general academic nature. Degree-granting institutions should refer to chapter 28B.85 RCW for information about the requirement for authorization by the Washington higher education coordinating board.

(iv) Institutions which are not operated for profit, and which are privately endowed under a deed of trust to offer instruction in trade, industry, and agriculture.

(v) Programs that an educational institution cosponsors with a nonprofit organization, as defined by the Internal Revenue Code Sec. 501 (c)(3), provided that educational institution grants college credit for course work successfully completed through the educational program.

(vi) Certain branch campuses of foreign degree-granting institutions, provided the following requirements, among others, are satisfied:

(A) The branch campus must be owned and operated directly by a foreign degree-granting institution or indirectly through a Washington profit or nonprofit corporation in which the foreign degree-granting institution is the sole or controlling shareholder or member;

(B) Courses must be provided solely and exclusively to students enrolled in a degree-granting program offered by the institution;

(C) The branch campus must be approved by the Washington higher education coordinating board to operate in this state; and

(D) The branch campus must be recognized to be exempt from income taxes pursuant to 26 U.S.C. Sec. 501(c).

(vii) "Educational institutions" does not include any entity defined as a "private vocational school" under RCW 28C.10.020 and/or any entity defined as a "degree-granting private vocational school" under chapters 28C.10 and 28B.85 RCW (other than those described in (b)(iv) of this subsection).

(c) "Private schools" means all schools and institutions which are excluded from the above definition of "educational institutions." For example, an elementary school operated by a church organization is a "private school" if the school is not approved. It will be given the tax treatment of an "educational institution" for purposes of this section only if it has obtained approval from the Washington state board of education.

(3) **Business and occupation tax.** Departments and institutions of the state of Washington are not subject to the B&O tax. (See WAC 458-20-189.) School districts are also not subject to the B&O tax, except as to income derived from a public utility or enterprise activity. RCW 82.04.419. Private schools, student organizations, school districts engaging in utility or enterprise activities, and educational institutions which are not departments or institutions of the state of Washington are subject to the B&O tax as follows:

(a) **Service and other business activities.** The service B&O tax applies to the following nonexclusive list of activities or sources of income:

(i) Tuition fees received by private schools. However, educational institutions, as defined above, may deduct amounts derived from tuition fees. RCW 82.04.4282.

(ii) Rental of conference facilities to various organizations or groups.

(iii) Rental by private schools of dormitories or other student lodging facilities which are not generally available to the public and where the student does not have an absolute right of control and occupancy. (See WAC 458-20-118.) However, educational institutions may deduct the income from charges for lodging made to students. These amounts are defined by law as being tuition.

(iv) Amounts received by private schools for providing meals to students where the meals are provided exclusively for students, teachers, staff, and their guests. However, refer to the comments under retailing for the taxability of meals sold to guests of students. Income from providing meals to students by educational institutions is deductible.

(v) Amounts received from owners of coin operated vending machines or amusement devices for allowing the placement of those machines on the premises of the school. (Refer also to WAC 458-20-187.)

(b) **Retailing.** Activities and sources of income subject to the retailing B&O tax include, but are not limited to, the following:

(i) Sales of tangible personal property or services classified as retail sales. This includes sales of books and supplies to students where these materials are not supplied as part of the tuition charge. Sales of academic transcripts are exempt from tax. RCW 82.04.399.

(ii) Sales of meals to guests of students.

(iii) Sales of meals or prepared foods in facilities which are generally open to the public, including those sold to students. (See also WAC 458-20-119.)

(4) **Retail sales tax.** The retail sales tax applies to all retail sales including, but not limited to, those identified in subsection (3) of this section, unless a specific statutory exemption applies.

(a) Educational institutions, school districts, student organizations, and private schools, including departments or institutions of the state of Washington, are required to collect the retail sales tax on sales of tangible personal property and retail services to consumers, even though such sales may be exempt from the retailing B&O tax. Retail sales tax exemptions are provided for sales of academic transcripts (RCW 82.08.02537) and certain food products (RCW 82.08.0293 and 82.08.0297, and WAC 458-20-244).

(b) Amounts derived from charges between departments or institutions of the state of Washington, or between departments of the same entity, constitute interdepartmental charges and are not subject to the retailing or retail sales tax. (See WAC 458-20-201 and 458-20-189.)

(c) Persons selling merchandise through vending machines should refer to WAC 458-20-187.

(5) **Deferred sales or use tax.** Educational institutions, school districts, student organizations, and private schools are required to report the deferred sales or use tax upon the use of all tangible personal property purchased or acquired under conditions whereby the Washington retail sales tax has not been paid, unless a specific statutory exemption applies. If items are purchased for dual purposes (i.e., for both consumption and resale), a tax paid at source deduction may be claimed for the cost of the articles resold upon which retail sales tax was previously paid. (See WAC 458-20-102.)

(a) These organizations are the consumers of food or beverage products which are ingredients of meals that are furnished to students and faculty. However, certain food products are exempt from the retail sales and/or use tax. RCW 82.12.0293 and 82.12.0297, and WAC 458-20-244.

(b) Use tax exemptions are also provided for the following:

(i) Academic transcripts. RCW 82.12.0347.

(ii) Computers, computer components, computer accessories, or computer software irrevocably donated to any public or private nonprofit school or college in this state, as defined by chapter 84.36 RCW. For the purposes of this exemption, RCW 82.04.215 defines "computer" as an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions. RCW 82.12.0284. This exemption is available to both the donor and the private nonprofit school or college receiving the donation.

(iii) Tangible personal property donated to a nonprofit charitable organization or state or local governmental entity including the subsequent use of the property by a person to whom the property is donated or bailed by the nonprofit charitable organization, or state or local governmental entity, if used to further the purpose of that organization.

(iv) The donation of tangible personal property without intervening use to a nonprofit charitable organization, or the incorporation of tangible personal property without intervening use into real or personal property of or for a nonprofit charitable organization in the course of installing, repairing, cleaning, altering, imprinting, improving, constructing, or decorating the real or personal property for no charge. RCW 82.12.02595.

(v) Motor vehicles equipped with dual controls loaned to and exclusively used by a school in connection with the school's driver training program. This exemption is available to both the donor and the school receiving the donation. For the purposes of this exemption, RCW 82.12.0264 limits the term "school" to:

(A) The University of Washington, Washington State University, the regional universities, The Evergreen State College, and the state community colleges;

(B) Any public, private, or parochial school accredited by either the state board of education or by the University of Washington (the state accrediting station); or

(C) Any public vocational school meeting the standards, courses, and requirements established and prescribed or approved in accordance with the Community College Act of 1967.

(6) **Nursery schools, preschools, child care providers, privately operated kindergartens, and persons monitoring home child care facilities.** Income received by nursery schools, preschools, child care providers, and privately operated kindergartens for the care or education of children who are under eight years of age and not enrolled in or above the first grade is exempt from the B&O tax. RCW 82.04.4282. Such persons are, however, subject to B&O tax upon the gross proceeds derived from providing child care to children who are eight years of age or older or enrolled in or above the first grade.

Persons providing child care for periods of less than twenty-four hours are subject to tax under the child care B&O classification. RCW 82.04.2905. The service and other activities B&O tax classification applies to child care services provided for periods in excess of twenty-four hours. Nursery schools, preschools, and child care providers receiving both taxable and exempt income must properly segregate such income in their books of account.

(a) The B&O tax does not apply to income derived by a church for the care of children of any age for periods of less than twenty-four hours, provided the church is exempt from property tax under RCW 84.36.020. RCW 82.04.339.

(b) Persons who monitor home child care facilities under one or more federal nutrition programs are required to register with the department and are taxable on their gross income under the service and other classification of the B&O tax. These monitors contract with, and are accountable to the superintendent of public instruction which receives funds from the United States Department of Agriculture and disburses funds to each monitor. Commonly, a portion of the funds received by the monitor is required by law to be passed directly to the home child care facilities for the provision of qualifying meals. That portion of the funds received by the monitor may be taken as a "reimbursement" deduction on the monitor's excise tax return, so that the monitor is subject to B&O tax only on the portion of funds retained for the rendering of services.

(7) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(a) MN University is an educational institution created by the state of Washington. MN University operates a book store at which it sells text books, school supplies, and apparel to students and nonstudents. As an institution of the state of Washington, MN University is exempt from the B&O tax with respect to all sales, irrespective that sales are made to nonstudents. However, MN is required to collect and remit retail sales tax on its gross proceeds of sales made through its book store.

(b) DMG College is a degree-granting institution accredited by an accrediting association recognized by the United States Secretary of Education. DMG College is an educational institution operated by a church. DMG makes charges to its students for tuition, meals, and lodging. It also receives income for occasionally providing lodging and meals to guests of its students during the year. DMG also rents its conference and dormitory facilities to various groups during the summer, providing cafeteria services when needed. The income from tuition, meals, and lodging received from the students is exempt of B&O and retail sales tax because this entity comes within the definition of an educational institution. DMG must report the retailing B&O tax and collect and remit retail sales tax upon the gross proceeds derived from the sales of meals and prepared foods to the conference attendees and guests. The income derived from the rental of the conference and dormitory facilities to various groups and student guests is subject to the service B&O tax. The college is not considered as holding itself out for the sale of lodging to the general public.

(c) JB College is an educational institution which is not a department or institution of the state of Washington. JB College has converted five housing units from student use for use by nonstudents. Guests of the administration use these units for stays of two or three days, and are charged a specific amount per night. The college provides linen, towels, etc., to the users. These units are always rented for periods under thirty days. JB College must report this rental income under the retailing B&O tax and collect and remit retail sales tax. This income is not derived from the occasional rental of student lodging facilities, but is derived from the rental of accommodations specifically maintained for public use.

(d) Jane Doe operates a private preschool and kindergarten, providing care and elementary education for children. She also provides after hours child care. Jane Doe may claim a deduction for the income received for the care and education of children under eight years old and not enrolled in or above the first grade, provided this income is properly segregated in her books of account. The income attributable to the care of children at or above the first grade level, i.e., eight years old or enrolled in or above the first grade, is subject to the child care B&O tax. Jane Doe may be able to reduce or eliminate any child care B&O tax liability if she qualifies for the small business B&O tax credit. RCW 82.04.4451 and WAC 458-20-104.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 07-10-056, § 458-20-167, filed 4/27/07, effective 5/28/07. Statutory Authority: RCW 82.32.300. WSR 99-03-005, § 458-20-167, filed 1/7/99, effective 2/7/99; WSR 94-07-047, § 458-20-167, filed 3/10/94, effective 4/10/94; WSR 83-07-032 (Order ET 83-15), § 458-20-167, filed 3/15/83; Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order ET 78-4), § 458-20-167, filed 6/27/78; Order ET 70-3, § 458-20-167 (Rule 167), filed 5/29/70, effective 7/1/70.]

WAC 458-20-168 Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities. (1) **Introduction.** This section explains the application of business and occupation (B&O), retail sales, and use taxes to persons operating hospitals as defined in RCW 70.41.020, nursing homes as defined in RCW 18.51.010,

boarding homes as defined in RCW 18.20.020, adult family homes as defined in RCW 70.128.010, and similar health care facilities.

The department of revenue (department) has adopted other rules dealing with the taxability of various activities relating to the provision of health care. Readers may want to refer to the following rules for additional information:

(a) WAC 458-20-150 Optometrists, ophthalmologists, and opticians;

(b) WAC 458-20-151 Dentists and other health care providers, dental laboratories, and dental technicians;

(c) WAC 458-20-18801 Prescription drugs, prosthetic and orthotic devices, ostomic items, and medically prescribed oxygen; and

(d) WAC 458-20-233 Tax liability of medical and hospital service bureaus and associations and similar health care organizations.

(2) **Personal and professional services of hospitals, nursing homes, boarding homes, and similar health care facilities.** This subsection provides information about the application of B&O tax to the personal and professional services of hospitals, nursing homes, boarding homes, and similar health care facilities. For information regarding B&O tax deductions and exemptions for persons operating health care facilities, readers should refer to subsection (3) of this section.

(a) **Public or nonprofit hospitals.** The gross income of public or nonprofit hospitals derived from providing personal or professional services to inpatients, is subject to B&O tax under the public or nonprofit hospitals classification. RCW 82.04.260. For the purpose of this section, "public or nonprofit hospitals" are hospitals, as defined in RCW 70.41.020, operated as nonprofit corporations, operated by political subdivisions of the state (e.g., a hospital district operated by a county government), or operated by but not owned by the state.

Gross income of public or nonprofit hospitals derived from providing personal or professional services for persons other than inpatients is generally subject to B&O tax under the service and other activities classification. RCW 82.04.290. Thus, for example, amounts received for services provided to outpatients, income received for providing nonmedical services, interest received on patient accounts receivable, and amounts received for providing transcribing services to physicians are subject to service and other activities B&O tax.

(i) **Clinics and departments operated by public or nonprofit hospitals.** Gross income derived from medical clinics and departments providing services to both inpatients and outpatients and operated by a public or nonprofit hospital is subject to B&O tax under the public or nonprofit hospitals classification where the clinic or department is an integral, interrelated, and essential part of the hospital. Otherwise, the gross income derived from medical clinics and departments providing services to both inpatients and outpatients and operated by a public or nonprofit hospital is subject to B&O tax under the service and other activities classification.

Relevant factors for determining whether a medical clinic or department operated by a public or nonprofit hospital is an integral, interrelated, and essential part of the hospital include whether the clinic or department is located at the hospital facility and whether the clinic or department furnishes the type of services normally provided by hospitals, such as twenty-four hour intake and emergency services.

The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(A) Acme Hospital is a nonprofit hospital. Acme has a medical clinic that is separate but physically located within the hospital. However, the clinic is open only during regular business hours and provides no domiciliary care or overnight facilities to its patients. The clinic is staffed, equipped, administered, and provides the type of medical services that one would expect to receive in the average physician's office. Acme's medical clinic is not an integral, interrelated, and essential part of Acme Hospital. Gross receipts by the medical clinic are subject to service and other activities B&O tax.

(B) Acme Hospital is a nonprofit hospital. Acme has a cancer treatment facility that is physically located within the hospital. The cancer treatment facility provides the type of services normally provided by hospitals to cancer patients. Acme's cancer treatment facility is an integral, interrelated, and essential part of Acme Hospital. Gross receipts by the cancer treatment facility are subject to public or nonprofit hospitals B&O tax.

(ii) **Educational programs and services.** Amounts received by public or nonprofit hospitals for providing educational programs and services to the general public are subject to B&O tax under the public or nonprofit hospitals classification if they are an integral, interrelated, and essential part of the hospital. Otherwise, such amounts are subject to B&O tax under the service and other activities classification. Educational services are considered an integral, interrelated, and essential part of the hospital only if they are unique and incidental to the provision of hospitalization services (i.e., services that will be, have been, or are currently being provided to the participants). Only those educational programs and services offered by a hospital that would be very difficult or impossible to duplicate by a person other than a hospital because of the specialized body of knowledge, facilities, and equipment required are unique and incidental to the provision of hospitalization services. Amounts derived from educational programs and services are subject to service and other activities B&O tax when the educational programs or services could be provided by any physician, clinic, or trained lay person.

(b) **Other hospitals, nursing homes, and similar health care facilities.** The gross income derived from personal and professional services of hospitals, clinics, nursing homes, and similar health care facilities, other than public or nonprofit hospitals described above in (a) of this subsection and hospitals owned by the state, is subject to service and other activities B&O tax. The gross income received by the state of Washington from operating a hospital or other health care facility, whether or not the hospital or other facility is owned by the state, is not subject to B&O tax. Nursing homes should refer to subsection (6) of this section for information regarding the quality maintenance fee imposed under chapter 82.71 RCW.

The following definitions apply for purposes of this section:

(i) "Hospital" has the same meaning as in RCW 70.41.-020; and

(ii) "Nursing home" has the same meaning as in RCW 18.51.010.

(c) **Boarding homes.** Effective July 1, 2004, persons operating boarding homes licensed under chapter 18.20 RCW are entitled to a preferential B&O tax rate. See RCW 82.04.2908. Persons operating licensed boarding homes should report their gross income derived from providing room and domiciliary care to residents under the licensed boarding homes B&O tax classification. For the purpose of this section, "boarding home" and "domiciliary care" have the same meaning as in RCW 18.20.020. Refer to subsection (3)(h) of the section for B&O tax deductions and exemptions available to boarding homes.

(d) **Nonprofit corporations and associations performing research and development.** There is a separate B&O tax rate that applies to nonprofit corporations and nonprofit associations for income received in performing research and development within this state, including medical research. See RCW 82.04.260.

(e) **Can a nursing home or boarding home claim a B&O tax exemption for the rental of real estate?** The primary purpose of a nursing home is to provide medical care to its residents. The primary purpose of boarding homes is to assume general responsibility for the safety and well-being of its residents and to provide other services to residents such as housekeeping, meals, laundry, and activities. Boarding homes may also provide residents with assistance with activities of daily living, health support services, and intermittent nursing services. Because the primary purpose of nursing homes and boarding homes is to provide services and not to lease or rent real property, no part of the gross income of a nursing home or boarding home may be exempted from B&O tax as the rental of real estate.

(f) **Adjustments to revenues.** Many hospitals will provide medical care without charge or where some portion of the charge will be canceled. In other cases, medical care is billed to patients at "standard" rates but is later adjusted to reduce the charges to the rates established by contract with medicare, medicaid, or private insurers. In these situations the hospital must initially include the total charges as billed to the patient as gross income unless the hospital's records clearly indicate the amount of income to which it will be entitled under its contracts with insurance carriers. Where tax returns are initially filed based on gross charges, an adjustment may be taken on future tax returns after the hospital has adjusted its records to reflect the actual amounts collected. In no event may the hospital reduce the amount of its current gross income by amounts that were not previously reported on its excise tax return. If the tax rate changes from the time the B&O tax was first paid on the gross charges and the time of the adjustment, the hospital must file amended tax returns to report the B&O tax on the transaction as finally completed at the rate in effect when the service was performed.

(g) **What are the tax consequences when a hospital contracts with an independent contractor to provide medical services at the hospital?** When a hospital contracts with an independent contractor (service provider) to provide medical services such as managing and staffing the hospital's emergency department, the hospital may not deduct the amount paid to the service provider from its gross income. If, however, the patients are alone liable for paying the service provider, and the hospital has no personal liability, either primarily or secondarily, for paying the service provider, other than as agent for the patients, then the hospital may deduct from its gross income amounts paid to the service provider.

In addition, the service provider is subject to service and other activities B&O tax on the amount received from the hospital for providing these services for the hospital. If the service provider subcontracts with third parties, such as physicians or nurses, to help provide medical services as independent contractors, the service provider may not deduct from its gross income amounts paid to the subcontractors where the service provider is personally liable, either primarily or secondarily, for paying the subcontractors. If, however, the hospital is alone liable for paying the subcontractors, and the service provider has no personal liability, either primarily or secondarily, other than as agent for the hospital, then the service provider may deduct from its gross income amounts paid to the subcontractors. For additional information regarding deductible advances and reimbursements, refer to WAC 458-20-111 (Advances and reimbursements).

(3) **B&O tax deductions, credits, and exemptions.** This subsection provides information about several B&O tax deductions, credits, and exemptions available to persons operating medical or other health care facilities.

(a) **Organ procurement organizations.** Amounts received by a qualified organ procurement organization under 42 U.S.C. Sec. 273(b) in effect as of January 1, 2001, to the extent that the amounts are exempt from federal income tax, are exempt from B&O tax. RCW 82.04.326. This exemption is effective March 22, 2002.

(b) **Contributions, donations, and endowment funds.** A B&O tax deduction is provided by RCW 82.04.4282 for amounts received as contributions, donations, and endowment funds, including grants, which are not in exchange for goods, services, or business benefits. For example, B&O tax deduction is allowed for donations received by a public hospital, as long as the donors do not receive any goods, services, or any business benefits in return. On the other hand, a public hospital is not allowed to take a B&O tax deduction on amounts received from a state university for work-study programs or training seminars for doctors, because the university receives business benefits in return, as students receive education and training while enrolled in the university's degree programs.

The deductible amounts should be included in the gross income reported on the excise tax return and then deducted on the return to determine the amount of taxable income. Deductions taken must be identified on the appropriate deduction detail page of the excise tax return.

(c) **Adult family homes.** The gross income derived from personal and professional services of adult family homes licensed by the department of social and health services (DSHS), or which are specifically exempt from licensing under the rules of DSHS, is exempt from B&O tax under RCW 82.04.327. The exemption under RCW 82.04.327 does not apply to persons who provide home care services to clients in the clients' own residences.

For the purpose of this section, "adult family home" has the same meaning as in RCW 70.128.010.

(d) **Nonprofit kidney dialysis facilities, hospice agencies, and certain nursing homes and homes for unwed mothers.** B&O tax does not apply to amounts received as compensation for services rendered to patients or from sales of drugs for human use pursuant to a prescription furnished as an integral part of services rendered to patients by kidney dialysis facilities operated as a nonprofit corporation, nonprofit hospice agencies licensed under chapter 70.127 RCW, and nursing homes and homes for unwed mothers operated as religious or charitable organizations. RCW 82.04.4289. This exemption applies only if no part of the net earnings received by such an institution inures, directly or indirectly, to any person other than the institution entitled to this exemption. This exemption is available to nonprofit hospitals for income from the operation of kidney dialysis facilities if the hospital accurately identifies and accounts for the income from this activity.

Examples of nursing homes and homes for unwed mothers operated as religious or charitable organizations include nursing homes operated by church organizations or by nonprofit corporations designed to assist alcoholics in recovery and rehabilitation. Nursing homes and homes for unwed mothers operated by governmental entities, including public hospital districts, do not qualify for the B&O tax exemption provided in RCW 82.04.4289.

(e) **Government payments made to health or social welfare organizations.** A B&O tax deduction is provided by RCW 82.04.4297 to a health or social welfare organization, as defined in RCW 82.04.431, for amounts received directly from the United States, any instrumentality of the United States, the state of Washington, or any municipal corporation or political subdivision of the state of Washington as compensation for health or social welfare services. A deduction is not allowed, however, for amounts that are received under an employee benefit plan. The deductible amounts should be included in the gross income reported on the excise tax return and then deducted on the tax return to determine the amount of taxable income. Deductions taken must be identified on the appropriate deduction detail page of the excise tax return. Readers should refer to WAC 458-20-169 (Nonprofit organizations) for additional information regarding this deduction.

For purposes of the deduction provided by RCW 82.04.-4297, "employee benefit plan" includes any plan, trust, commingled employee benefit trust, or custodial arrangement that is subject to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Sec. 1001 et seq., or that is described in sections 125, 401, 403, 408, 457, and 501 (c)(9) and (17) through (23) of the Internal Revenue Code of 1986, as amended, or a similar plan maintained by a state or local government, or a plan, trust, or custodial arrangement established to self-insure benefits required by federal, state, or local law.

(f) **Amounts received under a health service program subsidized by federal or state government.** A public hospital that is owned by a municipal corporation or political subdivision, or a nonprofit hospital, or a nonprofit community health center, or a network of nonprofit community health centers, that qualifies as a health and social welfare organization as defined in RCW 82.04.431, may deduct from the measure of B&O tax amounts received as compensation for health care services covered under the federal medicare program authorized under Title XVIII of the federal Social Security Act; medical assistance, children's health, or other program under chapter 74.09 RCW; or for the state of Washington basic health plan under chapter 70.47 RCW. RCW 82.04.4311. This deduction applies to amounts received directly or through a third party from the qualified programs or plans. However, this deduction does not apply to amounts received from patient copayments or patient deductibles. The deductible amounts should be included in the gross income reported on the excise tax return and then deducted on the return to determine the amount of taxable income. Deductions taken must be identified on the appropriate deduction detail page of the excise tax return.

For purposes of the deduction provided by RCW 82.04.-4311, "community health center" means a federally qualified health center as defined in 42 U.S.C. Sec. 1396d as existed on August 1, 2005.

(i) **Effective date of deduction.** The deduction for a public hospital owned by a municipal corporation or political subdivision and for a nonprofit hospital is effective April 2, 2002. Taxpayers who have paid B&O taxes between January 1, 1998, and April 2, 2002, on amounts that would qualify for this deduction are entitled to a refund. In addition, tax liability for accrued but unpaid taxes that would be deductible under this subsection (3)(f) are waived. For information regarding refunds, refer to WAC 458-20-229 (Refunds).

The deduction for a nonprofit community health center or a network of nonprofit community health centers is effective August 1, 2005.

(ii) **Example.** Acme Hospital is a nonprofit hospital that qualifies as a health and social welfare organization as defined in RCW 82.04.431. Acme receives $1,000 for providing health care services to Jane, who qualifies for the federal medicare program authorized under Title XVIII of the federal Social Security Act. Jane is covered in a health care plan that is a combination of medicare, which is B&O tax deductible by Acme, and a medicare plus plan, which is paid for by Jane and is not B&O tax deductible by Acme. Jane pays $20 to Acme as patient copayments. Medicare pays $600 to Acme for the health care services, and the medicare plus plan pays $380. Acme may only deduct the $600 received from medicare.

(g) **Blood and tissue banks.** Amounts received by a qualifying blood bank, a qualifying tissue bank, or a qualifying blood and tissue bank are exempt from B&O tax to the extent the amounts are exempt from federal income tax. RCW 82.04.324. For the purposes of this exemption, the following definitions apply:

(i) **Qualifying blood bank.** "Qualifying blood bank" means a blood bank that qualifies as an exempt organization under 26 U.S.C. 501 (c)(3) as existing on June 10, 2004, is registered under 21 C.F.R., part 607 as existing on June 10, 2004, and whose primary business purpose is the collection, preparation, and processing of blood. "Qualifying blood bank" does not include a comprehensive cancer center that is recognized as such by the National Cancer Institute.

(ii) **Qualifying tissue bank.** "Qualifying tissue bank" means a tissue bank that qualifies as an exempt organization under 26 U.S.C. 501 (c)(3) as existing on June 10, 2004, is

registered under 21 C.F.R., part 1271 as existing on June 10, 2004, and whose primary business purpose is the recovery, processing, storage, labeling, packaging, or distribution of human bone tissue, ligament tissue and similar musculoskeletal tissues, skin tissue, heart valve tissue, or human eye tissue. "Qualifying tissue bank" does not include a comprehensive cancer center that is recognized as such by the National Cancer Institute.

(iii) **Qualifying blood and tissue bank.** "Qualifying blood and tissue bank" is a bank that qualifies as an exempt organization under 26 U.S.C. 501 (c)(3) as existing on June 10, 2004, is registered under 21 C.F.R., Part 607 and Part 1271 as existing on June 10, 2004, and whose primary business purpose is the collection, preparation, and processing of blood, and the recovery, processing, storage, labeling, packaging, or distribution of human bone tissue, ligament tissue and similar musculoskeletal tissues, skin tissue, and heart valve tissue. "Qualifying blood and tissue bank" does not include a comprehensive cancer center that is recognized as such by the National Cancer Institute.

(h) **Boarding homes.** Effective July 1, 2004, licensed boarding home operators are entitled to a B&O tax deduction for amounts received as compensation for providing adult residential care, enhanced adult residential care, or assisted living services under contract with the department of social and heath services authorized by chapter 74.39A RCW to residents who are medicaid recipients. RCW 82.04.4337. For the purpose of this section, "adult residential care," "enhanced adult residential care," and "assisted living services" have the same meaning as in RCW 74.39A.009.

Effective July 1, 2005, B&O tax does not apply to the amounts received by a nonprofit boarding home licensed under chapter 18.20 RCW for providing room and domiciliary care to residents of the boarding home. RCW 82.04.4264. For purposes of this section, "nonprofit boarding home" means a boarding home that is operated as a religious or charitable organization, is exempt from federal income tax under 26 U.S.C. Sec. 501 (c)(3), is incorporated under chapter 24.03 RCW, is operated as part of a nonprofit hospital, or is operated as part of a public hospital district.

(i) **Comprehensive cancer centers.** Effective July 1, 2006, B&O tax does not apply to the amounts received by a comprehensive cancer center to the extent the amounts are exempt from federal income tax. RCW 82.04.4265. For purposes of this section, "comprehensive cancer center" means a cancer center that has written confirmation that it is recognized by the National Cancer Institute as a comprehensive cancer center and that qualifies as an exempt organization under 26 U.S.C. Sec. 501 (c)(3) as existing on July 1, 2006.

(j) **Hospital safe patient handling credit.**

(i) RCW 82.04.4485 allows a hospital to take a credit against the B&O tax for the cost of purchasing mechanical lifting devices and other equipment that are primarily used to minimize patient handling by health care providers. In order to qualify for credit, the purchases must be made as part of a safe patient handling program developed and implemented by the hospital in compliance with RCW 70.41.390. The credit is equal to one hundred percent of the cost of the mechanical lifting devices or other equipment.

(ii) No application is necessary for the credit; however, a hospital taking a credit under this section must maintain records, as required by the department, necessary to verify eligibility for the credit under this subsection. The hospital is subject to all of the requirements of chapter 82.32 RCW. A credit earned during one calendar year may be carried over to be credited against taxes incurred in a subsequent calendar year. No refunds shall be granted for credits under this subsection.

(iii) The maximum credit that may be earned under this section for each hospital is limited to one thousand dollars for each acute care available inpatient bed.

(iv) Credits are available on a first in-time basis. The department shall disallow any credits, or portion thereof, that would cause the total amount of credits claimed statewide under this subsection to exceed ten million dollars. If the ten million dollar limitation is reached, the department will notify hospitals that the annual statewide limit has been met. In addition, the department will provide written notice to any hospital that has claimed tax credits after the ten million dollar limitation in this subsection has been met. The notice will indicate the amount of tax due and shall provide that the tax be paid within thirty days from the date of such notice. The department will not assess penalties and interest as provided in chapter 82.32 RCW on the amount due in the initial notice if the amount due is paid by the due date specified in the notice, or any extension thereof.

(v) Credit may not be claimed under this section for the acquisition of mechanical lifting devices and other equipment if the acquisition occurred before June 7, 2006.

(vi) Credit may not be claimed under this section for any acquisition of mechanical lifting devices and other equipment that occurs after December 30, 2010.

(vii) The department shall issue an annual report on the amount of credits claimed by hospitals under this section, with the first report due on July 1, 2008.

(viii) For the purposes of this subsection, "hospital" has the meaning provided in RCW 70.41.020.

(k) **Prescription drugs administered by the medical service provider.** Effective October 1, 2007, RCW 82.04.-620 allows a deduction from the service and other activities classification of the B&O tax (RCW 82.04.290(2)) for amounts received by physicians or clinics for drugs for infusion or injection by licensed physicians or their agents for human use pursuant to a prescription. This deduction only applies to amounts that:

(i) Are separately stated on invoices or other billing statements;

(ii) Do not exceed the then current federal rate; and

(iii) Are covered or required under a health care service program subsidized by the federal or state government.

For purpose of this deduction only, amounts that "are covered or required under a health care service program subsidized by the federal or state government" include any required drug copayments made directly from the patient to the physician or clinic.

(A) "Federal rate" means the rate at or below which the federal government or its agents reimburse providers for prescription drugs administered to patients as provided for in the medicare, Part B drugs average sales price information resource as published by the United States Department of Health and Human Services, or any index that succeeds it.

(B) The deduction is available on an "all or nothing" basis against the total of amounts received for a specific drug charge. If the total amount received by the physician or clinic for a specific drug exceeds the federal reimbursement rate, none of the total amount received qualifies for the deduction (including any required copayment received directly from the patient). In other words, a physician or clinic may not simply take an "automatic" deduction equal to the federal reimbursement rate for each drug.

(C) For physicians or clinics reporting their taxes on the accrual basis, the total amount charged for a drug must be included in the gross income at the time of billing if it is in excess of the federal rate. However, in some cases the gross income from charges may be adjusted, as indicated in subsection (2)(f) of this section. If such an adjustment to gross income is appropriate, the exemption discussed in this subsection may also be taken at the time of billing if the adjustment leaves the physician or clinic contractually liable to receive a total amount (including any copayment received from the patient) that is not in excess of the federal rate.

(l) **Temporary medical housing provided by a health or social welfare organization.** Effective July 1, 2008, RCW 82.08.997 created an exemption from state and local sales taxes and lodging taxes for temporary medical housing provided by a health or social welfare organization. The term "health or social welfare organization" is defined in RCW 82.04.431. "Temporary medical housing" means transient lodging and related services provided to a patient or the patient's immediate family, legal guardian, or other persons necessary to the patient's mental or physical well-being.

(i) The exemption applies to the following taxes:

(A) Retail sales tax levied under RCW 82.08.020;

(B) Lodging taxes levied under chapter 67.28 RCW;

(C) Convention and trade center tax levied under RCW 67.40.090 and 67.40.130;

(D) Public facilities tax levied under RCW 36.100.040; and

(E) Tourism promotion areas tax levied under RCW 35.101.050.

(ii) The exemptions in this subsection apply to charges made for "temporary medical housing" only:

(A) While the patient is receiving medical treatment at a hospital required to be licensed under RCW 70.41.090 or at an outpatient clinic associated with such hospital, including any period of recuperation or observation immediately following such medical treatment; and

(B) By a person that does not furnish lodging or related services to the general public.

(4) **Sales of tangible personal property.** Retailing B&O tax applies to sales of tangible personal property sold and billed separately from the performance of personal or professional services by hospitals, nursing homes, boarding homes, adult family homes, and similar health care facilities. This includes charges for making copies of medical records. In addition, retail sales tax must be collected from the buyer and remitted to the department unless the sale is specifically exempt by law.

(a) **Tangible personal property used in providing medical services to patients.** Retailing B&O and retail sales taxes do not apply to charges to a patient for tangible personal property used in providing medical services to the patient, even if separately billed. Tangible personal property used in providing medical services is not considered to have been sold separately from the medical services simply because those items are separately invoiced. These charges, even if separately itemized, are for providing medical services and are subject to B&O tax under either the public or nonprofit hospital B&O tax classification or the service and other activities classification depending on the person making the charge. For example, charges for drugs physically administered by the seller are subject to B&O tax under either the public or nonprofit hospital classification or the service and other activities classification depending on the person making the charge. On the other hand, charges for drugs sold to patients or their caregivers, either for patient self-administration or administration by a caregiver other than the seller, are subject to retailing B&O tax and retail sales tax unless specifically exempt by law. Readers should refer to WAC 458-20-18801 for detailed information regarding retail sales tax exemptions that apply to sales of prescription drugs and other medical items.

(b) **Sales of meals.** Although the sale of meals is generally considered to be a retail sale, hospitals, nursing homes, boarding homes, and similar health care facilities that furnish meals to patients or residents as a part of the services provided to those patients or residents are not considered to be making retail sales of meals. Thus amounts received by hospitals, nursing homes, boarding homes, and similar health care facilities for furnishing meals to patients or residents as part of the services provided to those patients or residents are subject to B&O tax under the service and other activities, public or nonprofit hospital, or licensed boarding homes classifications, depending upon the person furnishing the meals.

Prepared meals sold to senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW are exempt from retail sales and use taxes. RCW 82.08.0293 and 82.12.0293. The exemptions apply to sales of prepared meals to not-for-profit organizations organized under chapter 24.03 or 24.12 RCW, that provide the meals to senior citizens, disabled persons, or low-income persons as a part of the patient services they render.

Hospitals, nursing homes, boarding homes, and similar health care facilities may have restaurants, cafeterias, or other dining facilities where meals are sold for cash or credit to doctors, nurses, other employees, and visitors. Some of these facilities may provide meals to their employees at no charge. Under these circumstances, all sales of meals to such persons are subject to retailing B&O and retail sales taxes, including the value of meals provided at no charge to employees. For additional information regarding the sale of meals, including meals furnished to employees, refer to WAC 458-20-119 (Sales of meals). Hospitals, nursing homes, boarding homes, and similar health care facilities that provide free meals to persons other than employees, such as visitors, should refer to WAC 458-20-124 (Restaurants, cocktail bars, taverns and similar businesses) for information about the taxability of meals given away free of charge.

(c) **Sales of medical supplies, chemicals, or materials to a comprehensive cancer center.** Effective July 1, 2006, sales of medical supplies, chemicals, or materials to a comprehensive cancer center are exempt from retail sales and use

tax. RCW 82.08.808 and 82.12.808. This exemption, however, does not apply to the sales of construction materials, office equipment, building equipment, administrative supplies, or vehicles.

(i) **Medical supplies.** For purposes of this exemption, "medical supplies" means any item of tangible personal property, including any repair and replacement parts for such tangible personal property, used by a comprehensive cancer center for the purpose of performing research on, procuring, testing, processing, storing, packaging, distributing, or using blood, bone, or tissue. The term includes tangible personal property used to:

(A) Provide preparatory treatment of blood, bone, or tissue;

(B) Control, guide, measure, tune, verify, align, regulate, test, or physically support blood, bone, or tissue; and

(C) Protect the health and safety of employees or others present during research on, procuring, testing, processing, storing, packaging, distributing, or using blood, bone, or tissue.

(ii) **Chemicals.** For purposes of this exemption, "chemical" means any catalyst, solvent, water, acid, oil, or other additive that physically or chemically interacts with blood, bone, or tissue.

(iii) **Materials.** For purposes of this exemption, "materials" means any item of tangible personal property, including, but not limited to, bags, packs, collecting sets, filtering materials, testing reagents, antisera, and refrigerants used or consumed in performing research on, procuring, testing, processing, storing, packaging, distributing, or using blood, bone, or tissue.

(iv) **Research.** For purposes of this exemption, "research" means basic and applied research that has as its objective the design, development, refinement, testing, marketing, or commercialization of a product, service, or process.

(5) Equipment and supplies used by health care providers. Hospitals, nursing homes, adult family homes, boarding homes, and similar health care providers are required to pay retail sales tax on purchases of equipment and supplies unless specifically exempt by law. Readers should refer to WAC 458-20-18801 for detailed information regarding exemptions that are available to these health care providers, as well as persons performing medical research and organ procurement organizations.

(a) **Purchases for resale.** Purchases of tangible personal property for resale without intervening use are not subject to retail sales tax. Persons purchasing tangible personal property for resale must furnish a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to the seller to document the wholesale nature of the sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(b) **Buyer's responsibility to remit deferred sales or use tax.** If the seller does not collect retail sales tax on a retail sale, the buyer must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law. For detailed information regarding the use tax, refer to WAC 458-20-178 (Use tax).

(i) **How do I report deferred sales or use tax.** Persons registered with the department and required to file tax returns should report deferred sales or use tax on their excise tax return. The excise tax return does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's excise tax return. If a deferred sales tax or use tax liability is incurred by a person who is not required to obtain a tax registration endorsement from the department, the person must report the tax on a "Consumer Use Tax Return" and remit the appropriate tax to the department.

(ii) **Where can I obtain a Consumer Use Tax Return?** The Consumer Use Tax Return may be obtained from the department's internet site at: http://dor.wa.gov, or by calling the department's telephone information center at 1-800-647-7706.

(6) **Quality maintenance fee imposed on nursing homes.** Effective July 1, 2007, the quality maintenance fee imposed on operators of nonexempt nursing facilities in Washington was repealed. Legislation passed in 2006 (section 1, chapter 241, Laws of 2006) repealed chapter 82.71 RCW, which imposed the fee. Originally effective on July 1, 2003, RCW 82.71.020 imposed a quality maintenance fee on every nursing home in this state not exempt from the fee under RCW 74.46.091. The amount of the quality maintenance fee was in addition to any other tax imposed upon nursing homes. Nursing homes were required to report the number of patient days and remit the fee to the department on a monthly basis. Persons with questions about how the quality maintenance fee affected individual nursing home operators or about the exemption provided by RCW 74.46.091 should contact the department of social and health services.

For purposes of this section, "patient day" means a calendar day of care provided to a nursing home resident, excluding a medicare patient day. Patient days include the day of admission and exclude the day of discharge; except that, when admission and discharge occur on the same day, one day of care shall be deemed to exist. "Medicare patient day" means a patient day for medicare beneficiaries on a medicare Part A stay and a patient day for persons who have opted for managed care coverage using their medicare benefit.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-168, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 08-16-057, § 458-20-168, filed 7/30/08, effective 8/30/08; WSR 05-14-090, § 458-20-168, filed 6/30/05, effective 7/31/05. Statutory Authority: RCW 82.32.300 and 82.04.260(15). WSR 94-11-097, § 458-20-168, filed 5/17/94, effective 6/17/94. Statutory Authority: RCW 82.32.300. WSR 88-01-050 (Order 87-9), § 458-20-168, filed 12/15/87; WSR 87-05-042 (Order 87-1), § 458-20-168, filed 2/18/87; WSR 83-07-033 (Order ET 83-16), § 458-20-168, filed 3/15/83. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order ET 78-4), § 458-20-168, filed 6/27/78; Order ET 74-2, § 458-20-168, filed 6/24/74; Order ET 70-3, § 458-20-168 (Rule 168), filed 5/29/70, effective 7/1/70.]

WAC 458-20-169 Nonprofit organizations. (1) **Introduction.** Unlike most states' and the federal tax systems, Washington's tax system, specifically its business tax, applies to nonprofit organizations. Washington's business tax is imposed upon all entities that generate gross receipts or pro-

ceeds, unless there is a specific statutory exemption or deduction. This section reviews how the business and occupation (B&O), retail sales, and use taxes apply to activities often performed by nonprofit organizations. Although some nonprofit organizations may be subject to other taxes (e.g., public utility or insurance premium taxes on income from utility or insurance activities), these taxes are not discussed in this section. The section describes the most common exemptions and deductions for the B&O, retail and use taxes specifically provided to nonprofit organizations by state law. Other exemptions and/or deductions not specific to nonprofit organizations may also apply.

Other sections that may be relevant to specific activities of nonprofit organizations include the following:

(a) Artistic or cultural organizations, WAC 458-20-249;

(b) Educational institutions, school districts, student organizations, and private schools, WAC 458-20-167;

(c) Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities, WAC 458-20-168;

(d) Membership organizations, nonprofit groups and clubs providing amusement, recreation, or physical fitness services, WAC 458-20-183; and

(e) Organizations holding trade shows, conventions, or seminars, WAC 458-20-256.

(2) **Registration requirements.** Nonprofit organizations with $12,000 or more per year in gross receipts from sales, and/or gross income from services subject to the B&O tax or who are required to collect or pay to the department of revenue (department) retail sales tax or any other tax or fee which the department administers (regardless of the level of annual gross receipts) must register with the department. Nonprofit organizations that have gross receipts of less than $12,000 per year and who are not required to collect retail sales tax or any other tax or fee administered by the department are not required to register with the department.

For more details on registration requirements see WAC 458-20-101 (Tax registration and tax reporting).

(3) **Filing tax returns.** Nonprofit organizations making retail sales that require the collection of the retail sales tax must file a tax return, regardless of the annual level of gross receipts or gross income and whether or not any B&O tax is due. (See also WAC 458-20-104 (Small business tax relief based on income of business).) The excise tax return with payment is generally filed on a monthly basis. However, under certain conditions the department may authorize taxpayers to file and remit payment on either a quarterly or annual basis. Refer to WAC 458-20-22801 for more information regarding how reporting frequencies are assigned.

Nonprofit organizations that do not have retail sales tax to remit, but are required to register, do not have to file a tax return if they meet certain statutory requirements (e.g., annual gross income of less than $28,000) and are placed on an "active nonreporting" status by the department. Refer to WAC 458-20-101 for more information regarding the "active nonreporting" status.

(4) **General tax reporting responsibilities.** While Washington state law provides some tax exemptions and deductions specifically targeted toward nonprofit organizations, these organizations otherwise have the same tax-reporting responsibilities as those of for-profit organizations.

(a) **Business and occupation tax.** Chapter 82.04 RCW imposes a B&O tax upon all persons engaged in business activities within this state, unless the income is specifically exempt or deductible under state law. The B&O tax applies to the value of products, gross proceeds of sales, or gross income of the business, as the case may be. RCW 82.04.220.

(i) **Common B&O tax classifications.** Chapter 82.04 RCW provides a number of classifications that apply to specific activities. The most common B&O tax classifications that apply to income received by nonprofit organizations are the service and other activities, retailing, and wholesaling classifications. If an organization engages in more than one kind of business activity, the gross income from each activity must be reported under the appropriate tax classification.

(ii) **Measure of tax.** The most common measures of the B&O tax are "gross proceeds of sales" and "gross income of the business." RCW 82.04.070 and 82.04.080, respectively. These measures include the value proceeding or accruing from the sale of tangible personal property or services rendered without any deduction for the cost of property sold, cost of materials used, labor costs, discounts paid, delivery costs, taxes, losses or any other expenses.

(b) **Retail sales tax.** A nonprofit organization must collect and remit retail sales tax on all retail sales, unless the sale is specifically exempt by statute. Examples of retail sales tax exemptions that commonly apply to nonprofit organizations are those for sales of certain food products (see WAC 458-20-244 for more information regarding sales of food and food ingredients), construction materials purchased by a health or social welfare organization for new construction of alternative housing for youth in crisis, to be licensed as a family foster home (RCW 82.08.02915), and fund-raising activities (see subsection (5)(e) of this section). New construction includes renovating an existing structure to provide new housing for youth in crisis.

A nonprofit organization must pay retail sales tax when it purchases goods or retail services for its own use as a consumer, unless the purchase is specifically exempt by statute. Items purchased for resale without intervening use are purchases at wholesale and are not subject to the retail sales tax. The purchaser should provide the seller with a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchased made on or after January 1, 2010, to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(c) **Use tax.** The use tax is imposed on every person, including nonprofit organizations, using tangible personal property within this state as a consumer, unless such use is specifically exempt by statute. The use tax applies only if retail sales tax has not previously been paid on the item. The rate of tax is the same as the sales tax rate that applies at the location where the property is first used.

A common application of the use tax occurs when items are purchased from an out-of-state seller who has no presence in Washington. Because the out-of-state seller is under no obligation to collect Washington's retail sales or use tax, the buyer is statutorily required to remit use tax directly to the

department. (See also WAC 458-20-178 for more information regarding the use tax.)

Except for fund-raising, exemptions from use tax generally correspond to the retail sales tax exemptions. For example, a use tax exemption for construction materials acquired by a health or social welfare organization for new construction of alternative housing for youth in crisis, to be licensed as a family foster home, RCW 82.12.02915, corresponds with the retail sales tax exemption described in subsection (4)(b) above for purchasing these construction materials.

(i) **Use tax exemption for donated items.** RCW 82.12.-02595 provides a use tax exemption for property donated to a nonprofit charitable organization. This exemption is available for the nonprofit charitable organization and the donor, if the donor did not previously use the item as a consumer. It also applies to the use of property by a donor who is incorporating the property into a nonprofit organization's real or personal property for no charge.

The exemption also applies to another person using property originally donated to a charitable nonprofit organization that is subsequently donated or bailed to that person by the charitable nonprofit organization, provided that person uses the property in furtherance of the charitable purpose for which the property was originally donated to the charitable nonprofit organization. For example, a hardware store donates an industrial pressure washer to a nonprofit community center for neighborhood cleanup, the community center bails this washer to people enrolled in its neighborhood improvement group for neighborhood clean-up projects. No use tax is due from any of the participants in these transactions. An example of a gift that would not qualify is when a car is donated to a church for its staff and the church gives that car to its pastor. The pastor must pay use tax on the car because it serves multiple purposes. It serves the church's charitable purpose, but it also acts as compensation to the pastor and is available for the pastor's personal use. The subsequent donation of property from the charity to another person must be solely for a charitable purpose. If the property is donated or bailed to the third party for a charitable purpose in line with the nonprofit organization's charitable activities, generally, no additional proof is required that this was the charitable purpose for which the property was originally donated.

(ii) **Use tax implications with respect to fund-raising activities.** Subsection (5)(e) below explains that a retail sales tax exemption is available for certain fund-raising sales. However, there is no comparable use tax exemption provided to the buyer/user of property purchased at these fund-raising sales. While the nonprofit organization is under no obligation to collect use tax from the buyer, the organization is encouraged to inform the buyer of the buyer's possible use tax obligation.

(5) **Exemptions.** The following sources of income are specifically exempt from tax. As such they should not be included or reported as gross income if the organization is required to file an excise tax return.

(a) **Adult family homes.** The B&O tax does not apply to income earned by a licensed adult family home or an adult family home exempt from licensing. RCW 82.04.327.

(b) **Camp or conference centers.** RCW 82.04.363 and 82.08.830 respectively provide B&O and retail sales exemptions to amounts received by a nonprofit organization from the sale or furnishing of certain items or services at a camp or conference center conducted on property exempt from the property tax under RCW 84.36.030 (1), (2), or (3).

Income derived from the sale of the following items and services is exempt:

(i) Lodging, conference and meeting rooms, camping facilities, parking, and similar licenses to use real property;

(ii) Food and meals;

(iii) Books, tapes, and other products that are available exclusively to the participants at the camp, conference, or meeting and are not available to the public at large.

The property tax exemptions are further discussed at WAC 458-16-210 (Church camps), WAC 458-16-220 (Nonprofit organizations or associations organized and conducted for nonsectarian purposes), and WAC 458-16-230 (Character building organizations).

(c) **Child care resource and referral services.** The B&O tax does not apply to nonprofit organizations with respect to amounts received for child care resource and referral services. Child care resource and referral services do not include child care services provided directly to children. RCW 82.04.3395.

(d) **Credit and debt services.** RCW 82.04.368 provides a B&O tax exemption for amounts received by nonprofit organizations for providing specialized credit and debt services. These services include:

(i) Presenting individual and community credit education programs including credit and debt counseling;

(ii) Obtaining creditor cooperation allowing a debtor to repay debt in an orderly manner;

(iii) Establishing and administering negotiated repayment programs for debtors; and

(iv) Providing advice or assistance to a debtor with regard to (i), (ii), or (iii) of this subsection.

(e) **Day care provided by churches.** The B&O tax does not apply to income derived by a church for the care of children of any age for periods of less than twenty-four hours, provided the church is exempt from property tax under RCW 84.36.020. RCW 82.04.339.

(f) **Fund-raising.** RCW 82.04.3651 provides a B&O tax exemption for amounts received from certain fund-raising activities. RCW 82.08.02573 provides a comparable retail sales tax exemption.

It is important to note that these exemptions apply only to the fund-raising income received by the nonprofit organization. For example, the commission income received by a nonprofit organization selling books owned by a for-profit entity on a consignment basis is exempt of tax if the statutory requirements are satisfied. The nonprofit organization is generally responsible for collecting and remitting retail sales tax upon the gross proceeds of sales when selling items for another person (see WAC 458-20-159).

(i) **What nonprofit organizations qualify?** Nonprofit organizations that qualify for this exemption are those that are:

(A) A tax-exempt nonprofit organization described by section 501 (c)(3) (educational and charitable), (4) (social welfare), or (10) (fraternal societies operating as lodges) of the Internal Revenue Code;

(B) A nonprofit organization that would qualify for tax exemption under these codes except that it is not organized as a nonprofit corporation; or

(C) A nonprofit organization that does not pay its members, stockholders, officers, directors, or trustees any amounts from its gross income, except as payment for services rendered, does not pay more than reasonable compensation to any person for services rendered, and does not engage in a substantial amount of political activity. Political activity includes, but is not limited to, influencing legislation and participating in any campaign on behalf of any candidate for political office.

A nonprofit organization may meet (A), (B), or (C) above.

(ii) **Qualifying fund-raising activities.** For the purpose of this exemption, "fund-raising activity" means soliciting or accepting contributions of money or other property, or activities involving the anticipated exchange of goods or services for money between the soliciting organization and the organization or person solicited, for the purpose of furthering the goals of the nonprofit organization.

(A) Money raised by a nonprofit charitable group from its annual telephone fund drive to fund its homeless shelters where nothing is promised in return for a donor's pledge is exempt as fund-raising contributions of money to further the goals of the nonprofit organization.

(B) A nonprofit group organized as a community playhouse has an annual telephone fund drive. The group gives the caller a mug, jacket, dinner, or vacation trip depending on the amount of pledge made over the phone. The community playhouse does not sell or exchange the mugs, jackets, dinners or trips for cash or property, except during this pledge drive. The money is used to produce the next season's plays. The money earned from the pledges is exempt from both retail sales tax and business and occupation tax to the extent these amounts represent an exchange for goods and services for money to further the goals of the nonprofit group. The money earned from the pledges above the value of the goods and services exchanged is exempt as a fund-raising contribution of money to further the goals of the nonprofit organization.

(C) A nonprofit group sells ice cream bars at booths leased during the two-week runs of three county fairs, for a total of six weeks during the year, to fund youth camps maintained by the nonprofit group. The money earned from the booths is exempt from both retail sales tax and business and occupation tax as a fund-raising exchange of goods for money to further the goals of the nonprofit group.

(iii) **Contributions of money or other property.** The term contributions includes grants, donations, endowments, scholarships, gifts, awards, and any other transfer of money or other property by a donor, provided the donor receives no significant goods, services, or benefits in return for making the gift. For example, an amount received by a nonprofit educational broadcaster from a group that conditions receipt upon the nonprofit broadcaster airing its seminars is not a contribution regardless of how the amount paid was titled by the two organizations.

It is not unusual for the person making a gift to require some accountability for how the gift is used as a condition for receiving the gift or future gifts. Such gifts remain exempt, provided the "accountability" required does not result in a direct benefit to the donor (examples of direct benefits to a donor are: Money given for a report on the soil contamination levels of land owned by the donor, medical services provided to the donor or the donor's family, or market research benefitting the donor directly). This "accountability" can take the form of conditions or restrictions on the use of the gift for specific charitable purposes or can take the form of written reports accounting for the use of the gift. Public acknowledgment of a donor for the gift does not result in a significant service or benefit simply because the gift is publicly acknowledged.

(iv) **Nonqualifying activities.** Fund-raising activity does not include the operation of a regular place of business in which services are provided or sales are made during regular hours such as a bookstore, thrift shop, restaurant, legal or health clinic, or similar business. It also does not include the operation of a regular place of business from which services are provided or performed during regular hours such as the provision of retail, personal, or professional services. A regular place of business and the regular hours of that business depend on the type of business being conducted.

(A) In the example demonstrating that an amount received by a nonprofit broadcaster was not a contribution because services were given in return for the funds, this activity must also be examined to see whether the exchange was for services as part of a fund-raising activity. The broadcaster was in the business of broadcasting programs. It had a regular site for broadcasting programs and ran broadcasts for twenty-four hours every day. Broadcasting was a part of its business activity performed from a regular place of business during regular hours. The money received from the group with the requirement that its seminars be broadcast would not qualify as money received from a fund-raising activity even though the parties viewed the money as a "donation."

(B) A nonprofit organization that makes catalog sales throughout the year with a twenty-four hour telephone line for taking orders has a regular place of business at the location where the sales orders are processed and regular hours of twenty-four hours a day. Catalog sales are not exempt as fund-raising amounts even though the funds are raised for a nonprofit purpose.

(C) A nonprofit group organized as a community playhouse has three plays during the year at a leased theatre. The plays run for a total of six weeks and the group provides concessions at each of the performances. The playhouse has a regular place of business with regular hours for that type of business. The concessions are done at that regular place of business during regular hours. The concessions are not exempt as fund-raising activities even though amounts raised from the concessions may be used to further the nonprofit purpose of that group.

(D) A nonprofit student group, that raises money for scholarships and other educational needs, sets up an espresso stand that is open for two hours every morning during the school year. The espresso stand is a regular place of business with regular hours for that type of business. The money earned from the espresso stand is not exempt, even though the amounts are raised to further the student group's nonprofit purpose.

(v) **Fund-raising sales by libraries.** RCW 82.04.3651 specifically provides that the sale of used books, used videos, used sound recording, or similar used information products in a library is not the operation of a regular place of business, if the proceeds are used to support the library. The library must be a free public library supported in whole or in part with money derived from taxes. RCW 27.12.010.

(g) **Group training homes.** RCW 82.04.385 provides a B&O tax exemption for amounts received from the department of social and health services for operating a nonprofit group training home. The amounts excluded from gross income must be used for the cost of care, maintenance, support, and training of developmentally disabled individuals. A nonprofit group training home is an approved nonsectarian facility equipped, supervised, managed, and operated on a full-time nonprofit basis for the full-time care, treatment, training, and maintenance of individuals with developmental disabilities.

(h) **Sheltered workshops.** RCW 82.04.385 provides a B&O tax exemption for amounts received by a nonprofit organization for operating a sheltered workshop.

(i) **What is a sheltered workshop?** A sheltered workshop is that part of the nonprofit organization engaged in business activities that are performed primarily to provide evaluation and work adjusted services for a handicapped person or to provide gainful employment or rehabilitation services to a handicapped person. The sheltered workshop can be maintained on or off the premises of the nonprofit organization.

(ii) **What is meant by "gainful employment or rehabilitation services to a handicapped person"?** Gainful employment or rehabilitation services must be an interim step in the rehabilitation process which is provided because the person cannot be readily absorbed into the competitive labor market or because employment opportunities for the person do not exist during that time in the competitive labor market.

"Handicapped," for the purposes of this exemption, means a physical or mental disability that restricts normal achievement, including medically recognized addictions and learning disabilities. However, this term does not include social or economic disadvantages that restrict normal achievement (e.g., prior criminal history or low-income status).

(i) **Student loan services.** RCW 82.04.367 provides a B&O tax exemption for the gross income of nonprofit organizations that are exempt from federal income tax under section 501 (c)(3) of the Internal Revenue Code that:

(i) Are guarantee agencies under the federal guaranteed student loan program or that issue debt to provide or acquire student loans; or

(ii) Provide guarantees for student loans made through programs other than the federal guaranteed student loan program.

(6) **B&O tax deduction of government payments made to health or social welfare organizations.** RCW 82.04.4297 provides a B&O tax deduction to health or social welfare organizations for amounts received from the United States, any instrumentality of the United States, the state of Washington, or any municipal corporation or political subdivision of the state of Washington as compensation for health or social welfare services. A deduction is not allowed, however, for amounts that are received under an employee benefit plan. These deductible amounts should be included in the gross income reported on the return, and then deducted on the return when determining the amount of the organization's taxable income.

(a) **What is a health or social welfare organization?** A health or social welfare organization is a nonprofit organization providing health or social welfare services that is also:

(i) A corporation sole under chapter 24.12 RCW or a not-for-profit corporation under chapter 24.03 RCW. It does not include a corporation providing professional services authorized under chapter 18.100 RCW;

(ii) Governed by a board of not less than eight individuals who are not paid corporate employees when the organization is a not-for-profit corporation;

(iii) Not paying any part of its corporate income directly or indirectly to its members, stockholders, officers, directors, or trustees except as executive or officer compensation or as services rendered by the corporation in accordance with its purposes and bylaws to a member, stockholder, officer, or director or as an individual;

(iv) Only paying compensation to corporate officers and executives for actual services rendered. This compensation must be at a level comparable to like public service positions within Washington;

(v) Irrevocably dedicating its corporate assets to health or social welfare activities. Upon corporate liquidation, dissolution, or abandonment, any distribution or transfer of corporate assets may not inure directly or indirectly to the benefit of any member or individual, except for another health or social welfare organization;

(vi) Duly licensed or certified as required by law or regulation;

(vii) Using government payments to provide health or social welfare services;

(viii) Making its services available regardless of race, color, national origin, or ancestry; and

(ix) Provides access to the corporation's books and records to the department's authorized agents upon request.

(b) **Qualifying health or welfare services.** Health or social welfare services are limited exclusively to the following services:

(i) Mental health, drug, or alcoholism counseling or treatment;

(ii) Family counseling;

(iii) Health care services;

(iv) Therapeutic, diagnostic, rehabilitative or restorative services for the care of the sick, aged, physically-disabled, developmentally-disabled, or emotionally-disabled individuals;

(v) Activities, including recreational activities, intended to prevent or ameliorate juvenile delinquency or child abuse;

(vi) Care of orphans or foster children;

(vii) Day care of children;

(viii) Employment development, training, and placement;

(ix) Legal services to the indigent;

(x) Weatherization assistance or minor home repairs for low-income homeowners or renters;

(xi) Assistance to low-income homeowners and renters to offset the cost of home heating energy, through direct ben-

efits to eligible households or to fuel vendors on behalf of eligible households; and

(xii) Community services to low-income individuals, families and groups that are designed to have a measurable and potentially major impact on the poverty in Washington.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-070, § 458-20-169, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 01-09-066, § 458-20-169, filed 4/16/01, effective 5/17/01; WSR 91-21-001, § 458-20-169, filed 10/3/91, effective 11/3/91; WSR 88-21-014 (Order 88-7), § 458-20-169, filed 10/7/88; WSR 86-02-039 (Order ET 85-8), § 458-20-169, filed 12/31/85; WSR 83-07-033 (Order ET 83-16), § 458-20-169, filed 3/15/83. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order ET 78-4), § 458-20-169, filed 6/27/78; Order ET 70-3, § 458-20-169 (Rule 169), filed 5/29/70, effective 7/1/70.]

WAC 458-20-170 Constructing and repairing of new or existing buildings or other structures upon real property. (1) **Definitions.** As used herein:

(a) The term "prime contractor" means a person engaged in the business of performing for consumers, the constructing, repairing, decorating or improving of new or existing buildings or other structures under, upon or above real property, either for the entire work or for a specific portion thereof. The term includes persons who rent or lease equipment to property owners for use in respect to constructing, repairing, etc., buildings or structures upon such property, when the equipment is operated by the lessor.

(b) The word "subcontractor" means a person engaged in the business of performing a similar service for persons other than consumers, either for the entire work or for a specific portion thereof. The term includes persons who rent or lease equipment to prime contractors or subcontractors for use in respect to constructing, repairing, etc., when such equipment is operated by the lessor. When equipment or other tangible personal property is rented without an operator to contractors, subcontractors or others, the transaction is a sale at retail (see RCW 82.04.040 and 82.04.050).

(c) The terms "prime contractor" and "subcontractor" include persons performing labor and services in respect to the moving of earth or clearing of land, cleaning, fumigating, razing, or moving of existing buildings or structures even though such services may not be done in connection with a contract involving the constructing, repairing, or altering of a new or existing building or structure. The terms also include persons constructing streets, roads, highways, etc., owned by the state of Washington.

(d) The term "buildings or other structures" means everything artificially built up or composed of parts joined together in some definite manner and attached to real property. It includes not only buildings in the general and ordinary sense, but also tanks, fences, conduits, culverts, railroad tracks, tunnels, overhead and underground transmission systems, monuments, retaining walls, piling and privately owned bridges, trestles, parking lots, and pavements for foot or vehicular traffic, etc.

(e) The term "constructing, repairing, decorating or improving of new or existing buildings or other structures," in addition to its ordinary meaning, includes: The installing or attaching of any article of tangible personal property in or to real property, whether or not such personal property becomes a part of the realty by virtue of installation; the clearing of land and the moving of earth; and the construction of streets, roads, highways, etc., owned by the state of Washington. The term includes the sale of or charge made for all service activities rendered in respect to such constructing, repairing, etc., regardless of whether or not such services are otherwise defined as "sale" by RCW 82.04.040 or "sales at retail" by RCW 82.04.050. Hence, for example, such service charges as engineering fees, architectural fees or supervisory fees are within the term when the services are included within a contract for the construction of a building or structure. The fact that the charge for such services may be shown separately in bid, contract or specifications does not establish the charge as a separate item in computing tax liability.

(2) **Speculative builders.**

(a) As used herein the term "speculative builder" means one who constructs buildings for sale or rental upon real estate owned by him. The attributes of ownership of real estate for purposes of this rule include but are not limited to the following: (i) The intentions of the parties in the transaction under which the land was acquired; (ii) the person who paid for the land; (iii) the person who paid for improvements to the land; (iv) the manner in which all parties, including financiers, dealt with the land. The terms "sells" or "contracts to sell" include any agreement whereby an immediate right to possession or title to the property vests in the purchaser.

(b) Where an owner of real estate sells it to a builder who constructs, repairs, decorates, or improves new or existing buildings or other structures thereon, and the builder thereafter resells the improved property back to the owner, the builder will not be considered a speculative builder. In such a case that portion of the resale attributable to the construction, repairs, decorations, or improvements by the builder, shall not be considered a sale of real estate and shall be fully subject to retailing business and occupation tax and retail sales tax. It is intended by this provision to prevent the avoidance of tax liability on construction labor and services by utilizing the mechanism of real property transfers. (RCW 82.04.050 (2)(c).)

(c) Amounts derived from the sale of real estate are exempt from the business and occupation tax. (RCW 82.04.390.) Consequently, the proceeds of sales by legitimate speculative builders of completed buildings are not subject to such tax. Neither does the sales tax apply to such sales, since such a sale involves no charge made for construction for a consumer, but the price paid is for the sale of real estate.

(d) However, when a speculative builder sells or contracts to sell property upon which he is presently constructing a building, all construction done subsequent to the date of such sale or contract constitutes a retail sale and that portion of the sales price allocable to construction done after the agreement shall be taxed accordingly. Consequently, the builder must pay business and occupation tax under the retailing classification on that part of the sales price attributable to construction done subsequent to the agreement, and shall also collect sales tax from the buyer on such allocable part of the sales price.

(e) Speculative builders must pay sales tax upon all materials purchased by them and on all charges made by their subcontractors. Deductions for such tax paid with respect to materials used or charges made for that part of the construction done after the contract to sell the building should be

claimed by the speculative builder on his tax returns in accordance with WAC 458-20-102, under the subheading PURCHASES FOR DUAL PURPOSES.

(f) Persons, including corporations, partnerships, sole proprietorships, and joint ventures, among others, who perform construction upon land owned by their corporate officers, shareholders, partners, owners, co-venturers, etc., are constructing upon land owned by others and are taxable as sellers under this rule, not as "speculative builders."

(3) **Business and occupation tax.**

(a) Prime contractors are taxable under the retailing classification, and subcontractors under the wholesaling classification upon the gross contract price.

(b) Where no gross contract price is stated in any contract or agreement between the builder and the property owner, then the measure of business and occupation tax is the total amount of construction costs, including any charges for licenses, fees, permits, etc., required for the construction and paid by the builder.

(4) **Retail sales tax.**

(a) Prime contractors are required to collect from consumers the retail sales tax measured by the full contract price. Where no gross contract price is stated, the measure of sales tax is the total amount of construction costs including any charges for licenses, fees, permits, etc., required for construction and paid by the builder.

(b) The retail sales tax does not apply to charges made for janitorial services nor for the mere leveling of land used in commercial farming or agriculture. The tax does apply, however, in respect to contracts for cleaning septic tanks or the exterior walls of buildings, as well as to earth moving, land clearing and the razing or moving of structures, whether or not such services are performed as incidents of a contract to construct, repair, decorate, or improve buildings or structures.

(c) Sales to prime contractors and subcontractors of materials such as concrete, tie rods, lumber, finish hardware, etc., which become part of the structure being built or improved are sales for resale and are not subject to the retail sales tax. Sales of form lumber to such contractors are sales for resale provided that such lumber is used or to be used first by such persons for the molding of concrete in a single contract, project or job and the form lumber is thereafter incorporated into the product of that same contract project or job as an ingredient or component thereof. Sales of form lumber not so incorporated as an ingredient or component are sales at retail.

(d) The retail sales tax applies upon sales and rentals to prime contractors and subcontractors of tools, machinery and equipment, and consumable supplies, such as hand and machine tools, cranes, air compressors, bulldozers, lubricating oil, sandpaper and form lumber which are primarily for use by the contractor rather than for resale as a component part of the finished structure.

(e) The retail sales tax applies upon sales to speculative builders of all tangible personal property, including building materials, tools, equipment and consumable supplies and upon sales of labor, services and materials to speculative builders by independent contractors.

(5) **Use tax.**

The use tax applies generally to the use by prime contractors and subcontractors of tools, machinery, equipment and consumable supplies acquired by them primarily for their own use and upon which the retail sales tax has not been paid. This includes equipment and supplies purchased in a foreign state for use or consumption in performing contracts in this state. The use tax applies generally to the use by speculative builders of all tangible personal property, including building materials, purchased or acquired by them without payment of the retail sales tax (see also WAC 458-20-178).

[Statutory Authority: RCW 82.32.300. WSR 87-19-007 (Order ET 87-5), § 458-20-170, filed 9/8/87; WSR 83-07-033 (Order ET 83-16), § 458-20-170, filed 3/15/83; Order ET 71-1, § 458-20-170, filed 7/22/71; Order ET 70-3, § 458-20-170 (Rule 170), filed 5/29/70, effective 7/1/70.]

WAC 458-20-17001 Government contracting—Construction, installations, or improvements to government real property. (1) Special business and occupation tax applications and special sales/use tax applications pertain for prime and subcontractors who perform certain construction, installation, and improvements to real property of or for the United States, its instrumentalities, or a county or city housing authority created pursuant to chapter 35.82 RCW. These specific construction activities are excluded from the definition of "sale at retail" under RCW 82.04.050. All other sales to the United States, its agencies or instrumentalities are taxable as retail sales or wholesale sales, as appropriate. See WAC 458-20-190.

(2) The definitions of terms and general provisions contained in WAC 458-20-170 apply equally for this rule, as appropriate. In addition, the terms, "clearing land" and "moving earth" include well drilling, core drilling, and hole digging, whether or not casing materials are installed and any grading or clearing of land, including the razing of buildings or other structures.

Business and Occupation Tax

(3) Amounts derived from constructing, repairing, decorating, or improving new or existing buildings or other structures, including installing or attaching tangible personal property therein or thereto, and clearing land or moving earth, of or for the United States, its instrumentalities, or county or city housing authorities of chapter 35.82 RCW are taxable under the government contracting classification of business and occupation tax. The measure of the tax is the gross contract price.

(4) Government contractors who manufacture or produce any tangible personal property for their own commercial or industrial use as consumers in performing government contracting activities are subject to the manufacturing classification of business and occupation tax measured by the value of the property manufactured or produced. See also, WAC 458-20-134. The manufacturing tax applies even though the property manufactured or produced for commercial use may be subsequently incorporated into buildings or other structures under the government contract and may thereby enhance the gross contract price.

Retail Sales Tax

(5) The retail sales tax does not apply to the gross contract price, or any part thereof, for any business activities taxable under the government contracting classification. Prime and subcontractors who perform such activities are themselves included within the statutory definition of "consumer" under RCW 82.04.190 and are required to pay retail sales tax upon all purchases of materials, including prefabricated and precast items, equipment, and other tangible personal property which is installed, applied, attached, or otherwise incorporated in their government contracting work. This applies for all such purchases of tangible personal property for installation, etc., even though the full purchase price of such property will be reimbursed by the government or housing authority in the gross contract price. It also applies notwithstanding that the contract may contain an immediate title vesting clause which provides that the title to the property vests in the government or housing authority immediately upon its acquisition by the contractor.

(6) Also, the retail sales tax must be paid by government contractors upon their purchases and leases or rentals of tools, consumables, and other tangible personal property used by them as consumers in performing government contracting.

Use Tax

(7) The use tax applies upon the value of all materials, equipment, and other tangible personal property purchased at retail, acquired as a bailee or donee, or manufactured or produced by the contractor for commercial or industrial use in performing government contracting and upon which no retail sales tax has been paid by the contractor, its bailor or donor.

(8) Thus the use tax applies to all property provided by the federal government to the contractor for installation or inclusion in the contract work as well as to all government provided tooling.

(9) The use tax is to be reported and paid by the government contractor who actually installs or applies the property to the contract. Where the actual installing contractor pays the tax, no further use tax is due upon such property by any other contractor.

(10) Note to contractors: The United States Supreme Court has sustained the government contracting tax applications for this state, even though the ultimate economic burden of the tax is borne by the United States Government (Washington v. US, 75 L.Ed 2d 264, 1983).

(11) This rule does not apply to public road construction. See WAC 458-20-171.

[Statutory Authority: RCW 82.32.300. WSR 86-10-016 (Order ET 86-9), § 458-20-17001, filed 5/1/86.]

WAC 458-20-171 Building, repairing or improving streets, roads, etc., which are owned by a municipal corporation or political subdivision of the state or by the United States and which are used primarily for foot or vehicular traffic.

Definitions

As used herein:

The word "contractor" means a person engaged in the business of building, repairing or improving any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic, either as a prime contractor or as a subcontractor. It does not include persons who merely sell or deliver road materials to such contractors or to the public authority whose property is being improved. It also does not include persons who construct streets, roads, etc. *owned by the state of Washington.* (See WAC 458-20-170 for the tax liability of such persons.)

The term "street, place, road, highway, etc." is used in the ordinary sense that the combination of such words implies. It includes docks used primarily by ferry boats operated in connection with a street, road or highway, but does not include railroads, wharves, moorings, hallways, catwalks, or runways, aprons or taxiways for the landing, take-off or movement of airplanes within airports or landing fields; nor does it include ferry boats, even though the ferry be operated in connection with a street, road or highway. It includes roads and walks which are not open to the public generally, but which may be restricted to use by the military or by employees of a department or instrumentality of the United States.

The word "place" means only an area similar to a street or pedestrian walk, such as thoroughfares in various cities designated "places" for the purpose of preserving the continuity of street names or house numbers; generally, a street of shorter length than others.

The term "building, repairing or improving of a publicly owned street, place, road, etc.," includes clearing, grading, graveling, oiling, paving and the cleaning thereof; the constructing of tunnels, guard rails, fences, walks and drainage facilities, the planting of trees, shrubs and flowers therein, the placing of street and road signs, the striping of roadways, and the painting of bridges and trestles; it also includes the mining, sorting, crushing, screening, washing and hauling of sand, gravel, and rock taken from a public pit or quarry. It also includes the constructing of road and street lighting systems, even though portions of such systems also are used for purposes other than street and road lighting; also the constructing of a drainage system in streets and roads, even though such system is also used for the carrying of sewage: Provided, That the drainage facilities are sufficient for disposal of the normal runoff of surface waters from the particular streets and roads in which the system is constructed or an ordinance authorizing the construction of a combined sewer system is incorporated by reference in the contract and the contract or specifications clearly indicate that the system is designed and intended for the disposal of the normal runoff of surface waters from the streets and roads in which the system is constructed.

The term includes any contract for the readjustment, reconstruction or relocation of the facilities of any public, private or cooperatively owned utility or railroad in the course of building, repairing or improving a street, place, road, etc., which is owned by a municipal corporation or political subdivision of the state or by the United States, the cost of which readjustment, reconstruction, or relocation is the responsibility of the public authority whose street, place, road, etc., is being built, repaired or improved. It also includes building or repairing mass transportation facilities owned by a municipal

corporation or political subdivision of the state or by the United States.

Except as provided above, the term does not include the constructing of water mains, telephone, telegraph, electrical power, or other conduits or lines in or above streets or roads, unless such power lines become a part of a street or road lighting system as aforesaid; nor does it include the constructing of sewage disposal facilities, nor the installing of sewer pipes for sanitation, unless the installation thereof is within, and a part of, a street or road drainage system.

Business and Occupation Tax

Such contractors are taxable under the public road construction classification upon their total contract price.

The business and occupation tax does not apply to the cost of or charge made for labor and services performed in respect to the mining, sorting, crushing, screening, washing, hauling, and stockpiling of sand, gravel, and rock, when such sand, gravel, or rock is taken from a pit or quarry which is owned by or leased to a county or city and such sand, gravel or rock is

(a) Stockpiled in said pit or quarry for placement on the street, road, or highway by the county or city itself using its own employees, or

(b) Placed on the street, road, or highway by the county or city itself using its own employees, or

(c) Sold by the county or city at actual cost to another county or city for road use.

Retail Sales Tax

The retail sales tax applies upon the sale to such contractors of all materials including prefabricated and precast items, equipment and supplies used or consumed in the performance of such contracts.

The retail sales tax does not apply upon any portion of the charge made by such contractors.

The sales tax does not apply to charges made for labor and services which are exempt from business tax as indicated above.

Use Tax

The use tax applies to the use by all contractors of all materials including prefabricated and precast items, equipment and supplies upon which the retail sales tax has not been paid. This tax also applies in respect to articles produced or manufactured by them for commercial use. (See WAC 458-20-134.)

The use tax does not apply in respect to the use of any sand, gravel, or rock to the extent of the cost of or charges made for labor and services performed in respect to the mining, sorting, crushing, screening, washing, hauling, and stockpiling such sand, gravel, or rock, when such sand, gravel, or rock is taken from a pit or quarry which is owned by or leased to a county or a city, and such sand, gravel, or rock is either (1) stockpiled in said pit or quarry for placement or is placed on the street, road, place, or highway of the county or city by the county or city itself (i.e., by its own employees), or (2) sold by the county or city to a county or a city at actual cost for placement on a street, road, place, or highway owned by the county or city. This exemption shall not apply to the use of such material to the extent of the cost of or charge made for such labor and services, if the material is used for other than public road purposes or is sold otherwise than as here indicated.

(For lien of unpaid taxes on the retained percentage withheld on public improvement contract, see WAC 458-20-217.)

[Order ET 71-1, § 458-20-171, filed 7/22/71; Order ET 70-3, § 458-20-171 (Rule 171), filed 5/29/70, effective 7/1/70.]

WAC 458-20-172 Clearing land, moving earth, cleaning, fumigating, razing or moving existing buildings, and janitorial services. Persons engaged in performing well drilling, contracts for the grading or clearing of land or the moving of earth, and which do not involve the building, repairing or improving of any streets, roads, etc. which are owned by a municipal corporation or political subdivision of the state or by the United States (see WAC 458-20-171); and persons engaged in performing contracts which involve the cleaning, fumigating, razing or moving of existing buildings or structures and persons performing janitorial services are taxable as follows:

Business and Occupation Tax

Taxable under the classification retailing upon gross income from contracts to perform such services for consumers, but excluding gross income from contracts providing solely for the performance of janitorial services the mere core drilling of or testing of soil samples, or the mere leveling of land for agricultural purposes.

Taxable under the classification wholesaling—all others upon gross income from subcontracts to perform such services for resale.

Taxable under the classification service and other activities upon gross income from contracts to perform janitorial services the mere core drilling of or testing of soil samples, or the mere leveling of land for agricultural purposes.

The term "janitorial services" includes activities performed regularly and normally by commercial janitor service businesses. Generally, these activities include the washing of interior and exterior window surfaces, floor cleaning and waxing, the cleaning of interior walls and woodwork, the cleaning in place of rugs, drapes and upholstery, dusting, disposal of trash, and cleaning and sanitizing bathroom fixtures. The term "janitorial services" does not include, among others, cleaning the exterior walls of buildings, the cleaning of septic tanks, special clean up jobs required by construction, fires, floods, etc., painting, papering, repairing, furnace or chimney cleaning, snow removal, sandblasting, or the cleaning of plant or industrial machinery or fixtures.

Retail Sales Tax

Persons engaged in performing contracts for the grading or clearing of land, the moving of earth or the cleaning, fumigating, razing or moving of existing buildings or structures must collect the retail sales tax upon the full contract price when the work is performed for consumers. The retail sales tax is not applicable to charges for janitorial services or the mere leveling of land for agricultural purposes.

The retail sales tax applies upon the sales to such contractors of equipment and supplies used or consumed in the

performance of such contracts and which are not resold as a component part of the work.

Use Tax

The use tax applies to the use by such contractors of equipment and supplies upon which the retail sales tax has not been paid.

[Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), § 458-20-172, filed 3/15/83; Order ET 71-1, § 458-20-172, filed 7/22/71; Order ET 70-3, § 458-20-172 (Rule 172), filed 5/29/70, effective 7/1/70.]

WAC 458-20-173 Installing, cleaning, repairing or otherwise altering or improving personal property of consumers.

Business and Occupation Tax

Retailing. Persons installing, cleaning, decorating, beautifying, repairing or otherwise altering or improving tangible personal property of consumers or for consumers are taxable under the retailing classification upon the gross proceeds received from sales of tangible personal property and the rendition of services.

Wholesaling. Persons who sell tangible personal property to, or render any of the above services for others than consumers, are taxable under the wholesaling classification upon the gross proceeds of sales received.

There must be included within gross amounts reported for tax all fees for services rendered and all charges recovered for expenses incurred in connection therewith, such as transportation costs, hotel, restaurant, telephone and telegraph charges, etc.

Retail Sales Tax

Persons engaged in the business of installing, cleaning, decorating, beautifying, repairing or otherwise altering or improving tangible personal property of consumers or for consumers are required to collect the retail sales tax upon the total charge made for the rendition of such services, even though no tangible personal property in the form of materials or supplies is sold or used in connection with such services. Where tangible personal property in the form of materials and supplies is sold or used in connection with such services, the retail sales tax applies to the total charges made for the sale of the materials and supplies and the services rendered in connection therewith.

The following are illustrative of services upon which the retail sales tax applies to the total charge made to consumers:

Laundering, dyeing and cleaning;

Automobile repairing, washing and painting;

Boat repairing (see WAC 458-20-175 and 458-20-176 for certain exemptions); shoe repairing and shining;

Altering or repairing wearing apparel.

In general, the repairing of any personal property, such as radios, refrigerators, machines, watches and jewelry and other articles.

The retail sales tax does not apply to sales of materials which are resold as a part of the articles of tangible personal property being repaired, altered or improved. Therefore, for buyers giving a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to sellers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits), the retail sales tax will not apply to purchases such as:

(1) Parts or paint by an automotive repairman;

(2) Lumber, chandlery, etc., by a boat repairman;

(3) Shoe findings, thread, nails, polish and dyes by a shoe repairman;

(4) Solder, wire, condensers, etc., by a radio or television repairman.

Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

On the other hand the retail sales tax does apply to the purchase of all other supplies which may be consumed and utilized by such persons in the rendition of such services, such as fuel, lubricant, machines, hand tools, stationery and other supplies and equipment.

REPAIRS FOR OUT-OF-STATE PERSONS. Persons residing outside this state may ship into this state articles of tangible personal property for the purpose of having the articles repaired, cleaned, or otherwise altered, and then returned to them. The retail sales tax is not applicable to the charge made for labor and/or materials, provided the seller, as a requirement of the agreement, delivers the property to the purchaser at a point outside this state or delivers the property to a common or bona fide private carrier consigned to the purchaser at a point outside this state. Proof of exempt sales will be the same as that required for sales of tangible personal property in interstate commerce. See WAC 458-20-193. No deduction is allowed, however, under the business and occupation tax.

For taxability of warranties and maintenance agreements, see WAC 458-20-257.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-070, § 458-20-173, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), § 458-20-173, filed 3/15/83; Order ET 70-3, § 458-20-173 (Rule 173), filed 5/29/70, effective 7/1/70.]

WAC 458-20-174 Sales of motor vehicles, trailers, and parts to motor carriers operating in interstate or foreign commerce. (1) **Introduction.** This section explains the retail sales tax exemptions provided by RCW 82.08.0262 and 82.08.0263 for sales to for hire motor carriers operating in interstate or foreign commerce. Addressed are the requirements which must be met and the documents which must be preserved to substantiate a claim of retail sales tax exemption. Motor carriers should refer to WAC 458-20-17401 for a discussion of the use tax and use tax exemptions available to motor carriers for the purchase or use of vehicles and parts under RCW 82.12.0254.

(2) **Business and occupation tax.** Business and occupation (B&O) tax is due on all sales to motor carriers when delivery is made in Washington, notwithstanding that the retail sales tax may not apply because of the specific statutory exemptions provided by RCW 82.08.0262 and 82.08.0263.

(a) **Retailing of interstate transportation equipment.** This B&O tax classification, with respect to sales to motor carriers, applies to retail sales which are exempt from retail sales tax because of the provisions of RCW 82.08.0262 or 82.08.0263. (See RCW 82.04.250.) The retailing of interstate transportation B&O tax applies to the following, but only

when the retail sales tax exemption requirements for RCW 82.08.0262 or 82.08.0263 are met:

(i) Sales of motor vehicles, trailers, and component parts thereof;

(ii) The lease of motor vehicles and trailers without operator; and

(iii) Charges for labor and services rendered in respect to constructing, cleaning, repairing, altering or improving vehicles and trailers or component parts thereof. The term "component parts" means any tangible personal property which is attached to and becomes an integral part of the motor vehicle or trailer. It includes such items as motors, motor and body parts, batteries, paint, permanently affixed decals, and tires. "Component parts" includes the axle and wheels, referred to as "converter gear" or "dollies," which is used to connect a trailer behind a tractor and trailer. "Component parts" can include tangible personal property which is attached to the vehicle and used as an integral part of the motor carrier's operation of the vehicle, even if the item is not required mechanically for the operation of the vehicle. It includes cellular telephones, communication equipment, fire extinguishers, and other such items, whether themselves permanently attached to the vehicle or held by brackets which are permanently attached. If held by brackets, the brackets must be permanently attached to the vehicle in a definite and secure manner with these items attached to the bracket when not in use and intended to remain with that vehicle. It does not include antifreeze, oil, grease, and other lubricants which are considered as consumed at the time they are placed into the vehicle, even though required for operation of the vehicle. It does include items such as spark plugs, oil filters, air filters, hoses and belts.

(b) **Retailing.** The retailing B&O tax applies to the following:

(i) Sales and services as described in (a)(i) through (iii) of this subsection, which do not meet the exemption requirements provided in RCW 82.08.0262 or 82.08.0263;

(ii) Sales of equipment, tools, parts and accessories which do not become a component part of a motor vehicle or trailer used in transporting persons or property therein;

(iii) Sales of consumable supplies, such as oil, antifreeze, grease, other lubricants, cleaning solvents and ice; and

(iv) Towing charges.

(c) **Interstate sales deduction for lease income.** Persons who lease motor vehicles and trailers to motor carriers at retail (without operator) may claim an interstate sales deduction for the amount of the lease income attributable to the actual out-of-state use of the vehicles and trailers. Documentation substantiating such a claim must be retained by the lessor. This deduction may be taken even if the vehicle is not used substantially in interstate hauls for hire. The B&O tax applies to that portion of use of the vehicle while the vehicle is being used in Washington, even if the usage is in connection with interstate hauls and the vehicle is used substantially in hauling for hire in interstate commerce. See also WAC 458-20-193 Inbound and outbound interstate sales of tangible personal property.

(3) **Retail sales tax.** RCW 82.08.0262 and 82.08.0263 provide retail sales tax exemptions for certain sales to motor carriers when delivery is made in Washington.

(a) **Sales of motor vehicles and trailers.** RCW 82.08.0263 provides an exemption from the retail sales tax for sales of motor vehicles and trailers to be used for transporting therein persons or property for hire in interstate or foreign commerce. This exemption is available whether such use is by a for hire motor carrier, or by persons operating the vehicles and trailers under contract with a for hire motor carrier. The for hire carrier must hold a carrier permit issued by the Interstate Commerce Commission or its successor agency to qualify for this exemption. The seller, at the time of the sale, must retain as a part of its records an exemption certificate which must be completed in its entirety. The buyers' retail sales tax exemption certificate is available on the department's internet site at http://dor.wa.gov, or can be obtained by contacting the department at:

Taxpayer Services
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478
1-800-647-7706

If the department's buyers' retail sales tax exemption certificate is not used, the form used must be in substantially the following form:

Exemption Certificate

The undersigned hereby certifies that it is, or has contracted to operate for, the holder of carrier permit No. . . . ., issued by the Interstate Commerce Commission or its successor agency, and that the vehicle this date purchased from you being a (specify truck or trailer and make) , Motor No. . . . . , Serial No. . . . . is entitled to exemption from the Retail Sales Tax under the provisions of RCW 82.08.0263. This certificate is given with full knowledge of, and subject to, the legally prescribed penalties for fraud and tax evasion.

Dated . . . . . .

. . . . . .
(name of carrier-purchaser)

By . . . . . .
(title)

. . . . . .
(address)

The lease of motor vehicles and trailers to motor carriers, without operator, must satisfy all conditions and requirements provided by RCW 82.08.0263 to qualify for the retail sales tax exemption. Failure to meet these requirements will require the lessor to collect the retail sales tax on the lease. However, where the exemption from retail sales tax has not been met, a retail sales tax exemption may continue to apply to that portion of the lease while the vehicle is being used outside Washington, provided the lessor can substantiate the usage outside Washington. (See WAC 458-20-193.)

(b) **Sales of component parts of motor vehicles and trailers and charges for repairs, etc.** RCW 82.08.0262 provides an exemption from the retail sales tax for sales of component parts and repairs of motor vehicles and trailers. This exemption is available only if the user of the motor vehicle or

trailer is the holder of a carrier permit issued by the Interstate Commerce Commission or its successor agency which authorizes transportation by motor vehicle across the boundaries of Washington. Since carriers are required to obtain these permits only when the carrier is hauling for hire, the exemption applies only to parts and repairs purchased for vehicles which are used in hauling for hire. The exemption includes labor and services rendered in constructing, repairing, cleaning, altering, or improving such motor vehicles and trailers.

(i) This exemption is available whether the motor vehicles or trailers are owned by, or operated under contract with, persons holding the carrier permit. This exemption applies even if the motor vehicle or trailer to which the parts are attached will not be used substantially in interstate hauls, provided the vehicles are used in hauling for hire.

(ii) The seller must retain as a part of its records a completed exemption certificate. This certificate may be:

(A) Issued for each purchase;

(B) Incorporated in or stamped upon the purchase order; or

(C) In blanket form certifying all future purchases as being exempt from sales tax. Blanket exemption certificates are valid for as long as the buyer and seller have a recurring business relationship. A "recurring business relationship" means at least one sale transaction within a period of twelve consecutive months. RCW 82.08.050 (7)(c).

(iii) The buyers' retail sales tax exemption certificate is available on the department's internet site at http://dor.wa.gov, or can be obtained by contacting the department at:

Taxpayer Services
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478
1-800-647-7706

If the department's buyers' retail sales tax exemption certificate is not used, the form used must be in substantially the following form:

Exemption Certificate

The undersigned hereby certifies that it is, or has contracted to operate for, the holder of a carrier permit, No.. . . . . ., issued by the Interstate Commerce Commission or its successor agency authorizing transportation by motor vehicle across the boundaries of this state. The undersigned further certifies that the motor truck or trailer to be constructed, repaired, cleaned, altered, or improved by you, or to which the subject matter of this purchase is to become a component part, will be used in direct connection with the business of transporting therein persons or property for hire; and that such sale and/or charges are exempt from the Retail Sales Tax under the provisions of RCW 82.08.0262. This certificate is given with full knowledge of, and subject to, the legally prescribed penalties for fraud and tax evasion.

Dated. . . . . .

. . . . . .
(name of carrier-purchaser)

. . . . . .
(address)

By . . . . . .
(title)

(c) **Taxable sales.** The following sales do not qualify for exemption under the provisions of RCW 82.08.0262 or 82.08.0263, and are subject to the retail sales tax when delivery is made in Washington.

(i) Sales of equipment, tools, parts and accessories which do not become a component part of a motor vehicle or trailer used in transporting persons or property for hire. This includes items such as tire chains and tarps which are not custom made for a specific vehicle.

(ii) Sales of consumable supplies, such as oil, antifreeze, grease, other lubricants, cleaning solvents and ice.

(iii) Towing charges.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.08.0262, and 82.08.0263. WSR 08-14-018, § 458-20-174, filed 6/20/08, effective 7/21/08. Statutory Authority: RCW 82.32.300. WSR 97-11-022, § 458-20-174, filed 5/13/97, effective 6/13/97; WSR 94-18-003, § 458-20-174, filed 8/24/94, effective 9/24/94; WSR 83-07-033 (Order ET 83-16), § 458-20-174, filed 3/15/83; Order ET 71-1, § 458-20-174, filed 7/22/71; Order 70-3, § 458-20-174 (Rule 174), filed 5/29/70, effective 7/1/70.]

WAC 458-20-17401 Use tax liability for motor vehicles, trailers, and parts used by motor carriers operating in interstate or foreign commerce. (1) **Introduction.** This section explains the use tax and the use tax exemptions provided by RCW 82.12.0254 which apply to for hire motor carriers operating in interstate or foreign commerce. For hire motor carriers should refer to WAC 458-20-174 for a discussion of the retail sales tax and retail sales tax exemptions which apply to motor carriers for the purchase of vehicles and parts under RCW 82.08.0262 and 82.08.0263.

(2) **Use tax.** The use tax complements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer of any tangible personal property purchased at retail, where the user has not paid retail sales tax with respect to the purchase of the property used. (See also WAC 458-20-178.) If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the retail sales or use tax directly to the department unless the purchase and/or use is exempt from the retail sales and/or use tax.

(3) **Motor vehicles and trailers.** Purchasers of motor vehicles and trailers should note the differences in the conditions and requirements for the retail sales and use tax exemptions provided by RCW 82.08.0263 and 82.12.0254, respectively. The purchaser of a motor vehicle or trailer may qualify for the retail sales tax exemption at the time of purchase, yet incur a use tax liability for the subsequent use of the same vehicle or trailer.

(a) For vehicles purchased in Washington, RCW 82.12.0254 provides a use tax exemption for the use of any motor vehicle or trailer while being operated under the authority of a trip permit and moving from the point of delivery in this state to a point outside this state.

(b) RCW 82.12.0254 also provides a use tax exemption for the use of any motor vehicle or trailer owned by, or operated under contract with, a for hire motor carrier engaged in the business of transporting persons or property in interstate

or foreign commerce if both of the following conditions are met:

(i) The user is, or operates under contract with, a holder of a carrier permit issued by the Interstate Commerce Commission (ICC) or its successor agency; and

(ii) The vehicle is used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of the state.

"In substantial part" means that the motor vehicle or trailer for which exemption is claimed actually crosses Washington boundaries and is used a minimum of twenty-five percent in interstate hauling for hire.

(c) The motor carrier must continue to substantially use the motor vehicle or trailer in interstate for hire hauls during each calendar year to retain the exemption from use tax. This requires that at the start of each calendar year the carrier review the usage of each vehicle and trailer for a "view period" consisting of the previous calendar year. If a particular vehicle was purchased or sold during the year so that the vehicle was not available for use during the entire calendar year, the taxpayer at its option may elect to review the usage during the portion of the year during which the vehicle was owned or may use a twelve-month period beginning with the date of purchase of a vehicle or ending with the date of sale of a vehicle. For example, if a vehicle is traded-in on May 30, 1996, the taxpayer must meet the substantial use test for this vehicle for either the period January through May 1996 or for the period June 1, 1995, through May 30, 1996. Use tax is due for those vehicles which have not been used substantially in interstate commerce and on which retail sales or use tax has not been paid.

(d) Carriers who maintain their records on a fiscal year basis may, at their option, elect to review the usage of their vehicles using their fiscal year rather than the calendar year. If a fiscal year is used, it must be used for the entire fleet of vehicles. These carriers may not change to a calendar year basis without first obtaining prior approval from the department.

(e) Usage will be reviewed on a calendar or fiscal year basis and not on a "moving" twelve-month period. For example, a tractor purchased on August 1, 1996, will need to have met the substantial use test for the period August through December 1996, or for the period August 1, 1996, through July 31, 1997, the period selected being at the taxpayer's option, and for the calendar year 1997 and each calendar year thereafter in order to retain the use tax exemption.

(f) The motor carrier may select one of the methods from those listed below to determine if its motor vehicles and trailers satisfy the substantial use threshold for exemption under RCW 82.12.0254. The particular method must be applied to all trucks, tractors, and trailers within the fleet. Regardless of the method selected, a vehicle will not be considered as used in interstate hauls unless the vehicle actually crosses the boundaries of the state and is used in part outside Washington. The motor carrier may change the method with the prior written consent of the department of revenue. The methods are:

(i) Line crossing. The line crossing method compares the number of interstate for hire hauls made by a particular motor vehicle or trailer to the total number of for hire hauls. The motor vehicle or trailer must actually cross the boundaries of this state or be used for hauls which begin and end outside this state, for the haul to be considered an interstate haul.

(ii) Mileage. The mileage method compares the interstate mileage associated with the for hire hauls made by a particular motor vehicle or trailer, to the total mileage associated with its for hire hauls. All mileage associated with a specific haul which requires the motor vehicle or trailer to actually cross the boundaries of this state, or haul exclusively outside this state, is considered to be interstate mileage. Where a vehicle is returning empty after having delivered an interstate load or is empty on its way to pickup an interstate load, the empty mileage will be considered to be part of the mileage from an interstate haul.

(iii) Revenue. The revenue method compares the interstate for hire revenue generated by the particular motor vehicle or trailer to the total for hire revenue generated. The revenue generated by the motor vehicle or trailer actually crossing the boundaries of this state, or hauling exclusively outside this state, is considered to be interstate revenue for the purposes of determining use tax liability. If the motor carrier uses more than one motor vehicle or trailer to transport the cargo, the revenue generated from hauling this cargo must be allocated between the motor vehicles and/or trailers used. For the purposes of determining use tax liability, a vehicle will not be considered as having interstate revenue even if the haul originates or ends outside Washington unless the vehicle actually crosses the boundaries of the state.

(iv) Other. Any other method may be used when approved in advance and in writing by the department of revenue.

(g) The following examples show how the methods of determining substantial interstate use would be applied to various situations. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(i) ARC Trucking picks up a load of cargo in Spokane, Washington and delivers it to the dock in Seattle, Washington, for subsequent shipment to Japan. While ARC may claim an interstate and foreign sales deduction on its excise tax return for the income attributable to this haul if all of the requirements of RCW 82.16.050(8) are met, the haul itself is considered to be intrastate for the purposes of determining whether the tractor/trailer rig meets the substantial use threshold discussed in RCW 82.12.0254. Both the pickup and delivery points are within the state of Washington.

(ii) DMG Express picks up a load of cargo in Yakima, Washington for ultimate delivery in Billings, Montana. The cargo is initially hauled from the Yakima location to DMG's hub terminal in Spokane, Washington by truck A. It is unloaded from truck A at the hub terminal, reloaded on truck B, and delivered to Billings. For the purposes of determining qualification for the use tax exemption provided by RCW 82.12.0254, two hauls have taken place. The haul performed by truck A is considered to be an intrastate haul since truck A did not cross the borders of Washington, while the haul performed by truck B is considered interstate for purposes of determining continued exemption from use tax on the trucks, even though the entire hauling income may be deductible from the motor transportation tax.

(iii) AA Express operates one tractor/trailer rig, which has previously met the retail sales and use tax exemption requirements. AA verifies compliance with the twenty-five percent substantial use threshold on a calendar year basis, using the line crossing method. AA makes one hundred for hire hauls within the calendar year. Of these hauls, seventy-one are entirely in Washington, ten are performed entirely outside Washington, and nineteen require AA to cross the borders of Washington. AA Express has not incurred a use tax liability on the tractor/trailer rig as twenty-nine percent of the for hire hauls were interstate in nature.

(iv) BDC Hauling operates one tractor/trailer rig which has previously met the retail sales and use tax exemption requirements. BDC verifies compliance with the twenty-five percent substantial use threshold on a calendar year basis, using the mileage method. BDC makes one hundred for hire hauls within the calendar year, for a total of one hundred thousand miles. Included in this mileage figure are the unladen or "empty" miles BDC incurs from delivery points to its terminal. Fifteen of these hauls were interstate in nature and involved laden travel of twenty thousand miles, including the Washington miles of the interstate hauls where the rig made border crossings. BDC's rig also incurred an additional eight thousand miles as a result of having to drive unladen from the delivery point of an interstate haul to its Washington terminal. BDC Hauling has not incurred a use tax liability for its use of the tractor/trailer rig. Under the mileage method, twenty-eight percent of the tractor/trailer's usage was in interstate hauling.

(v) GV Trucking operates one tractor/trailer rig which has previously met the retail sales and use tax exemption requirements. GV verifies compliance with the twenty-five percent substantial use threshold on a calendar year basis, using the revenue method. GV makes one hundred for hire hauls within the calendar year, for which GV earns eighty thousand dollars. Fifteen of these hauls were interstate in nature, for which GV earned twenty thousand dollars. GV Trucking has not incurred a use tax liability for its use of the tractor/trailer rig. Under the revenue method, twenty-five percent of GV's usage of the tractor/trailer rig was in interstate hauling.

(vi) XYZ Trucking operates a single tractor/trailer rig which has previously met the retail sales and use tax exemption requirements. XYZ picks up two loads of cargo in Seattle, one load for delivery to Kent, Washington and another for delivery to Portland, Oregon. Upon delivery of the cargo to Kent, XYZ picks up another load for delivery to Portland, Oregon. XYZ has performed three separate hauls, even if the loads are combined on the same rig. The Seattle to Portland and Kent to Portland hauls are considered interstate hauls, the Seattle to Kent haul intrastate. If using the mileage method the mileage associated with the Seattle to Portland and Kent to Portland hauls would be combined to determine total interstate miles, even though the rig made only one trip to Portland. If using the revenue method, the revenue generated by the Seattle to Portland and Kent to Portland hauls would be considered interstate. The mileage and/or revenue associated with the Seattle to Kent haul would be considered intrastate.

(4) **Special application to trailers.** Motor carriers must keep appropriate records and determine qualification for the use tax exemption provided by RCW 82.12.0254 for each individual truck and tractor. Motor carriers are encouraged to keep similar records for each individual trailer. Where records are maintained to document the use of individual trailers, use tax liability for trailers must be determined on the basis of those records. However, it is recognized that some motor carriers have no system of tracking or documenting the travel of their trailers and it would be an undue burden to require such recordkeeping, particularly where a tractor may be used to pull multiple trailers and the trailers are not assigned to a specific tractor. These motor carriers may elect to determine the use tax liability attributable to their use of trailers on the basis of their actual use of the tractors.

(a) Under this method, it is assumed that there is a direct correlation between the use of tractors and the use of trailers. Whenever use tax is incurred on a tractor because of the failure to maintain the twenty-five percent interstate usage, use tax will also be due on one or more trailers. The number of trailers subject to the use tax under this method shall correspond to the fleetwide trailer to tractor ratio. Any trailer to tractor ratio resulting in a fraction shall be rounded up when determining the number of trailers subject to the use tax. For example, if the fleetwide ratio of trailers to tractors is two and one quarter to one, and one tractor fails to maintain the substantial use threshold in a given year, the motor carrier shall incur a use tax liability on three trailers. However, if two tractors fail to maintain the substantial use threshold in a given year, the motor carrier shall incur a use tax liability on five trailers.

(b) The trailer or trailers subject to use tax under this method shall be those acquired nearest to the purchase date of the tractor triggering the use tax liability for those trailers meeting the following conditions:

(i) The trailer or trailers are compatible for towing with the tractor upon which use tax is incurred; and

(ii) The trailer or trailers have not previously incurred a retail sales or use tax liability; and

(iii) The trailer or trailers have been actively used in hauling for hire in the year tax liability is incurred.

(c) Under this method of reporting, use tax liability is generally incurred on one or more trailers whenever a tractor is subject to the use tax. If a tractor is purchased with the intent that less than twenty-five percent of the hauls will be across state borders, it will be presumed the tractor will also be pulling a trailer or trailers on which use tax is also due. For example, ABC Trucking has eight tractors and fifteen trailers in its fleet. The tractors and trailers met the exemption from retail sales tax and use tax at the time they were purchased, and it was determined during previous annual reviews that the tractors continued to be substantially used on interstate hauls. However, at the time of the annual review for the just-completed calendar year it was determined that one tractor was not used at least twenty-five percent in interstate hauls. Use tax is due on this tractor. Under this method, use tax is also due on two trailers. The two trailers on which use tax must be reported are the two purchased most nearly to the purchase date of the tractor.

(5) **Valuation.** The value of the motor vehicle or trailer subject to the use tax is its fair market value at the time of first use within the review period for which the exemption cannot be maintained. However, because the taxpayer will not know until the close of the period whether the usage met the

exemption requirements, the use tax is due and should be reported on the last excise tax return for that review period. For example, a motor carrier who has previously met the exemption requirements for a particular truck determines this truck no longer was substantially used in interstate hauls during calendar year 1996. Use tax should be reported on the last tax return filed for 1996 with the taxable value based on the value of the truck at January 1, 1996.

(a) The department of revenue will accept independent publications containing values of comparable vehicles if those values are generally accepted in the industry as accurately reflecting the value of used vehicles. The department will also consider notarized valuation opinions signed by qualified appraisers and/or dealers as evidence of the fair market value. In the absence of a readily available fair market value, the department will accept a value based on depreciation schedules used by the department of licensing to determine the value of vehicles for licensing purposes.

(b) The following examples show how use tax liability would be determined in typical situations. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(i) ABC Trucking purchased five trailers for use in both interstate and intrastate for hire hauls on January 1, 1996. All the necessary conditions for exemption under RCW 82.08.0263 were met; delivery was made in Washington, and the trailers were purchased without payment of the retail sales tax. The taxpayer uses the "line crossing" method for determining interstate use.

ABC Trucking keeps a journal showing the origin and destination for each haul which identifies each truck/tractor and trailer used on a per unit basis. This journal is reviewed at the end of each calendar year to verify compliance with the statutory provision that motor vehicles and trailers be substantially used for transporting therein persons or property for hire across the boundaries of the state. During the first year of use, all five of the trailers met the "substantial use" threshold. However, in reviewing this journal for the 1997 calendar year, ABC Trucking determines that two of the trailers failed to meet the twenty-five percent "substantial use" threshold. ABC Trucking must remit use tax directly to the department on its December 1997 excise tax return, based on the fair market values of the two trailers as of January 1, 1997. Since the taxpayer maintained specific usage records for each trailer, the "substantial use" in interstate hauling must be met by each trailer for which exemption is claimed. If detailed records for usage of trailers had not been kept, use tax liability of the trailers would have been based on the tractors. In any event, use tax liability may not be determined based on the overall experience of a fleet of vehicles. If a vehicle is used both in hauling for hire and in hauling the carrier's own products, the "substantial use" is determined solely on the usage in hauling for hire.

(ii) DB Carriers is a motor carrier which is engaged in both intrastate and interstate for hire hauls. DB purchases and first uses a truck in Washington on January 1, 1997. All the necessary conditions for exemption under RCW 82.08.0263 were met; delivery was made in Washington, and the truck was purchased without payment of the retail sales tax. DB Carriers uses the "line crossing" method for determining interstate use.

DB Carriers keeps a journal showing the origin and destination for each haul which identifies each truck used on a per unit basis. This journal is reviewed at the end of the 1997 calendar year, and DB determines that the truck failed to meet the twenty-five percent "substantial use" threshold. DB Carriers must remit use tax directly to the department on its December 1997 excise tax return, based on the fair market value of the truck as of January 1, 1997. DB Carriers may not compute the use tax liability based upon the December 31, 1997, fair market value as the vehicle never satisfied the substantial interstate use provision of RCW 82.12.0254.

(6) **Leased vehicles.** The use tax exemption requirements are the same for leased vehicles as for purchased vehicles. Motor vehicles and trailers, leased without operator are exempt from the use tax if the user is, or operates under contract with, a holder of a permit issued by the ICC or its successor agency and the vehicle is used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of the state. This requires that the leased vehicle be used a minimum of twenty-five percent in interstate hauls. The taxpayer may elect to use either the fiscal year of the business or a calendar year to determine if the leased vehicle was used substantially in interstate hauls for hire. Where the vehicle lease does not begin or end at the start of the calendar year (or fiscal year if the business uses a fiscal year view period), the same requirements apply to leased vehicles as to purchased vehicles (see subsection (3)(c) of this section).

(a) If the leased vehicle does not meet the substantial use requirement during the "view period," the use tax applies only to the portion of the lease payment which is for use in Washington during the "view period." See the examples in subsection (6)(b) of this section. Mileage is an acceptable basis for determining instate and out-of-state use. For the purposes of determining instate and out-of-state use of leased vehicles or trailers where use tax is determined to be due, all miles traveled in Washington by the leased vehicle are instate miles, notwithstanding that they may be associated with an interstate haul. The motor carrier must maintain accurate records of actual instate and out-of-state use to substantiate any claim that a portion of any lease payment was exempt of use tax because of out-of-state use. Use tax will be determined for each "view period." For example, if a truck was leased for the years 1996 and 1997 and failed to meet the substantial use requirement in 1996, but met the requirement in 1997, use tax would only be due for the usage in Washington which occurred in 1996.

(b) The following examples show how this method would be applied to typical situations. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(i) BG Hauling is a for hire carrier which on January 1, 1996, enters into a lease agreement for a truck without operator. All the necessary conditions for the retail sales and use tax exemptions for the first year of the lease were met. BG Hauling verifies compliance with the twenty-five percent substantial use threshold on a calendar year basis.

BG determines that this truck failed to meet the twenty-five percent substantial use threshold for calendar year 1997. Use tax will be due beginning with the period for which the exemption was not met, in this case beginning with January 1997. However, BG Hauling may report use tax only on that portion of each lease payment attributable to actual instate use, provided it maintains accurate records substantiating the truck's instate and out-of-state activity. Only mileage incurred while actually outside Washington will be considered out-of-state mileage. If BG Hauling continues to lease this truck in 1998, usage will again be reviewed for that period and use tax may or may not be due for the 1998 lease payments, depending on whether the vehicle was used substantially in interstate hauls during that year.

(ii) MG Inc. is an equipment distributor which, in addition to hauling its own product to customers, is engaged in hauling for hire activities. MG is a holder of an ICC permit. MG enters into a lease agreement for a truck without operator on January 1, 1996. All conditions for retail sales and use tax exemption are satisfied for the first year of the lease.

Based upon the truck's for hire hauling activities during the 1997 calendar year, MG determines that the use of the truck failed to satisfy the twenty-five percent substantial use threshold. MG must remit use tax upon the amount of lease payments made during 1997 at the time it files its last tax return in 1997. Provided accurate records are maintained to substantiate instate and of out-of-state use, MG may remit use tax only upon that portion of each lease payment attributable to actual instate use. While only the hauling for hire activities are reviewed when determining whether the truck satisfies the substantial interstate use threshold, once it is established the exemption cannot be maintained, the use tax liability is based upon all instate activity, including the motor carrier's hauling of its own product.

(7) **Component parts.** RCW 82.12.0254 also provides a use tax exemption for the use of tangible personal property which becomes a component part of any motor vehicle or trailer used for transporting therein persons or property for hire. This exemption is available for motor vehicles or trailers owned by, or operated under contract with, a person holding a carrier permit issued by the Interstate Commerce Commission or its successor agency authorizing transportation by motor vehicle across the boundaries of this state. Since carriers are required to obtain these permits only when the carrier is hauling for hire, the exemption applies only to tangible personal property purchased for vehicles which are used in hauling for hire. The exemption for component parts will apply even if the parts are for use on a motor vehicle or trailer which is used less than twenty-five percent in interstate hauls for hire, provided the vehicle is used in hauling for hire.

(a) For the purposes of this section, the term "component parts" means any tangible personal property which is attached to and becomes an integral part of the motor vehicle or trailer. It includes such items as motors, motor and body parts, batteries, paint, permanently affixed decals, and tires. "Component parts" includes the axle and wheels, referred to as "converter gear" or "dollies," which is used to connect a trailer behind a tractor and trailer. "Component parts" can include tangible personal property which is attached to the vehicle and used as an integral part of the motor carrier's operation of the vehicle, even if the item is not required mechanically for the operation of the vehicle. It includes cellular telephones, communication equipment, fire extinguishers, and other such items, whether themselves permanently attached to the vehicle or held by brackets which are permanently attached. If held by brackets, the brackets must be permanently attached to the vehicle in a definite and secure manner with these items attached to the bracket when not in use and intended to remain with that vehicle. It does not include antifreeze, oil, grease, and other lubricants which are considered as consumed at the time they are placed into the vehicle, even though required for operation of the vehicle. It does include items such as spark plugs, oil filters, air filters, hoses and belts.

(b) The following items do not qualify for exemption from the use tax under the provisions of RCW 82.12.0254:

(i) Equipment, tools, parts and accessories which do not become a component part of a motor vehicle or trailer used in transporting persons or property for hire; and

(ii) Consumable supplies, such as oil, grease, other lubricants, cleaning solvents and ice.

[Statutory Authority: RCW 82.32.300. WSR 97-11-022, § 458-20-17401, filed 5/13/97, effective 6/13/97; WSR 94-18-004, § 458-20-17401, filed 8/24/94, effective 9/24/94.]

WAC 458-20-175 Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce. The term "private carrier" means every carrier, other than a common carrier, engaged in the business of transporting persons or property for hire.

The term "watercraft" includes every type of floating equipment which is designed for the purpose of carrying therein or therewith persons or cargo. It includes tow boats, but it does not include floating dry docks, dredges or pile drivers, or any other similar equipment.

The term "carrier property" means airplanes, locomotives, railroad cars or watercraft, and component parts of the same.

The term "component part" includes all tangible personal property which is attached to and a part of carrier property. It also includes spare parts which are designed for ultimate attachment to carrier property. The said term does not include furnishings of any kind which are not attached to the carrier property nor does it include consumable supplies. For example, it does not include, among other things, bedding, linen, table and kitchen ware, tables, chairs, ice for icing perishables or refrigerator cars or cooling systems, fuel or lubricants.

"Such persons," and "such businesses" mean the persons and businesses described in the title of this rule.

Business and Occupation Tax, Public Utility Tax

Persons engaged in such businesses are not subject to business tax or utility tax with respect to operating income received for transporting persons or property in interstate or foreign commerce. (See WAC 458-20-193.)

When such persons also engage in intrastate business activities they become taxable at the rates and in the manner stated in WAC 458-20-179, 458-20-181 and 458-20-193. For example, such persons are taxable under the retailing business tax classification upon the gross proceeds of sales of tan-

gible personal property, including sales of meals, when such sales are made within this state.

Persons selling tangible personal property to, or performing services for, others engaged in such businesses, are taxable to the same extent as they are taxable with respect to sales of property or services made to other persons in this state. However, on July 1, 1985, a statutory business and occupation tax deduction became effective for sales of fuel for consumption outside the territorial waters of the United States by vessels used primarily in foreign commerce. In order to qualify for this deduction sellers must take a certificate signed by the buyer or the buyer's agent stating: The name of the vessel for which the fuel is purchased; that the vessel is primarily used in foreign commerce; and, the amount of fuel purchased which will be consumed outside of the territorial waters of the United States. Sellers must exercise good faith in accepting such certificates and are required to add their own signed statement to the certificate to the effect that to the best of their knowledge the information contained in the certificate is correct. The following is an acceptable certificate form:

Foreign Fuel Exemption Certificate

SELLER: . . . . . VESSEL: . . . . . .

WE HEREBY CERTIFY that this purchase of (kind and amount of product) from (seller) will be consumed as fuel outside the territorial waters of the United States by the above-named vessel. We further certify that said vessel is used primarily in foreign commerce and that none of the fuel purchased will be consumed within the territorial boundaries of the State of Washington.

DATED . . . . . , 19 . . . . . .
Purchaser

. . . . . .
Purchaser's Agent

By: . . . . . .

. . . . . .
Title or Office

When a completed certification such as this is taken in good faith by the seller, the sale is exempt of business and occupation tax, whether made at wholesale or retail, and even though the fuel is delivered to the buyer in this state.

Retail Sales Tax

Sales of meals (including those sold to employees, see WAC 458-20-119) and retail sales of other tangible personal property, made by such persons, are subject to the retail sales tax when such sales are made within this state.

By reason of specific exemptions contained in RCW 82.08.0261 and 82.08.0262 the retail sales tax does not apply upon the following sales:

(1) Sales of airplanes, locomotives, railroad cars, or watercraft for use in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire;

(2) Sales of tangible personal property which becomes a component part of such carrier property in the course of constructing, repairing, cleaning, altering or improving the same;

(3) Sales of or charges made for labor or services rendered with respect to the constructing, repairing, cleaning, altering or improving of such carrier property;

(4) Sales of any tangible personal property other than the type referred to in 1 and 2 above, for use by the purchaser in connection with such businesses, provided that any actual use thereof in this state shall, at the time of actual use, be subject to the use tax.

Except as to sales of or charges made for labor or services rendered with respect to the constructing, repairing, cleaning, altering or improving of carrier property, the foregoing exemptions are limited to sales of tangible personal property. Hence the retail sales tax applies upon the sales of or charges made for labor or services rendered in respect to (1) the installing, repairing, cleaning, altering, imprinting or improving of any other type of tangible personal property; and in respect to (2) the constructing, repairing, decorating or improving of new or existing buildings or other structures. Thus the retail sales tax applies upon the charge made for repairing within this state of such things as switches, frogs, office equipment, or any other property which is not carrier property. It also applies upon the charge made for laundering linen and bedding. The tax also applies upon the charge made for constructing buildings, such as depots, wharves and hangars, or for repairing, decorating or improving the same.

However, the cost of installing, repairing, cleaning, altering, imprinting or improving of tangible personal property prior to its initial use by the carrier is considered as part of the initial cost of the property involved and therefore exempt from the sales tax. Thus, for example, the treating of railroad ties prior to their initial use is considered as part of the original cost of the ties and therefore exempt from the sales tax under RCW 82.08.0261.

Exemption certificates required. Persons selling tangible personal property or performing services which come within any of the foregoing exemptions are required to obtain from the purchaser, or his authorized agent, a certificate evidencing the exempt nature of the transaction. This certificate must identify the operator of the carrier by name and by its department of revenue registration number, if registered, and if not registered, by address.

The certificate may be in blanket form—that is, may certify as to all future purchases, or individual certificates may be made for each purchase. Also the certificate may be incorporated in or stamped upon the purchase order.

The certificate should be in substantially the following form:

Exemption Certificate

WE HEREBY CERTIFY that all the tangible personal property to be purchased from you will be for use in connection with our business of operating as a (private or common) carrier by (air, rail or water) in (interstate or foreign) commerce; that all (airplanes, locomotives, railroad cars or watercraft) or component parts thereof, to be constructed, repaired, cleaned, altered or improved by you, will be used in conducting (interstate or foreign) commerce; and that all

such sales are entitled to exemption from the Retail Sales Tax under the provisions of RCW 82.08.0261 and 82.08.0262.

Dated . . . . . , 19 . . .

. . . . . .
(Purchaser)

By . . . . . .
(Title-Officer or Agent)

Address . . . . . .
. . . . . .

Department of Revenue Registration No.
. . . . . .

Use Tax

The use tax does not apply upon the use of airplanes, locomotives, railroad cars or watercraft, including component parts thereof, which are used primarily in conducting such businesses.

"Actual use within this state," as used in RCW 82.08.-0261 does not include use of durable goods aboard carrier property while engaged in interstate or foreign commerce. Thus the use tax does not apply upon the use of furnishings and equipment (whether attached to the carrier or not) intended for use aboard carrier property while operating partly within and partly without this state. Included herein are such items as bedding, table linen and wares, kitchen equipment, tables and chairs, hand tools, hawsers, life preservers, parachutes, and other durable goods which are necessary, convenient or desirable for the proper operation of such carrier property.

The use tax does apply upon the actual use within this state of all other types of tangible personal property purchased at retail and upon which the sales tax has not been paid. Included herein are all consumable goods for use on and placed aboard carrier property while within this state, but only to the extent of that portion consumed herein. Thus the tax applies upon the use of the amount consumed in this state of ice, fuel and lubricants which are placed aboard in this state, and upon food supplies or catered meals placed aboard carrier property in this state and served to customers in this state by transportation companies when the meals so served are included in the charge for transportation. (The retail sales tax must be collected upon separate sales within this state of meals or other tangible personal property.) The tax does not apply upon the use within this state of any part of consumable goods for use on carrier property and placed aboard outside this state.

Liability for the use tax arises at the time of actual use thereof in this state.

Due to the difficulty in many cases of determining at the time of purchase whether or not the property purchased or a part thereof will be put to use in this state and due to the resulting accounting problems involved, persons engaged in the business of operating as private or common carriers by air, rail or water in interstate or foreign commerce will be permitted to pay the use tax directly to the department of revenue rather than to the seller, and such sellers are relieved of the liability for the collection of such tax. This permission is limited, however, to persons duly registered with the department. The registration number given on the certificate which will be furnished to the seller ordinarily will be sufficient evidence that the purchaser is properly registered.

As to persons operating in interstate or foreign commerce as carriers by air, rail or water who are not registered with the department and who, therefore, are not regularly filing tax returns with the department, sellers of durable goods must either collect the use tax at the time of the sale or require from such purchasers a further certificate to the effect that no part of the subject matter of the sale is for actual use in this state.

Similarly, where consumable goods, such as ice, bunker fuel, or lubricants are purchased by or for carriers not registered with the department, and delivered on board a carrier regularly engaged in interstate or foreign commerce for consumption while both within and without the territorial boundaries of the state of Washington, the seller is required to collect from the buyer the amount of use tax applicable to that portion of the products sold which will be consumed within this state.

It will be presumed that the entire amount of the goods purchased will be consumed within this state unless the seller obtains from the buyer a certificate certifying as to the amount thereof which will be consumed while within the territorial boundaries hereof.

The certificate shall be made by the master or chief engineer of the carrier, or by some other person known by the seller to be competent to make the same, and shall be substantially in the following form:

Certificate

. . . . .	. . . . .
Seller	Purchaser
. . . . .	. . . . .
Name of Carrier	Name of Owner or Agent

The undersigned does hereby certify as follows:

(1) The purchaser has this day purchased from the seller in the State of Washington certain amounts of (type of goods purchased) and has taken delivery thereof aboard said carrier for its exclusive use while regularly engaged in transporting persons or property for profit in interstate or foreign commerce.

(2) While the said carrier is within the territorial boundaries of the state of Washington, it will consume the following amounts of the commodities purchased:

. . . . . barrels of fuel oil
. . . . . gallons of lubricants
. . . . . pounds of grease
. . . . . other consumable goods

Dated . . . . . , 19 . . .

. . . . . .
Name

. . . . . .
Office or Title

[Statutory Authority: RCW 82.32.300. WSR 86-07-005 (Order ET 86-3), § 458-20-175, filed 3/6/86; WSR 83-07-033 (Order ET 83-16), § 458-20-175,

filed 3/15/83; Order ET 70-3, § 458-20-175 (Rule 175), filed 5/29/70, effective 7/1/70.]

WAC 458-20-176 Commercial deep sea fishing—Commercial passenger fishing—Diesel fuel. (1) **Definitions.** As used herein:

(a) "Commercial deep sea fishing" means fishing done for profit outside the territorial waters of the state of Washington. It does not include sport fishing or the operation of charter boats for sport fishing. (See WAC 458-20-183 for tax liability of such persons.) Nor does the phrase include the operation or purchase of watercraft for kelping, purse seining, or gill netting, because such fishing methods can be legally performed in Washington only within the territorial waters of the state (the three-mile limit). Therefore, watercraft rigged for fishing by any of these methods will be deemed for use in other than commercial deep sea fishing unless proof, including documentation to be retained by sellers, is furnished that said watercraft will be used for these purposes exclusively outside the Washington territorial limit.

(b) "Watercraft" means every type of floating equipment which is designed for the purpose of carrying therein or therewith fishing gear, fish catch or fishing crews, and used primarily in commercial deep sea fishing operations.

(c) "Component part" includes all tangible personal property which is attached to and a part of a watercraft. It includes dories, gurdies and accessories, bait tanks, baiting tables and turntables. It also includes spare parts which are designed for ultimate attachment to a watercraft. The said term does not include equipment or furnishings of any kind which are not attached to a watercraft, nor does it include consumable supplies. Thus it does not include, among other things, bedding, table and kitchen wares, fishing nets, hooks, lines, floats, hand tools, ice, fuel or lubricants.

(d) "Commercial passenger fishing" means that done from charter boats for sport outside the territorial waters of the state of Washington.

(2) **Business and occupation tax.**

(a) Persons engaged in commercial deep sea fishing are not taxable under the extracting classification with respect to catches obtained outside the territorial waters of this state.

(b) Such persons are taxable under either the retailing or the wholesaling classification with respect to sales made within this state, unless entitled to exemption by reason of the commerce clauses of the federal constitution. (See WAC 458-20-193.)

(3) **Retail sales tax.**

(a) By reason of the exemption contained in RCW 82.08.0262, the retail sales tax does not apply upon sales of watercraft (including component parts thereof) which are primarily for use in conducting commercial deep sea fishing operations, nor does said tax apply to sales of or charges made for labor and services rendered in respect to the constructing, repairing, cleaning, altering or improving of such property.

(b) The retail sales tax applies upon sales made to persons engaged in commercial deep sea fishing of every other type of tangible personal property and upon sales of or charges made for labor and services rendered in respect to the construction, repairing, cleaning, altering or improving of such other types of property. Thus, the retail sales tax applies upon sales to such persons of such things as fishing nets, hooks, lines, floats and bait; table and kitchen wares; hand tools, ice, fuel except diesel fuel as noted below, and lubricants for use or consumption, except only sales of watercraft and component parts thereof. For sales of food products see WAC 458-20-119 and 458-20-244.

(4) **Exemption certificates required.**

(a) Persons selling watercraft or component parts thereof to persons engaged in commercial deep sea fishing or performing services with respect to such craft or parts, are required to obtain from the purchaser a certificate evidencing the exempt nature of the transaction. This certificate must identify the purchaser by name and address, and by name of the watercraft with respect to which the purchase is made, and must contain a statement to the effect that the property purchased or repaired is for use primarily in commercial deep sea fishing operations.

(b) The certificate should be in substantially the following form:

Exemption Certificate

I HEREBY CERTIFY that the . . . . . this day ordered from or purchased from you, will be used primarily in commercial deep sea fishing operations outside the territorial waters of the State of Washington; that the vessel is not for fishing inside such territorial waters, and is not rigged or equipped for such fishing; that the registered name of the watercraft to which said purchase applies is (name of fishing boat); and that said sale is entitled to exemption under the provisions of RCW 82.08.0262.

Dated . . . . . , 19 . . .

. . . . . .
(Name of Purchaser)

By
(Name of officer or agent)

Address . . . . . .

(c) Incidental use within the waters of this state of fishing boats which are used primarily in deep sea fishing operations, will not deprive the owners thereof of the statutory exemption from the retail sales tax.

(d) In the event the fishing boat with respect to which an exemption is claimed is of a type used in the waters of Puget Sound or the Columbia River and the tributaries thereof, and is not practical for use in deep sea fishing, sellers should collect the retail sales tax upon all sales of such boats and component parts thereof and upon charges made for the repair of the same.

(e) It is a gross misdemeanor for a buyer to make a false certificate of exemption for the purpose of avoiding the tax.

(5) **Use tax.**

(a) The use tax does not apply upon the use of watercraft or component parts thereof.

(b) The use tax does apply upon the actual use within this state of all other types of tangible personal property purchased at retail and upon which the sales tax has not been paid (see WAC 458-20-178) except on diesel fuel as noted below.

(6) **Diesel fuel.**

(a) The law provides for sales and use tax exemptions on diesel fuel for both commercial passenger fishing (charter boats for sport fishing) and commercial deep sea fishing operations.

(b) Neither retail sales nor use tax applies with respect to sales or use of diesel fuel in the operation of watercraft in commercial deep sea fishing operations or commercial passenger fishing operations by persons who are regularly engaged in the business of such operations outside the territorial waters (three-mile limit) of this state. For purposes of this exemption a person is not regularly engaged in either business if the person has gross receipts from the extra territorial operations of less than five thousand dollars a year. For persons involved in both commercial deep sea fishing operations and commercial passenger fishing operations, the receipts from both shall be added together to determine eligibility for this exemption.

(c) This exemption is plenary in scope and it is not required that all of the diesel fuel purchased be used outside of the territorial waters of this state. If a person qualifies for the exemptions by virtue of operating a deep sea fishing vessel, and has the requisite amount of gross receipts from that activity, all diesel fuel purchases and uses by such person for such vessel are tax exempt.

(d) **Diesel fuel exemption certificates required.** Persons selling diesel fuel to such persons are required to obtain from the purchaser a certificate evidencing the exempt nature of the transaction. This certificate must identify the purchaser by name and address, and by the registered name and number of the watercraft with respect to which the purchase is made. It must contain a statement to the effect that the diesel fuel is for use by a person who is engaged in commercial deep sea fishing and/or commercial passenger fishing operations who has annual gross receipts therefrom of at least five thousand dollars. Blanket certificates covering all diesel fuel purchases for specified watercraft may be used, where appropriate. A seller of diesel fuel who accepts such a certificate in good faith shall not be liable for sales tax on the diesel fuel sold. Certificates must be retained by the sellers in their permanent records as evidence of the exempt nature of diesel sales to eligible buyers. It is a gross misdemeanor for a buyer to make a false certificate of exemption for the purpose of avoiding the tax.

(e) The certificate should be in substantially the following form:

Diesel Fuel Exemption Certificate

I HEREBY CERTIFY that diesel fuel which I will purchase from (name of dealer) will be used in the operation of a watercraft which is used in commercial deep sea or commercial passenger fishing operations outside the territorial waters of the state of Washington; that the registered name and number of the watercraft to which said purchase applies is (registered vessel name and number); that the owner(s) of said vessel has gross income, based on federal income tax returns, of not less than five thousand dollars a year from such extra territorial fishing operations; and that said sales are entitled to exemption under the provisions of chapter 494, Laws of 1987.

Dated . . . . . , 19 . . .

. . . . . .
(Name of Purchaser)

By
(Name of officer or agent)

Address . . . . . .

[Statutory Authority: RCW 82.32.300. WSR 88-03-055 (Order 88-1), § 458-20-176, filed 1/19/88; WSR 83-07-033 (Order ET 83-16), § 458-20-176, filed 3/15/83. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order ET 78-4), § 458-20-176, filed 6/27/78; Order ET 70-3, § 458-20-176 (Rule 176), filed 5/29/70, effective 7/1/70.]

WAC 458-20-177 Sales of motor vehicles, campers, and trailers to nonresident consumers. (1) **Introduction.** This section applies to any sale of a vehicle to a consumer who is not a resident of the state, including nonresident military personnel temporarily stationed in Washington. The section describes the different business and occupation (B&O) and retail sales tax consequences that result from vehicle sales to nonresidents, particularly the sales tax exemption provided by RCW 82.08.0264. It also describes the documentation a seller must retain to demonstrate that a sale is exempt.

For information on use tax liability associated with vehicles, see WAC 458-20-178, Use tax.

For sales of vehicles to Indians or Indian tribes and required documentation, see WAC 458-20-192, Indians—Indian country.

Questions regarding vehicle licensing or registration requirements should be directed to the department of licensing.

(2) **What is a "vehicle"?** For the purposes of this section, a "vehicle" is any vehicle of a type that may be lawfully licensed under chapter 46.16 RCW for operation on a public highway in this state, except that the term does not include any machinery and implements for use in conducting a farming activity subject to RCW 82.08.0268. The term "vehicle" includes, but is not limited to, a car, truck, camper, trailer, bus, motorhome, and motorcycles equipped for road use. It does not include farm tractors, bicycles, mopeds, motorized scooters, snowmobiles, or vehicles that are manufactured for exclusively off-road use.

(3) **What are the tax consequences when a vehicle sold to a nonresident is delivered in-state?** A sale of a vehicle to a nonresident where the vehicle is delivered in-state is exempt from retail sales tax if the sale meets the requirements of RCW 82.08.0264. In all other cases where the vehicle is delivered to the buyer in this state, the retail sales tax applies and must be collected at the time of sale, unless otherwise exempt by law. The mere fact that the buyer may be or claims to be a nonresident or that the buyer intends to, and actually does, use the vehicle in some other state does not, by itself, entitle the buyer to the exemption. In any case where the seller licenses or registers the vehicle in Washington on the buyer's behalf, the retail sales tax applies.

In computing the B&O tax liability of persons engaged in the business of selling vehicles, no deduction is allowed for a sale made to a nonresident for use outside this state if the nonresident buyer takes delivery in Washington. This is true

even if the buyer is entitled to an exemption from the retail sales tax.

(a) **Exemption requirements.** If a vehicle is delivered within this state to a nonresident buyer, retail sales tax does not apply if the vehicle is purchased for use outside this state and, immediately upon delivery, the vehicle:

(i) Is removed from the state under the authority of a trip permit issued by the department of licensing pursuant to RCW 46.16.160 or any agency of another state that has authority to issue similar permits; or

(ii) Is registered and licensed in the state of the buyer's residence, will not be used in this state more than three months, and will not be legally required to be registered and licensed in this state.

If the vehicle bears Washington state license plates, the seller must remove the Washington plates before delivering the vehicle and retain evidence of that removal to avoid liability for collection and payment of the retail sales tax.

(b) **Seller obligations; documentation.** For sales completed before July 22, 2007, the seller must properly document the following facts:

(i) The buyer is a nonresident of Washington;

(ii) The vehicle is for use outside this state;

(iii) The vehicle is to be removed from the seller's premises under the authority of either:

(A) A trip permit; or

(B) Valid license plates issued for that vehicle by the state of the buyer's residence, with the plates actually affixed to the vehicle upon final delivery; and

(iv) If the vehicle bears Washington state license plates, the seller has removed the Washington plates before delivery.

(c) **Seller obligations effective July 22, 2007.** For sales completed on or after July 22, 2007, the seller must retain the following documents, which must be made available upon request by the department of revenue (department):

(i) A copy of the buyer's currently valid out-of-state driver's license or other official picture identification issued by a jurisdiction other than Washington state;

(ii) A copy of any one of the following documents, on which there is an out-of-state address for the buyer:

• A current residential rental agreement;

• A property tax statement from the current or previous year;

• A utility bill, dated within the previous two months;

• A state income tax return from the previous year;

• A voter registration card;

• A current credit report; or

• Any other document determined by the department to be acceptable, with buyer's street address, such as:

(A) A bank statement issued within the previous two months;

(B) A government check issued within the previous two months;

(C) A pay check issued within the previous two months;

(D) Mortgage documents of current residence;

(E) Current vehicle insurance card;

(F) Letter or other documentation issued by the postmaster within the previous two months;

(G) Other government document issued within the previous two months;

(iii) A witnessed declaration in the form designated by the department, signed by the buyer, and stating that the buyer's purchase meets the requirements of this section (buyer's affidavit); and

(iv) A seller's certification, in the form designated by the department, that either a vehicle trip permit was issued or the vehicle was immediately registered and licensed in another state as required by RCW 82.08.0264.

To comply with these requirements, the seller must retain a properly completed buyer's affidavit and seller's certificate (in-state delivery). If the nonresident buyer is a corporation, the seller must also retain the number of the corporate nonresident permit.

(d) **What are the consequences for noncompliance?**

(i) Any seller that makes sales without collecting the tax to a person who does not provide the documents required under (c) of this subsection, and any seller who fails to retain the documents required under (c) of this subsection for the period prescribed by RCW 82.32.070 is personally liable for the amount of tax due.

(ii) Any seller that makes sales without collecting the retail sales tax under RCW 82.08.0264 and who has actual knowledge that the buyer's documentation required by (c) of this subsection is fraudulent is guilty of a misdemeanor and, in addition, is liable for the tax and subject to a penalty equal to the greater of one thousand dollars or the tax due on such sales. In addition, both the buyer and the seller are liable for any penalties and interest assessable under chapter 82.32 RCW.

(4) **What are the tax consequences when a vehicle sold to a nonresident is delivered out-of-state?** A sale of a vehicle to a nonresident where the seller delivers the vehicle out-of-state is exempt from retail sales tax. If the vehicle is delivered to the buyer outside the state, the seller may also deduct the sale amount from the gross proceeds of sales for B&O tax purposes. The deductible amount must be included in the gross income reported on the excise tax return and then deducted on the return to determine the amount of taxable income. The deduction must be identified on the deduction detail page of the return as an "interstate and foreign sales" deduction.

(a) **Requirements.** If a vehicle is delivered outside the state to a nonresident buyer, retail sales tax does not apply if:

(i) The seller, as required by the contract of sale, delivers possession of the vehicle to the buyer at a point outside Washington; and

(ii) The vehicle is not licensed or registered in this state. If the vehicle bears Washington state license plates, the seller must remove the Washington plates before delivery and retain evidence of that removal to avoid liability for collection and payment of the retail sales tax.

(b) **Seller obligations; documentation.** The seller must properly document the following facts:

(i) The buyer's out-of-state address;

(ii) The vehicle is not licensed or registered in this state or the Washington state license plates have been removed from the vehicle before delivery;

(iii) Under the terms of the sales agreement, the seller is required to deliver the vehicle to the buyer at a point outside this state; and

(iv) The out-of-state delivery was actually made by the seller or by a common carrier acting as the seller's agent.

To comply with these requirements, the seller must retain a properly completed buyer's certificate and seller's certificate (out-of-state delivery). The seller's certificate must be signed by the person who actually delivers the vehicle to the buyer at the out-of-state location and may be completed only after delivery occurs.

(c) **Documentation when delivery is made by common carrier.** When a vehicle is delivered outside the state by common carrier acting as the seller's agent, no buyer's certificate or seller's certificate is required. Instead, the seller must retain:

(i) Evidence that the vehicle's license plates (if licensed in Washington) were removed; and

(ii) A signed copy of the bill of lading issued by the carrier. The bill of lading must show the seller as the consignor and indicate that the carrier agrees to transport the vehicle to a point outside the state.

(5) **What forms should be used to document an exempt sale?** The documents: "Buyer's Affidavit," "Seller's Certificate In-State Delivery," "Buyer's Certificate Out-of-State Delivery," and "Seller's Certificate Out-of-State Delivery" are necessary to substantiate exempt sales to nonresidents. Do not send the documents to the department, but keep them as part of the seller's permanent records for five years. Without this documentation, claims that a transaction was exempt from tax will be disallowed.

Copies of the forms can be obtained:

• From the department's internet web site at http://dor.wa.gov

• By facsimile by calling fast fax at 360-705-6705 or 800-647-7706 (using menu options)

• By writing to:

Taxpayer Services
Washington State Department of Revenue
P.O. Box 47478
Olympia, Washington 98504-7478

Documents in substantially the same form as the department's forms will be accepted in lieu of the department's documents.

(a) **In-state delivery.** A sale with in-state delivery requires a completed buyer's affidavit and seller's certificate-in-state delivery.

(b) **Delivery out-of-state by seller.** A sale with out-of-state delivery by a seller requires a completed buyer's certificate and seller's certificate-out-of-state.

(6) **What are a seller's obligations to verify a buyer's statements on nonresidency?**

(a) Prior to July 22, 2007, completion of a buyer's affidavit documents the exempt nature of a sale under RCW 82.08.-0264 unless there are facts that negate the presumption that the seller relied on the buyer's affidavit in good faith. The seller, however, must exercise a reasonable degree of care in accepting statements regarding a buyer's nonresidence. If delivery occurs in-state, the seller must examine and retain a copy of at least one form of documentary evidence showing the buyer's out-of-state residence. Lack of good faith on the part of the seller or lack of the exercise of the degree of care required is indicated, for example, in the following circumstances:

(i) If the seller knows that the buyer is living in Washington;

(ii) If the buyer gives a Washington address for the purpose of financing the purchase of the vehicle;

(iii) If, at the time of sale, arrangements are made for future servicing of the vehicle in the seller's shop and a Washington address or telephone number is shown for the shop customer; or

(iv) If the seller has ready access to any other information that discloses that the buyer may be a resident of Washington.

(b) **What if the department questions the authenticity of the information provided by the buyer?** For sales completed on or after July 22, 2007, if the department has information indicating the buyer is a Washington resident, or if the addresses for the buyer shown on the documentation provided under subsection (3)(c) of this section are not the same, the department may contact the buyer to verify the buyer's eligibility for the exemption provided by RCW 82.08.0264. If the department subsequently determines the buyer was not eligible for an exemption, the department will pursue collection of the retail sales tax from the buyer. The seller will not be liable for the retail sales tax except as provided in subsection (3)(d)(ii) of this section.

(7) **Do military personnel qualify for the nonresident exemptions?** A member of the armed services who is temporarily stationed in Washington is presumed to be a nonresident, unless that person was a resident of this state when inducted. This presumption does not apply to a civilian employee of the armed services. Nonetheless, a sale to a nonresident member of the armed forces must meet all of the statutory requirements for a retail sales tax exemption or B&O tax deduction. If a vehicle sold to a member of the armed forces will remain in Washington for more than three months, retail sales tax is due on the sale, even if the vehicle is registered in the home state of the armed forces member.

(a) **Military temporary license.** In addition to the exemptions provided under RCW 82.08.0264, a member of the armed forces may alternatively qualify for the retail sales tax and use tax exemptions provided by RCW 46.16.480 if the member obtains a forty-five day nonresident military temporary license from the department of licensing under RCW 46.16.460 and satisfies the requirements of RCW 46.16.480.

(b) **Additional documentation required.** In addition to the documentation otherwise required by this section, for a sale to a member of the armed forces a seller must retain a copy of military orders showing that the buyer:

(i) Is temporarily stationed in Washington and will leave within three months of the date of purchase; or

(ii) Is permanently reassigned to a new duty station outside Washington and will leave within three months of the date of purchase.

(c) **Military personnel of NATO-member nations.** Pursuant to treaty, a member of the armed forces of any NATO-member nation who is stationed in Washington is considered to be a nonresident for purposes of the RCW 82.08.0264 retail sales tax exemption. The buyer must meet all otherwise applicable requirements for exemption. In addi-

tion, the seller must retain proof of the buyer's military assignment in Washington as a member of a NATO-member nation's armed forces.

(8) **Are sales to residents of noncontiguous states exempt from Washington retail sales tax?** RCW 82.08.-0269 exempts purchases of tangible personal property from the retail sales tax if the property is purchased for use in states, territories, and possessions of the United States that are not contiguous with any other state. However, the exemption only applies if, as a necessary incident to the contract of sale, the seller delivers the property to the purchaser or the purchaser's designated agent at the usual receiving terminal of the carrier selected to transport the goods, under such circumstances that it is reasonably certain that the goods will be transported directly to a destination in a noncontiguous state, territory, or possession.

RCW 82.08.0269 applies to the sale of motor vehicles when the requirements stated above are met. Therefore, in addition to being exempt from retail sales tax under RCW 82.08.0264 (discussed above), a sale of a motor vehicle to a resident of a noncontiguous state, territory, or possession may qualify for exemption under RCW 82.08.0269. If so, the sale is exempt from retail sales tax but does not qualify for a B&O tax deduction. For more information on the requirements of the RCW 82.08.0269 exemption, including the documentation requirements, see WAC 458-20-193, Inbound and outbound interstate sales of tangible personal property.

(9) **Are sales to residents of states with no sales tax exempt from Washington retail sales tax?** RCW 82.08.-0273 exempts purchases of tangible personal property from the retail sales tax if the purchaser is a resident of another state or possession or a province of Canada that does not impose a retail sales tax or use tax of three percent or more. That statute does not apply to purchases of vehicles. Because RCW 82.08.0264 more specifically applies to the sale of vehicles, it takes precedence over RCW 82.08.0273. A resident of another state or possession or a province of Canada that does not impose a retail sales tax or use tax of three percent or more may purchase and take delivery of a vehicle in Washington free of retail sales tax only if the person meets the requirements of RCW 82.08.0264 or 82.08.0269.

(10) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(a) Buyer purchases a vehicle from Dealer. Buyer provides identification indicating that Buyer is a resident of California and provides California license plates for the vehicle. However, Buyer also states that he intends to use the vehicle in the state of Washington for four months before returning to California. Buyer does not qualify for a sales tax exemption because Buyer will use the vehicle for more than three months in the state.

(b) Buyer provides proof of residency in Idaho; there are no contrary facts regarding Buyer's residency. Buyer completes the buyer's affidavit, stating that the vehicle is for use out-of-state. Buyer obtains and uses a trip permit issued under authority of RCW 46.16.160 to remove the vehicle from Washington. The Dealer completes a seller's certificate and certifies that the Dealer removed the Washington license plates before delivering the vehicle to Buyer. This sale qualifies for the retail sales tax exemption but not the B&O tax deduction.

(c) Buyer is a Washington resident, employed by out-of-state Corporation X. On behalf of Corporation X, Buyer purchases and accepts in-state delivery of a vehicle from Dealer. The vehicle will be used as a company car out-of-state and will not be used or garaged in Washington. Payment is made by corporate check. Buyer provides a trip permit for transport of the vehicle out of Washington. This sale qualifies for the retail sales tax exemption (but not for the B&O tax deduction) notwithstanding the Washington residency of its employee. The Dealer must record in its records the number of the corporate nonresident permit.

(d) Buyer is a resident of Alaska and purchases a vehicle from Dealer in Washington. The sales contract requires Dealer to deliver the vehicle to Buyer in Anchorage, Alaska. Before shipping the vehicle, Dealer removes the vehicle's Washington state license plates and retains a photocopy of the plates as evidence of the removal. Seller ships the vehicle to Alaska by common carrier. Seller retains a signed copy of the bill of lading, indicating the Seller as consignor and the Buyer as consignee. This sale qualifies for the retail sales tax exemption and a B&O tax deduction.

(e) Buyer is a resident of Alaska and purchases a vehicle from Dealer in Washington. Dealer delivers the vehicle to the Buyer at dockside in Seattle to be shipped to Anchorage, Alaska by common carrier. Dealer retains the exemption certificate and dock receipt required by WAC 458-20-193. This sale qualifies for the retail sales tax exemption provided by RCW 82.08.0269 but not for a B&O tax deduction.

(f) Buyer is a member of the armed forces and provides a copy of her orders showing that she is temporarily stationed in Washington. Before entering military service, buyer resided in another state. Buyer purchases a vehicle from Dealer and licenses it in her home state, but intends to keep the vehicle in this state for over three months. This sale does not qualify for any exemption or deduction. If the vehicle were to be removed from the state within three months, the sale would qualify for the RCW 82.08.0264 retail sales tax exemption but not for a B&O tax deduction.

(g) Buyer owns homes in Washington and Arizona, spending summers in Washington and winters in Arizona. In October, Buyer purchases a vehicle from Dealer, asserting that he will immediately drive the vehicle to Arizona and license it in that state. Buyer presents an Arizona driver's license for identification and provides a trip permit to remove the vehicle from Washington. Dealer is aware that Buyer lives in Washington for a significant portion of each year. In such a case, the sale would not qualify for the retail sales tax exemption. Under these facts, Buyer has dual residency in Washington and Arizona for tax purposes.

(h) Buyer purchases a motorcycle from Dealer in Vancouver, Washington. The motorcycle is equipped for use on public highways. Buyer provides an Oregon driver's license and asserts that the motorcycle will be licensed in Oregon. Buyer also states that the motorcycle will only be used outside of Washington. Buyer places the motorcycle in the back of a truck for transport to Oregon. This sale does not qualify for any exemption or deduction. To qualify for the sales tax exemption, RCW 82.08.0264 requires the Buyer to obtain a

trip permit or provide license plates from another state before removing the vehicle from Washington.

(11) **Buyer obligations when claiming exemption.** It is the buyer's responsibility to provide the seller with valid identification that entitles the buyer to purchase a motor vehicle, trailer, or camper exempt from retail sales tax as provided by RCW 82.08.0264.

(a) A buyer making fraudulent statements, which includes the offer of fraudulent identification or fraudulently procured identification to a seller, in order to purchase a motor vehicle, trailer, or camper without paying retail sales tax is guilty of perjury under chapter 9A.72 RCW.

(b) Any buyer making tax exempt purchases under RCW 82.08.0264 by displaying proof of identification not his or her own, or counterfeit identification, with intent to violate the provisions of RCW 82.08.0264 is guilty of a misdemeanor and, in addition, is liable for the tax and subject to a penalty equal to the greater of one hundred dollars or the tax due on such purchases.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and 82.08.0264. WSR 08-16-041, § 458-20-177, filed 7/29/08, effective 8/29/08. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 05-14-086, § 458-20-177, filed 6/30/05, effective 7/31/05. Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order ET 83-1), § 458-20-177, filed 3/30/83; Order ET 70-3, § 458-20-177 (Rule 177), filed 5/29/70, effective 7/1/70.]

WAC 458-20-178 Use tax. (1) Nature of the tax. The use tax supplements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer of any article of tangible personal property purchased at retail or acquired by lease, gift, repossession, or bailment, or extracted, produced or manufactured by the person so using the same, where the user, donor or bailor has not paid retail sales tax under chapter 82.08 RCW with respect to the property used.

(2) In general, the use tax applies upon the use of any tangible personal property, the sale or acquisition of which has not been subjected to the Washington retail sales tax. Conversely, it does not apply upon the use of any property if the sale to the present user or to the present user's donor or bailor has been subjected to the Washington retail sales tax, and such tax has been paid thereon. Thus, these two methods of taxation stand as complements to each other in the state revenue plan, and taken together, provide a uniform tax upon the sale or use of all tangible personal property, irrespective of where it may have been purchased or how acquired.

(3) When tax liability arises. Tax liability imposed under the use tax arises at the time the property purchased, received as a gift, acquired by bailment, or extracted or produced or manufactured by the person using the same is first put to use in this state. The terms "use," "used," "using," or "put to use" include any act by which a person takes or assumes dominion or control over the article and shall include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within the state. Tax liability arises as to that use only which first occurs within the state and no additional liability arises with respect to any subsequent use of the same article by the same person. As to lessees of tangible personal property who have not paid the retail sales tax to their lessors, liability for use tax arises as of the time rental payments fall due and is measured by the amount of such rental payments.

(4) Persons liable for the tax. The person liable for the tax is the purchaser, the extractor or manufacturer who commercially uses the articles extracted or manufactured, the bailor or donor and the bailee or donee if the tax is not paid by the bailor or donor, and the lessee (to the extent of the amount of rental payments to a lessor who has not collected the retail sales tax). A lessor who leases equipment with an operator is deemed a user and is liable for the tax on the full value of the equipment.

(5) The law provides that the term "sale at retail" means, among other things, every sale of tangible personal property to persons taxable under the classifications of public road construction, government contracting, and service and other business activities of the business and occupation tax. Hence, persons engaged in such businesses are liable for the payment of the use tax with respect to the use of materials purchased by them for the performance of those activities, when the Washington retail sales tax has not been paid on the purchase thereof, even though title to such property may be transferred to another either as personal or as real property. Persons engaged in the types of businesses referred to in this paragraph are expressly included within the statutory definition of the word "consumer." (See RCW 82.04.190.) Also liable for tax is any person who distributes or displays or causes to be distributed or displayed any article of tangible personal property, the primary purpose of which is to promote the sale of products and services except newspapers and except printed materials over which the person has taken no direct dominion and control. (See RCW 82.12.010(5).)

(6) Lessors and lessees. Any use tax liability with respect to leased tangible personal property will be that of the lessee and is limited to the amount of rental payments paid or due the lessor. However, when boats, motor vehicles, equipment and similar property are rented under conditions whereby the lessor itself supplies an operator or crew, the lessor itself is the user and the use tax is applicable to the value of the property so used.

(7) Exemptions. Persons who purchase, produce, manufacture, or acquire by lease or gift tangible personal property for their own use or consumption in this state, are liable for the payment of the use tax, except as to the following uses which are exempt under RCW 82.12.0251 through 82.12.034 of the law:

(a) The use of tangible personal property brought into the state of Washington by a nonresident thereof for use or enjoyment while temporarily within the state, unless such property is used in conducting a nontransitory business activity within the state; or

(b) The use by a nonresident of a motor vehicle or trailer which is currently registered or licensed under the laws of the state of the nonresident's residence and which is not required to be registered or licensed under the laws of this state, including motor vehicles or trailers exempt pursuant to a declaration issued by the department of licensing under RCW 46.85.060; or

(c) The use of household goods, personal effects, and private automobiles by a bona fide resident of this state or nonresident members of the armed forces who are stationed in this state pursuant to military orders, if such articles were

acquired and used by such person in another state while a bona fide resident thereof and such acquisition and use occurred more than ninety days prior to the time such person entered this state.

(i) Use by a nonresident. The exemptions set forth in (a) and (b) of this subsection, do not extend to the use of articles by a person residing in this state irrespective of whether or not such person claims a legal domicile elsewhere or intends to leave this state at some future time, nor do they extend to the use of property brought into this state by a nonresident for the purpose of conducting herein a nontransitory business activity.

(ii) The term "nontransitory business activity" means and includes the business of extracting, manufacturing, selling tangible and intangible property, printing, publishing, and performing contracts for the constructing or improving of real or personal property. It does not include the business of conducting a circus or other form of amusement when the personnel and property of such business regularly moves from one state into another, nor does it include casual or incidental business done by a nonresident lawyer, doctor or accountant.

(d) The use of any article of tangible personal property purchased at retail or acquired by lease, by bailment or by gift if the sale thereof to or the use thereof by the present user or its bailor or donor has already been subjected to retail sales tax or use tax and such tax has been paid by the present user or by its bailor or donor; or in respect to the use of property acquired by bailment when tax has been paid by the bailee or any previous bailee, based on reasonable rental value as provided by RCW 82.12.060, equal to the amount of tax multiplied by the value of the article used at the time of first use, at the tax rate then applicable, or in respect to the use by a bailee of property acquired prior to June 9, 1961, by a previous bailee from the same bailor for use in the same general activity.

(e) The use of any article of tangible personal property the sale of which is specifically taxable under the public utility tax.

(f) In respect to the use of any airplane, locomotive, railroad car, or water craft used primarily in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire or used primarily in commercial deep sea fishing operations outside the territorial waters of the state, and;

(g) In respect to the use of tangible personal property which becomes a component part of any such airplane, locomotive, railroad car, or water craft, and in respect to the use by a nonresident of this state of any motor vehicle or trailer used exclusively in transporting persons or property across the boundaries of this state and in intrastate operations incidental thereto when such motor vehicle or trailer is registered and licensed in a foreign state; also in respect to the use by a nonresident of this state of any motor vehicle or trailer so registered and licensed and used within this state for a period not exceeding fifteen consecutive days when the user has furnished the department of revenue with a written statement containing the following information:

(i) Name of registered owner.

(ii) Name of the foreign state in which motor vehicle or trailer is registered.

(iii) License number.

(iv) Make and model.

(v) Purpose of use in Washington.

(vi) Date of first use in Washington.

(vii) Date last used in Washington.

(h) For reasons approved by the department of revenue, fifteen additional days may be granted consecutive to the original period of use. Application for such additional use must be made in writing in advance of the expiration of the original period of use and must set out the justification for and the reason why such additional time should be allowed.

(i) This exemption is not available to persons performing construction or service contracts in this state but is limited to casual or isolated use by a nonresident for servicing of its own facilities.

(j) For the purpose of this exemption the term "nonresident" shall include a user who has one or more places of business in this state as well as in one or more other states, but the exemption for nonresidents shall apply only to those vehicles which are most frequently dispatched, garaged, serviced, maintained, and operated from the user's place of business in another state, and;

(k) In respect to the use by the holder of a carrier permit issued by the Interstate Commerce Commission of any motor vehicle or trailer used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of this state if the first use of which within this state is actual use in conducting interstate or foreign commerce. Also in respect to use by subcontractors to such interstate carriers, (i.e., persons operating their own vehicles under leases with operator) and;

(l) In respect to the use of any motor vehicle or trailer while being operated under the authority of a trip permit issued by the department of motor vehicles pursuant to RCW 46.16.160 and moving upon the highways from the point of delivery in this state to a point outside this state, and;

(m) In respect to the use of tangible personal property which becomes a component part of any motor vehicle or trailer used by the holder of a carrier permit issued by the Interstate Commerce Commission authorizing transportation by motor vehicle across the boundaries of this state. Also in respect to use by subcontractors to such interstate carriers (i.e., persons operating their own vehicles under leases with operator).

(n) The use of any article of tangible personal property which the state is prohibited from taxing under the constitution of the state or under the constitution or laws of the United States;

(o) The use of motor vehicle fuel used in aircraft by the manufacturer thereof for research, development, and testing purposes, and special fuel purchased in this state upon which a refund is obtained as provided in RCW 82.38.180(2), and motor vehicle and special fuel if:

(i) The fuel is used for the purpose of public transportation and the purchaser is entitled to a refund or an exemption under RCW 82.36.275 or 82.38.080(9); or

(ii) The fuel is purchased by a private, nonprofit transportation provider certified under chapter 81.66 RCW and the purchaser is entitled to a refund or an exemption under RCW 82.36.285 or 82.38.080(8); or

(iii) The fuel is taxable under chapter 82.36 or 82.38 RCW: Provided, That the use of motor vehicle and special fuel upon which a refund of the applicable fuel tax is obtained shall not be exempt under this subsection, and the director of licensing shall deduct from the amount of such tax to be refunded the amount of use tax due and remit the same each month to the department of revenue.

(p) In respect to the use of any article of tangible personal property included within the transfer of the title to the entire operating property of a publicly or privately owned public utility, or a complete operating integral section thereof by the state or a political subdivision thereof in conducting any business defined in RCW 82.16.010 (1) through (11).

(q) The use of tangible personal property (including household goods) which has been used in conducting a farm activity, but only when that property was purchased from a farmer at an auction sale held or conducted by an auctioneer upon a farm and not otherwise.

(r) The use of tangible personal property by corporations which have been incorporated under any act of the Congress of the United States of America and whose principal purposes are to furnish volunteer aid to members of the armed forces of the United States and also to carry on a system of national and international relief and to apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other national calamities, and to devise and carry on measures for preventing the same. (The Red Cross is the only existing organization that qualifies for this exemption.)

(s) The use of purebred livestock for breeding purposes where said animals are registered in a nationally recognized breed association, and in respect to the use of cattle and milk cows used on the farm.

(t) The use of poultry in the production for sale of poultry or poultry products.

(u) The use of fuel by the extractor or manufacturer thereof when used directly in the operation of the particular extractive operation or manufacturing plant which produced or manufactured the same.

(v) The use of motor vehicles, equipped with dual controls, which are loaned to accredited schools and used in connection with their driver training programs.

(w) The use by a bailee of any article of tangible personal property which is entirely consumed in the course of research, development, experimental and testing activities conducted by the user, provided the acquisition or use of such articles by the bailor was not subject to sales or use tax.

(x) The use by residents of this state of motor vehicles and trailers acquired outside this state and used while such persons are members of the armed services and are stationed outside this state pursuant to military orders, but this exemption does not apply to the use of motor vehicles or trailers acquired less than thirty days prior to the discharge or release from active duty of such person from the armed services. This exemption is not permitted to persons called to active duty for training periods of less than six months.

(y) The use of sand, gravel, or rock to the extent of the cost of or charges made for labor and services performed in respect to the mining, sorting, crushing, screening, washing, hauling, and stockpiling such sand, gravel, or rock, when such sand, gravel, or rock is taken from a pit or quarry which is owned by or leased to a county or a city, and such sand, gravel, or rock is (a) either stockpiled in said pit or quarry for placement or is placed on the street, road, place or highway of the county or city by the county or city itself (i.e., by its own employees), or (b) sold by the county or city to a county or a city at actual cost for placement on a publicly owned street, road, place, or highway. This exemption shall not apply to the use of such material to the extent of the cost of or charge made for such labor and services, if the material is used for other than public road purposes or is sold otherwise than as here indicated.

(z) The use of form lumber by any person engaged in the construction, repairing, decorating or improving of new or existing buildings or other structures under, upon or above real property of or for consumers: Provided, That such lumber is used or to be used first by such person for the molding of concrete in a single such contract, project or job and is thereafter incorporated into the product of that same contract, project or job as an ingredient or component thereof.

(aa) The use of wearing apparel only as a sample for display for the purpose of effecting sales of goods represented by such sample.

(bb) The use of tangible personal property held for sale and displayed in single trade shows for a period not in excess of thirty days, the primary purpose of which is to promote the sale of products or services.

(cc) The use of pollen.

(dd) The use of the personal property of one political subdivision by another political subdivision directly or indirectly arising out of or resulting from the annexation or incorporation of any part of the territory of one political subdivision by another.

(ee) The use of prescription drugs, including the use by the state or a political subdivision or municipal corporation thereof of drugs to be dispensed to patients by prescription without charge.

(ff) The use of returnable containers for beverages and foods, including but not limited to soft drinks, milk, beer, and mixers.

(gg) The use of insulin, prosthetic devices, or orthotic devices prescribed for an individual by a chiropractor, osteopath, or physician, ostomic items, medically prescribed oxygen, and hearing aids which are prescribed or are dispensed and fitted by a licensee under chapter 18.35 RCW.

(hh) The use of food products for human consumption (see WAC 458-20-244), including the use of livestock for personal consumption as food.

(ii) The use of ferry vessels of the state of Washington or of local governmental units in the state of Washington in transporting pedestrian or vehicular traffic within and outside the territorial waters of the state. Also, the use of tangible personal property which becomes a component part of any such ferry vessel.

(jj) Alcohol that is sold in this state for use solely as fuel in motor vehicles, farm implements and machines, or implements of husbandry. This exemption expires December 31, 1986.

(kk) The use of vans used regularly as ride sharing vehicles, as defined in RCW 46.74.010(3), by not less than seven persons, including passengers and driver, if the vans are exempt under the motor vehicle excise tax for thirty-six consecutive months beginning within thirty days of application

for exemption under the use tax. This exemption expires January 1, 1988.

(ll) The use of used mobile homes as defined in RCW 82.45.032 and the use of mobile homes acquired by renting or leasing for more than thirty days, except for short term transient lodging.

(mm) The use of special fuel purchased in this state upon which a refund of special fuel tax is obtained as provided in RCW 82.38.180(2), by reason of such fuel having been purchased for use by interstate commerce carriers outside this state. Also, the use of motor vehicle fuel or special fuel by private, nonprofit transportation providers who are entitled to fuel tax refund or exemption under chapter 82.36 or 82.38 RCW.

(nn) The lease of irrigation equipment if:

(i) The irrigation equipment was purchased by the lessor for the purpose of irrigating land controlled by the lessor;

(ii) The lessor has paid tax under RCW 82.08.020 or 82.12.020 in respect to irrigation equipment;

(iii) The irrigation equipment is attached to the land in whole or in part; and

(iv) The irrigation equipment is leased to the lessee as an incidental part of the lease of the underlying land to the lessee and is used solely on such land.

(oo) The use of computers, computer components, computer accessories, or computer software irrevocably donated to any public or private school or college, as defined in chapter 84.36 RCW, in this state.

(pp) The use of semen in the artificial insemination of livestock.

(qq) The use of feed by persons for the cultivating or raising for sale of fish entirely within confined rearing areas on the persons own land or on land in which the person has a present right of possession.

(rr) The use by artistic or cultural organizations of:

(i) Objects of art;

(ii) Objects of cultural value;

(iii) Objects to be used in the creation of a work of art, other than tools; or

(iv) Objects to be used in displaying art objects or presenting artistic or cultural exhibitions or performances.

(ss) The use of used floating homes as defined in RCW 82.45.032 upon which sales tax or use tax has once been paid.

(tt) The use of feed, seed, fertilizer, and spray materials by persons raising agricultural or horticultural products for sale at wholesale including the use of feed in feeding animals at public livestock markets.

(uu) The use of prepared meals or food products used in prepared meals provided to senior citizens, disabled persons, or low income persons by not-for-profit organizations organized under chapter 24.03 or 24.12 RCW.

(vv) The use of property to produce ferrosilicon for further use in the production of magnesium for sale, where such property directly reacts chemically, with ingredients of the ferrosilicon.

(ww) In respect to lease payments by a seller/lessee to a purchaser/lessor after April 3, 1986, under a sale/leaseback agreement covering property used by the seller/lessee primarily in the business of canning, preserving, freezing, or dehydrating fresh fruits, vegetables, and fish; nor in respect to the purchase amount paid by the lessee pursuant to an option to purchase such property at the end of the lease term: Provided, That the seller/lessee paid the retail sales tax or use tax at the time of its original acquisition of the property.

(8) In addition to the exemptions listed earlier, the use tax does not apply to the value of tangible personal property traded in on the purchase of tangible personal property of like kind used in this state. (See WAC 458-20-247.) Also, the use tax does not apply to the use of precious metal bullion or monetized bullion acquired under such conditions that the retail sales tax would not apply to such things in this state. (See WAC 458-20-248.)

(9) See WAC 458-20-24001 and 458-20-24002 for provisions for certain use tax deferrals on materials, labor, and services rendered in the construction of qualified buildings, machinery, and equipment used in new manufacturing and research/development facilities.

(10) RCW 82.08.0251 provides expressly that the exemption therein with respect to casual sales shall not be construed as exempting from the use tax the use of any article of tangible personal property acquired through a casual sale. Thus, while casual sales made by persons who are not registered with the department of revenue are exempt from the retail sales tax (for the obvious reason that the procedure for collection of that tax is impractical in those cases), the use of property acquired through such sales is not exempt from the use tax, except as provided in RCW 82.12.0251 through 82.12.034.

(11) See also WAC 458-20-106 regarding the use tax on the use of articles purchased at a casual sale.

(12) Credit. When property purchased elsewhere is brought into this state for use or consumption the use tax will apply upon the use thereof, but a credit is allowed for the amount of sales or use tax paid by the user or its bailor or donor on such property to any other state or political subdivision thereof, the District of Columbia, or any foreign country, prior to the use of the property in this state.

(13) Value of the article used. The tax is levied and collected on an amount equal to the value of the article used by the taxpayer. The term "value of the article used" is defined by the law as being the total of the consideration paid or given by the purchaser to the seller for the article used plus any additional amounts paid by the purchaser as tariff or duty with respect to the importation of the article used. In case the article used was extracted or produced or manufactured by the person using the same or was acquired by gift or was sold under conditions where the purchase price did not represent the true value thereof, the value of the article used must be determined as nearly as possible according to the retail selling price, at the place of use, of similar products of like quality, quantity and character. In case the articles used are acquired by bailment, the value of the use of the articles so used shall be in an amount representing a reasonable rental for the use of the articles so bailed, determined as nearly as possible according to the value of such use at the places of use of similar products of like quality and character. In case the articles used are acquired by lease or rental, use tax liability is measured by the amount of rental payments to a lessor who has not collected the retail sales tax.

(14) In the case of an article manufactured or produced for purposes of serving as a prototype for the development of a new or improved product, the value of the article used shall

be determined by: (a) The retail selling price of such new or improved product when first offered for sale; or (b) the value of materials incorporated into the prototype in cases in which the new or improved product is not offered for sale. See: RCW 82.04.450, WAC 458-20-112.

(15) In the case of articles owned by a user engaged in business outside the state which are brought into the state for no more than ninety days in any period of three hundred sixty-five consecutive days and which are temporarily used for business purposes by the person in this state, the value of the article used shall be an amount representing a reasonable rental for the use of the articles, unless the person has paid tax under this chapter or chapter 82.08 RCW upon the full value of the article used.

(16) Returns and registration. Persons subject to the payment of the use tax, and who are not required to register or report under the provisions of chapters 82.04, 82.08, 82.16, or 82.28 RCW, are not required to secure a certificate of registration as provided under WAC 458-20-101. As to such persons, returns must be filed with the department of revenue on or before the fifteenth day of the month succeeding the end of the period in which the tax accrued. Forms and instructions for making returns will be furnished upon request made to the department at Olympia or to any of its branch offices.

(17) See WAC 458-20-221 for liability of certain selling agents for collection of use tax.

[Statutory Authority: RCW 82.32.300. WSR 87-01-050 (Order ET 86-19), § 458-20-178, filed 12/16/86; Order ET 71-1, § 458-20-178, filed 7/22/71; Order ET 70-3, § 458-20-178 (Rule 178), filed 5/29/70, effective 7/1/70.]

WAC 458-20-17802 Collection of use tax by county auditors and department of licensing—Measure of tax. (1) **Introduction.** The department of revenue has authorized county auditors and the department of licensing to collect the use tax imposed by chapter 82.12 RCW when a person applies to transfer the certificate of ownership of a motor vehicle acquired without the payment of sales tax. See RCW 82.12.045. This rule explains how county auditors, their subagents, and the department of licensing determine the measure of the use tax. This rule does not relieve a seller registered with the department of revenue of the statutory requirement to collect sales tax when selling tangible personal property, including motor vehicles. RCW 82.08.020 and 82.08.0251. The use tax reporting responsibilities of Washington residents in other situations and the general nature of the use tax are addressed in WAC 458-20-178 (Use tax). The various use tax exemptions provided by chapter 82.12 RCW are discussed in WAC 458-20-17801 (Use tax exemptions). The application of tax to vehicles acquired by Indians and Indian tribes is discussed in WAC 458-20-192 (Indians—Indian country).

Vehicle licensing locations and information about vehicle titles and registration are available from the department of licensing on the internet at: http://www.wa.gov/dol/, under "vehicles list." This information is also available by contacting the local county auditor's office listed in the government pages of the telephone directory.

(2) **What is use tax based on?** For purposes of computing the amount of use tax due, the value of the article used is the measure of tax. The value of the article used is generally the purchase price. If the purchase price does not represent the true value of the article used, the value must be determined as nearly as possible according to the retail selling price at place of use of similar vehicles of like quality and character. RCW 82.12.010.

(3) **Use of automated system to verify measure of tax.** When a person applies to transfer the certificate of ownership of a motor vehicle, county auditors, their subagents, or the department of licensing must verify that the purchase price represents the true value. In doing so, county auditors, their subagents, or the department of licensing compare the vehicle's purchase price to the average retail value of comparable vehicles using an automated valuing system. The automated valuing system identifies the average retail value using a data base that is provided by a regional industry standard source specializing in providing valuation services to local, state, and federal governments, and the private sector.

In limited situations, the automated valuing system's data base may not provide the average retail value for a motor vehicle. For example, the automated valuing system's data base does not provide average retail value information for collectible vehicles or vehicles that are over twenty years of age. In the absence of an average retail value, county auditors, their subagents, or the department of licensing will determine the true value as nearly as possible according to the retail selling price at place of use of similar vehicles of like character and quality. To assist in this process, the department of revenue and the department of licensing may approve the use of alternative valuing authorities as necessary.

(4) **What happens when the purchase price is presumed to represent the true value?** County auditors, their subagents, or the department of licensing will use the purchase price to compute the amount of use tax due when the purchase price represents the vehicle's true value. County auditors, their subagents, or department of licensing will presume the purchase price represents the vehicle's true value if one of the following conditions is met:

(a) The vehicle's average retail value, as provided by the automated valuing system, is less than $3,000.

For example, a person buys a motor vehicle for $800. The automated valuing system indicates that the vehicle's average retail value is $2,900. The purchase price is presumed to represent the vehicle's true value because the average retail value is less than $3,000.

(b) The vehicle's purchase price is not more than $2,000 below the average retail value as provided by the automated valuing system.

For example, a person buys a used motor vehicle for $4,500. The automated valuing system indicates the vehicle's average retail value is $6,000. When compared to the average retail value, the purchase price is not more than $2,000 below the average retail value. Consequently, the purchase price is presumed to represent the vehicle's true value.

(5) **What happens when the purchase price is not presumed to represent the true value?** If the vehicle's purchase price is not presumed to be the true value as explained in subsection (4) of this rule, a person may remit use tax based on the average retail value as indicated by the automated valuing system or substantiate the true value of the vehicle using any one of the following methods.

(a) **Industry-accepted pricing guide.** A person applying to transfer a certificate of ownership may provide the county auditor, a subagent, or the department of licensing with documentation from one of the various industry-accepted pricing guides. The value from the industry-accepted pricing guide must represent the retail value of a similarly equipped vehicle of the same make, model, and year in a comparable condition. The purchase price is presumed to represent the vehicle's true value if the purchase price is not more than $2,000 below the retail value.

For example, a person buys a vehicle for $3,500. The automated valuing system indicates that the vehicle's average retail value is $5,700. An industry-accepted pricing guide shows that the retail value of a similarly-equipped vehicle in a comparable condition of the same make, model, and year is $5,000. When compared to the retail value established by the industry-accepted pricing guide, the purchase price is not more than $2,000 below the retail value. Consequently, the purchase price is presumed to represent the vehicle's true value.

(b) **Declaration of buyer and seller.** A person applying to transfer a certificate of ownership may provide to the county auditor, a subagent, or the department of licensing a Declaration of Buyer and Seller Regarding Value of Used Vehicle Sale (REV 32 2501) to substantiate that the purchase price is the true value of the vehicle. The declaration must be signed by both the buyer and the seller and must certify to the purchase price and the vehicle's condition under penalty of perjury. The department of revenue may review a declaration and assess additional tax, interest, and penalties. A person may appeal an assessment to the department of revenue as provided in WAC 458-20-100 (Appeals, small claims and settlements).

The declaration is available from the department of revenue on the internet at http://dor.wa.gov/ under "other forms and schedules." It is also available at all vehicle licensing locations, department of revenue field offices, or by writing:

Department of Revenue
Taxpayer Services
P.O. Box 47478
Olympia, WA 98504-7478

(c) **Written appraisal.** A person applying to transfer a certificate of ownership may present to the county auditor, a subagent, or the department of licensing a written appraisal from an automobile dealer, insurance or other vehicle appraiser to substantiate the true value of the vehicle. If an automobile dealer performs the appraisal, the dealer must be currently licensed with the department of licensing's dealer services division or be a licensed vehicle dealer in another jurisdiction.

The written appraisal must appear on company stationery or have the business card attached and include the vehicle description, including the vehicle make, model, and identification number (VIN). The person performing the appraisal must certify that the stated value represents the retail selling price of a similarly-equipped vehicle of the same make, model, and year in a comparable condition. The department of revenue may review an appraisal and assess additional tax, interest, and penalties. A person may appeal an assessment to the department of revenue as provided in WAC 458-20-100 (Appeals, small claims and settlements).

(d) **Declaration of use tax.** A person applying to transfer a certificate of ownership may present to the county auditor, a subagent, or the department of licensing a Declaration of Use Tax (REV 32 2486e) to substantiate the true value of the vehicle. An authorized employee of the department of revenue must complete the declaration. Determining the true value may require a visual inspection that is not available at all department of revenue locations.

(e) **Repair estimate.** A person applying to transfer a certificate of ownership may present to the county auditor, a subagent, or the department of licensing a written repair estimate, prepared by an auto repair or auto body repair business. This estimate will then be used to assist with determining the true value of the vehicle. The written estimate must appear on company stationery or have the business card attached. In addition, the written estimate must include the vehicle description, including the vehicle make, model, and identification number (VIN), and an itemized list of repairs. The department of revenue may review an appraisal and assess additional tax, interest, and penalties. A person may appeal an assessment to the department of revenue as provided in WAC 458-20-100 (Appeals, small claims and settlements).

The purchase price is presumed to represent the true value if the total of the purchase price and the repair estimate is not more than $2,000 below the average retail value. For example, a person purchases a vehicle with extensive bumper damage for $1,700. The automated valuing system indicates that the vehicle's average retail value is $6,000. An estimate from an auto body repair business indicates a cost of $2,500 to repair the bumper damage. The purchase price is presumed to represent the vehicle's true value because when the total of the purchase price and the repair estimate ($1,700 + $2,500 = $4,200) is compared to the average retail value, the total is not more than $2,000 below the average retail value ($6,000).

[Statutory Authority: RCW 82.32.300 and 82.12.045. WSR 01-22-008, § 458-20-17802, filed 10/26/01, effective 11/26/01.]

WAC 458-20-17803 Use tax on promotional material. (1) **Introduction.** Persons who distribute or cause to be distributed any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services, are subject to use tax on the value of the property. RCW 82.12.010, 82.12.020, and chapter 367, Laws of 2002. This section explains the use tax reporting responsibilities of consumers when such property is delivered directly to persons other than the consumer from outside Washington. For the purposes of this section, the term "promotional material" is used in describing such property where applicable.

This rule provides numerous examples that identify a number of facts and then state a conclusion. These examples should only be used as a general guide. Similar determinations for other situations can be made only after a review of all facts and circumstances. For purposes of these examples, presume the promotional material is delivered to persons within Washington.

Chapter 514, Laws of 2005, changed the taxability of delivery charges associated with direct mail. Refer to subsection (5) of this section for further information.

(2) **What is the use tax?** The use tax complements the retail sales tax by imposing a tax of a like amount when a consumer uses tangible personal property or certain retail services within this state. RCW 82.12.020. The tax does not apply to the use of any property or service if the present user, donor, or bailor previously paid retail sales tax under chapter 82.08 RCW with respect to the property used or the service obtained. See WAC 458-20-178 (Use tax) for an explanation of the use tax and use tax reporting requirements.

(3) **Who is liable for the use tax on promotional material?** The use tax is imposed on the consumer. Effective June 1, 2002, the law provides that with respect to promotional material distributed to persons within this state, the consumer is the person who distributes or causes the distribution of the promotional material. A consumer as defined in this rule is responsible for remitting use tax only if the consumer has nexus in Washington.

(a) **Example 1.** Department Store contracts with Printer to print promotional material advertising sale merchandise available at Department Store's Washington locations. Printer distributes promotional material to Department Store's customers. Department Store is the consumer of the promotional material and is liable for use tax on promotional material distributed into Washington. Neither Printer nor Department Store's customers are consumers of this promotional material.

(b) **Example 2.** Retailer contracts with Seattle Advertising Agency for advertising services. Advertising Agency makes a single charge for all services, which includes designing, printing, and distributing catalogs to potential customers. Advertising Agency contracts with California Printer to print and prepare for distribution promotional material advertising a new Washington location. Retailer is the consumer of the catalogs and is liable for use tax on the promotional material sent to Washington addresses. Neither Advertising Agency nor potential customers are consumers of this promotional material.

(4) **What is promotional material?** Promotional material is any article of tangible personal property, except newspapers, displayed or distributed in the state of Washington for the primary purpose of promoting the sale of products or services. Examples of promotional material include, but are not limited to, advertising literature, circulars, catalogs, brochures, inserts (but not newspaper inserts), flyers, applications, order forms, envelopes, folders, posters, coupons, displays, signs, free gifts, or samples (such as carpet or textile samples).

(a) **Is advertising contained on billing statements promotional material?** It is presumed that the primary purpose of billing statements and statements of account is to secure payment for goods or services previously purchased. Thus, unless the facts and circumstances indicate that the primary purpose of the property is to promote the sale of goods and services, billing statements and statements of account are not considered promotional material. Attaching, affixing, or otherwise incorporating property promoting the sale of goods or services does not alter the primary purpose of billing statements and statements of account. However, flyers, inserts, or other separate property enclosed with billing statements or statements of account that promote the sale of goods or services are promotional material and subject to use tax.

(i) **Example 1.** Richland Attorney contracts with Oregon Printer to print and prepare for distribution monthly billing statements and return remittance envelopes to Attorney's clients. The contract also includes printing and inserting flyers promoting Attorney's estate planning services. The primary purpose of the flyers is to solicit the sale of services. Consequently, the flyers are promotional material. The primary purpose of the billing statements is to secure payment for services rendered. The billing statements are not promotional material.

(ii) **Example 2.** Department Store prints the monthly billing statements for its store credit card in Atlanta, Georgia, and mails them to customers located in Washington. Although the billing statement includes three sentences noting an upcoming sale, this information does not alter the primary purpose of the billing statement, which is to secure payment for services rendered. The billing statements are not promotional material.

(iii) **Example 3.** The following month, Department Store's billing statement includes a detachable coupon for fifteen percent off selected items purchased during a specified period. Although the detachable coupon solicits the sale of goods or services, it does not alter the primary purpose of the billing statement, which is to secure payment for goods or services already purchased. The billing statement and detachable coupon are not promotional material.

(iv) **Example 4.** In the third month, Department Store lengthens the billing statement to include information promoting the grand opening of a location. Although the lengthened portion of the billing statement contains information promoting the sale of goods or services, it does not alter the primary purpose of the billing statement, which is to secure payment for goods or services already purchased. The lengthened billing statement is not promotional material.

(b) **When are envelopes considered promotional material?** Envelopes used solely to mail property to promote the sale of goods or services are considered promotional material and subject to use tax.

Envelopes used to mail nonpromotional material, such as billing statements and statements of account, are used to secure payment for goods purchased or services rendered. The same is true of return envelopes that are enclosed for submitting payment. Unless the facts and circumstances indicate otherwise, the presumption is that the primary purpose of envelopes used for mailing both promotional and nonpromotional material in the same envelope is not to promote the sale of goods and services. Thus, envelopes and return envelopes used for dual purposes are not subject to use tax, even though promotional material may be printed on or attached to the envelopes. Although the imprinted or attached material promotes the sale of goods or services, it does not alter the primary purpose of the envelopes.

(i) **Example 1.** Bank mails brochures, applications, and return envelopes from Atlanta, Georgia, to Washington addresses promoting Bank's credit card. The primary purpose of envelopes used to mail the brochures, applications, and return envelopes is to solicit the sale of services. The envelopes, brochures, and applications are promotional material.

(ii) **Example 2.** Telephone Company mails monthly billing statements to Washington customers from St. Louis, Missouri. Inserts promoting the sale of various telephone acces-

sories are included. Return envelopes to be used in making payment of the statement amount are also enclosed. The primary purpose of the envelopes used to mail the billing statements and the return envelopes is to secure payment. Neither the mailing envelopes nor the return envelopes are promotional material.

(iii) **Example 3.** Mortgage Company mails monthly billing statements to Washington residents from its administrative offices in Nevada. The enclosed return envelope for customers to use in making payment includes an attachment promoting additional banking services. Although the attachment to the return envelopes contains advertising information, it does not alter the primary purpose of the envelope which is to obtain payment. Neither the mailing envelopes nor the return envelopes are promotional material.

(5) **What is the measure of tax?** The measure of the use tax is the value of the article used. For the purposes of computing the use tax due on promotional material, the measure of tax is the amount of consideration paid for the promotional material without deduction for the cost of materials, labor, or other service charges, even though such charges may be stated or shown separately on invoices. Except as noted below, it also includes the amount of any freight, delivery, or other like transportation charge paid or given by the consumer to the seller. The value of the promotional material also includes any tariffs or duties paid. If the total consideration paid does not represent the true value of the article used, the value must be determined as nearly as possible according to the retail selling price at place of use of similar materials of like quality and character. RCW 82.12.010.

A consumer who has paid retail sales or use tax that is due in another state with respect to promotional material that is subject to use tax in this state may take a credit for the amount of tax so paid. RCW 82.12.035. For further information, refer to WAC 458-20-178 (Use tax).

(a) **Delivery charges.** Chapter 514, Laws of 2005, altered the measure of the use tax with respect to the value of delivery charges made for the delivery of direct mail.

(i) **Delivery charges May 17, 2005, and after.** Effective May 17, 2005, amounts derived from delivery charges for the delivery of direct mail may be deducted from the measure of use tax when the delivery charge is separately stated on an invoice or similar billing invoice provided to the buyer.

(ii) **Delivery charges from June 1, 2002, through May 16, 2005.** The measure of tax includes all delivery charges. Postage is a delivery charge and is therefore included in the measure of tax if the cost is part of the consideration paid by the consumer to the seller. RCW 82.08.010 and 82.12.010. It is immaterial if amounts charged for postage are stated or shown separately on invoices. Amounts charged for postage and other delivery costs are not included in the measure of tax only if the amounts are not part of the consideration paid.

(A) **When are delivery charges part of the consideration paid?** Charges for postage or other delivery costs are considered part of the consideration paid if the permit to use precanceled stamps, a postage meter, or an imprint account for bulk mailings is in the name of the party contracted to provide and/or prepare promotional material for distribution. Such parties are liable to the post office for payment and the consumer's payment of such amounts represents a payment on the sale of tangible personal property or the services provided. For further information, refer to WAC 458-20-111 (Advances and reimbursements).

(B) **When are delivery charges not part of the consideration paid?** Charges for postage or other delivery costs are not considered part of the consideration paid if the permit to use precanceled stamps or a permit imprint account for bulk mailings is in the consumer's name. The consumer in these cases has primary or secondary liability for payment of the postage costs. (Refer to WAC 458-20-111 for information about advances and reimbursements.)

(iii) **What is direct mail?** "Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items is not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address. RCW 82.08.010 and chapter 514, Laws of 2005.

(iv) **What are delivery charges?** "Delivery charges" means charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing. RCW 82.08.010.

(b) **What is the measure of tax when a consumer contracts with one person for the promotional material and a separate person to prepare the material for distribution?** A consumer of promotional materials is subject to use tax on the value of the promotional material and the value of certain services rendered in respect to promotional material used in this state when the retail sales tax has not been paid.

The use tax is imposed on the value of the article used in this state. The tax is also imposed on the value of labor and services rendered in respect to altering, imprinting, or improving tangible personal property for use in this state when the retail sales tax has not been paid. RCW 82.12.020. With respect to promotional material, this includes activities typically performed by mailing bureaus or mail houses to prepare material for distribution, such as addressing, labeling, binding, folding, sealing, and tabbing.

(i) For discussion about activities performed by mailing bureaus, refer to WAC 458-20-141 (Duplicating activities and mailing bureaus).

(ii) For discussion about activities performed by the printing industry, refer to WAC 458-20-144 (Printing industry).

(c) **What is the measure of tax when a consumer manufactures its own promotional materials?** The measure of use tax is the value of the promotional material. Refer to WAC 458-20-112 (Value of products). A consumer who manufactures its own promotional material may also be conducting manufacturing activities and should refer to WAC 458-20-134 (Commercial or industrial use) and WAC 458-20-136 (Manufacturing, processing for hire, fabricating).

(6) **Determining the applicable local use tax rate.** For purposes of determining the applicable rate of local use tax for promotional material, the following guidelines must be followed unless the consumer obtains prior written approval

from the department to use an alternative method. Refer to (c) of this subsection for an explanation of the circumstances under which the department will consider approving alternate methods and how to obtain such approval.

(a) **Operations directed from within Washington.** The applicable local taxing jurisdiction and tax rate is the in-state location from where the consumer directs or manages its Washington operations.

(i) **Example 1.** Department Store operates ten locations in western Washington. Department Store's corporate headquarters, the location from where it manages its in-state operations, is in Seattle. The local use tax rate for Seattle is the applicable rate.

(ii) **Example 2.** Retailer, a national company with headquarters in Chicago, Illinois, operates multiple locations in Washington. Retailer manages its Washington operations from a location in Spokane. The local use tax rate for Spokane is the applicable rate.

(b) **Operations directed from outside Washington.** A consumer that manages or directs its Washington activities from outside the state must equally apportion the value of the promotional material among the local tax jurisdictions where the consumer conducts its business activities. Promotional material that is targeted to specific business locations of the consumer must be apportioned solely between those business locations. Targeted material is material specifically distributed to promote sales of products or services solely at a specific location(s) and at a different price(s) or terms than those offered at all other Washington locations.

(i) **Example 1.** Bank directs the operations of its four Washington branches from its headquarters in Sacramento, California. The branches are in Seattle, unincorporated King County, Tacoma, and Everett. For purposes of determining use tax liability, twenty-five percent of the value of the promotional material must be equally apportioned to Seattle, unincorporated King County, Tacoma, and Everett.

(ii) **Example 2.** Furniture Store, headquartered in Nevada, orders 100,000 flyers from a Portland, Oregon, printer to be mailed to Washington households announcing the opening of its new store in Spokane. Customers will receive a ten percent discount on all items purchased at the Spokane store. This discount will not apply to purchases made at Store C's other Washington locations. The local use tax rate for Spokane is the applicable rate.

(iii) **Example 3.** Restaurant manages the operations of its Washington locations from Portland, Oregon. Restaurant contracts to have coupon books printed and mailed to households in Clark and Cowlitz counties. The coupons are accepted only at the Vancouver and Longview locations. The value of the promotional material must be equally apportioned to both locations.

(iv) **Example 4.** Ohio Manufacturer has no offices, warehouses, or storefront locations in Washington. A salesperson operating from the person's Kent home solicits sales from Washington distributors for the manufacturer. Manufacturer mails promotional material to its distributors' customers in Washington. The local use tax rate for Kent is the applicable rate.

(v) **Example 5.** Michigan Wholesaler without offices, warehouses, or storefront locations in Washington sends salesperson into Washington to solicit sales. Wholesaler mails promotional material to potential customers in Washington. The applicable local use tax rate is a uniform statewide local rate of .005.

(c) **Are there alternative methods for determining the place of first use?** For purposes of reporting use tax on promotional material, the department may agree to allow a consumer to use another method of determining the applicable local use tax rate provided that the method proposed by the consumer results in an equal or more equitable distribution of the tax. A consumer may request written approval for the use of an alternative method by contacting the department's taxpayer services division at:

Department of Revenue
Taxpayer Services
P.O. Box 47478
Olympia, WA 98504-7478

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 06-06-046, § 458-20-17803, filed 2/24/06, effective 3/27/06; WSR 05-03-051, § 458-20-17803, filed 1/11/05, effective 7/1/05.]

WAC 458-20-179 Public utility tax. Introduction. This rule explains the public utility tax (PUT) imposed by chapter 82.16 RCW. The PUT is a tax for engaging in certain public service and transportation businesses within this state.

The department of revenue (department) adopted other rules that relate to the application of PUT. Readers may want to refer to the following rules:

(1) WAC 458-20-104, Small business tax relief based on income of business;

(2) WAC 458-20-121, Sales of heat or steam—Including production by cogeneration;

(3) WAC 458-20-175, Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce;

(4) WAC 458-20-180, Motor carriers;

(5) WAC 458-20-192, Indians—Indian country;

(6) WAC 458-20-193D, Transportation, communication, public utility activities, or other services in interstate or foreign commerce; and

(7) WAC 458-20-251, Sewerage collection and other related activities.

This rule contains examples which identify a number of facts and then state a conclusion. The examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

Part I - General Information

(101) **Persons subject to the public utility tax.** The PUT is imposed by RCW 82.16.020 on certain public service and transportation businesses including railroad, express, railroad car, water distribution, sewerage collection, light and power, telegraph, gas distribution, motor transportation, urban transportation, vessels under sixty-five feet in length operating upon the waters within the state of Washington, and tugboat businesses.

(a) **Hauling by watercraft.** Income from hauling persons or property for hire by watercraft between points in Washington is subject to one of two PUT classifications, depending on the nature of the service. Income from:

• Operating tugboats of any size, and the sale of transportation services by vessels sixty-five feet and over, is subject to tax under the "other public service business" PUT classification.

• The sale of transportation services using vessels under sixty-five feet, other than tugboats, is subject to tax under the "vessels under sixty-five feet" public utility tax classification.

These classifications do not include sightseeing tours, fishing charters, or activities which are in the nature of guided tours where the tour may include some water transportation. Persons engaged in providing tours should refer to WAC 458-20-258, Travel agents and tour operators.

(b) **Other businesses subject to the public utility tax.** The PUT also applies to any other public service business subject to control by the state, or having the powers of eminent domain, or any business declared by the legislature to be of a public service nature, unless the activity is subject to tax under chapter 82.04 RCW, Business and occupation (B&O) tax.

(i) The phrase "subject to control by the state" means control by the utilities and transportation commission or any other state agency required by law to exercise control of a business of a public service nature regarding rates charged or services rendered. Examples of other public service businesses include, but are not limited to: Airplane transportation, boom, dock, ferry, pipeline, toll bridge, water transportation, and wharf businesses. RCW 82.16.010.

(ii) Persons engaged in the same business activities as the businesses described above are subject to the PUT even if they are not publicly recognized as providing that type of service or the amount of income from these activities is not substantial. For example, an industrial manufacturing company that owns and operates a well, and that sells a relatively small amount of water to its wholly owned subsidiary, is subject to the PUT as a water distribution business on its sales of water.

(c) **Are amounts derived from interest and penalties taxable?**Amounts charged to customers as interest or penalties are generally subject to the service and other activities B&O tax. This includes interest charged for failure to timely pay for utility services or for incidental services. Incidental services include for example meter installation or other activities which are performed prior to the customer receiving utility services. Any interest or penalty resulting from the failure to timely pay a local improvement district or utility local improvement district assessment is not subject to public utility or B&O taxes.

(102) **Tax rates and measure of tax.** The rates of tax for each business activity subject to the PUT are imposed under RCW 82.16.020 and set forth on appropriate lines of the state public utility tax addendum for the excise tax return. The measure of the PUT is the gross income of the business. The term "gross income" means the value proceeding or accruing from the performance of the particular public service or transportation business involved, including operations incidental to that business. No deduction may be taken on account of the cost of the commodity furnished or sold, the cost of materials used, labor costs, interest, discounts, delivery costs, taxes, or any other expense whatsoever paid or accrued, nor on account of losses. RCW 82.16.010(3).

(103) **Persons subject to public utility tax may also be subject to B&O tax.** The B&O tax does not apply to any business activities for which PUT is specifically imposed, including amounts derived from activities for which a deduction from the PUT is available under RCW 82.16.050. RCW 82.04.310(1). However, many persons engaged in business activities subject to the PUT are also engaged in other business activities subject to B&O tax.

For example, a gas distribution company operating a system for the distribution of natural gas for sale may also make retail sales of gas appliances. The gas distribution company is subject to the PUT on its distribution of natural gas to consumers. However, it is also subject to retailing B&O tax and must collect and remit retail sales tax on its retail sales of gas appliances. Repairs of customer owned appliances would also be considered a retailing activity and subject to retail sales tax.

In distinguishing gross income taxable under the PUT from gross income taxable under the B&O tax, the department is guided by the uniform system of accounts established for the specific type of utility concerned. Because of differences in the uniform systems of accounts established for various types of utility businesses, such guides are not controlling for the purposes of classifying revenue under the Revenue Act.

(104) **Charges for service connections, line extensions, and other similar services.**

(a) For existing customers, amounts derived from services that are incidental to a public utility activity are subject to PUT. Thus, amounts received for the following are subject to PUT:

(i) Service connection, start-up, and testing fees;

(ii) Charges for line extensions, repairs, raisings, and/or drops;

(iii) Meter or pole replacement;

(iv) Meter reading or load factor charges; and

(v) Connecting or disconnecting.

(b) For new customers, amounts received for any of the services noted above in Part (104)(a) of this rule are subject to service and other activities B&O tax.

A "new customer" is a customer who previously has not received the utility service at the location. For example, a customer of a water distribution company who currently receives water at a residence and constructs a new residence at a different location is considered a "new customer" with respect to any meter installation services performed at the new residence, until the customer actually receives water at that location. It is immaterial that this customer may be receiving water at the old residence. The charge for installing the meter for this customer at the new location is subject to service and other activities B&O tax.

(105) **Contributions of equipment or facilities.** Contributions to a utility business in the form of equipment or facilities are not considered income to the utility business, if the contribution is a condition of receiving service.

(a) **Example 1.** An industrial customer purchases and pays sales tax on transformers it installs. The customer then provides the transformers to a public utility district as a condition of receiving future service. The public utility district is not subject to the PUT or B&O tax on the receipt of the transformers. Use tax is not owed by the utility district as the customer paid sales tax at the time of purchase.

(b) **Example 2.** For a water or sewerage collection business, the value of pipe, valves, pumps, or similar items provided by a developer for purposes of servicing the developed area is likewise not subject to PUT or B&O tax.

Part II - Exemptions, Deductions, and Nontaxable Receipts

(201) **Exemptions.** This subsection describes PUT exemptions. Also see subsections in this rule that discuss specific utilities.

(a) **Income exemption.** Persons subject to the PUT are exempt from the payment of the tax if their taxable income from utility activities does not meet a minimum threshold. RCW 82.16.040. For detailed information about this exemption, refer to WAC 458-20-104, Small business tax relief based on income of business.

(b) **Ride sharing.** RCW 82.16.047 exempts amounts received in the course of commuter ride sharing or ride sharing for persons with special transportation needs in accordance with RCW 46.74.010. For detailed information about this exemption, refer to WAC 458-20-261, Commute trip reduction incentives.

(c) **State route number 16.** RCW 82.16.046 exempts amounts received from operating state route number 16 corridor transportation systems and facilities constructed and operated under chapter 47.46 RCW.

(202) **Deductions.** In general, costs of doing business are not deductible under the PUT. However, RCW 82.16.050 does provide for limited deductions. This subsection describes a number of PUT deductions. The deductible amounts should be included in the gross income reported on the state public utility tax addendum for the excise tax return and then deducted on the deduction detail page to determine the amount of taxable income. Deductions taken but not identified on the appropriate deduction detail page may be disallowed. Also see Parts III and IV of this rule, which identify additional deductions available to power and light, gas distribution, and water distribution businesses.

(a) **Cash discounts.** The amount of cash discount actually taken by the purchaser or customer is deductible under RCW 82.16.050(4).

(b) **Credit losses.** The amount of credit losses actually sustained by taxpayers whose regular books of account are kept on an accrual basis is deductible under RCW 82.16.050 (5). For additional information regarding credit losses see WAC 458-20-196, Bad debts.

(c) **Taxes.** Amounts derived by municipally owned or operated public service businesses directly from taxes levied for their support are deductible under RCW 82.16.050(1). However, service charges that are spread on the property tax rolls and collected as taxes are not deductible.

Local improvement district and utility local improvement district assessments, including interest and penalties on such assessments, are not income because they are exercises of the jurisdiction's taxing authority. These assessments may be composed of a share of the costs of capital facilities, installation labor, connection fees, etc.

(d) **Prohibitions imposed by federal law or the state or federal constitutions.** Amounts derived from business that the state is prohibited from taxing under federal law or the state or federal constitutions are deductible under RCW 82.16.050(6).

(e) **Sales of commodities for resale.** Amounts derived from the sale of commodities to persons in the same public service business as the seller for resale within this state are deductible under RCW 82.16.050(2). This deduction is allowed only with respect to water distribution, gas distribution, or other public service businesses that furnish water, gas, or any other commodity in the performance of a public service business. For example, income from the sale of natural gas by a gas distributing company to natural gas companies located in Washington, who resell the gas to their customers, is deductible from the gas distributing company's gross income.

(f) **Services furnished jointly.** In general, costs of doing business are not deductible under the PUT. However, RCW 82.16.050(3) allows a deduction for amounts actually paid by a taxpayer to another person taxable under the PUT as the latter's portion of the consideration due for services furnished jointly by both, provided the full amount paid by the customer for the service is received by the taxpayer and reported as gross income subject to the PUT. The services must be furnished jointly by both the taxpayer and another person taxable under the PUT.

Example 1. Manufacturing Company hires ABC Transport (ABC) to haul goods from Tacoma to a manufacturing facility in Bellingham. ABC subcontracts part of the haul to XYZ Freight (XYZ) and has XYZ haul the goods from Tacoma to Everett, where the goods are loaded into ABC's truck and transported to Bellingham. Assuming all other requirements of the deduction are met, ABC may deduct the payments it makes to XYZ from its gross income as XYZ's portion of the consideration paid by Manufacturing Company for transportation services furnished jointly by both ABC and XYZ. See WAC 458-20-180 for additional information on motor carriers.

Example 2. Dakota Electricity Generator (DEG) sells electricity to Mod Industrial Firm (MIF). DEG hires Wheeler #1 to transmit the electricity from DEG to MIF. Wheeler #1 subcontracts a portion of the transmission service to Wheeler #2.

• Wheeler #1 and Wheeler #2 are jointly furnishing transmission services to DEG. Assuming all other requirements of the deduction are met, Wheeler #1 may claim a "services jointly provided" deduction in the amount paid to Wheeler #2.

• DEG may not claim a "services jointly provided" deduction for the amount DEG paid Wheeler #1. DEG and Wheeler #1 are***not***jointly furnishing a service to MIF. DEG is selling electricity to MIF, and Wheeler #1 is selling transmission services to DEG.

Example 3. City A's water department purchases water from City B's water department. City A sells the water to its customers. City A may not take a deduction for its payment to City B's water department as "services jointly provided." The sale of water by City A to its customers is not a service jointly provided to City A's customers by both City A and City B.

City B, however, may take a deduction under RCW 82.16.050(2) for its sales of water to City A since this is a sale

of commodities to a person in the same public service business, for resale within this state.

(203) **Nontaxable amounts.** The following amounts are not considered taxable income.

(a) **Insurance claim amounts.** Amounts received from insurance companies in payment of losses, which are distinguishable from amounts received to settle contract payment disagreements.

(b) **Payment of damages.** Amounts received from individuals and others in payment of damages caused by them to the utility's plant or equipment.

(c) **Amounts from eminent domain proceedings or governmental action.** Amounts received as compensation for compensatory or involuntary taking of facilities of a public utility, by the exercise of eminent domain or governmental action, are considered liquidated damages.

Part III - Light and Power Business

(301) **Light and power business.** Public utility tax is imposed by RCW 82.16.020 on gross income from providing light and power services. Light and power business means the business of operating a plant or system for the generation, production or distribution of electrical energy for hire or sale. RCW 82.16.010.

(302) **Requirements for light and power businesses.** RCW 82.16.090 requires that customer billings issued by light and power businesses serving more than twenty thousand customers include the following information:

(a) The rates and amounts of taxes paid directly by the customer upon products or services rendered by such business; and

(b) The rate, origin, and approximate amount of each tax levied upon the revenue of such business which has been added as a component of the amount charged to the customer. This does not include taxes levied by the federal government or taxes levied under chapters 54.28, 80.24, or 82.04 RCW.

(303) **Wheeling of electricity.** "Wheeling of electricity" is the activity of delivering or distributing electricity owned by others using power lines and equipment of the person doing the wheeling. Income from wheeling electricity is subject to the PUT.

(304) **Exchanges of electricity by light and power businesses.** There is no specific exemption that applies to an "exchange" of electrical energy or its rights. However, exchanges of electrical energy between light and power businesses do qualify for deduction in computing the PUT as being sales of power to another light and power business for resale. RCW 82.16.050(11). An exchange is a transaction that is considered to be a sale and involves a delivery or transfer of energy or its rights by one party to another for which the second party agrees, subject to the terms and conditions of the agreement, to deliver electrical energy at the same or another time. Examples of deductible exchange transactions include, but are not limited to, the following:

(a) The exchange of electric power for electric power between one light and power business and another light and power business;

(b) The transmission of electric power by one light and power business to another light and power business pursuant to the agreement for coordination of operations among power systems of the Pacific Northwest executed as of September 15, 1964;

(c) The acquisition of electric power by the Bonneville Power Administration (BPA) for resale to its Washington customers in the light and power business;

(d) The residential exchange of electric power entered into between a light and power business and the administrator of the BPA pursuant to the Pacific Northwest Electric Power Planning and Conservation Act, P.L. 96-501, Sec. 5(c), 16 U.S.C. Sec. 839c. In some cases, power is not physically transferred, but the purpose of the residential exchange is for BPA to pay a "subsidy" to the exchanging utilities. These subsidies are considered a nontaxable adjustment (rebate or discount) for purchases of power from BPA.

(305) **Exemptions.** The following exemptions are available for sales of electricity, and are in addition to the general exemptions found in Part II of this rule.

(a) **Sales of electricity to an electrolytic processor.** RCW 82.16.0421 provides an exemption for sales of electricity made by light and power businesses to chlor-alkali electrolytic processing businesses or sodium chlorate electrolytic processing businesses for the electrolytic process. This exemption, which is scheduled to expire June 30, 2019, applies to sales of electricity made by December 31, 2018.

The exemption does not apply to amounts received from the remarketing or resale of electricity originally obtained by contract for the electrolytic process.

(i) **Exemption certificate required.** In order to claim the exemption, the chlor-alkali electrolytic processing business or the sodium chlorate electrolytic processing business must provide the light and power business with an exemption certificate. RCW 82.16.0421. A certificate can be obtained from the department's internet site at http://dor.wa.gov.

(ii) **Annual report requirement.** RCW 82.16.0421 requires taxpayers receiving the benefit of this tax preference to file an annual report by April 30th of the year following any calendar year in which a taxpayer becomes eligible to claim the tax preference. RCW 82.32.534.

(iii) **Qualification requirements.** To qualify all the following requirements must be met:

(A) The electricity used in the electrolytic process must be separately metered from the electricity used for the general operations of the business;

(B) The price charged for the electricity used in the electrolytic process must be reduced by an amount equal to the tax exemption available to the light and power business; and

(C) Disallowance of all or part of the exemption is a breach of contract and the damages to be paid by the chlor-alkali electrolytic processing business or the sodium chlorate electrolytic processing business is the amount of the tax exemption disallowed.

(b) **Sales of electricity to aluminum smelters.** RCW 82.16.0498 provides an exemption to be taken in the form of a credit. The credit is allowed if the contract for sale of electricity to an aluminum smelter specifies that the price charged for the electricity will be reduced by an amount equal to the credit. The exemption does not apply to amounts received from the remarketing or resale of electricity originally obtained by contract for the smelting process. The credit allowed is the same amount as the utility tax that would otherwise have been due under RCW 82.16.020.

(c) **BPA credits or funds.** Effective June 10, 2010, RCW 82.04.310 exempts from the B&O tax credits or payments received by persons from the BPA, for the purpose of implementing energy conservation programs or demand-side management programs. This exemption is scheduled to expire June 30, 2015.

(306) **Deductions.** The following deductions are available for sales of electricity, and are in addition to the general deductions found in Part II of this rule.

(a) **Sales of electricity for resale or for consumption outside Washington.** Amounts derived from the production, sale, or transfer of electrical energy for resale within or outside the state of Washington or for consumption outside the state are deductible under RCW 82.16.050(11). These sales of electricity are also not subject to the manufacturing B&O tax. RCW 82.04.310.

(b) **Low density light and power businesses.** RCW 82.16.053 provides a deduction for light and power businesses having seventeen or fewer customers per mile of distribution power lines with retail power rates that exceed the state average power rate. The statute requires the department to determine the state average electric power rate each year and make this rate available to these businesses. This rate and additional information regarding this deduction can be found via the department's internet site at http://dor.wa.gov.

(c) **Conservation - Electrical energy and gas.** RCW 82.16.055 provides deductions relating to the production or generation of energy from cogeneration or renewable resources, and for measures to improve the efficiency of energy end-use.

(i) **Restrictions.** The below mentioned deductions are subject to the following restrictions:

(A) They apply only to new facilities for the production or generation of energy from cogeneration or renewable energy resources or measures to improve the efficiency of energy end-use on which construction or installation was begun after June 12, 1980, and before January 1, 1990;

(B) The measures or projects must be, at the time they are placed in service, reasonably expected to save, produce, or generate energy at a total incremental system cost per unit of energy delivered to end-use which is less than or equal to the incremental system cost per unit of energy delivered to end-use from similarly available conventional energy resources that utilize nuclear energy or fossil fuels and that the gas or electric utility could acquire to meet energy demand in the same time period; and

(C) They may be taken for a period not exceeding thirty years after the project is placed in operation. Any recurring costs determined to be eligible for deduction under this rule will cease to be eligible in whole or part at the time of termination of any energy conservation measure or project that originally authorized the deduction under RCW 82.16.055.

(ii) **What can be deducted.** The following may be deducted from a taxpayer's gross income:

(A) Amounts equal to the cost of production at the plant for consumption within the state of Washington of electrical energy produced or generated from cogeneration as defined in RCW 82.08.02565;

(B) Amounts equal to the cost of production at the plant for consumption within the state of Washington of electrical energy or gas produced or generated from renewable energy resources such as solar energy, wind energy, hydroelectric energy, geothermal energy, wood, wood wastes, municipal wastes, agricultural products and wastes, and end-use waste heat;

(C) Amounts expended to improve consumers' efficiency of energy end-use or to otherwise reduce the use of electrical energy or gas by the consumer;

(D) Amounts received by a utility as a contribution for the installation of service, and later refunded to the customer, are deductible from gross income at the time the amounts are refunded;

(E) Production expenses, eligible fuel costs and book depreciation of capital costs. Eligible fuel costs are all fuels if used for cogeneration or nonfossil fuel costs if not a cogeneration facility.

(307) **Credits.** Credit is available to light and power businesses that make contributions to an electric utility rural economic development revolving fund. The credit is equal to fifty percent of contributions made during a fiscal year to an electric utility rural economic development revolving fund.

(a) Light and power businesses may take a credit up to twenty-five thousand dollars, not to exceed the PUT that would normally be due, against their public utility tax liability each fiscal year for contributions made.

(b) Expenditures from the electric utility rural economic development revolving fund must be made solely on qualifying projects, in a designated qualifying rural area. For additional information see RCW 82.16.0491.

(c) The total amount of credits available statewide on a fiscal year basis for all qualified businesses is three hundred fifty thousand dollars. The department will allow earned credits on a first-come, first-served basis. The right to earn these tax credits expired June 30, 2011. Unused earned credits may be carried forward to subsequent years provided the department has given prior approval.

Part IV - Gas and Water Distribution Businesses

(401) **Gas distribution.** Gross income received for the distribution of gas is taxable under PUT as provided by RCW 82.16.020. Gas distribution business means the business of operating a plant or system for the production or distribution for hire or sale of gas, whether manufactured or natural. RCW 82.16.010. See Part II for general exemptions and deductions that may apply to gas distribution.

(402) **Requirements for gas distribution businesses.** RCW 82.16.090 requires that customer billings issued by gas distribution businesses serving more than twenty thousand customers include the following information:

(a) The rates and amounts of taxes paid directly by the customer upon products or services rendered by such business; and

(b) The rate, origin, and approximate amount of each tax levied upon the revenue of such business which has been added as a component of the amount charged to the customer. This does not include taxes levied by the federal government or taxes levied under chapters 54.28, 80.24, or 82.04 RCW.

(c) In addition to the general exemptions and deductions noted in Part II of this rule, the law provides the following:

(i) **Sales of natural or manufactured gas to aluminum smelters.** RCW 82.16.0498 provides an exemption to be taken in the form of a credit for sales of natural or manufac-

tured gas to aluminum smelters. The credit is allowed if the contract for sale of gas to an aluminum smelter specifies that the price charged for the gas will be reduced by an amount equal to the credit. The credit allowed is the same amount as the utility tax that would otherwise have been due under RCW 82.16.020.

(ii) **Conservation - Energy from gas.** RCW 82.16.055 provides deductions for the production or generation of energy from cogeneration or renewable resources and for measures to improve the efficiency of energy end-use. See subsection (306)(c) of this rule.

(403) **Water distribution.** PUT is imposed on amounts derived from the distribution of water under RCW 82.16.020. Water distribution business means the business of operating a plant or system for the distribution of water for hire or sale. RCW 82.16.010. In addition to the general exemptions and deductions noted in Part II of this rule, the law provides the following:

(a) **Water distribution by a nonprofit water association.** Amounts derived from the distribution of water by a nonprofit water association and used for capital improvements, related to the water distribution service, by that association are deductible under RCW 82.16.050(12).

(b) **Distribution of irrigation water.** Amounts derived from the distribution of water through an irrigation system, for irrigation purposes, are deductible under RCW 82.16.050 (7). The phrase "for irrigation purposes" means water that is used solely for nourishing plant life. Thus, when a water distribution business supplies potable water and some of the water is segregated and separately supplied solely for the nourishing of plant life as opposed to water supplied for domestic, municipal, or industrial uses, charges for such separately supplied irrigation water may be deducted from gross income subject to PUT.

In order to meet the "irrigation system" requirement, a water distribution business must demonstrate that its distribution system has turnouts or similar connections for irrigation purposes that are separate from service hookups or similar connections for domestic, industrial, or municipal uses. Under the appropriate circumstances, the use of separate meters and cross-connection or back flow devices may be evidence of such separate connections.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and chapter 82.16 RCW. WSR 13-14-121, § 458-20-179, filed 7/3/13, effective 8/3/13. Statutory Authority: RCW 82.32.300. WSR 94-13-034, § 458-20-179, filed 6/6/94, effective 7/7/94; WSR 86-18-069 (Order 86-16), § 458-20-179, filed 9/3/86; WSR 85-22-041 (Order 85-6), § 458-20-179, filed 11/1/85; WSR 83-01-059 (Order ET 82-13), § 458-20-179, filed 12/15/82; Order ET 71-1, § 458-20-179, filed 7/22/71; Order ET 70-3, § 458-20-179 (Rule 179), filed 5/29/70, effective 7/1/70.]

WAC 458-20-17902 Brokered natural gas—Use tax. (1) **Introduction.** RCW 82.12.022 and 82.14.230 impose state and local use taxes on the use of natural gas or manufactured gas by a consumer, if the person who sold the gas to the consumer has not paid public utility tax on that sale. This use tax is imposed only for natural gas delivered to a consumer through a pipeline. The use tax is applied at the same rate as the state and city public utility taxes. This section explains how this use tax applies and how it is reported to the department.

(2) **Definitions.** For the purpose of this section:

(a) "Brokered natural gas" means natural gas purchased by a consumer from a source out of the state and delivered to the consumer in this state.

(b) "Value of gas consumed or used" means the purchasing price of the gas to the consumer and generally must include all or part of the transportation charges as explained later.

(3) **Applicability of use tax.** The distribution and sale of natural gas in this state is generally taxed under the state and city public utility taxes. With changing conditions and federal regulations, it is now possible to have natural gas brokered from out of the state and sold directly to the consumer. If this occurs and the public utility taxes have not been paid, RCW 82.12.022 (state) and RCW 82.14.230 (city) impose a use tax on the brokered natural gas at the same rate as the state and city public utility taxes.

(4) **State tax.** When the use tax applies, the rate of tax imposed is equal to the public utility tax on gas distribution business under RCW 82.16.020 (1)(c). The rate of tax applies to the value of the gas consumed or used and is imposed upon the consumer.

(5) **City tax.** Cities are given the authority to impose a use tax on brokered natural gas. When imposed and applicable, the rate of tax is equal to the tax on natural gas business under RCW 35.21.870 on the value of gas consumed or used and is imposed on the consumer.

(6) **Transportation charges.**

(a) If all or part of the transportation charges for the delivery of the brokered natural gas are separately subject to the state's and cities' public utility taxes (RCW 82.16.020 (1)(c) and RCW 35.21.870), those transportation charges are excluded from measure of the use tax. The transportation charges not subject to the public utility taxes are included in the value of the gas consumed or used.

(b) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. In actual practice, the tax status of a situation must be determined after a review of all of the facts and circumstances.

(i) Public university purchases natural gas from an out of the state source through a broker. The natural gas is delivered by interstate pipeline to the local gas distribution system who delivers it to the university. The university pays the supplier for the gas, the pipeline for the interstate transportation charge, and the gas distribution system for its local transportation charge. The transportation charge by the pipeline is not subject to public utility tax because it is an interstate transportation charge. The transportation charge paid to the local gas distribution system is subject to the public utility taxes as an intrastate delivery. The value of the gas consumed or used is the purchase price paid to the supplier plus the transportation charge paid to pipeline company.

(ii) The above factual situation applies except that the natural gas is delivered directly by the interstate pipeline to the university. The university pays the supplier for the gas and the pipeline for the transportation charge. As the transportation charge is not subject to the public utility tax, it will be included in the measure of the tax. The value of the gas consumed or used is the purchase price plus the transportation charge paid to the pipeline.

(7) **Credits against the taxes.**

(a) A credit is allowed against the use taxes described in this section for any use tax paid by the consumer to another state which is similar to this use tax and is applicable to the gas subject to this tax. Any other state's use tax allowed as a credit will be prorated to the state's and cities' portion of the tax based on the relative rates of the two taxes.

(b) A credit is also allowed against the use tax imposed by the state for any gross receipts tax similar that imposed pursuant to RCW 82.16.020 (1)(c) by another state on the seller of the gas with respect to the gas consumed or used.

(c) A credit is allowed against the use tax imposed by the cities for any gross receipts tax similar to that imposed pursuant to RCW 35.21.870 by another state or political subdivision of the state on the seller of the gas with respect to the gas consumed or used.

(8) **Reporting requirements.** The person who delivers the gas to the consumer must make and submit a report to the local sales and use tax section of the department's taxpayer account administration division by the fifteenth day of the month following a calendar quarter. The report must contain the following information:

(a) The name and address of the consumer to whom gas was delivered,

(b) The volume of gas delivered to each consumer during the calendar quarter, and,

(c) Service address of consumer if different from mailing address.

(9) **Collection and administration.** Use tax on brokered natural gas must be filed with the department by the consumer on forms and records prescribed by the department. Such forms and records must be accompanied by the remittance of the tax. The department's authority to collect this tax is found in RCW 82.12.020 and 82.14.050.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.12.022 and 82.14.230. WSR 07-24-055, § 458-20-17902, filed 12/3/07, effective 1/3/08. Statutory Authority: RCW 82.32.300. WSR 90-17-068, § 458-20-17902, filed 8/16/90, effective 9/16/90.]

WAC 458-20-180 Motor carriers. (1) **Introduction.** This rule explains the tax reporting responsibilities of persons engaged in the business of transporting by motor vehicle persons or property for hire. It explains transportation business and the application of public utility tax (PUT), business and occupation (B&O), and retail sales taxes to persons engaged in the business.

(a) **Examples.** This rule contains examples which identify a number of facts and then state a conclusion. The examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(b) **References to related rules.** The department of revenue (department) has adopted other rules that relate to the application of the PUT. Readers may want to refer to the following rules:

(i) WAC 458-20-104, Small business tax relief based on income of business;

(ii) WAC 458-20-13501, Timber harvest operations, which provides guidance regarding hauling of logs;

(iii) WAC 458-20-171, Building, repairing or improving streets, roads, etc., which are owned by a municipal corporation or political subdivision of the state or by the United States and which are used primarily for foot or vehicular traffic;

(iv) WAC 458-20-174, Sales of motor vehicles, trailers, and parts to motor carriers operating in interstate or foreign commerce;

(v) WAC 458-20-175, Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce;

(vi) WAC 458-20-178, Use tax;

(vii) WAC 458-20-179, Public utility tax;

(viii) WAC 458-20-193D, Transportation, communication, public utility activities, or other services in interstate or foreign commerce.

(2) **What is a motor transportation business?** A "motor transportation business" is a business operating any motor propelled vehicle transporting persons or property of others for hire and includes, but is not limited to, the operation of any motor propelled vehicle as an auto transportation company, common carrier, or contract carrier as defined by RCW 81.68.010 and 81.80.010. (See RCW 82.16.010.) The term "motor transportation business" does not include any "urban transportation business" as described in subsection (3) of this rule.

(a) It includes hauling for hire any extracted or manufactured material, over the state's highways and over private roads but does not include:

(i) The transportation of logs or other forest products exclusively upon private roads or private highways (which is subject to the service B&O tax, e.g., see WAC 458-20-13501, Timber harvest operations); and

(ii) Effective July 1, 2009, a log transportation business, see RCW 82.16.010(6).

(b) It does not include the hauling of any earth or other substance excavated or extracted from or taken to the right of way of a publicly owned street, place, road, or highway, by a person taxable under the public road construction B&O tax classification, regardless of whether or not the earth moving portion is separately stated. (See WAC 458-20-171.)

(3) **What is an urban transportation business?** An "urban transportation business" is a business operating any vehicle for public use in the transportation of persons or property for hire, when:

• Operating entirely within the corporate limits of any city or town, or within five miles of the corporate limits thereof; or

• Operating entirely within and between cities and towns whose corporate limits are not more than five miles apart or within five miles of the corporate limits of either thereof.

(a) **The five mile standard.** "Operating entirely within five miles of the corporate limits thereof" means the five-mile standard is applied on a straight line from the corporate limits and not based on road mileage. It is immaterial how many miles the carrier travels from the origin to the termination of the haul as long as the origin and the termination of the haul are within five miles of the corporate limits. (See RCW 82.16.010.)

(b) **What is included in urban transportation?** Urban transportation includes, but is not limited to, the business of operating passenger vehicles of every type and also the business of operating cartage, pickup or delivery services, includ-

ing the collection and distribution of property arriving from or destined to a point within or without the state, whether or not such collection or distribution be made by the person performing a local or interstate line-haul of such property. See subsection (6)(d) of this rule for deduction information for interstate transportation of persons or property.

(c) **What is not urban transportation?** Urban transportation does not include the business of operating any vehicle for transporting persons or property for hire when the origin or termination is more than five miles beyond the corporate limits of any city (or contiguous cities) through which it passes. Thus an operation extending from a city to a point which is more than five miles beyond its corporate limits does not constitute urban transportation. This is true even if the route is through intermediate cities which enable the vehicle to always be within five miles of a city's corporate limits. See subsection (2) of this rule for "What is a motor transportation business?"

(4) **What does "motor transportation" and "urban transportation" include?** Motor and urban transportation include the business of operating motor-driven vehicles, upon public roads, used in transporting persons or property belonging to others, on a for-hire basis. These terms include the business of:

(a) Operating taxicabs, armored cars, and contract mail delivery vehicles, but do not include the businesses of operating auto wreckers or towing vehicles (taxable as sales at retail under RCW 82.04.050), school buses, ambulances, nor the collection and disposal of solid waste (taxable under the service and other activities B&O tax classification); and

(b) Renting or leasing trucks, trailers, buses, automobiles, and similar motor vehicles to others for use in the conveyance of persons or property when as an incident of the rental contract such motor vehicles are operated by the lessor or by an employee of the lessor.

(5) **Why is the distinction between the motor and urban transportation classifications important?** These tax classifications have different tax rates and it is important to segregate the gross income of each activity. Persons engaged in the business of motor transportation have their gross income taxed under the motor transportation PUT classification. Persons engaged in the business of urban transportation have their gross income taxed under the urban transportation PUT classification. Persons engaged in both urban and motor transportation have their gross income taxed under the motor transportation classification, unless the revenue is segregated as shown by their records.

(6) **Are deductions available?** Income, as described below, can be deducted from the taxable amounts reported, provided the amounts were originally included in the gross income. See WAC 458-20-179 for generally applicable deductions for PUT, such as bad debt and cash discount.

(a) **Fees and charges for public transportation services.** RCW 82.16.050(14) provides a deduction for amounts derived from fees or charges imposed on persons for transit services provided by a public transportation agency. Public transportation agencies must spend an amount equal to the tax reduction provided by this deduction solely to:

• Adjust routes to improve access for citizens using food banks and senior citizen services; or

• To extend or add new routes to assist low-income citizens and seniors.

(b) **Services furnished jointly.** In general, costs of doing business are not deductible under the public utility tax (PUT). However, RCW 82.16.050(3) does allow a deduction for amounts actually paid by a taxpayer to another person taxable under the PUT as the latter's portion of the consideration due for services furnished jointly by both, provided the full amount paid by the customer for the service is received by the taxpayer and reported as gross income subject to the PUT.

This includes the amount paid to a ferry company for the transportation of a vehicle and its contents (but not amounts paid to state owned or operated ferries) when the vehicle is carrying freight or passengers for hire and is being operated by a person engaged in the business of motor or urban transportation. This does not include amounts paid for transporting such vehicles over toll bridges.

Example: A customer hires ABC Transport (ABC) to haul goods from Tacoma to a manufacturing facility in Bellingham. ABC subcontracts part of the haul to XYZ Freight (XYZ) and has XYZ haul the goods from Tacoma to Everett where the goods are loaded into ABC's truck and transported to Bellingham. Assuming all other requirements of the deduction are met, ABC may deduct the payments it makes to XYZ from its gross income as XYZ's portion of the consideration paid by the customer for transportation services furnished jointly by ABC and XYZ.

(c) **Transportation of commodities to export facilities.** Income received from transporting commodities from points of origin in this state to an export elevator, wharf, dock, or ship side on tidewater or its navigable tributaries is deductible under RCW 82.16.050(9). The deduction is only available when the commodities are forwarded, without intervening transportation, by vessel, in their original form, to interstate or foreign destinations. However, this deduction is not available when the point of origin and the point of delivery to the export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town.

(i) **Example 1:** AB Transport moves freight by tug and barge from points in Washington to terminal facilities at tidewater ports in Washington. The freight is subsequently shipped from the ports by vessel to interstate and foreign destinations. AB Transport may deduct the gross income from these shipments under RCW 82.16.050(9).

(ii) **Example 2:** ABC Trucking hauls widgets from the manufacturing plant to a storage area which is adjacent to the dock. The storage area is quite large and the widgets are moved from the storage area to alongside the ship in time for loading. The widgets are loaded on the ship and then transported to a foreign country. ABC Trucking may take a deduction for the amounts received for transporting the widgets from the manufacturer to the storage area. The movement of the widgets within the storage area is not considered to be "intervening transportation," but is part of the stevedoring activity.

(iii) **Example 3:** ABC Trucking hauls several types of widgets from the manufacturing plant to a "staging area" where the widgets are sorted. After sorting, XY Hauling transports some of the widgets from the staging area to local buyers and other widgets to the dock which is located approximately five miles from the staging area where the widgets

are immediately loaded on a vessel for shipment to Japan. The dock and staging area are not within the corporate city limits of the same city. ABC Trucking may not take a deduction for amounts received for hauling widgets to the staging area. Even though some of the widgets ultimately were exported, ABC Trucking did not deliver the widgets to the dock where the widgets were loaded on a vessel.

However, XY Hauling may take a deduction for the gross income for hauls from the staging area to the dock. The widgets were loaded on the vessel in their original form with no additional processing. The haul also did not originate or terminate within the corporate city limits of the same city or town. All the conditions were met for XY Hauling to claim the deduction.

(d) **Interstate transportation of persons or property.** Income received from transporting persons or property by motor transportation equipment where either the origin or destination of the haul is outside the state of Washington is deductible. The interstate movement originates or terminates at the point where the transport obligation of the interstate carrier begins or ends. See WAC 458-20-193D for additional information on interstate activities. Transportation provided within the state prior to the point of origin of the interstate movement or subsequent to the point of destination within this state is wholly intrastate and not deductible.

Example: Airport B Shuttle provides transportation to and from the airport for persons departing or arriving from destinations which may or may not be out of state. This service is not incidental to any interstate movement and thus gross income is taxable under either motor or urban transportation.

(e) **Interstate transportation of commodities.** Income received from the transportation of commodities from points of origin in this state to final destination outside this state, or from points of origin outside this state to final destination in this state are deductible under RCW 82.16.050(8) where the carrier grants to the shipper the privilege of stopping the shipment in transit at some point in this state for the purpose of storing, manufacturing, milling, or other processing, and thereafter forwards the same commodity, or its equivalent, in the same or converted form, under a through freight rate from point of origin to final destination.

(f) **Transportation of agricultural commodities.** Certain income received from the transportation of agricultural commodities can be deducted when the commodities do not include manufactured substances or articles. For the income to be deducted, the commodities must be transported from points of origin in the state to interim storage facilities in this state for transshipment, without intervening transportation, to an export elevator, wharf, dock, or ship side on tidewater or its navigable tributaries to be forwarded, without intervening transportation, by vessel, in their original form, to interstate or foreign destinations. If agricultural commodities are transshipped from interim storage facilities in this state to storage facilities at a port on tidewater or its navigable tributaries, the same agricultural commodity dealer must operate both the interim storage facilities and the storage facilities at the port. RCW 82.16.050(10).

(i) The deduction under this subsection is available only when the person claiming the deduction obtains a completed "Certificate of Agricultural Commodity Shipped to Interstate and Foreign Destinations" from the agricultural commodity dealer operating the interim storage facilities.

(ii) A blank certificate can be found via the department's Internet site at http://dor.wa.gov. The form may also be obtained by contacting the department's telephone information center at 1-800-647-7706, or by writing the department at:

Taxpayer Information and Education
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478

(7) **Exemption for income from persons with special transportation needs.** RCW 82.16.047 provides an exemption from PUT for amounts received for providing commuter share riding or ride sharing for persons with special transportation needs in accordance with RCW 46.74.010. Transportation must be provided by a public social service agency or a private, nonprofit transportation provider as defined in RCW 81.66.010.

(8) **Business activities other than hauling.** Persons engaged in the business of motor or urban transportation may also receive income from other business activities. The tax consequences of this income is generally based on whether or not these services are performed as a part of or are incidental to the hauling activity, or are services where the taxpayer does not haul the shipment.

(a) **Handling and other services that are a part of or incidental to the hauling activity.** When a person performs activities such as packing, crating, loading or unloading of goods that the person is hauling for the customer, those services are considered to be performed as a part of the hauling activity, or are services incidental to the haul itself. The gross income from those services is taxed in the same manner as the hauling activity, e.g., motor or urban transportation.

Example: Mary hires Luke's Packing & Hauling Co. (Luke's) to load, haul, and unload her belongings at a local storage facility just a couple of miles down the street from the city apartment she is vacating. Luke's will report the gross income from Mary under the urban transportation PUT classification.

(b) **Handling and other services that are not a part of or incidental to the hauling activity.**

(i) If a person engaged in hauling activities packs, crates, loads, or unloads goods that the person is not also hauling for the customer, the gross income from these activities will generally be subject to service and other activities B&O tax.

Example: James hires Luke's Packing & Hauling (Luke's) to wrap, pack, and crate his belongings in preparation for long-term storage. Luke's will not be hauling James' belongings as Haul and Storage Inc. has been hired to pick up the belongings and put them in their storage facility. Luke's will report the gross income for wrapping, packing, and crating James' belongings under the service and other activities B&O tax classification.

(ii) A person engaged in hauling activities may also perform services that are not a part of or are separate from the hauling activity. The gross income from these activities is not subject to the motor or urban transportation PUT, but is instead subject to tax based on the nature of the activity and other provisions of the law.

Example: Affordable Hauling and Storage (Affordable) hauls products for hire and also operates a warehouse. Big Manufacturing Company (Big) hires Affordable to pick-up and deliver products to and from Affordable's warehouse for long-term storage. Affordable charges Big for the hauling services as they occur and also separately invoices Big a monthly fee for storing the products. The income from the hauling services is subject to the motor transportation or urban transportation PUT classification, as the case may be. The monthly storage charges are subject to the warehousing B&O tax classification. (See WAC 458-20-182 for an explanation of the tax-reporting responsibilities of warehouse businesses.)

(c) **Sales, leases, or rentals of tangible personal property by motor carriers.** Persons engaged in either motor or urban transportation may also sell, lease, or rent tangible personal property, such as forklifts or trailers. Gross income from the sale, lease, or rental of tangible personal property without an operator to a consumer, is subject to retailing B&O and retail sales taxes, unless a specific exemption applies. If the sale is a sale for resale, the sale is subject to the wholesaling B&O tax classification. (See WAC 458-20-211 for more information regarding the tax reporting responsibilities of persons that lease or rent tangible personal property.)

If the sale, lease, or rental of the property qualifies for one of the retail sales tax exemptions for equipment used in interstate commerce provided by RCW 82.08.0262 or 82.08.-0263 (e.g., as may be the case with a trailer used in interstate commerce), the retailing of interstate transportation equipment B&O tax classification applies. (See WAC 458-20-174 for limited exemptions for motor carriers operating in interstate or foreign commerce.)

(9) **Purchases of tangible personal property.** Persons engaged in the business of motor or urban transportation must pay retail sales tax to their vendors when purchasing motor vehicles, trailers, parts, equipment, tools, supplies, and other tangible personal property for use in conducting their business. (See WAC 458-20-174 for limited exemptions for motor carriers operating in interstate or foreign commerce.)

(10) **Purchases made for rental or lease to others.** Persons buying motor vehicles, trailers and similar equipment solely for the purpose of renting or leasing the same without an operator are making purchases for resale. For sales made on or after January 1, 2010, the seller must obtain a reseller permit from the buyer to document the wholesale nature of any sale as provided in WAC 458-20-102 (Reseller permits). Resale certificates used prior to January 1, 2010, must be kept on file by the seller for five years from the date of last use or until December 31, 2014.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and chapter 82.16 RCW. WSR 13-14-121, § 458-20-180, filed 7/3/13, effective 8/3/13. Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), § 458-20-180, filed 3/15/83; Order ET 70-3, § 458-20-180 (Rule 180), filed 5/29/70, effective 7/1/70.]

WAC 458-20-181 Vessels, including log patrols, tugs and barges, operating upon waters in the state of Washington.

Business and Occupation Tax

Retailing. Persons engaged in the business of operating such vessels and tugs are taxable under the retailing classification upon the gross sales of meals (including meals to employees) and other tangible personal property taxable under the retail sales tax.

Service and other business activities. The business of operating lighters is a service business taxable under the service and other business activities classification upon the gross income from such service. Also taxable under this classification is gross income from operation of vessels to provide scenic cruises.

Retail Sales Tax

Sales of meals and other tangible personal property by persons operating such vessels and tugs are sales at retail and the retail sales tax must be collected thereon. For applicability of retail sales tax where meals are furnished to members of the crew or to other employees as a part of their compensation for services rendered, see WAC 458-20-119.

Sales of foodstuff and other articles to such operators for resale aboard ship are not subject to retail sales tax.

Sales to all such operators of fuel, lubricants, machinery, equipment and supplies which are not resold are sales at retail and the retail sales tax must be paid thereon, unless exempt by law.

Charges made by others for the repair of any boat or barge are also sales at retail and the retail sales tax must be paid upon the total charge made for both labor and materials.

Charges made for drydocking are not subject to the retail sales tax provided such charges are shown as an item separate from charges made for repairing.

Use Tax

The use tax applies upon the use within this state of all articles of tangible personal property purchased at retail and upon which the retail sales tax has not been paid, unless exempt by law.

Public Utility Tax

The business of operating upon waters wholly within the state of Washington vessels which are common carriers regulated by the utilities and transportation commission is taxable under the public utility tax as follows:

(1) Vessels under sixty-five feet in length, taxable under the classification vessels under sixty-five feet upon gross income.

(2) Vessels sixty-five feet or more in length, taxable under the classification other public service business upon gross income.

The other public service classification of the public utility tax applies to the business of operating tugs, barges, and log patrols.

[Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), § 458-20-181, filed 3/15/83; Order ET 70-3, § 458-20-181 (Rule 181), filed 5/29/70, effective 7/1/70.]

WAC 458-20-182 Warehouse businesses. (1) **Definitions.** For purposes of this section the following terms and meanings will apply:

(a) "Warehouse" means every structure wherein facilities are offered for the storage of tangible personal property.

(b) "Storage warehouse" means a building or structure, or any part thereof, in which goods, wares, or merchandise are received for storage for compensation, except field warehouses, fruit warehouses, fruit packing plants, warehouses licensed under chapter 22.09 RCW (which are agricultural commodities warehouses), public garages storing automobiles, railroad freight sheds, docks and wharves, and "self-storage" or "mini-storage" facilities whereby customers have direct access to individual storage areas by separate access.

(c) "Cold storage warehouse" means a storage warehouse used to store fresh and/or frozen perishable fruits or vegetables, meat, seafood, dairy products, or fowl, or any combination thereof, at a desired temperature to maintain the quality of the product for orderly marketing. This term does not include freezer space or frozen food lockers.

(d) "Automobile storage garage" means any off-street building, structure, or area where vehicles are parked or stored, for any period of time, for a charge.

(2) **Business and occupation tax.** Warehouse businesses are taxable according to the nature of their operations and the specific kinds of goods stored, as follows:

(a) Persons engaged in operating any "storage warehouse" or "cold storage warehouse," as defined herein, are subject to tax under the warehousing classification, measured by the gross income of the business. (See RCW 82.04.280.)

(b) Persons engaged in operating any automobile storage garage are subject to tax under the retailing classification, measured by gross proceeds of such operations. (See RCW 82.04.050 (3)(d).)

(c) Persons engaged in operating any warehouse business, other than those of (a) and (b) of this subsection, are subject to tax under the service classification, measured by the gross income of the business. (See RCW 82.04.290.) This includes cold storage and frozen food lockers, field warehouses, fruit warehouses, agricultural commodities warehouses, and freight storage warehouses.

(d) Effective July 1, 1986, no warehouse business or operation of any kind is subject to tax under the public utility tax of chapter 82.16 RCW.

(3) **Tax measure.** The gross income of the business of operating a warehouse includes all income from the storing, handling, sorting, weighing, measuring, and loading or unloading for storage of tangible personal property.

(4) Where a grain warehouseman purchases or owns grain stored in such warehouse, there shall be included in taxable gross income:

(a) An amount equal to the charges at the customary rate for all services rendered in connection with such grains up to the time of purchase by the warehouseman; and

(b) The amount of any charges for services that are rendered during the period of the warehouseman's ownership thereof billed and stated, as such, separately from the price of the grains on the invoice to the purchaser at the time of the sale by the warehouseman.

(5) **Retail sales tax.** Persons operating automobile garage storage businesses must collect and report retail sales tax upon the gross selling price of such parking/storage services.

(6) **Consumables.** Persons engaged in operating any of the business activities covered by this section must pay retail sales tax upon their purchases of consumable supplies, equipment, and materials for their own use as consumers in operating such businesses.

(7) **Use tax.** The use tax is due upon the value of all tangible personal property used as consumers by persons operating warehouse businesses, upon which the retail sales tax has not been paid.

For specific provisions covering temporary holding of goods in foreign or interstate movement by water, see WAC 458-20-193D respecting stevedoring and associated activities.

[Statutory Authority: RCW 82.32.300. WSR 87-05-042 (Order 87-1), § 458-20-182, filed 2/18/87; Order ET 74-1, § 458-20-182, filed 5/7/74; Order ET 70-3, § 458-20-182 (Rule 182), filed 5/29/70, effective 7/1/70.]

WAC 458-20-183 Amusement, recreation, and physical fitness services. (1) **Introduction.** This section provides tax reporting instructions for persons who provide amusement, recreation, and physical fitness services, including persons who receive their income in the form of dues and initiation fees. Section 301, chapter 25, Laws of 1993 sp. sess., amended RCW 82.04.050 to include as a retail sale "physical fitness services." This change became effective July 1, 1993. Physical fitness services were previously taxed under the service and other business activities classification. Amusement and recreation services were retail sales prior to the 1993 law amendment and the tax classification remains unchanged for these activities.

(a) Local governmental agencies that provide amusement, recreation, and physical fitness services should also refer to WAC 458-20-189 (Sales to and by the state of Washington, counties, cities, school districts, and other municipal subdivisions).

(b) Persons engaged in operating coin operated amusement devices should refer to WAC 458-20-187 (Coin operated vending machines, amusement devices and service machines).

(c) Persons engaged in providing camping and outdoor living facilities should refer to WAC 458-20-118 (Sale or rental of real estate, license to use real estate) and WAC 458-20-166 (Hotels, motels, boarding houses, rooming houses, resorts, summer camps, trailer camps, etc.).

(2) **Definitions.** The following definitions apply throughout this section:

(a) "Amounts derived" means gross income from whatever source and however designated. It includes "gross proceeds of sales" and "gross income of the business" as those terms are defined by RCW 82.04.070 and 82.04.080, respectively. It shall also include income attributable to bona fide "initiation fees" and bona fide "dues."

(b) "Amusement and recreation services" include, but are not limited to: Golf, pool, billiards, skating, bowling, swimming, bungee jumping, ski lifts and tows, basketball, racquet ball, handball, squash, tennis, and all batting cages. "Amusement and recreation services" also include the provision of related facilities such as basketball courts, tennis courts, handball courts, swimming pools, and charges made for providing the opportunity to dance. The term "amusement and recreation services" does not include instructional les-

sons to learn a particular activity such as tennis lessons, swimming lessons, or archery lessons.

(c) "Any additional charge" means a price or payment other than bona fide initiation fees or dues, paid by persons for particular goods and services received. The additional charge must be reasonable and any business and/or sales taxes must be paid upon such charges in order to qualify other income denominated as "bona fide dues" or "fees" to be deductible. The reasonableness of any additional charge will be based on one of the following two criteria:

(i) It must cover all costs reasonably related to furnishing the goods or services; or

(ii) It must be comparable with charges made for similar goods or services by other comparable businesses.

(d) "Direct overhead costs" include all items of expense immediately associated with the specific goods or services for which the costs of production method is used. For example, the salary of a swimming pool lifeguard or the salary of a golf club's greenskeeper are both direct overhead costs in providing swimming and golfing respectively.

(e) "Dues" are those amounts periodically paid by members solely for the purpose of entitling those persons to continued membership in the club or similar organization. It shall not include any amounts paid for goods or services rendered to the member by the club or similar organization.

(f) "Entry fees" means those amounts paid solely to allow a person the privilege of entering a tournament or other type of competition. The term does not include any amounts charged for the underlying activity.

(g) "Goods or services rendered" shall include those amusement, recreation, and physical fitness services defined to be retail sales in (m) of this subsection. Also see, WAC 458-20-166 (Hotels, motels, boarding houses, rooming houses, resorts, summer camps, trailer camps, etc.) and WAC 458-20-244 (Food products). The term shall include the totality or aggregate of goods or services available to members. It is not determinative that some members actually receive more goods or actually enjoy more services than others so long as the totality of the goods or services offered are made available to members in general.

(h) "Indirect overhead costs" means overhead costs incurred by the service provider that are not immediately associated with the specific goods and services. These costs include a pro rata share of total operating costs, including all executive salaries and employee salaries that are not "direct overhead costs" as that term is defined in (d) of this subsection, as well as a pro rata share of administrative expenses and the cost of depreciable capital assets.

(i) "Initiation fees" means those amounts paid solely to initially admit a person as a member to a club or organization. "Bona fide initiation fees" within the context of this rule shall include only those one-time amounts paid which genuinely represent the value of membership in a club or similar organization. It shall not include any amount paid for or attributable to the privilege of receiving any goods or services other than mere nominal membership.

(j) "League fees" means those amounts paid solely for the privilege of allowing a person or a person's team to join an association of sports teams or clubs that compete chiefly amongst themselves. The term does not include any amounts charged for the underlying activity.

(k) "Nonprofit youth organization" means a nonprofit organization engaged in character building of youth which is exempt from property tax under RCW 84.36.030.

(l) "Physical fitness services" include, but are not limited to: All exercise classes, whether aerobic, dance, water, jazzercise, etc., providing running tracks, weight lifting, weight training, use of exercise equipment, such as treadmills, bicycles, stair-masters and rowing machines, and providing personal trainers (i.e., a person who assesses an individual's workout needs and tailors a physical fitness workout program to meet those individual needs). "Physical fitness services" do not include instructional lessons such as those for self-defense, martial arts, yoga, and stress-management. Nor do these services include instructional lessons for activities such as tennis, golf, swimming, etc. "Instructional lessons" can be distinguished from "exercise classes" in that instruction in the activity is the primary focus in the former and exercise is the primary focus in the latter.

(m) "Sale at retail" or "retail sale" include the sale or charge made by persons engaged in providing "amusement and recreation services" and "physical fitness services" as those terms are defined in (b) and (l) of this subsection. The term "sale at retail" or "retail sale" does not include: The sale of or charge made for providing facilities where a person is merely a spectator, such as movies, concerts, sporting events, and the like; the sale of or charge made for instructional lessons, or league fees and/or entry fees; charges made for carnival rides where the customer purchases tickets at a central ticket distribution point and then the customer is subsequently able to use the purchased tickets to gain admission to an assortment of rides or attractions; or, the charge made for entry to an amusement park or theme park where the predominant activities in the area are similar to those found at carnivals.

(n) "Significant amount" relates to the quantity or degree of goods or services rendered and made available to members by the organization. "Significant" is defined as having great value or the state of being important.

(o) "Value of such goods or services" means the market value of similar goods or services or computed value based on costs of production.

(3) **Business and occupation tax.**

(a) **Retailing classification.** Gross receipts from the kind of amusement, recreation, and physical fitness services defined to be retail sales in subsection (2)(m) of this section are taxable under the retailing classification. Persons engaged in providing these activities are also taxable under the retailing classification upon gross receipts from sales of meals, drinks, articles of clothing, or other property sold by them.

(b) **Service and other activities classification.** Gross receipts from activities not defined to be retail sales, such as tennis lessons, golf lessons, and other types of instructional lessons, are taxable under the service and other activities classification. Persons providing licenses to use real estate, such as separately itemized billings for locker rentals, are also taxable under this classification. See WAC 458-20-118 (Sale or rental of real estate, license to use real estate).

(4) **Receiving income in the form of dues and/or initiation fees.**

(a) **General principles.** For the purposes of the business and occupation tax, all amounts derived from initiation fees

and dues must be reported as gross income which then must be apportioned between taxable and deductible income. The following general principles apply to providing amusement, recreation, and physical fitness services when income is received in the form of dues and/or initiation fees:

(i) RCW 82.04.4282 provides for a business and occupation tax deduction for amounts derived from activities and charges of essentially a nonbusiness nature. The scope of this statutory deduction is limited to situations where no business or proprietary activity (including the rendering of goods or services) is engaged in which directly generates the income claimed for deduction. Many for-profit or nonprofit entities may receive "amounts derived," as defined in this section, which consist of a mixture of tax deductible amounts (bona fide initiation fees and dues) and taxable amounts (payment for significant goods and services rendered). To distinguish between these kinds of income, the law requires that tax exemption provisions be strictly construed against the person claiming exemption. Also, RCW 82.32.070 requires the maintenance of suitable records as may be necessary to determine the amount of any tax due. The result of these statutory requirements is that all persons must keep adequate records sufficient to establish their entitlement to any claimed tax exemption or deduction.

(ii) The law does not contemplate that the deduction provided for by RCW 82.04.4282 should be granted merely because the payments required to be made by members or customers are designated as "initiation fees" or "dues." The statutory deduction is not available for outright sales of tangible personal property or for providing facilities or services for a specific charge. Neither is it available if dues are in exchange for any significant amounts of goods or services rendered by the recipient thereof to members without any additional charge to the member, or if the dues are graduated upon the amount of goods or services rendered. Thus, it is only those initiation fees and dues which are paid solely and exclusively for the express privilege of belonging as a member of a club, organization, or society, which are deductible.

(iii) In applying RCW 82.04.4282, no distinction is made between the kinds of clubs, organizations, associations, or other entities which may be eligible for this deduction. They may be operated for profit or nonprofit. They may be owned by the members, incorporated, or operating as a partnership, limited liability company, joint venture, sole proprietorship, or cooperative group. They may be of a charitable, fraternal, social, political, benevolent, commercial, or other nature. The availability of the deduction is determined solely by the nature of the activity or charge which generates the "amounts derived" as that term is defined in subsection (2)(a) of this section.

(iv) Nonprofit youth organizations, as defined in subsection (2)(k) of this section, may deduct fees or dues received from members even though the members are entitled to use the organization's facilities, including camping and recreational facilities, in return for such payments. (See RCW 82.04.4271.)

(b) **Allocation of income.** Persons who derive income from initiation fees and dues may find that they have incurred business and occupation tax liability under both the retailing and service and other activities classifications. For example, an organization may furnish exercise equipment as well as provide lessons in martial arts to its members in return for payment of dues. The former is a retailing taxable activity while the latter is taxable under the service business tax. These taxes are at different rates. Once the income has been allocated between taxable and deductible amounts, the parts of taxable income attributable to either retailing activities or service activities must be reported on the combined excise tax return under the appropriate classification and under the prevailing tax rates. In addition, state and local retail sales taxes measured by the retailing portions must be separately collected from dues paying members, reported, and remitted with the same excise tax return.

(c) **Alternative methods of reporting.** Persons who receive any "amounts derived" from initiations fees and/or dues may report their tax liabilities and determine the amount of tax reportable under different classifications (retailing or service) by use of two alternative allocation methods. The taxpayer may only change its selected allocation method annually and all changes are prospective only. These mutually exclusive methods are:

(i) **Actual records of facilities usage.**

(A) Persons may allocate their income based upon such actual records of facilities usage as are maintained. This method is accomplished by either: The allocation of a reasonable charge for the specific goods or services rendered; or, the average comparable charges for such goods or services made by other comparable businesses. In no case shall any charges under either method be calculated to be less than the actual cost of providing the respective good or service. When using the average comparable charges method the term "comparable businesses" shall not include subsidized public facilities when used by a private facility.

(B) The actual records of facilities usage method must reflect the nature of the goods or services and the frequency of use by the membership, either from an actual tally of times used or a periodic study of the average membership use of facilities. Actual usage reporting may also be based upon a graduated or sliding fees and dues structure. For example, an organization may charge different initiation fees or dues rates for a social membership than for a playing membership. The difference between such rates is attributable to the value of the goods or services rendered. It constitutes the taxable portion of the "amounts derived" allocable to that particular activity. Because of the broad diversification of methods by which "amounts derived" may be assessed or charged to members, the actual records of usage method of reporting may vary from organization to organization.

(C) Organizations which provide more than one kind of "goods or services" as defined in subsection (2)(g) of this section, may provide such actual records for each separate kind of goods or services rendered. Based upon this method, the total of apportioned "taxable" income may be subtracted from total gross income to derive the amount of gross income which is entitled to deduction as "bona fide initiation fees and dues" under RCW 82.04.4282; or

(ii) **Cost of production method.**

(A) The cost of production allocation method is based upon the cost of production of goods or services rendered. Persons using this method are advised to seek the department's review of the cost accounting methods applied, in order to avoid possible tax deficiency assessment if records

are audited. In such cases, the cost of production shall include all items of expense attributable to the particular facility (goods or services) made available to members, including direct and indirect overhead costs.

(B) No portion of assets which have been fully depreciated will be included in computing overhead costs, nor will there be included any costs attributable to membership recruitment and advertising, or providing members with the indicia of membership (membership cards, certificates, contracts of rights, etc.).

(C) The cost of production method is performed by multiplying gross income (all "amounts derived") by a fraction, the numerator of which is the direct and indirect costs associated with providing any specific goods or service, and the denominator of which is the organization's total operating costs. The result is the portion of "amounts derived" that is allocable to the taxable facility (goods or services rendered). If more than one kind of facility (goods or services) is made available to members, this formula must be applied for each facility in order to determine the total of taxable and deductible amounts and to determine the amount of taxable income to report as either retailing taxable or service taxable. The balance of gross amounts derived is deductible as bona fide initiation fees or dues.

(D) Under very unique circumstances and only upon advance written request and approval, the department will consider variations of the foregoing accounting methods as well as unique factors.

(E) Unless income accounting and reporting are accomplished by one or a combination of methods outlined in this section, or under a unique reporting method authorized in advance by the department, it will be presumed that all "amounts derived" by any person who provides "goods or services" as defined herein, constitute taxable, nondeductible amounts.

(5) **Retail sales tax.**

(a) The retail sales tax must be collected upon charges for admissions, the use of facilities, equipment, and exercise classes by all persons engaged in the amusement, recreation, and physical fitness services that are defined to be retail sales in subsection (2)(m) of this section. The retail sales tax must also be collected upon sales of food, drinks and other merchandise by persons engaging in such businesses. See WAC 458-20-244 (Food products). In the case of persons who receive their income in the form of dues and/or initiation fees, the amount of gross receipts determined to be taxable under the retailing business and occupation classification shall be used to determine the person's retail sales tax liability under this subsection.

(b) When the charge for merchandise is included within a charge for admission which is not a "sale at retail" as defined herein, the retail sales tax applies to the charge made for both merchandise and admission, unless a proper segregation of such charge is made in the billing to the customer and upon the books of account of the seller.

(c) The retail sales tax applies upon the purchase or rental of all equipment and supplies by persons providing amusement, recreation, and physical fitness services, other than merchandise that is actually resold by them. For example, the retail sales tax applies to purchases of such things as soap or shampoo provided at no additional charge to members of a health club.

(6) **Transitory provisions for nonprofit youth organizations.** The 1993 amendment of RCW 82.04.050 resulted in "physical fitness services" provided by nonprofit youth organizations being classified as retail sales. However, section 1, chapter 85, Laws of 1994, amended RCW 82.08.0291 and thereby exempted from the definition of retail sale, the sale of such services by a nonprofit youth organization to members of the organization. This change became effective July 1, 1994. Therefore, nonprofit youth organizations are only liable for retail sales tax on the sale or charge made for "physical fitness services" from July 1, 1993, to June 30, 1994. Nonprofit youth organizations were previously exempt from the collection of retail sales tax on "amusement and recreation services" (RCW 82.08.0291) and were previously not subject to retailing business and occupation tax on both the provision of "physical fitness services" and "amusement and recreation services" (RCW 82.04.4271). Nonprofit youth organizations, however, may have tax liabilities for other types of activities, such as retail sales of food, retail sales of tangible personal property, or the license to use real estate, as discussed above.

[Statutory Authority: RCW 82.32.300. WSR 95-22-100, § 458-20-183, filed 11/1/95, effective 12/2/95; WSR 84-12-046 (Order ET 84-2), § 458-20-183, filed 6/1/84. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order ET 78-4), § 458-20-183, filed 6/27/78; Order ET 70-3, § 458-20-183 (Rule 183), filed 5/29/70, effective 7/1/70.]

WAC 458-20-185 Tax on tobacco products. (1) **Introduction.** This rule explains the tax liabilities of persons engaged in business as retailers or distributors of tobacco products other than cigarettes. The tax on tobacco products (also called "other tobacco products tax," "tobacco tax," or "OTP tax") is in addition to all other taxes owed, such as retailing or wholesaling business and occupation tax, sales tax, and litter tax. See WAC 458-20-186 for tax liabilities associated with taxes that apply exclusively to cigarettes.

(2) **Licensing requirements and responsibilities.** The Washington state liquor control board assumed the licensing responsibilities for cigarettes on July 1, 2009. Please see chapters 314-33 and 314-34 WAC.

(3) **Organization of rule.** The information provided in this rule is divided into five parts:

(a) Part I provides definitions and explains the tax liabilities of persons engaged in the business of selling or distributing tobacco products (excluding cigarettes) in this state.

(b) Part II explains the requirements and responsibilities for persons transporting tobacco products in Washington.

(c) Part III explains the recordkeeping requirements and enforcement of the tobacco tax.

(d) Part IV describes the credits for tax paid and the procedures that must be followed to qualify for credit.

Part I - Tax on Tobacco Products (excluding Cigarettes)

(101) **In general.** The Washington state tobacco products tax is due and payable by the first distributor who possesses tobacco products in this state. The measure of the tax in most instances is based on the actual price paid by the distributor for the tobacco product, unless the distributor is affiliated with the seller.

(102) **Definitions.** For the purposes of this rule, the following definitions apply:

(a) **"Actual price"** means the total amount of consideration for which tobacco products are sold, valued in money, whether received in money or otherwise, including any charges by the seller necessary to complete the sale such as charges for delivery, freight, transportation, or handling.

(b) **"Affiliated"** means related in any way by virtue of any form or amount of common ownership, control, operation, or management.

(c) **"Board"** means the liquor control board.

(d) **"Business"** means any trade, occupation, activity, or enterprise engaged in for the purpose of selling or distributing tobacco products in this state.

(e) **"Cigar"** means a roll for smoking that is of any size or shape and that is made wholly or in part of tobacco, irrespective of whether the tobacco is pure or flavored, adulterated or mixed with any other ingredient, if the roll has a wrapper made wholly or in greater part of tobacco. "Cigar" does not include a cigarette.

(f) **"Cigarette"** has the same meaning as in RCW 82.24.010.

(g) **"Department"** means the department of revenue.

(h) **"Distributor"** means:

(i) Any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale;

(ii) Any person who makes, manufactures, fabricates, or stores tobacco products in this state for sale in this state;

(iii) Any person engaged in the business of selling tobacco products from outside this state who ships or transports tobacco products to retailers in this state, to be sold by those retailers;

(iv) Any person engaged in the business of selling tobacco products in this state who handles for sale any tobacco products that are within this state but upon which tax has not been imposed. RCW 82.26.010 (3)(a) through (d). (For example, Sunshine Tobacco Shop ("Sunshine") buys cigars from an out-of-state manufacturer for resale to consumers in this state. The cigars are shipped to Sunshine via common carrier. In this instance, Sunshine is a distributor, must have both a retailer's and a distributor's license, and must pay the tobacco products tax on the products it brings into the state. However, if Sunshine bought its merchandise exclusively from in-state distributors that have paid the tobacco products tax on that merchandise, Sunshine would not be considered a distributor, and would need only a retailer's license.)

(i) **"Indian," "Indian country,"** and **"Indian tribe"** have the same meaning as defined in chapter 82.24 RCW and WAC 458-20-192.

(j) **"Manufacture"** means the production, assembly, or creation of new tobacco products. For the purposes of this rule, "manufacture" does not necessarily have the same meaning as provided in RCW 82.04.120.

(k) **"Manufacturer"** means a person who manufactures and sells tobacco products.

(l) **"Manufacturer's representative"** means a person hired by a manufacturer to sell or distribute the manufacturer's tobacco products, and includes employees and independent contractors.

(m) **"Person"** means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, the state and its departments and institutions, political subdivision of the state of Washington, corporation, limited liability company, association, society, any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise. The term excludes any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country.

(n) **"Place of business"** means any place where tobacco products are sold or where tobacco products are manufactured, stored, or kept for the purpose of sale, including any vessel, vehicle, airplane, train, or vending machine.

(o) **"Retailer"** means any person engaged in the business of selling tobacco products to ultimate consumers.

(p) **"Retail outlet"** means each place of business from which tobacco products are sold to consumers.

(q) **"Sale"** means:

(i) Any transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, and includes and means all sales made by any person.

(ii) The term "sale" includes a gift by a person engaged in the business of selling tobacco products, for advertising, promoting, or as a means of evading the provisions of this chapter.

(r) **"Sample"** and **"sampling"** have the same meaning as in RCW 70.155.010.

(s) **"Store," "stores,"** or **"storing"** means the holding of tobacco products for later sale or delivery inside or outside this state. For example:

(i) Wilderness Enterprises ships products from out-of-state to its Kent warehouse. All products are intended for future sale to Alaska. Wilderness Enterprises is a distributor that stores tobacco products in this state. Wilderness Enterprises is liable for tobacco products tax on the products stored in this state. (However, see subsection (501) of this section for credits that may be available to Wilderness Enterprises for out-of-state sales.)

(ii) Cooper Enterprises brings tobacco products into this state for sale. It rents storage space from a third party, Easy Storage. Cooper Enterprises (the distributor), not Easy Storage, is responsible for the tax and reporting requirements on the stored tobacco products.

(t) **"Taxable sales price"** means:

(i) In the case of a taxpayer that is not affiliated with the manufacturer, distributor, or other person from whom the taxpayer purchased tobacco products, the actual price for which the taxpayer purchased the tobacco products. For purposes of this subsection, "person" includes both persons as defined in (m) of this subsection and any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country;

(ii) In the case of a taxpayer that purchases tobacco products from an affiliated manufacturer, affiliated distributor, or other affiliated person, and that sells those tobacco products to unaffiliated distributors, unaffiliated retailers, or ultimate

consumers, the actual price for which that taxpayer sells those tobacco products to unaffiliated distributors, unaffiliated retailers, or ultimate consumers.

For purposes of this subsection, "person" includes both persons as defined in (m) of this subsection and any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country;

(iii) In the case of a taxpayer that sells tobacco products only to affiliated distributors or affiliated retailers, the price, determined as nearly as possible according to the actual price for which other distributors sell similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers;

(iv) In the case of a taxpayer that is a manufacturer selling tobacco products directly to ultimate consumers, the actual price for which the taxpayer sells those tobacco products to ultimate consumers;

(v) In the case of a taxpayer that has acquired tobacco products under a sale as defined in (q)(ii) of this subsection, the price, determined as nearly as possible according to the actual price for which the taxpayer or other distributors sell the same tobacco products or similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers; or

(vi) In any case where (t)(i) through (v) of this subsection do not apply, the price, determined as nearly as possible according to the actual price for which the taxpayer or other distributors sell the same tobacco products or similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers.

(u) **"Taxpayer"** means a person liable for the tax imposed by chapter 82.26 RCW.

(v) **"Tobacco products"** means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, including wrapping papers or tubes that contain any amount of tobacco (such as "blunts"), prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking, but shall not include cigarettes as defined in RCW 82.24.010.

(w) **"Unaffiliated distributor"** means a distributor that is not affiliated with the manufacturer, distributor, or other person from whom the distributor has purchased tobacco products.

(x) **"Unaffiliated retailer"** means a retailer that is not affiliated with the manufacturer, distributor, or other person from whom the retailer has purchased tobacco products.

(103) **Imposition of tax.** RCW 82.26.030 as amended effective July 1, 2005, states: "It is the further intent and purpose of this chapter that the distributor who first possesses the tobacco product in this state shall be the distributor liable for the tax and that in most instances the tax will be based on the actual price that the distributor paid for the tobacco product, unless the distributor is affiliated with the seller." The tax is imposed at the time the first distributor possesses the product in this state for sale. RCW 82.26.020(2).

Examples. The following examples, while not exhaustive, illustrate some of the circumstances in which the tax is imposed. These examples should be used only as a general guide. The status of each situation must be determined after a review of all of the facts and circumstances.

(a) BET Wholesalers sells and ships tobacco products from Kentucky via common carrier to Surprise Enterprises in Washington. The tax is due from Surprise Enterprises a licensed distributor, because it is the first possessor in Washington that holds the product for sale. However, BET Distributors must give the liquor control board (LCB) notice of its intent to ship tobacco products into this state.

(b) BET Wholesalers sells and ships tobacco products in its own trucks from Kentucky to Jamie's Enterprises, a licensed distributor in Washington. The tax is due from BET Wholesalers, because it is the first possessor in Washington that holds the product for sale.

(c) Garden State Cigars is located in New Jersey. It ships its products to Washington retailers via National Common Carrier. The retailers must be licensed as distributors and are liable for the tax. However, Garden State Cigars must give the liquor control board (LCB) notice of its intent to ship tobacco products into this state.

(104) **Rates.** The Washington state tobacco tax is an excise tax levied on the taxable sales price as defined in RCW 82.26.010. The rate is a combination of statutory rates found in RCW 82.26.020.

(105) **Promotions.**

(a) Tobacco products sold, provided at a reduced cost, or given away for advertising or any other purpose are taxed in the same manner as if they were sold, used, consumed, handled, possessed, or distributed in this state. RCW 82.26.010 (5)(b). The taxable sales price for the tobacco products is the actual price for which the taxpayer or other distributors sell the same tobacco products, or a maximum of 67 cents each for cigars. RCW 82.26.010(18).

For example, Etta's (an out-of-state manufacturer) gives Joe's Distributing 500 cigars and 200 cans of snuff as a promotion. Etta's and Joe's Distributing are unaffiliated. Joe's Distributing normally sells this brand of cigars for $1.00 each and the snuff for $2.50 each to unaffiliated distributors and/or retailers. Joe's Distributing owes tobacco products tax on this merchandise. Because Joe's Distributing normally sells each cigar for more than 67 cents, the tobacco products tax is calculated on the cigars at 50 cents each (500 x 0.50 = $250). The tobacco products tax on the snuff is calculated at 75% of Joe's normal selling price to unaffiliated buyers (200 x $2.50 = $500 x 75% = $375) for a total tobacco products tax of $625.

(b) If a product is purchased or sold at a discount in a promotion characterized as a "2 for 1" or similar sale, the tax is calculated on the actual prorated consideration the buyer paid to the unaffiliated distributor, or a maximum of 67 cents a cigar.

For example:

(i) Duke Distributing (an out-of-state wholesaler) ships tobacco products via common carrier to Lem's Tobacco Shop (an unaffiliated Washington retailer). Duke invoices Lem's for $1,500. The sale includes 200 cigars priced "buy one for $2 and get one free"; the balance of the sale is chewing tobacco priced at $1,300. Lem's Tobacco Shop is liable for

the tax. The tax on the chewing tobacco is $975 ($1,300 x 75%). Each cigar costs Lem's Tobacco Shop $1 ($200/200 cigars = $1 per cigar). Because each cigar costs more than 67 cents, the tax on the cigars is capped at $0.50 each. The tax on the cigars is $100 (200 cigars x $0.50 = $100). Total tobacco tax due on the invoice is $1,075.

(ii) Shasta Distributing (an out-of-state wholesaler) ships OTP in its own trucks to Lem's Tobacco Shop (an unaffiliated Washington retailer). Shasta invoices Lem's for $1,500. The sale includes 200 cigars priced "buy one for $2 and get one free"; the balance of the sale is chewing tobacco priced at $1,300. Shasta Distributing owes the tax. Shasta originally purchased the products from an unaffiliated manufacturer for $300 ($100 for the cigars and $200 for the chewing tobacco). The tax on the chewing tobacco is $150 ($200 x 75%). The tax on the cigars is $75 ($100 x 75% = $75), because the cigars cost less than 67 cents each ($100/200 cigars = 50 cents per cigar). Total tobacco tax due on the invoice is $225.

(iii) Wind Blown Distributing (an out-of-state wholesaler) ships tobacco products in its own trucks to Lem's Tobacco Shop (an unaffiliated retailer located in this state). Wind Blown invoices Lem's for $1,500. The sale includes 200 cigars priced "buy one for $2 and get one free"; the balance of the sale is chewing tobacco priced at $1,300. Wind Blown Distributing owes the tax. Wind Blown originally purchased the products from an affiliated manufacturer for $100 ($25 for the cigars and $75 for the chewing tobacco). The measure of the tax is the actual price for which Wind Blown sells these products to unaffiliated buyers, i.e., Lem's. The tax due on the chewing tobacco is $975 ($1,300 x 75%). The tax on the cigars is $100 (200 cigars x 50 cents). The tax on the cigars is capped at $0.50 each, because each cigar costs more than 67 cents ($200/200 cigars = $1 per cigar). Total tobacco tax due on the invoice is $1,075.

Part II - Transporting Tobacco Products in Washington

(201) **Transportation of tobacco products restricted.**

(a) Only licensed distributors or retailers in their own vehicles, or manufacturer's representatives authorized to sell or distribute tobacco products in this state, can transport tobacco products in this state. Individuals transporting the product must have a copy of a valid retailer's or distributor's license in their possession and evidence that they are representatives of the licensees. Individuals transporting tobacco products for sale must also have in their possession invoices or delivery tickets for the tobacco products that show the name and address of the consignor or seller, the name and address of the consignee or purchaser, and the quantity and brands of the tobacco products being transported. It is the duty of the distributor, retailer, or manufacturer responsible for the delivery or transportation of the tobacco products to ensure that all drivers, agents, representatives, or employees have the delivery tickets or invoices in their possession for all such shipments.

(b) All other persons must give notice to the board in advance of transporting or causing tobacco products to be transported in this state for sale. This includes those transporting tobacco products in this state via common carrier. For example: Peg's Primo Cigars (PPC), a small out-of-state distributor, sells tobacco products to retailers in Washington. PPC ships the products via National Common Carrier. Before placing the product in shipment to Washington, PPC must give notice to the board of the pending shipment. The notice must include the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the tobacco products being transported, and the shipment date.

Part III - Recordkeeping and Enforcement

(301) **Books and records.** An accurate set of records showing all transactions related to the purchase, sale, or distribution of tobacco products must be retained. RCW 82.26.-060, 82.26.070 and 82.26.080. All records must be preserved for five years from the date of the transaction.

(a) **Distributors.** Distributors must keep at each place of business complete and accurate records for that place of business. The records to be kept by distributors include itemized invoices of tobacco products held, purchased, manufactured, brought in or caused to be brought in from without the state or shipped or transported to retailers in this state, and of all sales of tobacco products. The itemized invoice for each purchase or sale must be legible and must show the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts. Itemized invoices must be preserved for five years from the date of sale.

(b) **Retailers.** Retailers must secure itemized invoices of all tobacco products purchased. The itemized invoice for each purchase must be legible and must show the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts. Itemized invoices must be preserved for five years from the date of sale. Retailers are responsible for the tax on any tobacco products for which they do not have invoices.

(302) **Reports and returns.** The department may require any person dealing in tobacco products in this state to complete and return forms, as furnished by the department, setting forth sales, inventory, shipments, and other data required by the department to maintain control over trade in tobacco.

(a) **Tax returns.** The tax is reported on the combined excise tax return that must be filed according to the reporting frequency assigned by the department. Detailed instructions for preparation of these returns may be obtained from the department.

(b) **Reports.** Retailers and distributors may be required to file a report with the department in compliance with the provisions of the National Uniform Tobacco Settlement when purchasing tobacco products (e.g., "roll your own tobacco") from certain manufacturers. Please see WAC 458-20-264 and chapter 70.157 RCW.

(c) **Access to premises and records.** Retailers and distributors must allow department personnel free access to their premises to inspect the tobacco products on the premises and to examine the books and records for the business. For further details, please see subsection (305) of this section.

(303) **Criminal provisions.** Chapter 82.26 RCW prohibits certain activities with respect to tobacco products. Persons handling tobacco within this state must refer to these statutes.

(304) **Search, seizure, and forfeiture.** Any tobacco products in the possession of a person selling tobacco in this state without a license or transporting tobacco products without the proper invoices or delivery tickets may be seized

without a warrant by any agent of the department, agent of the board, or law enforcement officer of this state. In addition, all conveyances, including aircraft, vehicles, or vessels used to transport the illegal tobacco product may be seized and forfeited.

(305) **Enforcement.** Pursuant to RCW 82.26.121 and 66.44.010, enforcement officers of the liquor control board may enforce all provisions of the law with respect to the tax on tobacco products. Retailers and distributors must allow department personnel and enforcement officers of the liquor control board free access to their premises to inspect the tobacco products on the premises and to examine the books and records of the business. If a retailer fails to allow free access, or hinders, or interferes with department personnel and/or enforcement officers of the liquor control board, that retailer's registration certificate issued under RCW 82.32.030 is subject to revocation. Additionally, any licenses issued under chapter 82.26 or 82.24 RCW are subject to suspension or revocation by the department or board.

(306) **Penalties.** Penalties and interest may be assessed in accordance with chapter 82.32 RCW for nonpayment of tobacco tax.

Part IV - Credits

(401) **Credits.**

(a) **Interstate and foreign sales.** A credit is available to distributors for tobacco products sold to retailers and wholesalers outside the state for resale. This credit may be taken only for the amount of tobacco products tax reported and previously paid on such products. RCW 82.26.110. No credit may be taken for a sale of tobacco products from a stock of goods in this state to a consumer outside the state.

(b) **Returned or destroyed goods.** A credit may be taken for tax previously paid when tobacco products are destroyed or returned to the manufacturer. Credits claimed against tax owed or as a refund of tax paid, must be supported by documentation.

(c) **Documentation.** Credits claimed against tax owed or as a refund of tax paid, must be supported by documentation. Affidavits or certificates are required, and must substantially conform to those illustrated below. The affidavits or certificates must be completed by the taxpayer prior to claiming the credit, and must be retained with the taxpayer's records as set forth in Part VI of this rule.

Claim for Credit on Tobacco Products Sold for Resale Outside Washington

The undersigned distributor under penalty of perjury under the laws of the state of Washington certifies that the following is true and correct to the best of his/her knowledge:

(Business name), (tax reporting number), purchased the tobacco products specified below for resale outside this state. Tobacco products tax has been paid on such tobacco products as set forth below.

Products were purchased from: (name of business)

. . . . . .
Date

Products were sold to: (name of out-of-state buyer)

. . . . . .
Address

. . . . . .
Date

Product	Taxable sales price	Quantity	Tax paid
Cigars exceeding $0.67 per cigar	N/A		
Cigars not exceeding $0.67 per cigar		N/A	
All tobacco products that are not cigars		N/A	

Signature of Taxpayer or Authorized Representative:
. . . . . .
Name . . . . . .
Title: . . . . . .

Claim for Credit on Tobacco Products Destroyed Merchandise

(i) **Certificate of taxpayer.**

Product	Taxable sales price	Quantity	Tax paid
Cigars exceeding $0.67 per cigar	N/A		
Cigars not exceeding $0.67 per cigar		N/A	
All tobacco products that are not cigars		N/A	

The undersigned certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of his/her knowledge:

(Business name), (tax reporting number), a dealer in tobacco products, has destroyed tobacco products unfit for sale. Tobacco tax has been paid on such tobacco products as set forth above. The tobacco products were destroyed in the manner set forth below. The destruction occurred either:
(A) In the presence of an authorized agent of the department of revenue; or
(B) With prior authorization from the department to destroy the product without an agent of the department present.

Date, manner, and place of destruction: . . . . . .

Signature of Taxpayer or Authorized Representative:
. . . . . .
Name: . . . . . .
Title: . . . . . .

Witnessed or approved: . . . . . .

Authorized Agent, Department of Revenue

Claim for Credit on Tobacco Products Returned Merchandise

(ii) **Certificate of manufacturer.**

Product	Taxable sales price	Quantity	Tax paid
Cigars exceeding $0.67 per cigar	N/A		
Cigars not exceeding $0.67 per cigar		N/A	
All tobacco products that are not cigars		N/A	

The undersigned certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of his/her knowledge:

_(Business name), _ _(tax reporting number), _ a dealer in tobacco products, has returned merchandise unfit for sale. Tobacco tax has been paid on such tobacco products as set forth above.

Returned to: . . . . . .

Date: . . . . . .

Method of transport: . . . . . .

Manufacturer's credit issued on: . . . . . .

Credit memo number: . . . . . .

Signature of Taxpayer or Authorized Representative:

. . . . . .

Name: . . . . . .

Title: . . . . . .

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-10-032, § 458-20-185, filed 4/26/10, effective 5/27/10; WSR 07-04-119, § 458-20-185, filed 2/7/07, effective 3/10/07; WSR 03-12-058, § 458-20-185, filed 6/2/03, effective 7/3/03. Statutory Authority: RCW 82.32.300. WSR 94-10-061, § 458-20-185, filed 5/3/94, effective 6/3/94; WSR 90-04-038, § 458-20-185, filed 1/31/90, effective 3/3/90; WSR 83-07-032 (Order ET 83-15), § 458-20-185, filed 3/15/83; Order ET 71-1, § 458-20-185, filed 7/22/71; Order ET 70-3, § 458-20-185 (Rule 185), filed 5/29/70, effective 7/1/70.]

WAC 458-20-186 Tax on cigarettes. (1) **Introduction.** This rule addresses those taxes activities that apply exclusively to cigarettes as defined by RCW 82.24.010. See WAC 458-20-185 for tax liabilities associated with tobacco products other than cigarettes. The tax on cigarettes is in addition to all other taxes owed. For example, retailers and wholesalers are liable for business and occupation tax on their retailing or wholesaling activities, and must collect and remit sales tax on retail sales of cigarettes. Consumers pay the cigarette tax in addition to sales or use tax on purchases of cigarettes for consumption within this state. (Wholesalers not licensed in the state of Washington who are making sales of cigarettes to Indians in accordance with a cigarette tax contract authorized by RCW 43.06.455 must comply with the specific terms of their individual contracts. See also WAC 458-20-192 regarding sales in Indian country.)

(2) **Licensing requirements and responsibilities.** The Washington state liquor control board assumed the licensing responsibilities for cigarettes on July 1, 2009. Please see chapters 314-33 and 314-34 WAC.

(3) **Organization of rule.** The information provided in this rule is divided into six parts:

(a) Part I explains the tax liabilities of persons who sell, use, consume, handle, possess, or distribute cigarettes in this state.

(b) Part II explains the stamping requirements and how the cigarette tax rates are calculated.

(c) Part III describes the exemptions from the tax and the procedures that must be followed to qualify for exemption.

(d) Part IV explains the requirements and responsibilities for persons transporting cigarettes in Washington.

(e) Part V explains the requirements and responsibilities for persons engaged in making delivery sales of cigarettes into this state.

(f) Part VI explains the enforcement and administration of the cigarette tax.

Part I - Tax on Cigarettes

(101) **In general.** The Washington state cigarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses, or distributes the cigarettes in this state.

(a) **Possession.** For the purpose of this rule, a "possessor" of cigarettes is anyone who personally or through an agent, employee, or designee, has possession of cigarettes in this state.

(b) **Payment.** Payment of the cigarette tax is made through the purchase of stamps from banks authorized by the department of revenue (department) to sell the stamps. Only licensed wholesalers may purchase or obtain cigarette stamps. Except as specifically provided in Part III of this rule, it is unlawful for any person other than a licensed wholesaler to possess unstamped cigarettes in this state. However, as explained in subsection (102)(b) of this rule, certain consumers may possess unstamped cigarettes for personal consumption if they pay the tax as provided in this rule.

(c) **Imposition of tax.** Ordinarily, the tax obligation is imposed on and collected from the first possessor of unstamped cigarettes. However, failure of an exempt entity with an obligation to collect and remit the tax does not relieve a subsequent nonexempt possessor of unstamped cigarettes from liability for the tax.

(d) **Promotions.** Cigarettes given away for advertising or any other purpose are taxed in the same manner as if they were sold, used, consumed, handled, possessed, or distributed in this state, but are not required to have the stamp affixed. Instead, the manufacturer of the cigarettes must pay the tax on a monthly return filed with the department. See subsection (602) of this rule.

(102) **Possession of cigarettes in Washington state.**

(a) Every person who is (i) in possession of unstamped cigarettes in this state, and (ii) is not specifically exempt by law, is liable for payment of the cigarette tax as provided in chapter 82.24 RCW and this rule.

(b) Consumers who buy unstamped cigarettes or who purchase cigarettes from sources other than licensed retailers in this state must pay the cigarette tax as provided in subsection (602) of this rule when they first bring the cigarettes into this state or first possess them in this state. This requirement includes, but is not limited to, delivery sales as described in Part VI of this rule.

(c) **Cigarettes purchased from Indian retailers.** Special rules apply to cigarettes purchased from Indian retailers.

(i) Indians purchasing cigarettes in Indian country are exempt from the state cigarette tax; however, these sales must comply with WAC 458-20-192. Other consumers may purchase cigarettes for their personal consumption from "qualified Indian retailers" without incurring liability for state cigarette tax. A "qualified Indian retailer" is one who is subject to the terms of a valid cigarette tax contract with the state pursuant to RCW 43.06.455.

(ii) Consumers who purchase cigarettes from Indian retailers who are not subject to a cigarette tax contract with the state must comply with the reporting requirements and remit the cigarette tax as explained in subsection (602) of this rule. These consumers are also liable for the use tax on their purchases. See WAC 458-20-178.

(iii) It is the duty of the consumer in each instance to ascertain his or her responsibilities with respect to such purchases.

(d) **Cigarettes purchased on military reservations.** Active duty or retired military personnel, and their dependants, may purchase cigarettes for their own consumption on military reservations without paying the state tax (see Part III). However, such persons are not permitted to give or resell those cigarettes to others.

(e) **Counterfeit cigarettes.** It is unlawful for any person to manufacture, sell, or possess counterfeit cigarettes. A cigarette is counterfeit if (i) it or its packaging bears any logo or marking used by a manufacturer to identify its own cigarettes, and (ii) the cigarette was not manufactured by the owner of that logo or trademark or by any authorized licensee of the manufacturer. RCW 82.24.570.

(f) Possession of unstamped and untaxed cigarettes, and possession of counterfeit cigarettes, are criminal offenses in this state. See Part VI.

Part II - Stamping and Rates

(201) **Cigarette stamps.**

(a) Stamps indicating payment of the cigarette tax must be affixed prior to any sale, use, consumption, handling, possession, or distribution of all cigarettes other than those specifically exempted as explained in Part III of this rule. The stamp must be applied to the smallest container or package, unless the department, in its sole discretion, determines that it is impractical to do so. Stamps must be of the type authorized by the department and affixed in such a manner that they cannot be removed from the package or container without being mutilated or destroyed.

(b) Licensed wholesalers may purchase state-approved cigarette stamps from authorized banks. Payment for stamps must be made at the time of purchase unless the wholesaler has prior approval of the department to defer payment and furnishes a surety bond equal to the proposed monthly credit limit. Payments under a deferred plan are due within thirty days following purchase. Licensed wholesalers are compensated for affixing the stamps at the rate of $6.00 per thousand stamps affixed ("stamping allowance").

(202) **Rates.**

(a) The Washington state cigarette tax is imposed on a per cigarette basis. The rate of the tax is a combination of statutory rates found in RCW 82.24.020, 82.24.027, and 82.24.028.

(b) When the rate of tax increases, the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed cigarettes after the rate increase is liable for the additional tax.

(203) **Refunds.** Any person may request a refund of the face value of the stamps when the tax is not applicable and the stamps are returned to the department. Documentation supporting the claim must be provided at the time the claim for refund is made.

(a) Refunds for stamped untaxed cigarettes sold to Indian tribal members or tribal entities in the full value of the stamps affixed will be approved by an agent of the department.

(b) Refunds for stamped cigarettes will not include the stamping allowance if the stamps are:

(i) Damaged, or unfit for sale, and as a result are destroyed or returned to the manufacturer or distributor; or

(ii) Improperly or partially affixed through burns, jams, double stamps, stamped on carton flaps, or improperly removed from the stamp roll.

(c) The claim for refund must be filed on a form provided by the department. An affidavit or a certificate from the manufacturer for stamped cigarettes returned to the manufacturer for destruction or by an agent of the department verifying the voiding of stamps and authorizing the refund must accompany the claim for refund.

Part III - Exemptions

(301) **In general.** There are limited exemptions from the cigarette tax provided by law. This part discusses exemptions and the procedures that must be followed to qualify for an exemption.

(302) **Government sales.** The cigarette tax does not apply to the sale of cigarettes to:

(a) The United States Army, Navy, Air Force, Marine Corps, or Coast Guard exchanges and commissaries and Navy or Coast Guard ships' stores;

(b) The United States Veteran's Administration; or

(c) Any person authorized to purchase from the federal instrumentalities named in (a) or (b) above, if the cigarettes are purchased from the instrumentality for personal consumption.

(303) **Sales in Indian country.**

(a) The definitions of "Indian," "Indian country," and "Indian tribe," in WAC 458-20-192 apply to this rule. "Cigarette contract" means an agreement under RCW 43.06.450 through 43.06.460.

(b) The cigarette tax does not apply to cigarettes taxed by an Indian tribe in accordance with a cigarette contract under RCW 43.06.450 through 43.06.460.

(c) The cigarette tax does not apply to cigarettes sold to an Indian in Indian country for personal consumption; however, those sales must comply with the allocation provisions of WAC 458-20-192. Sales made by an Indian cigarette out-

let to nontribal members are subject to the tax, except as provided in (b) above.

(d) See WAC 458-20-192 for information on making wholesale sales of cigarettes to Indians and Indian tribes.

(304) **Interstate commerce.** The cigarette tax does not apply to cigarettes sold to persons licensed as cigarette distributors in other states when, as a condition of the sale, the seller either delivers the cigarettes to the buyer at a point outside this state, or delivers the same to a common carrier with the shipment consigned by the seller to the buyer at a location outside this state. Any person engaged in making sales to licensed distributors in other states or making export sales or in making sales to the federal government must furnish a surety bond in a sum equal to twice the amount of tax that would be affixed to the cigarettes that are set aside for the conduct of such business without affixing cigarette stamps. The unstamped stock must be kept separate and apart from any stamped stock.

Part IV - Transporting Cigarettes in Washington

(401) **Transportation of cigarettes restricted.** No person other than a licensed wholesaler may transport unstamped cigarettes in this state except as specifically set forth in RCW 82.24.250 and this rule, or as may be allowed under a cigarette tax contract subject to the provisions of RCW 43.06.455. Licensed wholesalers transporting unstamped cigarettes in this state must do so only in their own vehicles unless they have given prior notice to the liquor control board of their intent to transport unstamped cigarettes in a vehicle belonging to another person.

(402) **Notice required.** Persons other than licensed wholesalers intending to transport unstamped cigarettes in this state must first give notice to the liquor control board of their intent to do so.

(403) **Transportation of unstamped cigarettes.** All persons transporting unstamped cigarettes must have in their actual possession invoices or delivery tickets for such cigarettes. The invoices or delivery tickets must show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes transported. It is the duty of the person responsible for the delivery or transport of the cigarettes to ensure that all drivers, agents, or employees have the delivery tickets or invoices in their actual possession for all such shipments.

(404) **Consignment.** If the cigarettes transported pursuant to subsection (401), (402), or (403) of this rule are consigned to or purchased by any person in this state, that purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state.

(405) **Out-of-state shipments.** Licensed wholesalers shipping cigarettes to a point outside Washington or to a federal instrumentality must, at the time of shipping or delivery, report the transaction to the department. The report must show both (a) complete details of the sale or delivery, and (b) whether stamps have been affixed to the cigarettes.

The report may be made either by submitting a duplicate invoice or by completing a form provided by the department, and must be filed with the department as set forth in subsection (602) of this rule.

(406) **Compliance required.** No person may possess or transport cigarettes in this state unless the cigarettes have been properly stamped or that person has fully complied with the requirements of RCW 82.24.250 and this rule. Failure to comply with the requirements of RCW 82.24.250 is a criminal act. Cigarettes in the possession of persons who have failed to comply are deemed contraband and are subject to seizure and forfeiture under RCW 82.24.130.

Part V - Delivery Sales of Cigarettes

(501) **Definitions.** The definitions in this subsection apply throughout this rule.

(a) **"Delivery sale"** means any sale of cigarettes to a consumer in the state where either: (i) The purchaser submits an order for a sale by means of a telephonic or other method of voice transmission, mail delivery, any other delivery service, or the internet or other online service; or (ii) the cigarettes are delivered by use of mail delivery or any other delivery service. A sale of cigarettes made in this manner is a delivery sale regardless of whether the seller is located within or outside the state. (For example, "Royal Tax-free Smokes," located in the state of Vermont, offers sales via the internet and a toll-free telephone number, and ships its products to consumers in this state. These transactions are delivery sales.) A sale of cigarettes not for personal consumption to a person who is a wholesaler licensed under chapter 82.24 RCW or a retailer licensed under chapter 82.24 RCW is not a delivery sale.

(b) **"Delivery service"** means any private carrier engaged in the commercial delivery of letters, packages, or other containers, that requires the recipient of that letter, package, or container to sign to accept delivery.

(502) **Tax liability.** Cigarettes delivered in this state pursuant to a delivery sale are subject to tax as provided in Part I of this rule. Persons making delivery sales in this state are required to provide prospective consumers with notice that the sales are subject to tax pursuant to chapters 82.24 and 82.12 RCW, with an explanation of how the tax has been or is to be paid with respect to such sales.

(503) **Additional requirements.** Persons making delivery sales of cigarettes in this state must comply with all the provisions of chapter 70.155 RCW. All cigarettes sold, delivered, or attempted to be delivered, in violation of RCW 70.155.105 are subject to seizure and forfeiture. RCW 82.24.-130.

Part VI - Enforcement and Administration

(601) **Books and records.** An accurate set of records showing all transactions related to the purchase, sale, or distribution of cigarettes must be retained. RCW 82.24.090. These records may be combined with those required in connection with the tobacco products tax (see WAC 458-20-185), if there is a segregation therein of the amounts involved. All records must be preserved for five years from the date of the transaction.

(602) **Reports and returns.** The department may require any person dealing with cigarettes in this state to complete and return forms, as furnished by the department, setting forth sales, inventory, and other data required by the department to maintain control over trade in cigarettes.

(a) Manufacturers and wholesalers selling stamped, unstamped, or untaxed cigarettes must submit a complete record of sales of cigarettes in this state monthly. This report is due no later than the fifteenth day of the calendar month and must include all transactions occurring in the previous month.

(b) Persons making sales of tax-exempt cigarettes to Indian tribes or Indian retailers pursuant to WAC 458-20-192 (9)(a) must transmit a copy of the invoice for each such sale to the special programs division of the department prior to shipment.

(c) Wholesalers selling stamped cigarettes manufactured by nonparticipating manufacturers as defined in WAC 458-20-264 must report all such sales to the special programs division no later than the twenty-fifth day of the calendar month and must include all transactions occurring in the previous month.

(d) Persons making sales of cigarettes into this state to other than a licensed wholesaler or retailer must file a report as required under Title 15, Chapter 10A, section 376 of the U.S. Code (commonly referred to as the "Jenkins Act" report). This report is due no later than the 10th day of each calendar month and must include all transactions occurring in the previous month.

(e) Persons shipping or delivering any cigarettes to a point outside of this state must submit a report showing full and complete details of the interstate sale or delivery as set forth in Part V of this rule. This report is due no later than the fifteenth day of the calendar month immediately following the shipment or delivery.

(f) Persons giving away unstamped cigarettes for advertising, promotional, or any other purpose, must report and pay the tax on the number of cigarettes distributed in this state.

(g) Consumers who buy unstamped cigarettes or who purchase cigarettes from sources other than licensed retailers in this state must pay the tax when they first bring the cigarettes into this state or first possess them in this state. The tax is paid with a "Tax Declaration for Cigarettes," which may be obtained from the department.

(603) **Criminal provisions.** Chapter 82.24 RCW prohibits certain activities with respect to cigarettes. Persons handling cigarettes within this state must refer to these statutes. The prohibited activities include, but are not limited to, the following:

(a) **Transportation, possession, or receiving 10,000 or fewer cigarettes.** Transportation, possession or receiving 10,000 or fewer unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a gross misdemeanor. RCW 82.24.110 (1)(n).

(b) **Transportation, possession, or receiving more than 10,000 cigarettes.** Transportation, possession, or receiving more than 10,000 unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.-250 have been met; failure to meet those notice requirements is a felony. RCW 82.24.110(2).

(c) **Forgery or counterfeiting of stamps.** Alteration, fabrication, forgery, and counterfeiting of stamps are felonies. RCW 82.24.100.

(d) **Counterfeit cigarettes.** The manufacture, sale, or possession of counterfeit cigarettes in this state is a felony. RCW 82.24.570.

(604) **Search, seizure, and forfeiture.** The department or the liquor control board may search for, seize, and subsequently dispose of unstamped cigarette packages and containers, counterfeit cigarettes, conveyances of all kinds (including aircraft, vehicles, and vessels) used for the transportation of unstamped and/or counterfeit cigarettes, and vending machines used for the sale of unstamped and/or counterfeit cigarettes. See RCW 82.24.130, et seq., for provisions relating to search, seizure, and forfeiture of property, possible redemption of property, and for treatment of such property in the absence of redemption.

(605) **Penalties.** RCW 82.24.120 provides a penalty for failure to affix the cigarette stamps or to cause the stamps to be affixed as required, or to pay any tax due under chapter 82.24 RCW. In addition to the tax deemed due, a penalty equal to the greater of $10.00 per package of unstamped cigarettes or $250.00 will be assessed. Interest is also assessed on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment. The department may, in its sole discretion, cancel all or part of the penalty for good cause.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-10-033, § 458-20-186, filed 4/26/10, effective 5/27/10; WSR 07-04-119, § 458-20-186, filed 2/7/07, effective 3/10/07. Statutory Authority: RCW 82.24.235, 82.32.300, and 82.01.060(1). WSR 05-02-035, § 458-20-186, filed 12/30/04, effective 1/30/05. Statutory Authority: RCW 82.32.300. WSR 94-10-062, § 458-20-186, filed 5/3/94, effective 6/3/94; WSR 90-24-036, § 458-20-186, filed 11/30/90, effective 1/1/91; WSR 90-04-039, § 458-20-186, filed 1/31/90, effective 3/3/90; WSR 87-19-007 (Order ET 87-5), § 458-20-186, filed 9/8/87; WSR 83-07-032 (Order ET 83-15), § 458-20-186, filed 3/15/83; Order ET 75-1, § 458-20-186, filed 5/2/75; Order ET 73-2, § 458-20-186, filed 11/9/73; Order ET 71-1, § 458-20-186, filed 7/22/71; Order ET 70-3, § 458-20-186 (Rule 186), filed 5/29/70, effective 7/1/70.]

WAC 458-20-187 Coin operated vending machines, amusement devices and service machines. (1) Definitions. As used herein the term "vending machines" means machines which, through the insertion of a coin will return to the patron a predetermined specific article of merchandise or provide facilities for installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers. It includes machines which vend photographs, toilet articles, cigarettes and confections as well as machines which provide laundry and cleaning services.

(2) The term "amusement devices" means those devices and machines which, through the insertion of a coin, will permit the patron to play a game. It includes slot and pinball machines and those machines or devices which permit the patron to see, hear or read something of interest.

(3) The term "service machines" means any coin operated machines other than those defined as "vending machines" or "amusement devices." It includes, for example, scales and luggage lockers, but does not include coin operated machines used in the conduct of a public utility business, such as telephones and gas meters; also excluded are shuffleboards and pool games.

(4) Business and occupation tax. Persons operating vending machines are engaged in a retailing business and must report and pay tax under the retailing classification with respect to the gross proceeds of sales.

(5) Persons operating amusement devices, except shuffleboard, pool, and billiard games, are taxable under the service and other business activities classification on the gross receipts therefrom.

(6) Persons engaged in operating shuffleboards or games of pool or billiards are taxable under the retailing classification on the gross receipts therefrom and are responsible for collecting and reporting to the department the retail sales tax measured by the gross receipts therefrom.

(7) Persons operating service machines are taxable under the service and other business activities classification upon the gross income received from the operation of such machines.

(8) When coin operated machines are placed at a location owned or operated by a person other than the owner of the machines, under any arrangement for compensation to the operator of the location, the person operating the location has granted a license to use real property and will be responsible for reporting and paying tax upon his gross compensation therefor under the service classification.

(9) Where the owner of amusement devices which are placed at the location of another has failed to pay the gross receipts tax and/or retail sales tax due, the department may proceed directly against the operator of the location for full payment of all tax due.

(10) Retail sales tax. The retail sales tax applies to the sale of merchandise through vending machines and persons owning and operating such machines are liable for the payment of such tax. (However, see WAC 458-20-244 for vending machine sales of food.) For practical purposes such persons are authorized to absorb the amount of the tax on the individual sales and to pay directly to the department the retail sales tax on the total amount received from such machines.

(11) Effective March 11, 1986, on all retail sales through vending machines the tax need not be stated separately from the selling price or collected separately from the buyer. (See RCW 82.08.050.) The seller may deduct the tax from the total amount received in the machines to arrive at the net amount which becomes the measure of the tax.

(12) Where a vending machine is designed or adjusted so that single sales are made exclusively in amounts less than the minimum sale on which a 1¢ tax may be collected from the purchaser, and the kind of merchandise sold through such machines is not sold by the operator over the counter or other than through vending machines at that location, the selling price for purposes of the retail sales tax shall be 60% of the gross receipts of the vending machine through which such sales are made. This 60% basis of reporting is available only to persons selling tangible personal property through vending machines.

(13) In order to qualify for the foregoing reduction in the measure of the retail sales tax, the books and records of the operator must show for each vending machine for which such reduction is claimed: (a) The location of the machine, (b) the selling price of sales made through the machine, (c) the type and brands of merchandise vended through the machine and (d) the gross receipts from that machine. The foregoing records may be maintained for each location, rather than for each machine, in cases where several machines are maintained by the same operator at the same location, provided that all of such machines make sales exclusively in amounts less than the minimum sale on which a 1¢ tax may be collected. The reduction will be disallowed in any instance where sales made through vending machines in such amounts are not clearly and accurately segregated from other sales by the operator and the burden is on the operator to make sales under such conditions and to maintain such records as to demonstrate absolute compliance with this requirement.

(14) Every operator or owner of a vending machine, before taking a deduction from gross sales through certain vending machines, shall file with the department annually an addendum to his application for registration with the department, on a form provided by the department, which form shall contain the following information:

(a) Number of vending machines in his ownership making sales under the above minimum.

(b) Value of such sales in the most recent calendar year.

(c) A statement that no sales are made by the owner or operator at any machine location of articles or products sold through such machines, except by vending machines and no provision is made either through the machine or otherwise, for multiple sales under circumstances where the tax may legally be collected from the buyer.

(15) The department will require a bond sufficient to assure recovery of any disallowed discount of tax due in any instance of registration where the department has reason to feel such recovery could be in jeopardy.

(16) Sales of vending machines, service machines and amusement devices to persons who will operate the same are sales at retail and the retail sales tax is applicable to all such sales.

(17) Use tax. The use tax applies to all tangible personal property used by persons making sales through vending machines, upon which the retail sales tax has not been paid, except inventory items resold through such machines.

Revised April 28, 1978.

Effective July 1, 1978.

[Statutory Authority: RCW 82.32.300. WSR 86-18-022 (Order ET 86-15), § 458-20-187, filed 8/26/86. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order ET 78-4), § 458-20-187, filed 6/27/78; Order ET 73-1, § 458-20-187, filed 11/2/73; Order ET 71-1, § 458-20-187, filed 7/22/71; Order ET 70-3, § 458-20-187 (Rule 187), filed 5/29/70, effective 7/1/70.]

WAC 458-20-18801 Prescription drugs, prosthetic and orthotic devices, ostomic items, and medically prescribed oxygen. (1) **Definitions.** As used in this section:

(a) "Prescription drugs" are medicines, drugs, prescription lenses, or other substances, other than food for use in the diagnosis, cure, mitigation, treatment, or prevention of disease or other ailment in humans ordered by (i) the written prescription to a pharmacist by a practitioner authorized by the laws of this state or laws of another jurisdiction to issue prescriptions, or (ii) an oral prescription of such practitioner which is reduced promptly to writing and filled by a duly licensed pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is promptly reduced to writing and filled by the pharmacist, or (iv) physicians or optometrists by way of written directions and specifications for the preparation, grinding,

and fabrication of lenses intended to aid or correct visual defects or anomalies of humans.

(b) "Prescription" means a formula or recipe or an order written by a medical practitioner for the composition, preparation and use of a healing, curative or diagnostic substance, and also includes written directions and specifications by physicians or optometrists for the preparation, grinding, and fabrication of lenses intended to aid or correct visual defects or anomalies of humans.

(c) "Other substances" means products such as catalytics, hormones, vitamins, and steroids, but the term generally does not include devices, instruments, equipment, and similar articles. However, "other substances" does include the needles, tubing, and the bag which are part of an intravenous set for delivery of prescription drugs. It also includes infusion pumps and catheters when used to deliver prescription drugs to a specific patient. These items are not conceptually distinct from the prescription drug solution. This same rationale applies to tubing and needles which are used in placing prescribed nutritional products in the patient's system. The stand which holds the intravenous set is not included nor are plain glass slides, plain specimen collection devices, and similar items which are used in the laboratory. This term does include diagnostic substances and reagents, including prepared slides, tubes and collection specimens devices which contain diagnostic substances and reagents at the time of purchase by a laboratory.

(d) "Medical practitioner" means a person within the scope of RCW 18.64.011(9) who is authorized to prescribe drugs, but excluding veterinarians, and for the purposes of this rule includes also persons licensed by chapter 18.53 RCW to issue prescriptions for lenses.

(e) "Licensed dispensary" means a drug store, pharmacy, or dispensary licensed by chapter 18.64 RCW or a dispensing optician licensed by chapter 18.34 RCW.

(f) "Prosthetic devices" are artificial substitutes which generally replace missing parts of the human body, such as a limb, bone, joint, eye, tooth, or other organ or part thereof, and materials which become ingredients or components of prostheses.

(g) "Orthotic devices" are apparatus designed to activate or supplement a weakened or atrophied limb or function. They include braces, collars, casts, splints, and other similar apparatus as well as parts thereof. Orthotic devices do not include durable medical equipment such as wheelchairs, crutches, walkers, and canes nor consumable supplies such as embolism stockings, arch pads, belts, supports, bandages, and the like, whether prescribed or not.

(h) "Ostomic items" are medical supplies used by colostomy, ileostomy, and urostomy patients. These include bags, tapes, tubes, adhesives, deodorants, soaps, jellies, creams, germicides, and sundry related supplies.

(i) "Medically prescribed oxygen" means oxygen prescribed for the use in the treatment of a medical condition. For periods after July 27, 1991, this term shall include, but is not limited to, the sale or rental of oxygen concentrator systems, oxygen enricher systems, liquid oxygen systems, and gaseous, bottled oxygen systems for use by an individual under a prescription. (See RCW 82.08.0283.)

(j) "Legend drugs" are those drugs which may not be legally dispensed without a prescription. These drugs are listed in the official United States pharmacopeia or similar source. (See RCW 69.41.010(8).) WAC 246-865-010(5) requires legend drugs to have a label stating that federal law prohibits dispensing without a prescription. Also refer to RCW 69.41.010(9).

(k) "Nutrition products" are prescribed dietary substances formulated to provide balanced nutrition as a sole source of nourishment.

(2) **Business and occupation tax.** The business and occupation tax applies to the gross proceeds from sales of drugs, medicines, prescription lenses, or other substances used for diagnosis, cure, mitigation, treatment, or prevention of disease or other ailments in humans. Sales of these items to persons for resale are taxable under the wholesaling classification. Sales to consumers are taxable under the retailing classification. Persons who provide medical services to patients are taxable under the service and other business activities classification on the gross charge to the patient, notwithstanding that some prescription drugs may be separately charged to the patient. Persons who provide medical services should refer to WAC 458-20-151 and 458-20-168 for additional tax reporting information.

(3) **Deductions.** The following may be deducted from gross proceeds for computing business and occupation tax:

(a) Sales of prescription drugs and other medical and healing supplies furnished as an integral part of services rendered by a publicly operated or nonprofit hospital, nonprofit kidney dialysis facility, nursing home, or home for unwed mothers operated as a religious or charitable organization which meets all the conditions for exemption for services generally under RCW 82.04.4288 or 82.04.4289 (see WAC 458-20-168).

(4) **Retail sales tax.** The retail sales tax applies upon all retail sales of tangible personal property unless expressly exempted by law.

(5) **Exemptions.** The following exemptions apply from the retail sales tax and use tax.

(a) Legend drugs are exempt from retail sales tax or use tax when sold for use in the diagnosis, cure, mitigation, treatment, or prevention of disease or other ailments of humans. This exemption applies to all levels of sales and distribution of legend drugs, including legend drugs given away as samples. Legend drugs are exempt from sales tax when sold to hospitals, doctors, dentists, or any other medical practitioner, as well as to patients. Sellers of legend drugs are not required to retain a resale certificate or other exemption documentation from the legend drug purchaser. The exemption applies at the time of purchase even if the hospital or medical practitioner who makes such purchases will not resell the legend drug as a separate line item charge to its patient.

(b) The retail sales tax does not apply to sales of nonlegend drugs, nutrition products including dietary supplements or dietary adjuncts, medicines, prescription lenses, or other substances, but only when

(i) Dispensed by a licensed dispensary

(ii) Pursuant to a written prescription

(iii) Issued by a medical practitioner

(iv) For diagnosis, cure, mitigation, treatment, or prevention of disease or other ailment in humans. (See RCW 82.08.0281.)

(c) Laboratory reagents and other diagnostic substances are exempt from retail sales tax when used as part of a test prescribed to diagnose disease in humans. These items include, among others, reagents, calibrators, chemicals, gases, vacutainers with heparin or other chemicals or medicines, and prepared media. Control reagents are exempt, but only when the control reagents are used in performing tests prescribed for a patient. Reagents which are used to merely calibrate equipment and are not related to a test prescribed for a specific patient are not exempt.

(d) The retail sales tax exemption applies also to intravenous sets, including the needles and tubing, when used for the administration of drugs prescribed to a patient. This also includes catheters, infusion pumps, syringes, and similar items when used for the delivery of prescription drugs. Medical gas delivery system components, including tubes, nebulizers, ventilators, masks, cannulae and similar items, are not conceptually distinct from the prescribed gases they deliver and are exempt from retail sales or use tax. The medical delivery system includes airway devices (tubes) which are prescribed to keep a patient's airways open and to deliver medical gases.

(e) The retail sales tax does not apply to sales of prosthetic devices, orthotic devices prescribed by physicians, osteopaths, or chiropractors, nor to sales of ostomic items. (See RCW 82.08.0283.) Sutures, pacemakers, hearing aids, and kidney dialysis machines are examples of prosthetic devices. Drainage devices which are particularly prescribed for use on or in a specific patient are exempt from sales or use taxes as prostheses because they either replace missing body parts or assist dysfunctional ones, either on a temporary or permanent basis. A prosthetic device can include a device that is implanted for cosmetic reasons. Hearing aids are also exempt when dispensed or fitted by a person licensed under chapter 18.35 RCW. A heart-lung machine used by a hospital in its surgical department is not an exempt prosthetic device.

(f) The sale of medically prescribed oxygen is not subject to retail sales or use tax when sold to an individual having a prescription issued by a person licensed under chapter 18.57 or 18.71 RCW for use in the medical treatment of that individual.

(g) The retail sales tax does not apply to the purchase of anesthesia gases, medical gases, contrast media, or irrigation solutions when these items are used under a physician's order as part of a medical treatment for a specific patient.

(6) **Proof of exemption.** Persons selling legend drugs need only to substantiate that the drugs meet the definition of legend drugs and are for use in the diagnosis, cure, mitigation, treatment, prevention of disease or other ailments in humans. Resale certificates or other exemption certificates are not required for these sales. For sales to consumers of nonlegend drugs, sellers must retain in their files the written prescription bearing the signature of the medical practitioner who issued the prescription and the name of the patient for whom prescribed. See also WAC 458-20-150 Optometrists, ophthalmologists, and oculists; 458-20-151 Dentists, dental laboratories and physicians; and 458-20-168 Hospitals.

(a) Hospitals and physicians who purchase drugs for use in providing medical services to patients may purchase the drugs without payment of retail sales tax if the drugs will only be dispensed under a physician's order. It is not required that the hospital or physician make a specific charge to the patient for drugs dispensed under a physician's order for the drug purchase to be exempt from retail sales or use tax. This also includes the purchases of intravenous sets, catheters, infusion pumps, syringes, and similar items which will be used for delivery of prescription drugs. The hospital or physician may give the nonlegend drug supplier an exemption certificate. The certificate should be retained by the seller for a period of five years after the last sale covered by the certificate. Certificates should not be sent to the department of revenue. The certificate should be in the following form:

Prescription drug exemption certificate

. . . . . .

(name of purchaser)

. . . . . .

(address of purchaser)

I hereby certify: That I am a registered Washington taxpayer. I may legally prescribe or dispense drugs or other substances. I further certify that the drugs and other substances listed below purchased from . . . . . (name of vendor) will be prescribed and used for the treatment of illness or ailments of human beings. I shall maintain invoices and prescriptions or such other records as are necessary to account for the disposition of the drugs or other substances for which I have not paid retail sales tax. In the event that any such drug or substance is used without a prescription being issued, it is understood that I am required to report and pay use tax measured by its purchase price. If I have indicated that this is a blanket certificate, this certificate shall be considered part of each order which I may hereafter give to you, unless otherwise specified, and shall be valid for a period of four years or until revoked by me in writing. Description of drugs and other substances to be purchased:

. . . . . .

. . . . . .

. . . . . .

Dated: . . . . . .

Single Purchase . . . . . Blanket Certificate . . . . . .

(indicate by check mark if certificate is for a single purchase or continuing purchases)

. . . . . .

(signature of purchaser or authorized agent)
(title)

. . . . . .

(Revenue registration number of buyer)

(b) A blanket exemption certificate may be given if there will be continuing purchases from a particular supplier. Blanket exemption certificates should be renewed at intervals not to exceed four years. The purchaser should indicate by an appropriate check mark on the certificate whether the certificate is being used for a single purchase or will be for continuing purchases. It is unnecessary to list each and every drug on the exemption certificate if all drugs purchased from a particular supplier are exempt.

(7) **Use tax.** The use tax does not apply to the use of articles and products which are exempt from sales tax as specified herein. (See RCW 82.12.0277.) This includes legend drugs which are given away as samples.

(8) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(a) ABC Hospital purchases both legend and nonlegend drugs. These drugs are held in inventory and dispensed to patients only under the written order of the patient's physician. These drugs are not billed specifically to the patient, but the cost is recovered through a general floor charge to the patient. ABC Hospital may purchase these drugs without payment of sales or use tax.

(b) ABC Hospital purchases reagents for use in its laboratory which are nonlegend drugs. Laboratory reagents are chemical compounds used to promote reactions in the laboratory to aid in determining disease pathology and are not administered directly to the patient. These reagents are used for three purposes consisting of tests on the tissue from a specific patient, a control reagent which is not applied to the tissue from the patient but is used to measure or control the reaction, and a reagent used to calibrate equipment. The reagents used for the first two purposes may be purchased without payment of sales or use tax. The reagents for the calibration of equipment are also exempt if the equipment is calibrated as part of tests for a specific patient. Reagents used to calibrate equipment that is not part of a prescribed test for a patient are taxable.

(c) XY Blood Bank purchases reagents which are nonlegend drugs. These reagents are used in determining the blood type and presence of disease. The blood is sold to local hospitals. The purchase of these reagents is taxable since they are not used to provide treatment for a specific patient.

[Statutory Authority: RCW 82.32.300. WSR 92-05-065, § 458-20-18801, filed 2/18/92, effective 3/20/92; WSR 87-05-042 (Order 87-1), § 458-20-18801, filed 2/18/87; WSR 83-07-032 (Order ET 83-15), § 458-20-18801, filed 3/15/83. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order ET 78-4), § 458-20-18801 (Rule 188), filed 6/27/78; Order 74-2, § 458-20-188 (codified as WAC 458-20-18801), filed 6/24/74.]

WAC 458-20-189 Sales to and by the state of Washington, counties, cities, towns, school districts, and fire districts. (1) **Introduction.** This section discusses the business and occupation (B&O), retail sales, use, and public utility tax applications to sales made to and by the state of Washington, counties, cities, towns, school districts, and fire districts. Hospitals or similar institutions operated by the state of Washington, or a municipal corporation thereof, should refer to WAC 458-20-168 (Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities). School districts should also refer to WAC 458-20-167 (Educational institutions, school districts, student organizations, and private schools). Persons providing physical fitness activities and amusement and recreation activities should also refer to WAC 458-20-183 (Amusement, recreation, and physical fitness services).

Persons providing public utility services may also want to refer to the following sections:

(a) WAC 458-20-179 (Public utility tax);

(b) WAC 458-20-180 (Motor transportation, urban transportation);

(c) WAC 458-20-250 (Solid waste collection tax); and

(d) WAC 458-20-251 (Sewerage collection and other related activities).

(2) **Definitions.** For the purposes of this section, the following definitions apply:

(a) "Municipal corporations" means counties, cities, towns, school districts, and fire districts of the state of Washington.

(b) "Public service business" means any business subject to control by the state, or having the powers of eminent domain, or any business declared by the legislature to be of a public service nature, irrespective of whether the business has the powers of eminent domain or the state exercises its control over the business. It includes, among others and without limiting the scope hereof, water distribution, light and power, public transportation, and sewer collection.

(c) "Subject to control by the state," as used in (b) of this subsection, means control by the utilities and transportation commission or any other state department required by law to exercise control of a business of a public service nature as to rates charged or services rendered.

(d) "Enterprise activity" means an activity financed and operated in a manner similar to a private business enterprise. The term includes those activities which are generally in competition with private business enterprises and which are over fifty percent funded by user fees. The term does not include activities which are exclusively governmental.

(3) **Persons taxable under the business and occupation tax.**

(a) Sellers are subject to the B&O tax upon sales to the state of Washington, its departments and institutions, or to municipal corporations of the state.

(b) The state of Washington, its departments and institutions, as distinct from its corporate agencies or instrumentalities, are not subject to the provisions of the B&O tax. RCW 82.04.030.

(c) Municipal corporations are not subject to the B&O tax upon amounts derived from activities which are exclusively governmental. RCW 82.04.419. Thus, the B&O tax does not apply to license and permit fees, inspection fees, fees for copies of public records, reports, and studies, pet adoption and license fees, processing fees involving fingerprinting and environmental impact statements, and taxes, fines, or penalties, and interest thereon. Also exempt are fees for on-street metered parking and on-street parking permits.

Municipal corporations are also exempt from the B&O tax on grants received from the state of Washington, or the United States government. RCW 82.04.418.

(d) Municipal corporations deriving income, however designated, from any enterprise or public service business activity for which a specific charge is made are subject to the provisions of the B&O or public utility tax. Charges between departments of a particular municipal corporation are interdepartmental charges and not subject to tax. (See also WAC 458-20-201 on interdepartmental charges.)

(i) When determining whether an activity is an enterprise activity, user fees derived from the activity must be measured against total costs attributable to providing the activity,

including direct and indirect overhead. This review should be performed on the fiscal or calendar year basis used by the entity in maintaining its books of account.

For example, a city operating an athletic and recreational facility determines that the facility generatedtwo hundred fifty thousand dollars in user fees for the fiscal year. The total costs for operating the facility were four hundred thousand dollars. This figure includes direct operating costs and direct and indirect overhead, including asset depreciation and interest payments for the retirement of bonds issued to fund the facility's construction. The principal payments for the retirement of the bonds are not included because these costs are a part of the asset depreciation costs. The facility's operation is an enterprise activity because it is more than fifty percent funded by user fees.

(ii) An enterprise activity which is operated as a part of a governmental or nonenterprise activity is subject to the B&O tax. For example, City operates Community Center, a large athletic and recreational facility, and three smaller neighborhood centers. Community Center operates with its own budget, and the three neighborhood centers are lumped together and operated under a single separate budget. Community Center and the neighborhood centers are operated as a part of an overall parks and recreation system, which is not more than fifty percent funded by user fees.

Each budget must be independently reviewed to determine whether these facilities are operated as enterprise activities. The operation of Community Center would be an enterprise activity only if the user fees account for more than fifty percent of Community Center's operating budget. The total user fees generated by the three neighborhood centers would be compared to the total costs of operating the three centers to determine whether they, as a whole, were operated as enterprise activity. Had each neighborhood center operated under an individual budget, the user fees generated by each neighborhood center would have been compared to the costs of operating that center.

(4) **Business and occupation tax.**

(a) Municipal corporations engaging in public service business activities should refer to the sections of chapter 458-20 WAC mentioned in subsection (1)(a) through (d) of this section to determine their B&O tax liability. Municipal corporations engaging in enterprise activities are subject to the B&O tax as follows:

(i) **Service and other business activities tax.** Amounts derived from, but not limited to, special event admission fees for concerts and exhibits, user fees for lockers and checkrooms, charges for moorage (less than thirty days), and the granting of a license to use real property are subject to the service and other business activities tax if these activities are considered enterprise activities. (See also WAC 458-20-118 on the sale or rental of real estate.) The service tax applies to fees charged for instruction in amusement and recreation activities, such as tennis or swimming lessons.

Physical fitness activities are retail sales. These activities include weight lifting, exercise facilities, aerobic classes, etc. (See also WAC 458-20-183 on amusement and recreation activities, etc.)

(ii) **Extracting tax.** The extracting of natural products for sale or for commercial use is subject to the extracting B&O tax. The measure of tax is the value of products. (See WAC 458-20-135 on extracting.) Counties and cities are not, however, subject to the extracting tax upon the cost of labor and services performed in the mining, sorting, crushing, screening, washing, hauling, and stockpiling of sand, gravel, or rock taken from a pit or quarry owned by or leased to the county or city when these products are either stockpiled for placement or are placed on a street, road, place, or highway of the county or city by the county or city itself. Nor does the extracting tax apply to the cost of or charges for such labor and services if the sand, gravel, or rock is sold by the county or city to another county or city at actual cost for placement on a publicly owned street, road, place, or highway. RCW 82.04.415.

(iii) **Manufacturing tax.** The manufacturing of products for sale or for commercial use is subject to the manufacturing B&O tax. The measure of tax is the value of products. (See WAC 458-20-136 on manufacturing.) The manufacturing tax does not apply to the value of materials printed by counties, cities, towns, or school districts solely for their own use. RCW 82.04.397.

(iv) **Wholesaling tax.** The wholesaling tax applies to the gross proceeds derived from sales or rentals of tangible personal property to persons who resell the same without intervening use. The wholesaling tax does not, however, apply to casual sales. (See WAC 458-20-106 on casual sales.) Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(v) **Retailing tax.** User fees for off-street parking and garages, and charges for the sale or rental of tangible personal property to consumers are taxable under the retailing B&O tax. The retailing tax does not, however, apply to casual sales. (See WAC 458-20-106.) Fees for amusement and recreation activities, such as golf, swimming, racquetball, and tennis, are retail sales and subject to the retailing tax if the activities are considered enterprise activities. Charges for instruction in amusement and recreation activities are subject to the service tax. (See also WAC 458-20-183 and (a)(i) of this subsection.)

Charges for physical fitness and sauna services are classified as retail sales and subject to the retailing tax. While a retail sales tax exemption for physical fitness classes provided by local governments is available (see subsection (6)(h) of this section), the retailing B&O tax continues to apply.

(b) Persons selling products which they have extracted or manufactured must report, unless exempt by law, under both the "production" (extracting and/or manufacturing) and "selling" (wholesaling or retailing) classifications of the B&O tax, and claim a tax credit under the multiple activities tax credit system. (See WAC 458-20-19301 on multiple activities tax credits.)

(5) **Retail sales tax.**

(a) The retail sales tax generally applies to all retail sales made to the state of Washington, its departments and institutions, and to municipal corporations of the state.

(b) The state of Washington, its departments and institutions, and all municipal corporations are required to collect retail sales tax on all retail sales of tangible personal property or services classified as retail services unless specific exemptions apply. Retail sales tax must be collected and remitted even though the sale may be exempt from the retailing B&O tax. For example, a city police department must collect retail sales tax on casual sales of unclaimed property to consumers, even though this activity is not subject to the B&O tax because these sales are considered casual sales. (See also WAC 458-20-106.)

(c) Sales between a department or institution of the state and a municipal corporation, or between municipal corporations are retail sales. For example, State Agency sells office supplies to County. State Agency is making a retail sale. State Agency must collect and remit retail sales tax upon the amount charged, even though the B&O tax does not apply to this sale. The amount of retail sales tax must be separately itemized on the sales invoice. RCW 82.08.050. State Agency may claim a tax paid at source deduction for any retail sales or use tax previously paid on the acquisition of the office supplies.

(d) Departments or institutions of the state of Washington are not considered sellers when making sales to other departments or institutions of the state because the state is considered to be a single entity. RCW 82.08.010(2). Therefore, the "selling" department or institution is not required by statute to collect the retail sales tax on these sales.

All departments or institutions of the state of Washington are, however, considered "consumers." RCW 82.08.010 (3). A department or institution of the state purchasing tangible personal property from another department or institution is required to remit to the department of revenue the retail sales or use tax upon that purchase, unless it can document that the "selling" institution previously paidthe appropriate retail sales or use tax on that item.

(6) **Retail sales tax exemptions.** The retail sales tax does not apply to the following:

(a) Sales to city or county housing authorities which were created under the provisions of the Washington housing authorities law, chapter 35.82 RCW. However, prime contractors and subcontractors for city or county housing authorities should refer to WAC 458-20-17001 (Government contracting—Construction, installations, or improvements to government real property) to determine their tax liability.

(b) Charges to municipal corporations and the state of Washington for that portion of the selling price of contracts for watershed protection or flood control which is reimbursed by the United States government according to the provisions of the Watershed Protection and Flood Prevention Act, Public Law 566, as amended. RCW 82.08.0271.

(c) Sales of the entire operating property of a publicly or privately owned public utility, or of a complete operating integral section thereof, to the state or a municipal corporation thereof for use in conducting any public service business except a tugboat business. RCW 82.08.0256.

(d) Sales of or charges made for labor and services in the mining, sorting, crushing, screening, washing, hauling, and stockpiling of sand, gravel, or rock taken from a pit or quarry owned or leased to a county or city, when the materials are either stockpiled in the pit or quarry, placed on the public road by the county or city itself, or sold at cost to another county or city for use on public roads. RCW 82.08.0275.

(e) Sales to one municipal corporation by another municipal corporation directly or indirectly arising out of, or resulting from, the annexation or incorporation of any part of the territory of one municipal corporation by another. RCW 82.08.0278.

(f) Sales to the state of Washington, or a municipal corporation in the state, of ferry vessels and component parts thereof, and charges for labor and services in respect to construction or improvement of such vessels. RCW 82.08.0285.

(g) Sales to the United States. However, sales to federal employees are subject to the retail sales tax, even if the federal employee will be reimbursed for the cost by the federal government. (See WAC 458-20-190 on sales to the United States.)

(h) Charges for physical fitness classes, such as aerobics classes, provided by local governments. RCW 82.08.0291. Local governments must collect retail sales tax on charges for other physical fitness activities such as weight lifting, exercise equipment, and running tracks.

This exemption does not apply if a person other than a local government provides the physical fitness class, even if the class is conducted at a local government facility.

(7) **Deferred sales or use tax.**

(a) If the seller fails to collect the appropriate retail sales tax, the state of Washington, its departments and institutions, and all municipal corporations are required to pay the deferred sales or use tax directly to the department.

(b) Purchases of cigarette stamps**,** vehicle license plates, license plate tabs, disability decals, or other items to evidence payment of a license, tax, or fee are purchases for consumption by the state or municipal corporation, and subject to the retail sales or use tax.

(c) Where tangible personal property or taxable services are purchased by the state of Washington, its departments and institutions, for the purpose of resale to any other department or institution of the state of Washington, or for the purpose of consuming the property purchased in manufacturing or producing for use or for resale to any other department or institution of the state of Washington a new article of which such property is an ingredient or component part, the transaction is deemed a purchase at retail and the retail sales tax applies.

(d) Persons producing or manufacturing products for commercial or industrial use are required to remit use tax upon the value of those products, unless a specific use tax exemption applies. RCW 82.12.020. This value must correspond as nearly as possible to the gross proceeds from retail sales of similar products. (See WAC 458-20-112 and 458-20-134 on value of products and commercial or industrial use, respectively.)

For example, a municipal corporation operating a print shop and producing forms or other documents for its own use must remit use tax upon the value of those products, even though a B&O tax exemption is provided by RCW 82.04.-397. The municipal corporation may claim a credit for retail sales tax previously paid on materials, such as paper or ink, which are incorporated into the manufactured product. The process of putting an internal communication, such as a memorandum to employees, on a blank form or document is not considered a manufacturing activity, even when multiple

copies of the resulting internal communication are reproduced for wide distribution to employees.

(i) Counties and cities are not subject to use tax upon the cost of labor and services in the mining, sorting, crushing, screening, washing, hauling, and stockpiling of sand, gravel, and rock taken from a pit or quarry owned or leased to a county or city when the materials are for use on public roads. RCW 82.12.0269.

(ii) If a department or institution of the state of Washington manufactures or produces tangible personal property for use or resale to any other department or institution of the state, use tax must be remitted upon the value of that article even though the state is not subject to the B&O tax.

For example, State Agency manufactures office furniture for resale to other departments or institutions of the state of Washington. State Agency will also on occasion use office furniture it has manufactured for its own offices. Use tax is due on the office furniture sold to the other departments or institutions of this state, and on the office furniture State Agency puts to its own use. The taxable value of the office furniture sold to the other departments or institutions of this state is the selling price. The taxable value for the office furniture State Agency puts to its own use is the selling price at which State Agency sells comparable furniture to other departments or institutions of the state. When computing and remitting use tax upon the value of manufactured furniture, State Agency may claim a credit for retail sales or use taxes previously remitted on materials incorporated into that furniture. A department or institution of this state purchasing office furniture from State Agency must remit use tax upon the value of that furniture, unless it can document that State Agency paid use tax upon the appropriate value of the furniture. (See also subsection (5)(d) of this section.)

(e) A use tax exemption is available to state or local governmental entities using tangible personal property donated to them. RCW 82.12.02595. The donor, however, remains liable for the retail sales or use tax on the donated property, even though the state or local governmental entity's use of the property is exempt of tax.

(8) **Persons subject to the public utility tax.**

(a) Persons deriving income subject to the provisions of the public utility tax may not claim a deduction for amounts received as compensation for services rendered to the state of Washington, its departments and institutions, or to municipal corporations thereof.

(b) The public utility tax does not apply to income received by the state of Washington, or its departments and institutions from providing public utility services.

(c) Municipal corporations operating public service businesses should refer to WAC 458-20-179 (Public utility tax), WAC 458-20-180 (Motor transportation, urban transportation), WAC 458-20-250 (Solid waste collection tax) and WAC 458-20-251 (Sewerage collection and other related activities) to determine their public utility tax liability.

(9) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should only be used as a general guide. The tax results of other situations must be determined after a review of all the facts and circumstances.

(a) City operates a community center which provides a number of activities and services. The center charges fees for court activities including tennis and racquetball, general admission to the swimming pool, swimming lessons, aerobics classes, and the use of weight equipment. The community center also provides programs targeted at youth and senior populations. These programs include arts and craft classes, dance instruction classes, and day camps providing a wide variety of activities such as picnics, nature walks, volleyball, and other games. The center provides banquet and meeting rooms to civic groups for a fee, but does not provide a meal service with the banquet facilities. The community center's operation is an enterprise activity, because it is more than fifty percent funded by user fees.

City's tax liability for the fees charged by the community center are as follows:

(i) Retailing B&O and retail sales taxes apply to all charges for the court activities**,** general admission to the swimming pool, and the use of weight equipment;

(ii) The retailing B&O tax applies to fees charged for aerobics classes. Retail sales tax does not apply because of the sales tax exemption for physical fitness classes provided by local governments;

(iii) Service and other business activities B&O tax applies to all fees for swimming lessons, the arts and crafts classes, dance instruction classes, day camps, and the rental of the banquet and meeting rooms. Retail sales tax does not apply to any part of the charge for the day camp because the portion of the day camp activities considered to be retail is minimal.

(b) City operates a swimming pool located at a high school. This swimming pool is open to the public in the evenings. City charges user fees for swimming lessons, water exercise classes, and general admission to the pool. City will occasionally "rent" the pool to a private organization for the organization's own use. In these cases, the private organization controls the overall operation and admission to the facility. City has no authority to control access and/or use when "renting" the pool to these organizations. City compares the user fees generated by the swimming pool to the total costs associated with the operation of the pool on an annual basis. The user fees never total "more than fifty percent" of the cost of pool operation, therefore the operation of the pool is not an enterprise activity.

City must collect and remit retail sales tax on all retail sales for which a retail sales tax exemption is not available, even though the B&O tax does not apply. Retail sales tax must be charged and collected on all general admission charges. Retail sales tax does not apply to the water exercise classes because of the retail sales tax exemption provided for physical fitness classes provided by local governments. City would not collect retail sales tax on the charges for the swimming lessons or the "rental" of the pool to private businesses (license to use real estate) because these charges are not retail sales.

(c) City sponsors various baseball leagues as a part of City's efforts to provide recreational activities to its citizens. Teams joining a league are charged a "league fee." Individual participants are charged a "participation fee." The league fee entitles a team to join the league, and reserve the use of the ball fields for league games. The participation fee entitles an individual team member to participate in the baseball activity. City does not account for the operation of the ball fields

under a single specific budget. The user fees generated from the baseball fields, as well as the costs of operating and maintaining these fields, are accounted for in City's overall parks and recreation system budget, which is not an enterprise activity.

The participation fees are retail sales and subject to the retail sales tax, because the team members pay these fees for the right to actually engage in an amusement and recreation activity. The league fees are not retail sales, because they simply entitle the teams to join an association of baseball teams that compete amongst themselves. (Refer also to WAC 458-20-183 on amusement and recreational activities.) The participation fees and league fees are not subject to the B&O tax, because these baseball fields are not operated as an enterprise activity. Had these fields been operated as an enterprise activity, the participation fees and league fees would also have been subject to the retailing and service and other business activities B&O tax classifications, respectively.

(d) Jane Doe enters into a contract with City to provide an aerobics class at City's community center. Jane is responsible for providing the aerobics class. City merely "rents" a room to Jane under a license to use agreement.

Jane Doe must collect and remit retail sales tax upon the charges for the aerobics classes. The charges for the aerobics classes do not qualify for the retail sales tax exemption provided by RCW 82.08.0291 merely because the classes are held at a local government facility. Jane Doe is not entitled to the retail sales tax exemption available to local governments.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-070, § 458-20-189, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 95-24-104, § 458-20-189, filed 12/6/95, effective 1/6/96; WSR 86-18-069 (Order 86-16), § 458-20-189, filed 9/3/86; WSR 85-22-041 (Order 85-6), § 458-20-189, filed 11/1/85; WSR 85-04-016 (Order 85-1), § 458-20-189, filed 1/29/85; WSR 83-07-033 (Order ET 83-16), § 458-20-189, filed 3/15/83; Order ET 70-3, § 458-20-189 (Rule 189), filed 5/29/70, effective 7/1/70.]

WAC 458-20-190 Sales to and by the United States—Doing business on federal reservations—Sales to foreign governments. (1) **Introduction.** Federal law prohibits Washington from directly imposing taxes upon the United States. Persons doing business with the United States are nonetheless subject to the taxes imposed by the state of Washington, unless specifically exempt. This rule explains the tax reporting responsibilities of persons making sales to the United States and to foreign governments. The rule also explains the tax reporting responsibilities of persons engaging in business activities within federal reservations and cleaning up radioactive waste and other by-products of weapons production for the United States.

Persons engaged in construction, installation, or improvement to real property of or for the United States should also refer to WAC 458-20-17001 (Government contracting, etc.). Persons building, repairing, or improving streets, roads, and other transportation facilities, which are owned by the United States should also refer to WAC 458-20-171 (Building, repairing or improving streets, roads, etc.). Persons selling cigarettes to the United States or any other federal entity should also refer to WAC 458-20-186 (Tax on cigarettes).

(2) **"United States" defined.**

(a) For the purposes of this rule, the term "United States" means the federal government, including the executive, legislative, and judicial branches, its departments, and federal entities exempt from state or local taxation by reason of specific federal statutory exemption.

The mere fact that an entity is a federal entity, such as an instrumentality or a federal corporation, does not mean that the entity is immune from tax. The taxability of a federal entity and whether or not the entity is required to collect and remit retail sales/use tax depends on the benefits and immunities conferred upon it by Congress. Thus, to determine the current taxable status of federal entities, the relevant portion of the federal law should be examined.

(b) "United States" does not include entities associated with but not a part of the United States, such as the National Guard (an instrumentality of the state of Washington). Nor does it include entities contracting with the United States government to administer its programs.

(3) **Prohibition against taxing the United States.** The state of Washington is prohibited from imposing taxes directly upon the United States.

(a) This prohibition applies to taxes imposed for the privilege of engaging in business such as the business and occupation (chapter 82.04 RCW) and the public utility (chapter 82.16 RCW) taxes.

It also applies to taxes imposed on a buyer or user of goods or services, including, but not limited to, the:

(i) State and local retail sales and car rental taxes (chapters 82.08 and 82.14 RCW);

(ii) State and local use tax (chapters 82.12 and 82.14 RCW);

(iii) Solid waste collection tax (chapter 82.18 RCW); and

(iv) Local government taxes such as the special hotel/motel (chapter 67.28 RCW) and convention and trade center (chapter 67.40 RCW) taxes.

(b) The state is also prohibited from requiring the United States to collect taxes imposed on the buyer (e.g., the retail sales tax) as an agent for the state. However, buyers must pay use tax on retail purchases from the United States, unless specifically exempt by law.

(c) In addition, federal law exempts certain nongovernmental entities from state taxes (for which Congress has given specific federal statutory tax exemptions). These specific federal statutory exemptions given by Congress may not be absolute and may be limited to specific activities of an entity.

(d) The American Red Cross is an instrumentality of the United States. As a federal corporation providing aid and relief, it is exempt from retail sales, use, and business and occupation taxes under state law. RCW 82.08.0258, 82.12.-0259, and 82.04.380.

(4) **Persons doing business with the United States.** Persons selling goods or services to the United States are subject to taxes imposed on the seller, such as the business and occupation (B&O) and public utility taxes, unless a specific tax exemption applies. Persons receiving income from contracting with the United States government to administer its programs, either in whole or in part, are also subject to tax, unless a specific tax exemption applies.

(a) **Certain invoiced amounts not included in gross income.** Persons who contract with the United States may, for federal accounting purposes, be contractually required to invoice goods or services provided to the United States by third parties. The purpose of the invoices is to match the expenditures with the appropriate category of congressional funding. These amounts should be excluded from the person's gross income when reporting on the combined excise tax return if all of the following conditions exist with respect to the goods or services:

(i) The third party directly invoices the United States;

(ii) The United States directly pays the third party; and

(iii) The person has no liability, either primarily or secondarily, for making payment to the third party or for remitting payment to the third party.

(b) **Tax obligation with respect to the use of tangible personal property.** Persons performing services for the United States are also subject to the retail sales or use tax on property they use or consume when performing services for the United States, unless specifically exempt.

(i) **Manufacturing articles for commercial or industrial use.** In the case of products manufactured or produced by the person using the products as a consumer, the measure of the use tax is generally the value of the products as explained in WAC 458-20-112 (Value of products). However, if the articles manufactured or produced by the user are used in the manufacture or production of products sold or to be sold to the department of defense of the United States, the value of articles used is the value of the ingredients of such articles. The manufacturing B&O tax also applies to the value of articles manufactured for commercial or industrial use.

(ii) **Use of government provided property.** When articles or goods used are acquired by bailment, the measure of the use tax to the bailee is the reasonable rental with the value to be determined as nearly as possible according to the rental price at the place of use of similar products of like quality and character. See WAC 458-20-211 (Leases or rental of tangible personal property, bailments). Thus, if a person has a contract to provide services for the United States and uses government supplied tangible personal property to perform the services, then the person must pay use tax on the fair market rental value of the government supplied tangible personal property.

Persons who incorporate government provided articles into construction projects or improvements made to real property of or for the United States should refer to WAC 458-20-17001 (Government contracting, etc.) for more specific tax-reporting information.

(c) **Exemption for certain machinery and equipment.** Manufacturers or processors for hire may be eligible for the retail sales or use tax exemption provided by RCW 82.08.-02565 and 82.12.02565 on machinery and equipment used directly in a manufacturing or research and development operation. See WAC 458-20-13601 (Manufacturers and processor for hire—Sales and use tax exemption for machinery and equipment).

(5) **Documenting exempt sales to the United States.** Only those sales made directly to the United States are exempt from retail sales tax or other tax imposed on the buyer. To be entitled to the exemption, the purchase must be paid for using a qualified U.S. government credit card, a check from the United States payable to the seller, a United States voucher, or with cash accompanied by the federal SF (Standard Form) 1165.

Sales to employees or representatives of the United States are subject to tax, even though the United States may reimburse the employee or representative for all or a part of the expense. Purchases by any other person, whether with federal funds or through a reimbursement arrangement, are subject to tax unless specifically exempt by law.

(a) **Documenting tax-exempt sales.** Sellers document the tax-exempt nature of sales made to the United States by keeping a copy of the United States credit card receipt, a copy of the check from the United States, a copy of the federal government voucher, or a signed copy of federal SF 1165.

(b) **Payment occurring via government contracted credit card.** Various United States government contracted credit cards are used to make payment for purchases of goods and services by or for the United States government. Sole responsibility for payment of these purchases may rest with the United States government or with the employee. The United States government's system of issuing government contracted credit cards is subject to change. For specific information about determining when payment is the direct responsibility of the United States government or the employee, contact the department's taxpayer services division at:

Department of Revenue
Taxpayer Services
P.O. Box 47478
Olympia, WA 98504-7478

or call the department's telephone information center at 1-800-647-7706 or visit the department's web site at http://dor.wa.gov.

(6) **Doing business on federal reservations.** The state of Washington has jurisdiction and authority to levy and collect taxes upon persons residing within, or with respect to business transactions conducted upon, federal reservations. 4 U.S.C. §§ 105-110. The term "federal reservation," as used in this rule, means any land or premises within the exterior boundaries of the state of Washington that are held or acquired by and for the use of the United States, its departments, institutions or entities. This means that a concessionaire operating within a federal reservation under a grant or permit issued by the United States or by a department or entity of the United States is taxable to the same extent as any private operator engaging in a similar business outside a federal reservation and without specific authority from the United States.

(a) **Sales tax collection requirements.** Persons making retail sales to members of the armed forces or others residing within or conducting business upon federal reservations are required to collect and remit retail sales tax from the buyer.

(b) **Cigarette tax stamps.** Washington cigarette tax stamps must generally be affixed to all cigarettes sold to persons residing within or conducting business upon federal reservations. However, such stamps need not be affixed to cigarettes sold to the United States or any of its entities including voluntary organizations of military personnel authorized by the Secretary of Defense or the Secretary of the Navy or by the United States or any of its entities to authorized purchas-

ers, for use on such reservation. See WAC 458-20-186 (Tax on cigarettes).

(7) **Sales made to authorized purchasers of the United States.** As explained in subsection (3)(b) of this rule, while sales by the United States are exempt of retail sales tax the purchaser is generally responsible for remitting use tax directly to the department of revenue. Federal law prohibits the imposition of use tax on tangible personal property sold to authorized purchasers by the United States, its entities, or voluntary unincorporated organization of armed forces personnel. 4 U.S.C. § 107(a).

(a) **Who is an "authorized purchaser"?** A person is an "authorized purchaser" only with respect to purchases he or she is permitted to make from commissaries, ships' stores, or voluntary unincorporated organizations of personnel of any branch of the armed forces of the United States, under regulations promulgated by the departmental secretary having jurisdiction over such branch. 4 U.S.C. § 107(b).

(b) **What is a "voluntary unincorporated organization"?** "Voluntary unincorporated organizations" are those organizations comprised of armed forces personnel operated under regulations promulgated by the departmental secretary having jurisdiction over such branch. Examples of voluntary unincorporated organizations are post flying clubs, officers or noncommissioned officers open messes, and recreation associations.

(8) **Purchases by persons using federal funds.** Retail sales or use tax is applicable to retail purchases made by any buyer, other than the United States, including the state of Washington and all of its political subdivisions, irrespective of whether or not the buyer uses or is reimbursed with federal funds.

(9) **Cleaning up radioactive waste and other by-products of weapons production and nuclear research and development.** RCW 82.04.263 provides a preferential tax rate for the gross income derived from cleaning up for the United States, or its instrumentalities, radioactive waste and other by-products of weapons production and nuclear research and development. This tax rate applies whether the person performing these activities is a general contractor or subcontractor.

(a) **What activities are entitled to the preferential tax rate?** Only those activities that meet the definition of "cleaning up radioactive waste and other by-products of weapons production and nuclear research and development" are entitled to the preferential tax rate. The statute defines "cleaning up radioactive waste and other by-products of weapons production and nuclear research and development" to mean:

(i) The handling, storing, treating, immobilizing, stabilizing, or disposing of radioactive waste, radioactive tank waste and capsules, nonradioactive hazardous solid and liquid wastes, or spent nuclear fuel;

(ii) Conditioning of spent nuclear fuel;

(iii) Removing contamination in soils and groundwater;

(iv) Decontaminating and decommissioning of facilities; and

(v) Services supporting the performance of cleanup. A service supports the performance of cleanup if it:

(A) Is within the scope of work under a clean-up contract with the United Stated Department of Energy; or

(B) Assists in the accomplishment of a requirement of a clean-up project undertaken by the United States Department of Energy under a subcontract entered into with the prime contractor or another subcontractor in furtherance of a clean-up contract between the United States Department of Energy and a prime contractor.

(b) **When does a service not assist in the accomplishment of a requirement of a clean-up project?** Subject to specific exceptions provided by law, a service does not assist in the accomplishment of a clean-up project when the same services are routinely provided to businesses not engaged in clean-up activities.

The following exceptions are always deemed to contribute to the accomplishment of a requirement of a clean-up project undertaken by the United States Department of Energy:

- Information technology and computer support services;
- Services rendered in respect to infrastructure; and
- Security, safety, and health services.

(c) **Guideline examples.** The following examples are to be used as a guideline when determining whether a service is "routinely provided to businesses not engaged in clean-up activities."

(i) **Accounting services.** The classification does not apply to general accounting services but does apply to performance audits performed for persons cleaning up radioactive waste.

(ii) **Legal services.** The classification does not apply to general legal services but does apply to those legal services that assist in the accomplishment of a requirement of a clean-up project undertaken by the United States Department of Energy. Thus, legal services provided to contest any local, state, or federal tax liability or to defend a company against worker's compensation claim arising from a worksite injury do not qualify for the classification. However, legal services related to the resolution of contractual dispute between the parties to a clean-up contract between the United States Department of Energy and a prime contractor do qualify.

(iii) **General office janitorial.** General office janitorial services do not qualify for the radioactive waste clean-up classification, but the specialized cleaning of equipment exposed to radioactive waste does qualify.

(d) **Clean-up examples.** The examples in this subsection identify a number of facts and then state a conclusion. These examples should only be used as a general guide. Similar determinations for other situations can be made only after a review of all facts and circumstances.

(i) Company C is a land excavation contractor who contracts with Prime Contractor to dig trenches where waste will be reburied after processing. Company C's contract for digging trenches qualifies for the preferential tax rate under RCW 82.04.263 because the activity of digging trenches is one of the physical acts of cleaning up.

(ii) Company D contracts with Company C from the previous example to provide payroll and accounting services. Company D's activity does not qualify for the preferential tax rate under RCW 82.04.263 because the activity of general accounting is not an activity involving the physical act of cleaning up, nor is it a service supporting the performance of cleanup as defined in (a)(v) of this subsection.

(iii) Company E is an environmental engineering company which contracts with Prime Contractor to develop a plan on how best to decontaminate the soil at a tank farm and will monitor the cleanup/decontamination as it progresses. Company E's activities qualify for the preferential tax rate under RCW 82.04.263 because the activities are services supporting the performance of cleanup.

(iv) Company F is a security company that contracts with Prime Contractor to provide overall security to the federal reservation, including providing security at clean-up sites. Security services at clean-up sites are services that support the performance of cleanup.

(e) **Taxability of tangible personal property used or consumed in cleaning up radioactive waste and other by-products of weapons production and nuclear research and development.** Persons cleaning up radioactive waste and other by-products of weapons production and nuclear research and development for the United States, or its instrumentalities, are consumers of any property they use or consume when performing these services. RCW 82.04.190. Therefore, tangible personal property used or consumed in the cleanup is subject to retail sales or use tax. If the seller does not collect retail sales tax on a retail sale, the buyer is required to pay the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department, unless specifically exempt by law. The "combined excise tax return" does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's combined excise tax return. Refer to WAC 458-20-178 for detailed information regarding use tax.

(10) **Sales to foreign governments or foreign diplomats.** For specific details concerning the taxability of sales of goods and services to foreign missions and diplomats, contact the department's taxpayer services division at:

Department of Revenue
Taxpayer Services
P.O. Box 47478
Olympia, WA 98504-7478

or call the department's telephone information center at 1-800-647-7706 or visit the department's web site at http://dor.wa.gov.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-10-030, § 458-20-190, filed 4/26/10, effective 5/27/10. Statutory Authority: RCW 82.32.300, 82.01.060(1), and 34.05.230. WSR 05-03-002, § 458-20-190, filed 1/5/05, effective 2/5/05. Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), § 458-20-190, filed 3/15/83; Order ET 75-1, § 458-20-190, filed 5/2/75; Order ET 70-3, § 458-20-190 (Rule 190), filed 5/29/70, effective 7/1/70.]

WAC 458-20-192 Indians—Indian country. (1) **Introduction.**

(a) Under federal law the state may not tax Indians or Indian tribes in Indian country. In some instances the state's authority to impose tax on a nonmember doing business in Indian country with an Indian or an Indian tribe is also preempted by federal law. This rule only addresses those taxes administered by the department of revenue (department).

(b) The rules of construction used in analyzing the application of tax laws to Indians and nonmembers doing business with Indians are:

(i) Treaties are to be construed in the sense in which they would naturally have been understood by the Indians; and

(ii) Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

(c) This rule reflects the harmonizing of federal law, Washington state tax law, and the policies and objectives of the Centennial Accord and the Millennium Agreement. It is consistent with the mission of the department of revenue, which is to achieve equity and fairness in the application of the law.

(d) It is the department's policy and practice to work with individual tribes on a government-to-government basis to discuss and resolve areas of mutual concern.

(2) **Definitions.** The following definitions apply throughout this rule:

(a) "Indian" means a person on the tribal rolls of an Indian tribe. A person on the tribal rolls is also known as an "enrolled member" or a "member" or an "enrolled person" or an "enrollee" or a "tribal member."

(b) "Indian country" has the same meaning as given in 18 U.S.C. 1151 and means:

(i) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation;

(ii) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same.

(c) "Indian tribe" means an Indian nation, tribe, band, community, or other entity recognized as an "Indian tribe" by the United States Department of the Interior. The phrase "federally recognized Indian tribe" and the term "tribe" have the same meaning as "Indian tribe."

(d) "Indian reservation" means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the use and occupancy of Indian tribes by treaty, law, or executive order and that are areas currently recognized as "Indian reservations" by the United States Department of the Interior. The term includes lands within the exterior boundaries of the reservation owned by non-Indians as well as land owned by Indians and Indian tribes and it includes any land that has been designated "reservation" by federal act.

(e) "Nonmember" means a person not on the tribal rolls of the Indian tribe.

(f) "State sales and use tax" includes local sales and use tax.

(3) **Federally recognized Indian tribes.** As of the effective date of this rule there are twenty-eight federally recognized Indian tribes in the state of Washington. You may contact the governor's office of Indian affairs for an up-to-date list of federally recognized Indian tribes in the state of Washington at its web site, www.goia.wa.gov or at:

Governor's Office of Indian Affairs
531 15th Ave. S.E.

P.O. Box 40909
Olympia, WA 98504-0909
360-753-2411

(4) **Recordkeeping.** Taxpayers are required to maintain appropriate records on the tax exempt status of transactions. For example, in the case of the refuse collection tax, the refuse collection company must substantiate the tax-exempt status of its customers. This could be done, for example, one of two ways. The tribe can provide the refuse collection company with a list of all of the tribal members living in Indian country or the individual members can provide exemption certificates to the company. A buyer's retail sales tax exemption certificate that can be used for this purpose is located on the department's web site (www.dor.wa.gov/forms/other.htm) or may be obtained by contacting the department. The company must then keep the list or the certificates in its files as proof of the tax exempt status of the tribe and its members. Individual businesses may contact the department to determine how best to keep records for specific situations.

(5) **Enrolled Indians in Indian country. Generally.** The state may not tax Indians or Indian tribes in Indian country. For the purposes of this rule, the term "Indian" includes only those persons who are enrolled with the tribe upon whose territory the activity takes place and does not include Indians who are members of other tribes. An enrolled member's spouse is considered an "Indian" for purposes of this rule if this treatment does not conflict with tribal law. This exclusion from tax includes all taxes (e.g., B&O tax, public utility tax, retail sales tax, use tax, cigarette tax). If the incidence of the tax falls on an Indian or a tribe, the tax is not imposed if the activity takes place in Indian country or the activity is treaty fishing rights related activity (see subsection (6)(b) of this rule). "Incidence" means upon whom the tax falls. For example, the incidence of the retail sales tax is on the buyer.

(a)(i) **Retail sales tax - tangible personal property - delivery threshold.** Retail sales tax is not imposed on sales to Indians if the tangible personal property is delivered to the member or tribe in Indian country or if the sale takes place in Indian country. For example, if the sale to the member takes place at a store located on a reservation, the transaction is automatically exempt from sales tax and there is no reason to establish "delivery."

(ii) **Retail sales tax - services.** The retail sales tax is not imposed if the retail service (e.g., construction services) is performed for the member or tribe in Indian country. In the case of a retail service that is performed both on and off Indian country, only the portion of the contract that relates to work done in Indian country is excluded from tax. The work done for a tribe or Indian outside of Indian country, for example road work that extends outside of Indian country, is subject to retail sales tax.

(b) **Use tax.** Use tax is not imposed when tangible personal property is acquired in Indian country by an Indian or the tribe for at least partial use in Indian country. For purposes of this rule, acquisition in Indian country creates a presumption that the property is acquired for partial use in Indian country.

(c) **Tax collection.** Generally, sales to persons other than Indians are subject to the retail sales tax irrespective of where in this state delivery or rendition of services takes place. Sellers are required to collect and remit to the state the retail sales tax upon each taxable sale made by them to nonmembers in Indian country. A tribe and the department may enter into an agreement covering the collection of state tax by tribal members or the tribe. (See also the discussion regarding preemption of tax in subsection (7) of this rule.)

In order to substantiate the tax-exempt status of a retail sale to a person who is a tribal member, unless the purchaser is personally known to the seller as a member, the seller must require presentation of a tribal membership card or other suitable identification of the purchaser as an enrollee of the Indian tribe. A tribe and the department may enter into an agreement covering identification of enrolled members, in which case the terms of the agreement govern.

A person's tax status under the Revenue Act does not change simply because he or she is making a tax-exempt sale to a tribe or tribal member. For example, a person building a home for a nonmember/consumer is entitled to purchase subcontractor services and materials to be incorporated into the home at wholesale. See RCW 82.04.050. A person building a home for a tribal member/consumer in Indian country is similarly entitled to purchase these services and materials at wholesale. The fact that the constructing of the home for the tribal member/consumer is exempt from retail sales tax has no impact on the taxability of the purchases of materials, and the materials continue to be purchased for resale.

(d) **Corporations or other entities owned by Indians.** A state chartered corporation comprised solely of Indians is not subject to tax on business conducted in Indian country if all of the owners of the corporation are enrolled members of the tribe except as otherwise provided in this section. The corporation is subject to tax on business conducted outside of Indian country, subject to the exception for treaty fishery activity as explained later in this rule. Similarly, partnerships or other entities comprised solely of enrolled members of a tribe are not subject to tax on business conducted in Indian country. In the event that the composition includes a family member who is not a member of the tribe, for instance a business comprised of a mother who is a member of the Chehalis Tribe and her son who is a member of the Squaxin Island Tribe, together doing business on the Chehalis reservation, the business will be considered as satisfying the "comprised solely" criteria if at least half of the owners are enrolled members of the tribe.

(6) **Indians outside Indian country.**

(a) **Generally.** Except for treaty fishery activity, Indians conducting business outside of Indian country are generally subject to tax (e.g., the B&O, the public utility tax, retail sales tax). Indians or Indian tribes who conduct business outside Indian country must register with the department as required by RCW 82.32.030. (See also WAC 458-20-101 for more registration information.)

(b) **Treaty fishery - preemption.** For the purpose of this rule, "treaty fishery" means the fishing and shellfish rights preserved in a tribe's treaty, a federal executive order, or an act of Congress. It includes activities such as harvesting, processing, transporting, or selling, as well as activities such as management and enforcement.

(i) **Indians - B&O tax.** The gross income directly derived from treaty fishing rights related activity is not sub-

ject to state tax. This exclusion from tax is limited to those businesses wholly owned and operated by Indians/tribe who have treaty fishing rights. If a business wholly owned and operated by Indians/tribe deals with both treaty and nontreaty fish, this exclusion from tax is limited to the business attributable to the treaty fish. "Wholly owned and operated" includes entities that meet the qualifications under 26 U.S.C. 7873, which requires that:

(A) Such entity is engaged in a fishing rights-related activity of such tribe;

(B) All of the equity interests in the entity are owned by qualified Indian tribes, members of such tribes, or their spouses;

(C) Except as provided in the code of federal regulations, in the case of an entity which engages to any extent in any substantial processing or transporting of fish, ninety percent or more of the annual gross receipts of the entity is derived from fishing rights-related activities of one or more qualified Indian tribes each of which owns at least ten percent of the equity interests in the entity; and

(D) Substantially all of the management functions of the entity are performed by members of qualified Indian tribes.

(ii) **Indians - sales and use tax.** The retail sales tax and use tax do not apply to the services or tangible personal property for use in the treaty fishery, regardless of where delivery of the item or performance of the service occurs. Gear, such as boats, motors, nets, and clothing, purchased or used by Indians in the treaty fishery is not subject to sales or use tax. Likewise, retail services in respect to property used in the treaty fishery, such as boat or engine repair, are not subject to sales tax.

(iii) **Sales to nonmembers.** Treaty fish and shellfish sold by members of the tribe are not subject to sales tax or use tax, regardless of where the sale takes place due to the sales and use tax exemption for food products.

(iv) **Government-to-government agreement.** A tribe and the department may enter into an agreement covering the treaty fishery and taxable activities of enrolled members, in which case the terms of the agreement govern.

(7) **Nonmembers in Indian country - preemption of state tax.** Generally, a nonenrolled person doing business in Indian country is subject to tax. Unless specifically described as preempted by this rule, the department will review transactions on a case-by-case basis to determine whether tax applies. A nonmember who is not taxable on the basis of preemption should refer to WAC 458-20-101 (tax registration) to determine whether the person must register with the department.

(a) **Preemption of tax on nonmembers - gaming.** Gaming by Indian tribes is regulated by the federal Indian Gaming Regulatory Act. Nonmembers who operate or manage gaming operations for Indian tribes are not subject to tax for business conducted in Indian country. This exclusion from tax applies to taxes imposed on income attributable to the business activity (e.g., the B&O tax), and to sales and use tax on the property used in Indian country to conduct the activity. Sales tax will apply if delivery of property is taken outside of Indian country.

Nonmembers who purchase tangible personal property at a gaming facility are subject to retail sales or use tax, unless:

(i) The item is preempted based on the outcome of the balancing test. For example, depending on the relative state, tribal, and federal interests, tax on food at restaurants or lounges owned and operated by the tribe or a tribal member or sales of member arts and crafts at gift shops might be preempted. See the balancing test discussion in subsection (c) below; or

(ii) The item is purchased for use in the gaming activity at the facility, such as bingo cards or daubers.

(b) **Preemption of B&O and public utility tax - sales of tangible personal property or provision of services by nonmembers in Indian country.** As explained in this subsection, income from sales in Indian country of tangible personal property to, and from the performance of services in Indian country for, tribes and tribal members is not subject to B&O (chapter 82.04 RCW) or public utility tax (chapters 82.16 and 54.28 RCW). The taxpayer is responsible for maintaining suitable records so that the taxpayer and the department can distinguish between taxable and nontaxable activities.

(i) **Sales of tangible personal property.** Income from sales of tangible personal property to the tribe or to tribal members is not subject to B&O tax if the tangible personal property is delivered to the buyer in Indian country and if:

(A) The property is located in Indian country at the time of sale; or

(B) The seller has a branch office, outlet, or place of business in Indian country that is used to receive the order or distribute the property; or

(C) The sale of the property is solicited by the seller while the seller is in Indian country.

(ii) **Provision of services.** Income from the performance of services in Indian country for the tribe or for tribal members is not subject to the B&O or public utility tax. Services performed outside of Indian country are subject to tax. In those instances where services are performed both on and off of Indian country, the activity is subject to state tax to the extent that services are substantially performed outside of Indian country.

(A) It will be presumed that a professional service (e.g., accounting, legal, or dental) is substantially performed outside of Indian country if twenty-five percent or more of the time taken to perform the service occurs outside of Indian country. The portion of income subject to state tax is determined by multiplying the gross receipts from the activity by the quotient of time spent outside of Indian country performing the service divided by total time spent performing the service.

For example, an accountant with an office outside of Indian country provides accounting services to a tribal member. The accountant performs some of the work at the office and some work at the business of the tribal member in Indian country. If at least twenty-five percent of the time performing the work is spent outside of Indian country, the services are substantially performed outside of Indian country and therefore a portion is subject to state tax. As explained above, the accountant must maintain suitable records to distinguish between taxable and nontaxable income in order to provide for a reasonable approximation of the amount of gross income subject to B&O tax. In this case, suitable records could be a log of the time and location of the services per-

formed for the tribal matter by the accountant, his or her employees, and any contractors hired by the accountant.

(B) For services subject to the retailing and/or wholesaling B&O tax (e.g., building, installing, improving, or repairing structures or tangible personal property), the portion of income relative to services actually performed outside of Indian country is subject to state tax.

For example, a contractor enters into a contract with a tribe to install a sewer line that extends off reservation. Only the income attributable to the installation of the portion of the sewer line off reservation is subject to state tax.

(C) For public utility services under chapters 82.16 and 54.28 RCW it will be presumed that the service is provided where the customer receives the service.

(c) **Preemption of tax on nonmembers - balancing test - value generated on the reservation.** In certain instances state sales and use tax may be preempted on nonmembers who purchase goods or services from a tribe or tribal members in Indian country. The U.S. supreme court has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: The degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax. See *Salt River Pima-Maricopa Indian Community v. Waddell*, 50 F.3d 734, (1995). This analysis is known as the "balancing test." This preemption analysis does not extend to subsequent transactions, for example if the purchaser buys for resale the tax imposed on the consumer in the subsequent sale is not preempted. However, because these balancing test determinations are so fact-based, the department will rule on these issues on a case-by-case basis. For such a ruling please contact the department at:

Department of Revenue
Executive
P.O. Box 47454
Olympia, WA 98504-7454

(d) **Federal contractors.** The preemption analysis does not extend to persons who are doing work for the federal government in Indian country. For example, a nonmember doing road construction for the Bureau of Indian Affairs within an Indian reservation is subject to state tax jurisdiction.

(e) **Indian housing authorities.** RCW 35.82.210 provides that the property of housing authorities and the housing authorities themselves are exempt from taxes, such as state and local sales and use taxes, state and local excise taxes, state and local property taxes, and special assessments. This covers tribal housing authorities and intertribal housing authorities both on and off of Indian land. Please note that tribal housing authorities, like all other housing authorities, are exempt from tax anywhere in the state, and the delivery requirement and other geographic thresholds are not applicable.

Not all assessments are exempted under RCW 35.82.-210. See *Housing Authority of Sunnyside v. Sunnyside Valley Irrigation District*, 112 Wn2d 262 (1989).

For the purposes of the exemption:

(i) "Intertribal housing authority" means a housing authority created by a consortium of tribal governments to operate and administer housing programs for persons of low income or senior citizens for and on behalf of such tribes.

(ii) "Tribal government" means the governing body of a federally recognized Indian tribe.

(iii) "Tribal housing authority" means the tribal government or an agency or branch of the tribal government that operates and administers housing programs for persons of low income or senior citizens.

(8) **Motor vehicles, trailers, snowmobiles, etc., sold to Indians or Indian tribes.** Sales tax is not imposed when a motor vehicle, trailer, snowmobile, off-road vehicle, or other such property is delivered to an Indian or the tribe in Indian country or if the sale is made in Indian country. Similarly, use tax is not imposed when such an item is acquired in Indian country by an Indian or the tribe for at least partial use in Indian country. For purposes of this rule, acquisition in Indian country creates a presumption that the property is acquired for partial use in Indian country.

(a) **Registration of vehicle, trailer, etc.** County auditors, subagencies appointed under RCW 46.01.140, and department of licensing vehicle licensing offices must collect use tax when Indians or Indian tribes apply for an original title transaction or transfer of title issued on a vehicle or vessel under chapters 46.09, 46.10, 46.12, or 88.02 RCW unless the tribe/Indian shows that they are not subject to tax. To substantiate that they are not subject to tax the Indian/tribe must show that they previously paid retail sales or use tax on their acquisition or use of the property, or that the property was acquired on or delivered to Indian country. The person claiming the exclusion from tax must sign a declaration of delivery to or acquisition in Indian country. A statement in substantially the following form will be sufficient to establish eligibility for the exclusion from sales and use tax.

(b) **Declaration.**

DECLARATION OF DELIVERY OR ACQUISITION IN INDIAN COUNTRY

The undersigned is (circle one) an enrolled member of the tribe/authorized representative of the tribe or tribal enterprise, and the property was delivered/acquired within Indian country, for at least partial use in Indian country.

name of buyer

date of delivery/acquisition

address of delivery/acquisition

(9) **Miscellaneous taxes.** The state imposes a number of excise taxes in addition to the most common excise taxes administered by the department (e.g., B&O, public utility, retail sales, and use taxes). The following is a brief discussion of some of these taxes.

(a) **Cigarette tax.** The statutory duties applicable to administration and enforcement of the cigarette tax are divided between the department and the liquor control board. Enforcement of nonvoluntary compliance is the responsibility of the liquor control board. Voluntary compliance is the responsibility of the department of revenue. See chapter 82.24 RCW for specific statutory requirements regarding purchase of cigarettes by Indians and Indian tribes. For a specific ruling regarding the taxability of and stamping requirements for cigarettes manufactured by Indians or Indian tribes in Indian country, please contact the department at:

Department of Revenue
Executive
P.O. Box 47454
Olympia, WA 98504-7454

Where sales of cigarettes are the subject of a government-to-government cooperative agreement, the provisions of that agreement supersede conflicting provisions of this subsection.

(i) Sales of cigarettes to nonmembers by Indians or Indian tribes are subject to the cigarette tax. The wholesaler is obligated to make precollection of the tax. Therefore, Indian or tribal sellers making sales to non-Indian customers must (A) purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales or (B) they may make purchases of cigarettes from licensed cigarette distributors for resale to qualified purchasers or (C) may purchase a stock of untaxed unstamped cigarettes for resale to qualified purchasers if the tribal seller gives advance notice under RCW 82.24.250 and Rule 186.

For purposes of this rule, "qualified purchaser" means an Indian purchasing for resale within Indian country to other Indians or an Indian purchasing solely for his or her use other than for resale.

(ii) Delivery or sale and delivery by any person of stamped exempt cigarettes to Indians or tribal sellers for sale to qualified purchasers may be made only in such quantity as is approved in advance by the department. Approval for delivery will be based upon evidence of a valid purchase order of a quantity reasonably related to the probable demand of qualified purchasers in the trade territory of the seller. Evidence submitted may also consist of verified record of previous sales to qualified purchasers, the probable demand as indicated by average cigarette consumption for the number of qualified purchasers within a reasonable distance of the seller's place of business, records indicating the percentage of such trade that has historically been realized by the seller, or such other statistical evidence submitted in support of the proposed transaction. In the absence of such evidence the department may restrict total deliveries of stamped exempt cigarettes to Indian country or to any Indian or tribal seller thereon to a quantity reasonably equal to the national average cigarette consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the resident enrolled membership of the affected tribe.

(iii) Any delivery, or attempted delivery, of unstamped cigarettes to an Indian or tribal seller without advance notice to the department will result in the treatment of those cigarettes as contraband and subject to seizure. In addition, the person making or attempting such delivery will be held liable for payment of the cigarette tax and penalties. See chapter 82.24 RCW.

Approval for sale or delivery to Indian or tribal sellers of stamped exempt cigarettes will be denied where the department finds that such Indian or tribal sellers are or have been making sales in violation of this rule.

(iv) Delivery of stamped exempt cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to Indian country. Delivery of stamped exempt cigarettes outside of Indian country at the distributor's dock or place of business or any other location outside of Indian country is prohibited unless the cigarettes are accompanied by an invoice.

(b) **Refuse collection tax.** Indians and Indian tribes are not subject to the refuse collection tax for service provided in Indian country, regardless of whether the refuse collection company hauls the refuse off of Indian country.

(c) **Leasehold excise tax.** Indians and Indian tribes in Indian country are not subject to the leasehold excise tax. Leasehold interests held by nonenrolled persons are subject to tax.

(d) **Fish tax.** Chapter 82.27 RCW imposes a tax on the commercial possession of enhanced food fish, which includes shellfish. The tax is imposed on the fish buyer. The measure of the tax is the value of the enhanced food fish at the point of landing. A credit is allowed against the amount of tax owed for any tax previously paid on the same food fish to any legally established taxing authority, which includes Indian tribes. Transactions involving treaty fish are not subject to the fish tax, regardless of where the transaction takes place.

(e) **Tobacco tax.** The tobacco tax is imposed on "distributors" as that term is defined in RCW 82.26.010. Tobacco tax is not imposed on Indian persons or tribes who take delivery of the tobacco in Indian country. Effective July 1, 2002, persons who handle for sale any tobacco products that are within this state but upon which tax has not been imposed are subject to the tobacco tax. Chapter 325, Laws of 2002. Thus, persons purchasing tobacco products for resale from Indians who are exempt from the tobacco tax are subject to tobacco tax on the product. See WAC 458-20-185, Tax on tobacco products.

(f) **Real estate excise tax.** The real estate excise tax is imposed on the seller. A sale of land located in Indian country by a tribe or a tribal member is not subject to real estate excise tax. A sale of land located within Indian country by a nonmember to the tribe or to a tribal member is subject to real estate excise tax.

(g) **Timber excise tax.** Payment of the timber excise tax is the obligation of the harvester. The tribe or tribal members are not subject to the timber excise tax in Indian country. Generally, timber excise tax is due from a nonmember who harvests timber on fee land within Indian country. Timber excise tax is not due if the timber being harvested is on trust land or is owned by the tribe and located in Indian country, regardless of the identity of the harvester. There are some instances in which the timber excise tax might be preempted on non-Indians harvesting timber on fee land in Indian country due to tribal regulatory authority. For such a ruling please contact the department at:

Department of Revenue
Executive
P.O. Box 47454
Olympia, WA 98504-7454

[Statutory Authority: RCW 82.32.300. WSR 02-14-133, § 458-20-192, filed 7/2/02, effective 8/2/02; WSR 00-24-050A, § 458-20-192, filed 11/30/00, effective 1/1/01; WSR 80-17-026 (Order ET 80-3), § 458-20-192, filed 11/14/80; Order ET 76-4, § 458-20-192, filed 11/12/76; Order ET 74-5, § 458-20-192, filed 12/16/74; Order ET 70-3, § 458-20-192 (Rule 192), filed 5/29/70, effective 7/1/70.]

WAC 458-20-193 Inbound and outbound interstate sales of tangible personal property. (1) **Introduction.** This section explains Washington's B&O tax and retail sales tax applications to interstate sales of tangible personal property. It covers the outbound sales of goods originating in this state to persons outside this state and of inbound sales of goods originating outside this state to persons in this state. This section does not include import and export transactions.

(2) **Definitions:** For purposes of this section the following terms mean:

(a) "State of origin" means the state or place where a shipment of tangible personal property (goods) originates.

(b) "State of destination" means the state or place where the purchaser/consignee or its agent receives a shipment of goods.

(c) "Delivery" means the act of transferring possession of tangible personal property. It includes among others the transfer of goods from consignor to freight forwarder or for-hire carrier, from freight forwarder to for-hire carrier, one for-hire carrier to another, or for-hire carrier to consignee.

(d) "Receipt" or "received" means the purchaser or its agent first either taking physical possession of the goods or having dominion and control over them.

(e) "Agent" means a person authorized to receive goods with the power to inspect and accept or reject them.

(f) "Nexus" means the activity carried on by the seller in Washington which is significantly associated with the seller's ability to establish or maintain a market for its products in Washington.

(3) **Outbound sales.** Washington state does not assess its taxes on sales of goods which originate in Washington if receipt of the goods occurs outside Washington.

(a) Where tangible personal property is located in Washington at the time of sale and is received by the purchaser or its agent in this state, or the purchaser or its agent exercises ownership over the goods inconsistent with the seller's continued dominion over the goods, the sale is subject to tax under the retailing or wholesaling classification. The tax applies even though the purchaser or its agent intends to and thereafter does transport or send the property out-of-state for use or resale there, or for use in conducting interstate or foreign commerce. It is immaterial that the contract of sale or contract to sell is negotiated and executed outside the state or that the purchaser resides outside the state.

(b) Where the seller delivers the goods to the purchaser who receives them at a point outside Washington neither retailing nor wholesaling business tax is applicable. This exemption applies even in cases where the shipment is arranged through a for-hire carrier or freight consolidator or freight forwarder acting on behalf of either the seller or purchaser. It also applies whether the shipment is arranged on a "freight prepaid" or a "freight collect" basis. The shipment may be made by the seller's own transportation equipment or by a carrier for-hire. For purposes of this section, a for-hire carrier's signature does not constitute receipt upon obtaining the goods for shipment unless the carrier is acting as the purchaser's agent and has express written authority from the purchaser to accept or reject the goods with the right of inspection.

(4) **Proof of exempt outbound sales.**

(a) If either a for-hire carrier or the seller itself carries the goods for receipt at a point outside Washington, the seller is required to retain in its records documentary proof of the sales and delivery transaction and that the purchaser in fact received the goods outside the state in order to prove the sale is tax exempt. Acceptable proofs, among others, will be:

(i) The contract or agreement of sale, if any, **And**

(ii) If shipped by a for-hire carrier, a waybill, bill of lading or other contract of carriage indicating the seller has delivered the goods to the for-hire carrier for transport to the purchaser or the purchaser's agent at a point outside the state with the seller shown on the contract of carriage as the consignor (or other designation of the person sending the goods) and the purchaser or its agent as consignee (or other designation of the person to whom the goods are being sent); or

(iii) If sent by the seller's own transportation equipment, a trip-sheet signed by the person making delivery for the seller and showing:

The seller's name and address,

The purchaser's name and address,

The place of delivery, if different from purchaser's address,

The time of delivery to the purchaser together with the signature of the purchaser or its agent acknowledging receipt of the goods at the place designated outside the state of Washington.

(b) Delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier merely utilized to arrange for and/or transport the goods is not receipt of the goods by the purchaser or its agent unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection. See also WAC 458-20-174, 458-20-17401, 458-20-175, 458-20-176, 458-20-177, 458-20-238 and 458-20-239 for certain statutory exemptions.

(5) **Other B&O taxes - Outbound and inbound sales.**

(a) **Extracting, manufacturing.** Persons engaged in these activities in Washington and who transfer or make delivery of such produced articles for receipt at points outside the state are subject to business tax under the extracting or manufacturing classification and are not subject to tax under the retailing or wholesaling classification. See also WAC 458-20-135 and 458-20-136. The activities taxed occur entirely within the state, are inherently local, and are conducted prior to the commercial journey. The tax is measured by the value of products as determined by the selling price in the case of articles on which the seller performs no further manufacturing after transfer out of Washington. It is immaterial that the value so determined includes an additional increment of value because the sale occurs outside the state. If the seller performs additional manufacturing on the article after transferring the article out-of-state, the value should be measured under the principles contained in WAC 458-20-112.

(b) **Extracting or processing for hire, printing and publishing, repair or alteration of property for others.** These activities when performed in Washington are also inherently local and the gross income or total charge for work performed is subject to business tax, since the operating incidence of the tax is upon the business activity performed in this state. No deduction is permitted even though the articles

produced, imprinted, repaired or altered are delivered to persons outside the state. It is immaterial that the customers are located outside the state, that the work was negotiated or contracted for outside the state, or that the property was shipped in from outside the state for such work.

(c) **Construction, repair.** Construction or repair of buildings or other structures, public road construction and similar contracts performed in this state are inherently local business activities subject to B&O tax in this state. This is so even though materials involved may have been delivered from outside this state or the contracts may have been negotiated outside this state. It is immaterial that the work may be performed in this state by foreign sellers who performed preliminary services outside this state.

(d) **Renting or leasing of tangible personal property.** Lessors who rent or lease tangible personal property for use in this state are subject to B&O tax upon their gross proceeds from such rentals for periods of use in this state. Proration of tax liability based on the degree of use in Washington of leased property is required.

It is immaterial that possession of the property leased may have passed to the lessee outside the state or that the lease agreement may have been consummated outside the state. Lessors will not be subject to B&O tax if all of the following conditions are present:

(i) The equipment is not located in Washington at the time the lessee first takes possession of the leased property; and

(ii) The lessor has no reason to know that the equipment will be used by the lessee in Washington; and

(iii) The lease agreement does not require the lessee to notify the lessor of subsequent movement of the property into Washington and the lessor has no reason to know that the equipment may have been moved to Washington.

(6) **Retail sales tax - Outbound sales.** The retail sales tax generally applies to all retail sales made within this state. The legal incidence of the tax is upon the purchaser, but the seller is obligated to collect and remit the tax to the state. The retail sales tax applies to all sales to consumers of goods located in the state when goods are received in Washington by the purchaser or its agent, irrespective of the fact that the purchaser may use the property elsewhere. However, as indicated in subsection (4)(b), delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier arranged either by the seller or the purchaser, merely utilized to arrange for and/or transport the goods out-of-state is not receipt of the goods by the purchaser or its agent in this state, unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.

(a) The retail sales tax does not apply when the seller delivers the goods to the purchaser who receives them at a point outside the state, or delivers the same to a for-hire carrier consigned to the purchaser outside the state. This exemption applies even in cases where the shipment is arranged through a for-hire carrier or freight consolidator or freight forwarder acting on behalf of either the seller or the purchaser. It also applies regardless of whether the shipment is arranged on a "freight prepaid" or a "freight collect" basis and regardless of who bears the risk of loss. The seller must retain proof of exemption as outlined in subsection (4), above.

(b) RCW 82.08.0273 provides an exemption from the retail sales tax to certain nonresidents of Washington for purchases of tangible personal property for use outside this state when the nonresident purchaser provides proper documentation to the seller. This statutory exemption is available only to residents of states and possessions or Province of Canada other than Washington when the jurisdiction does not impose a retail sales tax of three percent or more. These sales are subject to B&O tax.

(c) A statutory exemption (RCW 82.08.0269) is allowed for sales of goods for use in states, territories and possessions of the United States which are not contiguous to any other state (Alaska, Hawaii, etc.), but only when, as a necessary incident to the contract of sale, the seller delivers the property to the purchaser or its designated agent at the usual receiving terminal of the for-hire carrier selected to transport the goods, under such circumstance that it is reasonably certain that the goods will be transported directly to a destination in such noncontiguous states, territories and possessions. As proof of exemption, the seller must retain the following as part of its sales records:

(i) A certification of the purchaser that the goods will not be used in the state of Washington and are intended for use in the specified noncontiguous state, territory or possession.

(ii) Written instructions signed by the purchaser directing delivery of the goods to a dock, depot, warehouse, airport or other receiving terminal for transportation of the goods to their place of ultimate use. Where the purchaser is also the carrier, delivery may be to a warehouse receiving terminal or other facility maintained by the purchaser when the circumstances are such that it is reasonably certain that the goods will be transported directly to their place of ultimate use.

(iii) A dock receipt, memorandum bill of lading, trip sheet, cargo manifest or other document evidencing actual delivery to such dock, depot, warehouse, freight consolidator or forwarder, or receiving terminal.

(iv) The requirements of (i) and (ii) above may be complied with through the use of a blanket exemption certificate as follows:

Exemption Certificate

We hereby certify that all of the goods which we have purchased and which we will purchase from you will not be used in the State of Washington but are for use in the state, territory or possession of . . . . . .

You are hereby directed to deliver all such goods to the following dock, depot, warehouse, freight consolidator, freight forwarder, transportation agency or other receiving terminal:

. . . . . .

. . . . . .

for the transportation of those goods to their place of ultimate use.

This certificate shall be considered a part of each order that we have given you and which we may hereafter give to you, unless otherwise specified, and shall be valid until revoked by us in writing.

DATED . . . . . .

. . . . . .
(Purchaser)

By. . . . . .
(Officer or Purchaser's
Representative)

Address. . . . . .

(v) There is no business and occupation tax deduction of the gross proceeds of sales of goods for use in noncontiguous states unless the goods are received outside Washington.

(d) See WAC 458-20-173 for explanation of sales tax exemption in respect to charges for labor and materials in the repair, cleaning or altering of tangible personal property for nonresidents when the repaired property is delivered to the purchaser at an out-of-state point.

(7) **Inbound sales.** Washington does not assert B&O tax on sales of goods which originate outside this state unless the goods are received by the purchaser in this state and the seller has nexus. There must be both the receipt of the goods in Washington by the purchaser and the seller must have nexus for the B&O tax to apply to a particular sale. The B&O tax will not apply if one of these elements is missing.

(a) Delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier located outside this state merely utilized to arrange for and/or transport the goods into this state is not receipt of the goods by the purchaser or its agent unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.

(b) When the sales documents indicate the goods are to be shipped to a buyer in Washington, but the seller delivers the goods to the buyer at a location outside this state, the seller may use the proofs of exempt sales contained in subsection 4 to establish the fact of delivery outside Washington.

(c) If a seller carries on significant activity in this state and conducts no other business in the state except the business of making sales, this person has the distinct burden of establishing that the instate activities are not significantly associated in any way with the sales into this state. Once nexus has been established, it will continue throughout the statutory period of RCW 82.32.050 (up to five years), notwithstanding that the instate activity which created the nexus ceased. Persons taxable under the service B&O tax classification should refer to WAC 458-20-194. The following activities are examples of sufficient nexus in Washington for the B&O tax to apply:

(i) The goods are located in Washington at the time of sale and the goods are received by the customer or its agent in this state.

(ii) The seller has a branch office, local outlet or other place of business in this state which is utilized in any way, such as in receiving the order, franchise or credit investigation, or distribution of the goods.

(iii) The order for the goods is solicited in this state by an agent or other representative of the seller.

(iv) The delivery of the goods is made by a local outlet or from a local stock of goods of the seller in this state.

(v) The out-of-state seller, either directly or by an agent or other representative, performs significant services in relation to establishment or maintenance of sales into the state, even though the seller may not have formal sales offices in Washington or the agent or representative may not be formally characterized as a "salesperson."

(vi) The out-of-state seller, either directly or by an agent or other representative in this state, installs its products in this state as a condition of the sale.

(8) **Retail sales tax - Inbound sales.** Persons engaged in selling activities in this state are required to be registered with the department of revenue. Sellers who are not required to be registered may voluntarily register for the collection and reporting of the use tax. The retail sales tax must be collected and reported in every case where the retailing B&O tax is due as outlined in subsection 7. If the seller is not required to collect retail sales tax on a particular sale because the transaction is disassociated from the instate activity, it must collect the use tax from the buyer.

(9) **Use tax - Inbound sales.** The following sets forth the conditions under which out-of-state sellers are required to collect and remit the use tax on goods received by customers in this state. A seller is required to pay or collect and remit the tax imposed by chapter 82.12 RCW if within this state it directly or by any agent or other representative:

(a) Has or utilizes any office, distribution house, sales house, warehouse, service enterprise or other place of business; or

(b) Maintains any inventory or stock of goods for sale; or

(c) Regularly solicits orders whether or not such orders are accepted in this state; or

(d) Regularly engages in the delivery of property in this state other than by for-hire carrier or U.S. mail; or

(e) Regularly engages in any activity in connection with the leasing or servicing of property located within this state.

(i) The use tax is imposed upon the use, including storage preparatory to use in this state, of all tangible personal property acquired for any use or consumption in this state unless specifically exempt by statute. The out-of-state seller may have nexus to require the collection of use tax without personal contact with the customer if the seller has an extensive, continuous, and intentional solicitation and exploitation of Washington's consumer market. (See WAC 458-20-221).

(ii) Every person who engages in this state in the business of acting as an independent selling agent for unregistered principals, and who receives compensation by reason of sales of tangible personal property of such principals for use in this state, is required to collect the use tax from purchasers, and remit the same to the department of revenue, in the manner and to the extent set forth in WAC 458-20-221.

(10) **Examples - Outbound sales.** The following examples show how the provisions of this section relating to interstate sales of tangible personal property will apply when the goods originate in Washington (outbound sales). The examples presume the seller has retained the proper proof documents and that the seller did not manufacture the items being sold.

(a) Company A is located in Washington. It sells machine parts at retail and wholesale. Company B is located in California and it purchases machine parts from Company A. Company A carries the parts to California in its own vehicle to make delivery. It is immaterial whether the goods are received at either the purchaser's out-of-state location or at

any other place outside Washington state. The sale is not subject to Washington's B&O tax or its retail sales tax because the buyer did not receive the goods in Washington. Washington treats the transaction as a tax exempt interstate sale. California may impose its taxing jurisdiction on this sale.

(b) Company A, above, ships the parts by a for-hire carrier to Company B in California. Company B has not previously received the parts in Washington directly or through a receiving agent. It is immaterial whether the goods are received at either Company B's out-of-state location or any other place outside Washington state. It is immaterial whether the shipment is freight prepaid or freight collect. Again, Washington treats the transaction as an exempt interstate sale.

(c) Company B, above, has its employees or agents pick up the parts at Company A's Washington plant and transports them out of Washington. The sale is fully taxable under Washington's B&O tax and, if the parts are not purchased for resale by Company B, Washington's retail sales tax also applies.

(d) Company B, above, hires a carrier to transport the parts from Washington. Company B authorizes the carrier, or another agent, to inspect and accept the parts and, if necessary, to hold them temporarily for consolidation with other goods being shipped out of Washington. This sale is taxable under Washington's B&O tax and, if the parts are not purchased for resale by Company B, Washington's retail sales tax also applies.

(e) Washington will not tax the transactions in the above examples (a) and (b) if Company A mails the parts to Company B rather than using its own vehicles or a for-hire carrier for out-of-state receipt. By contrast, Washington will tax the transactions in the above examples (c) and (d) if for some reason Company B or its agent mails the parts to an out-of-state location after receiving them in Washington. The B&O tax applies to the latter two examples and if the parts are not purchased for resale by Company B then retail sales tax will also apply.

(f) Buyer C who is located in Alaska purchases parts for its own use in Alaska from Seller D who is located in Washington. Buyer C specifies to the seller that the parts are to be delivered to the water carrier at a dock in Seattle. The buyer has entered into a written contract for the carrier to inspect the parts at the Seattle dock. The sale is subject to the B&O tax because receipt took place in Washington. The retail sales tax does not apply because of the specific exemption at RCW 82.08.0269. This transaction would have been exempt of the B&O tax if the buyer had taken no action to receive the goods in Washington.

(11) **Examples - Inbound sales.** The following examples show how the provisions of this section relating to interstate sales of tangible personal property will apply when the goods originate outside Washington (inbound sales). The examples presume the seller has retained the proper proof documents.

(a) Company A is located in California. It sells machine parts at retail and wholesale. Company B is located in Washington and it purchases machine parts for its own use from Company A. Company A uses its own vehicles to deliver the machine parts to its customers in Washington for receipt in this state. The sale is subject to the retail sales and B&O tax if the seller has nexus, or use tax if nexus is not present.

(b) Company A, above, ships the parts by a for-hire carrier to Company B in Washington. The goods are not accepted by Company B until the goods arrive in Washington. The sale is subject to the retail sales or use tax and is also subject to the B&O tax if the seller has nexus in Washington. It is immaterial whether the shipment is freight prepaid or freight collect.

(c) Company B, above, has its employees or agents pick up the parts at Company A's California plant and transports them into Washington. Company A is not required to collect sales or use tax and is not liable for B&O tax on the sale of these parts. Company B is liable for payment of use tax at the time of first use of the parts in Washington.

(d) Company B, above, hires a carrier to transport the parts from California. Company B authorizes the carrier, or an agent, to inspect and accept the parts and, if necessary, to hold them temporarily for consolidation with other goods being shipped to Washington. The seller is not required to collect retail sales or use tax and is not liable for the B&O tax on these sales. Company B is subject to use tax on the first use of the parts in Washington.

(e) Company B, above, instructs Company A to deliver the machine parts to a freight consolidator selected by Company B. The freight consolidator does not have authority to receive the goods as agent for Company B. Receipt will not occur until the parts are received by Company B in Washington. Company A is required to collect retail sales or use tax and is liable for B&O tax if Company A has nexus for this sale. The mere delivery to a consolidator or for-hire carrier who is not acting as the buyer's receiving agent is not receipt by the buyer.

(f) Transactions in examples (11)(a) and (11)(b) will also be taxable if Company A mails the parts to Company B for receipt in Washington, rather than using its own vehicles or a for-hire carrier. The tax will continue to apply even if Company B for some reason sends the parts to a location outside Washington after the parts were accepted in Washington.

(g) Company W with its main office in Ohio has one employee working from the employee's home located in Washington. The taxpayer has no offices, inventory, or other employees in Washington. The employee calls on potential customers to promote the company's products and to solicit sales. On June 30, 1990 the employee is terminated. After this date the company no longer has an employee or agent calling on customers in Washington or carries on any activities in Washington which is significantly associated with the seller's ability to establish or maintain a market for its products in Washington. Washington customers who had previously been contacted by the former employee continue to purchase the products by placing orders by mail or telephone directly with the out-of-state seller. The nexus which was established by the employee's presence in Washington will be presumed to continue through December 31, 1994 and subject to B&O tax. Nexus will cease on December 31, 1994 if the seller has not established any new nexus during this period. Company W may disassociate and exclude from B&O tax sales to new customers who had no contact with the former employee. The burden of proof to disassociate is on the seller.

(h) Company X is located in Ohio and has no office, employees, or other agents located in Washington or any other contact which would create nexus. Company X receives by mail an order from Company Y for parts which are to be shipped to a Washington location. Company X purchases the parts from Company Z who is located in Washington and requests that the parts be drop shipped to Company Y. Since Company X has no nexus in Washington, Company X is not subject to B&O tax or required to collect retail sales tax. Company X has not taken possession or dominion or control over the parts in Washington. Company Z may accept a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a Streamlined Sales and Use Tax Agreement Certificate of Exemption or a Multistate Tax Commission Exemption Certificate (WAC 458-20-102) for sales made on or after January 1, 2010, from Company X which will bear the registration number issued by the state of Ohio. Company Y is required to pay use tax on the value of the parts. Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by Company Z for five years from the date of last use or December 31, 2014.

(i) Company ABC is located in Washington and purchases goods from Company XYZ located in Ohio. Upon receiving the order, Company XYZ ships the goods by a for-hire carrier to a public warehouse in Washington. The goods will be considered as having been received by Company ABC at the time Company ABC is entitled to receive a warehouse receipt for the goods. Company XYZ will be subject to the B&O tax at that time if it had nexus for this sale.

(j) P&S Department Stores has retail stores located in Washington, Oregon, and in several other states. John Doe goes to a P&S store in Portland, Oregon to purchase luggage. John Doe takes physical possession of the luggage at the store and elects to finance the purchase using a credit card issued to him by P&S. John Doe is a Washington resident and the credit card billings are sent to him at his Washington address. P&S does not have any responsibility for collection of retail sales or use tax on this transaction because receipt of the luggage by the customer occurred outside Washington.

(k) JET Company is located in the state of Kansas where it manufactures specialty parts. One of JET's customers is AIR who purchases these parts as components of the product which AIR assembles in Washington. AIR has an employee at the JET manufacturing site who reviews quality control of the product during fabrication. He also inspects the product and gives his approval for shipment to Washington. JET is not subject to B&O tax on the sales to AIR. AIR receives the parts in Kansas irrespective that JET may be shown as the shipper on bills of lading or that some parts eventually may be returned after shipment to Washington because of hidden defects.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-070, § 458-20-193, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 91-24-020, § 458-20-193, filed 11/22/91, effective 1/1/92. Formerly WAC 458-20-193A and 458-20-193B.]

WAC 458-20-19301 Multiple activities tax credits. (1) Introduction. Under the provisions of RCW 82.04.440 as amended effective August 12, 1987, Washington state's business and occupation taxes imposed under chapter 82.04 RCW were adjusted to achieve constitutional equality in the tax treatment of persons engaged in intrastate commerce (within this state only) and interstate commerce (between Washington and other states). The business and occupation tax system taxes the privilege of engaging in specified business activities based upon "gross proceeds of sales" (RCW 82.04.070) and the "value of products" (RCW 82.04.450) produced in this state. In order to maintain the integrity of this taxing system, to eliminate the possibility of discrimination between taxpayers, and to provide equal and uniform treatment of persons engaged in extracting, manufacturing, and/or selling activities regardless of where performed, a statutory system of internal and external tax credits was adopted, effective August 12, 1987. This tax credits system replaces the multiple activities exemption which, formerly, assured that the gross receipts tax would be paid only once by persons engaged in more than one taxable activity in this state in connection with the same end products. Unlike the multiple activities exemption which only prevented multiple taxation from within this state, the credits of the new system apply for gross receipts taxes paid to other taxing jurisdictions outside this state as well.

(2) Definitions. For purposes of this section the following terms will apply.

(a) "Credits" means the multiple activities tax credit(s) authorized under this statutory system also referred to as MATC.

(b) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is not, pursuant to law or custom, separately stated from the selling price.

(c) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed by RCW 82.04.230 (tax on extractors) and similar gross receipts taxes paid to other states.

(d) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes:

(i) The taxes imposed in RCW 82.04.240 (tax on manufacturers) and subsections (2) through (5) and (7) of RCW 82.04.260 (tax on special manufacturing activities) and

(ii) Similar gross receipts taxes paid to other states.

The term "manufacturing tax," by nature, includes a gross receipts tax upon the combination of printing and publishing activities when performed by the same person.

(e) "Selling tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a wholesaler or retailer of tangible personal property in this state or any other state. The term "selling" has its common and ordinary meaning and includes the acts of making either wholesale sales or retail sales or both.

(f) "State" means:

(i) The state of Washington,

(ii) A state of the United States other than Washington or any political subdivision of such other state,

(iii) The District of Columbia,

(iv) Territories and possessions of the United States, and

(v) Any foreign country or political subdivision thereof.

(g) "Taxes paid" means taxes legally imposed and actually paid in terms of money, credits, or other emoluments to a taxing authority of any "state." The term does not include taxes for which liability for payment has accrued but for which payment has not actually been made. This term also includes business and occupation taxes being paid to Washington state together with the same combined excise tax return upon which MATC are taken.

(h) "Business," "manufacturer," "extractor," and other terms expressly defined in RCW 82.04.020 through 82.04.-212 have the meanings given in those statutory sections regardless of how the terms may be used for other states' taxing purposes.

(3) Scope of credits. This integrated tax credits system is intended to assure that gross receipts from sales or the value of products determined by such gross receipts are taxed only one time, whether the activities occur entirely within this state or both within and outside this state. External tax credits arise when activities are taxed in this state and similar activities with respect to the same products produced and sold are also subject to similar taxes outside this state. There are five ways in which external tax credits may arise because of taxes paid in other states.

(a) Products or ingredients are extracted (taken from the ground) in this state and are manufactured or sold and delivered in another state which imposes a gross receipts tax on the latter activity(s). The credit created by payment of the other state's tax may be used to offset the Washington extracting tax liability.

(b) Products are manufactured, in whole or in part, in this state and sold and delivered in another state which imposes a gross receipts tax on the selling activity. Again, payment of the other state's tax may be taken as a credit against the Washington manufacturing tax liability.

(c) Conversely, products or ingredients are extracted outside this state upon which a gross receipts tax is paid in the state of extracting, and which are sold and delivered to buyers here. The other state tax payment may be taken as a credit against Washington's selling taxes.

(d) Similarly, products are manufactured, in whole or in part, outside this state and sold and delivered to buyers here. Any other state's gross receipts tax on manufacturing may be taken as a credit against Washington's selling tax.

(e) Products are partly manufactured in this state and partly in another state and are sold and delivered here or in another state. The combination of all other states' gross receipts taxes paid may be taken as credits against Washington's manufacturing and/or selling taxes.

Thus, the external tax credits may arise in the flow of commerce, either upstream or downstream from the taxable activity in this state, or both. Products extracted in another state, manufactured in Washington state, and sold and delivered in a third state may derive credits for taxes paid on both of the out-of-state activities.

Internal tax credits arise from multiple business activities performed entirely within this state, all of which are now subject to tax, but with the integrated credits offsetting the liabilities so that tax is only paid once on gross receipts. Under this system Washington extractors and manufacturers who sell their products in this state at wholesale and/or retail must report the value of products or gross receipts under each applicable tax classification. Credits may then be taken in the amount of the extracting and/or manufacturing tax paid to offset the selling taxes due. There are three ways in which credits may arise because of taxes paid exclusively in this state.

(f) Products are extracted in Washington and directly sold in Washington. Extracting business and occupation tax and selling business and occupation tax must both be reported but the payment of the former is a credit against the latter.

(g) Similarly, ingredients are extracted in Washington and manufactured into new products in this state. The extracting business and occupation tax reported and paid may be taken as a credit against manufacturing tax reported.

(h) Products manufactured in Washington are sold in Washington. Again, the payment of the manufacturing tax reported may be credited against the selling tax (wholesaling and/or retailing business and occupation tax) reported.

All of the external and internal tax credits derived from any flow of commerce may be used, repeatedly if necessary, to offset other tax liabilities related to the production and sale of the same products.

(4) Eligibility for taking credits. Statutory law places the following eligibility requirements and limitations upon the MATC system.

(a) The amount of the credit(s), however derived, may not exceed the Washington tax liability against which the credit(s) may be used. Any excess of credit(s) over liability may not be carried over or used for any purpose.

(b) The person claiming the credit(s) must be the same person who is legally obligated to pay both the taxes which give rise to the credit(s) and the taxes against which the credit is claimed. The MATC is not assignable.

(c) The taxes which give rise to the credit(s) must be actually paid before credit may be claimed against any other tax liability. Tax liability merely accrued is not creditable.

(d) The business activity subject to tax, and against which credit(s) is claimed, must involve the same ingredients or product upon which the tax giving rise to the credit(s) was paid. The credits must be product-specific.

(e) The effective date for developing and claiming credit(s) for products manufactured in Washington state and sold and delivered in other states which impose gross receipts selling taxes is June 1, 1987.

(f) The effective date for developing and claiming all credits other than those explained in subsection (e) above, is August 12, 1987.

(g) Persons who are engaged only in making wholesale or retail sales of tangible personal property which they have not extracted or manufactured are not entitled to claim MATC. Also, persons engaged in rendering services in this state are not so entitled, even if such services have been defined as "retail sales" under RCW 82.04.050. (See WAC 458-20-194 for rules governing apportionment of gross receipts from interstate services.)

(5) Other states' qualifying taxes. The law defines "gross receipts tax" paid to other states to exclude income taxes, value added taxes, retail sales taxes, use taxes, or other taxes which are generally stated separately from the selling price of

products sold. Only those taxes imposed by other states which include gross receipts of a business activity within their measure or base are qualified for these credit(s). The burden rests with the person claiming any MATC for other states' taxes paid to show that the other states' tax was a tax on gross receipts as defined herein. Gross receipts taxes generally include:

(a) Business and occupation privileges taxes upon extracting, manufacturing, and selling activities which are similar to those imposed in Washington state in that the tax measure or base is not reduced by any allocation, apportionment, or other formulary method resulting in a downward adjustment of the tax base. If costs of doing business may be generally or routinely deducted from the tax base, the tax is not one which is similar to Washington state's gross receipts tax.

(b) Severance taxes measured by the selling price of the ingredients or products severed (oil, logs, minerals, natural products, etc.) rather than measured by costs of production, stumpage values, the volume or number of units produced, or some other formulary tax base.

(c) Business franchise or licensing taxes measured by the gross volume of business in terms of gross receipts or other financial terms rather than units of production or the volume of units sold.

Other states' tax payments claimed for MATC must be identifiable with the same ingredients or products which incurred tax liability in Washington state, i.e., they must be product specific.

(d) The department will periodically publish an excise tax bulletin listing current taxes in other jurisdictions which are either qualified or disqualified for credit under the MATC system.

(6) Deductions in combination with MATC. Effective August 12, 1987, with the enactment of the MATC system, the liability for actual payment of tax by persons who extract, manufacture, and sell products in this state was shifted from the selling activity (wholesaling or retailing) to the production activity (extracting and/or manufacturing). As explained, the payment of the production taxes may now be credited against the liability for selling taxes on the same products. However, the deductions from tax provided by chapter 82.04 RCW (business and occupation tax deductions) may still be taken before tax credits are computed and used, with noted exceptions. In order for the MATC system to result in the correct computation of tax liabilities and credit applications, the tax deductions which may apply for any reporting period must be taken equally against both levels of tax liability reported, i.e., at both the production and selling levels. Failure to report tax deductions in this manner will result in overreporting tax due and may result in overpayment of tax. Thus, with the exceptions noted below, tax deductions formerly reported only against selling activities should now be reported against production activities as well. All such deductions, the result of which is to reduce the measure of tax reported, should be taken against both the production taxes (extracting or manufacturing) and the selling taxes (wholesaling and/or retailing) equally.

(a) Example:

(i) A company manufactures products in Washington which it also sells at wholesale for $5,000 and delivers to a buyer in this state. The buyer defaults on part of the payment and the seller incurs a $2,000 credit loss which it writes off as a bad debt during the tax reporting period. The bad debt deduction provided by RCW 82.04.4284 must be shown on both the manufacturing-other line and the wholesaling-other line of the combined excise tax return. Taking the deduction on only one of those activities results in overreported tax liability on the $2,000 loss.

(b) Exceptions. The deductions generally provided by RCW 82.04.4286, for interstate or foreign sales (where goods are sold and delivered outside this state) may not be taken against tax reported at the production level (extracting or manufacturing). This is because the MATC system itself provides for tax credits instead of tax deductions on gross receipts from transactions involving goods produced in this state and sold in interstate or foreign commerce. Thus, deductions which eliminate transactions from tax reporting may be taken only against selling taxes.

(c) Applicable deductions should be shown on the front of the combined excise tax return (Column #3) on each applicable tax classification line and detailed on the back side of the return, as usual, before MATC is taken.

(d) It is not the intent of the MATC law to invalidate or nullify the business and occupation tax exemption for taxable amounts below minimum (see WAC 458-20-104). Thus any person whose gross receipts or value of products reported under any single tax classification with respect to the production and sale of any product is less than the minimum taxable amount will not incur tax liability merely because of the requirement to report those gross receipts or value of products on the same product under other tax classifications as well.

(i) Example: A person both manufactures and sells at wholesale $2,000 worth of widgets in the first quarter of a tax year. The requirement to report the $2,000 tax measure under both the manufacturing-other classification and the wholesaling-other classification gives the false appearance of $4,000 in gross receipts during this quarter. However, only the amount reported under the manufacturing-other classification need be considered to determine eligibility for the amount-below-minimum exemption.

(7) How and when to take MATC. The credits available under the MATC system are all to be taken on the combined excise tax return beginning in August, 1987 and thereafter. The return form has been modified to accommodate these credits. Each tax return upon which MATC has been taken must be accompanied by a completed Schedule C. This schedule details the business activities and credits computations. The line by line instructions insure that no more or no less credits are claimed than are authorized under the law.

(8) Consolidation of tax liabilities and credits. Under the MATC system a person's Washington tax liability for all activities involved in that person's production and sale of the same ingredients or products (extracting, and/or manufacturing, and/or selling) is to be reported only at the time of the sale of such products or at the time of that person's own use of such products for commercial or industrial consumption. All of the taxable activities are to be reported on that same periodic excise tax return. Also, all external and internal tax credits derived from the payment of any gross receipts taxes on any of these activities are to be taken at that time. Thus,

the taxable activities and the tax credits are procedurally consolidated for reporting. This consolidation generally overcomes any need to track ingredients or products from their extraction to their sale. It also overcomes any need to report and pay Washington tax liability during one reporting period and to take credits against that tax liability in a different reporting period. Thus, except as noted below, there can be no credit carryovers or carrybacks under this system.

(a) Exception. Where different tax reporting periods are assigned by Washington state and another state to a company doing business both within and outside Washington state, the other state's gross receipts tax on the same products may not yet have been paid when the Washington tax is due for reporting and payment. In such cases the Washington tax due must be timely reported and paid during the period in which the sale is made. The external credit arising later, when the other state's tax is paid, may be taken as a credit against any Washington business and occupation tax reported during that later period. Thus, the limitation that the MATC must be product-specific by being limited to the amount of Washington tax paid on the same products does not mean that the credit(s) can only be used against precisely those same Washington taxes paid.

(i) In the situation described in subsection (a) above, if there is not sufficient Washington business and occupation tax due for payment in the later period, when the external tax credit arises, to allow for utilization of the entire credit, the amount of any overage may be carried forward and taken against Washington taxes reported in subsequent reporting periods until fully used.

When filing such exception returns, the full amount of any credits should be claimed, even though that credit amount will exceed the amount of tax liability reported for that period. The department of revenue itself will make the necessary adjustments and will perform the carrying over of any excess credits into future reporting periods.

(ii) In the same situation, if the person entitled to claim such credit overage is no longer engaged in taxable business in this state or for any other reason does not incur sufficient Washington business and occupation tax liability to fully utilize the perfected credit overage, a tax refund will be issued.

(iii) No tax refunds, MATC carryovers, or MATC carrybacks will be allowed under any circumstances other than those explained above.

(b) Special circumstances may arise where it is not possible to specifically identify ingredients or products as they move from production to sale (e.g., fungible commodities from various sources stored in a common warehouse). In such cases the taxpayer should seek advance approval from the department, in writing, for tax reporting and credit taking on a test period, formulary, or volume percentage basis, subject to audit verification.

(9) Recordkeeping requirements. Persons claiming the MATC must keep and preserve such records and documents as may be necessary to prove their entitlement to any credits taken under this system (RCW 82.32.070). It is not required to submit copies of such proofs when credits are claimed or together with the Schedule C detail. Rather, such records must be kept for a period no less than five years from the date of the tax return upon which the related tax credits are claimed. Such records are fully subject to audit for confirmation of the validity and amounts of credits taken. Records which must be preserved by persons claiming external tax credits include:

(a) Copies of sales contracts, or other written or memorialized evidence of any sales agreements, including purchase and billing invoices showing the origin state and destination state of products sold.

(b) Copies of shipping or other delivery documents identifying the products sold and delivered, reconcilable with the selling documents of subsection (a) above, if appropriate.

(c) Copies of production reports, transfer orders, and similar such documents which will reflect the intercompany or interdepartmental movement of extracted ingredients or manufactured products where no sale has occurred.

(d) Copies of tax returns or reports filed with other states' taxing authorities showing the kinds and amounts of taxes paid to such other states for which MATC is claimed.

(e) Copies of cancelled checks or other proofs of actual tax payment to the other state(s) giving rise to the MATC claimed.

(f) Copies of any other state(s) taxing statutes, laws, ordinances, and other appropriate legal authorities necessary to establish the nature of the other states' tax as a gross receipts tax, as defined in this section.

(g) Failure to keep and preserve proofs of entitlement to the MATC will result in the denial of credits claimed and the assessment of all taxes offset or reduced by such credits as well as the additional assessment of interest and penalties as required by law. (See RCW 82.32.050.)

(10) MATC in combination with other credits. The tax credits authorized under this system may be taken in combination with other tax credits available under Washington law. Such other credit programs, however, authorize credit carryovers from reporting period to period until the credits are fully utilized. Thus, the MATC must be computed and used to offset business and occupation tax liabilities during any tax reporting period before any other program credits to which a claimant may be entitled are claimed or applied. Failure to compute and take the MATC before applying other available credits may result in the loss of the other credit benefits.

(11) Superseding provisions. The MATC provisions of this section supersede and control the provisions of other sections of chapter 458-20 WAC (other tax rules) relating to intrastate, interstate, and foreign transactions to the extent that such provisions are or appear to be contrary or conflicting.

(12) Unique or special credit situations—Appeals. The provisions of this section generally explain the nature of the MATC system and the tax credit qualifications, limitations, and claiming procedures. The complexity of the integrated tax reporting and credit taking procedures may develop situations or questions which are not addressed herein. Such matters and requests for specialized rulings should be submitted to the department of revenue for prior determination before credits are claimed. Generally, prior determinations will be provided within sixty days after the department receives the information necessary to make such a ruling. Adverse rulings, tax credit denials, or tax assessments resulting from audits or other examinations of returns upon which the MATC is claimed may be administratively appealed under the provisions of chapter 82.32 RCW and WAC 458-20-100.

[Statutory Authority: RCW 82.32.300. WSR 87-23-008 (Order 87-8), § 458-20-19301, filed 11/6/87.]

WAC 458-20-193C Imports and exports—Sales of goods from or to persons in foreign countries.

WAC 458-20-193 deals with interstate and foreign commerce and is published in four separate parts:

Part A.	Sales of goods originating in Washington to persons in other states.
Part B.	Sales of goods originating in other states to persons in Washington.
Part C.	Imports and exports: Sales of goods from or to persons in foreign countries.
Part D.	Transportation, communication, public utility activities, or other services in interstate or foreign commerce.

Part C.

Foreign Commerce

Foreign commerce means that commerce which involves the purchase, sale or exchange of property and its transportation from a state or territory of the United States to a foreign country, or from a foreign country to a state or territory of the United States.

Imports. An import is an article which comes from a foreign country (not from a state, territory or possession of the United States) for the first time into the taxing jurisdiction of a state.

Taxation of such goods is impermissible while the goods are still in the process of importation, i.e., while they are still in import transportation. Further, such goods are not subject to taxation if the imports are merely flowing through this state on their way to a destination in some other state.

Exports. An export is an article which originates within the taxing jurisdiction of the state destined for a purchaser in a foreign country. Thus ships stores and supplies are not exports.

Business and Occupation Tax

Wholesaling and Retailing.

Imports. Sales of imports by an importer or his agent are not taxable and a deduction will be allowed with respect to the sales of such goods, if at the time of sale such goods are still in the process of import transportation. Immunity from tax does not extend: (1) To the sale of imports to Washington customers by the importer thereof or by any person after completion of importation whether or not the goods are in the original unbroken package or container; nor (2) to the sale of imports subsequent to the time they have been placed in use in this state for the purpose for which they were imported; nor (3) to sales of products which, although imports, have been processed or handled within this state or its territorial waters.

Exports. A deduction is allowed with respect to export sales when as a necessary incident to the contract of sale the seller agrees to, and does deliver the goods (1) to the buyer at a foreign destination; or (2) to a carrier consigned to and for transportation to a foreign destination; or (3) to the buyer at shipside or aboard the buyer's vessel or other vehicle of transportation under circumstances where it is clear that the process of exportation of the goods has begun, and such exportation will not necessarily be deemed to have begun if the goods are merely in storage awaiting shipment, even though there is reasonable certainty that the goods will be exported. The intention to export, as evidenced for example, by financial and contractual relationships does not indicate "certainty of export" if the goods have not commenced their journey abroad; there must be an actual entrance of the goods into the export stream.

In all circumstances there must be (a) a certainty of export and (b) the process of export must have started.

It is of no importance that title and/or possession of the goods pass in this state so long as delivery is made directly into the export channel. To be tax exempt upon export sales, the seller must document the fact that he placed the goods into the export process. That may be shown by the seller obtaining and keeping in his files any one of the following documentary evidence:

(1) A bona fide bill of lading in which the seller is shipper/consignor and by which the carrier agrees to transport the goods sold to the foreign buyer/consignee at a foreign destination; or

(2) A copy of the shipper's export declaration, showing that the seller was the exporter of the goods sold; or

(3) Documents consisting of:

(a) Purchase orders or contracts of sale which show that the seller is required to get the goods into the export stream, e.g., "f.a.s. vessel"; and

(b) Local delivery receipts, tripsheets, waybills, warehouse releases, etc., reflecting how and when the goods were delivered into the export stream; and

(c) When available, United States export or customs clearance documents showing that the goods were actually exported; and

(d) When available, records showing that the goods were packaged, numbered, or otherwise handled in a way which is exclusively attributable to goods for export.

Thus, where the seller actually delivers the goods into the export stream and retains such records as above set forth, the tax does not apply. It is not sufficient to show that the goods ultimately reached a foreign destination; but rather, the seller must show that he was required to, and did put the goods into the export process.

Sales of tangible personal property, of ships stores, and supplies to operators of steamships, etc., are not deductible irrespective of the fact that the property will be consumed on the high seas, or outside the territorial jurisdiction of this state, or by a vessel engaged in conducting foreign commerce. However, on July 1, 1985, a statutory business and occupation tax deduction became effective for sales of fuel for consumption outside the territorial waters of the United States by vessels used primarily in foreign commerce. In order to qualify for this deduction sellers must take a certificate signed by the buyer or the buyer's agent stating: The name of the vessel for which the fuel is purchased; that the vessel is primarily used in foreign commerce; and, the amount of fuel purchased which will be consumed outside of

the territorial waters of the United States. Sellers must exercise good faith in accepting such certificates and are required to add their own signed statement to the certificate to the effect that to best of their knowledge the information contained in the certificate is correct. The following is an acceptable certificate form:

Foreign Fuel Exemption Certificate

SELLER: . . . . . VESSEL: . . . . . .

WE HEREBY CERTIFY that this purchase of (kind and amount of product) from (seller) will be consumed as fuel outside the territorial waters of the United States by the above-named vessel. We further certify that said vessel is used primarily in foreign commerce and that none of the fuel purchased will be consumed within the territorial boundaries of the State of Washington.

DATED . . . . . , 19 . . . . . .
Purchaser

. . . . . .
Purchaser's Agent

By: . . . . . .

. . . . . .
Title or Office

When a completed certification such as this is taken in good faith by the seller, the sale is exempt of business and occupation tax, whether made at wholesale or retail, and even though the fuel is delivered to the buyer in this state.

Extracting, manufacturing. Persons engaged in these activities in Washington and who transfer or make delivery of articles produced to points outside the state are subject to business tax under the extracting or manufacturing classification and are not subject to business tax under the retailing or wholesaling classification. See also WAC 458-20-135 and 458-20-136. The activities taxed occur entirely within the state, are inherently local, and are conducted prior to the commercial journey. The tax is measured by the value of products as determined by the selling price. See WAC 458-20-112. It is immaterial that the value so determined includes an additional increment of value because the sale occurs outside the state.

Retail Sales Tax

The same principles apply to the retail sales tax as are set forth for business and occupation tax above, except that certain statutory exemptions may apply. (See WAC 458-20-174, 458-20-175, 458-20-176, 458-20-177, 458-20-238 and 458-20-239.)

Use Tax

The use tax is imposed upon the use, including storage, of all tangible personal property acquired for any use or consumption in this state unless specifically exempt by statute.

[Statutory Authority: RCW 82.32.300. WSR 86-07-005 (Order ET 86-3), § 458-20-193C, filed 3/6/86; WSR 83-07-033 (Order ET 83-16), § 458-20-193C, filed 3/15/83; Order ET 76-3, § 458-20-193C, filed 8/31/76; Order ET 70-3, § 458-20-193C (Rule 193 Part C), filed 5/29/70, effective 7/1/70.]

WAC 458-20-193D Transportation, communication, public utility activities, or other services in interstate or foreign commerce.

WAC 458-20-193 deals with interstate and foreign commerce and is published in four separate parts:

Part A.	Sales of goods originating in Washington to persons in other states.
Part B.	Sales of goods originating in other states to persons in Washington.
Part C.	Imports and Exports: Sales of goods from or to persons in foreign countries.
Part D.	Transportation, communication, public utility activities, or other services in interstate or foreign commerce.

Business and Occupation Tax, Public Utility Tax

In computing tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to the extent that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax subjects the activity to the risk of repeated exactions of the same nature from other states. Transporting across the state's boundaries is exempt, whereas supplying such transporters with facilities, arranging accommodations, providing funds and the like, by which they engage in such commerce is taxable.

Examples of Exempt Income:

(1) Income from those activities which consist of the actual transportation of persons or property across the state's boundaries is exempt.

(2) That portion of commissions received by local brokers or commission merchants for interstate or foreign sales which was paid to out-of-state independent agents is exempt.

(3) Income from services rendered by an out-of-state branch or office of the taxpayer regularly maintained outside the state is exempt. (See WAC 458-20-194.)

Examples of Taxable Income:

(1) Compensation received by persons engaged in business within this state for performance of business activities which are only ancillary to transportation across the state's boundaries is taxable.

(2) Compensation received by merchandise brokers or commission merchants for services rendered within this state to principals engaged in interstate or foreign commerce is taxable.

(3) Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable.

Persons engaged in stevedoring and associated activities involving the movement of goods and commodities in waterborne interstate or foreign commerce are subject to business tax at the rate .0033 upon the gross proceeds from such activities. Stevedoring and associated activities means all activities of a labor, service, or transportation nature whereby cargo is loaded or unloaded to or from vessels or barges, passing over, onto, or under a wharf, pier, or similar structure, including also the moving of cargo to a warehouse or similar holding or storage yard or area to await further movement in import or export; also the movement to a consolidation freight station to be stuffed, unstuffed, containerized, separated or otherwise segregated or aggregated for delivery or loading on any mode of transportation for delivery to its consignee. Specific activities included in this definition are: Wharfage, handling, loading, unloading, moving of cargo to a convenient place of delivery to the consignee or a convenient place for further movement to export mode; documentation services in connection with the receipt, delivery, checking, care, custody and control of cargo required in the transfer of cargo; imported automobile handling prior to delivery to consignee; terminal stevedoring and incidental vessel services, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers.

Persons engaging in business as an international steamship agent, international customs house broker, international freight forwarder, vessel and/or cargo charter broker in foreign commerce, or international air cargo agent are subject to business tax at the rate .0033 upon gross income with respect to such international activities.

In computing public utility tax, there may be deducted from gross income so much thereof as is derived from actually transporting persons or property or transmitting communications or electrical energy, from this state to another state or territory or to a foreign country and vice versa.

Persons, including dock companies or wharfage companies, are permitted no deduction from gross income of amounts received for services performed in this state consisting of the handling of cargo or freight even though such cargo or freight has moved or will move across the state's boundaries.

No deduction is permitted with respect to gross income derived from activities which are ancillary to transportation across the state's boundaries, such as income received by a wharf company or warehouse company for the storage of goods. The mere ownership or operation of facilities by means of which others engage in foreign or interstate commerce is an activity ancillary to such commerce and any income received therefrom is taxable.

Insofar as the transportation of goods is concerned, the interstate movement of cargo or freight ceases when the goods have arrived at the destination to which it was billed by the out-of-state shipper, and no deduction is permitted of the gross income derived from transporting the same from such point of destination in this state to another point within this state. Thus, freight is billed from San Francisco, or a foreign point, to Seattle. After arrival in Seattle it is transported to Spokane. No deduction is permitted of the gross income received for the transportation from Seattle to Spokane. Again, freight is billed from San Francisco, or a foreign point, to a line carrier's terminal, or a public warehouse in Seattle. After arrival in Seattle it is transported from the line carrier's terminal or public warehouse to the buyer's place of business in Seattle. No deduction is permitted of the gross income received as transportation charges from the line carrier's terminal or public warehouse to the buyer's place of business in Seattle.

The interstate movement of cargo or freight begins when the goods are committed to a carrier for transportation out of the state, which carrier will start the transportation to a point outside the state.

[Statutory Authority: RCW 82.32.300. WSR 83-07-033 (Order ET 83-16), § 458-20-193D, filed 3/15/83; Order ET 74-1, § 458-20-193D, filed 5/7/74; Emergency Order ET 74-6, filed 9/30/74 and Emergency Order ET 74-7, filed 10/3/74, effective 1/1/75; Order ET 70-3, § 458-20-193D (Rule 193 Part D), filed 5/29/70, effective 7/1/70.]

WAC 458-20-194 Doing business inside and outside the state. (1) **Introduction.**

(a) This section explains the apportionment requirements of persons entitled to apportion income under RCW 82.04.460(1), and applies only to tax liability incurred during the period of January 1, 2006, through May 31, 2010. Chapter 23, Laws of 2010, sp. sess. (2ESSB 6143) changed the apportionment provisions of RCW 82.04.460(1) effective June 1, 2010. This section specifically applies to taxpayers who maintain places of business both within and without the state that contribute to the rendition of services and who are taxable under RCW 82.04.290, 82.04.2908, or any other statute that provides for apportionment under RCW 82.04.460(1) during this period.

Persons subject to the service and other activities, international investment income, licensed boarding home, and low-level radioactive waste disposal business and occupation (B&O) tax classifications, and who are not required to apportion their income under another statute or rule, should use this section. In addition, this section describes Washington nexus standards for business activities subject to apportionment under RCW 82.04.460(1) for tax liability incurred between January 1, 2006, through May 31, 2010. Nexus is described in subsection (2) of this section; separate accounting in subsection (3) of this section; and cost apportionment in subsection (4) of this section.

(b) Readers may also find helpful information in the following rules:

(i) WAC 458-20-19401, Minimum nexus thresholds for apportionable activities. This section describes minimum nexus thresholds that are effective June 1, 2010.

(ii) WAC 458-20-19402, Single factor receipts apportionment—Generally. This section describes the general application of single factor receipts apportionment that is effective June 1, 2010.

(iii) WAC 458-20-19403, Single factor receipts apportionment—Royalties. This section describes the application of single factor receipts apportionment to gross income from royalties and applies only to tax liability incurred after May 31, 2010.

(iv) WAC 458-20-19404, Single factor receipts apportionment—Financial institutions. This section describes the application of single factor receipts apportionment to certain

income of financial institutions and applies only to tax liability incurred after May 31, 2010.

(v) WAC 458-20-14601, Financial institutions—Income apportionment. This section describes the apportionment of income for financial institutions for tax liability incurred prior to June 1, 2010.

(c) The examples included in this section identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of all situations must be determined after a review of all the facts and circumstances.

(2) **Nexus.**

(a) **Place of business - Minimum presence necessary for tax.** The following discussion of nexus applies only to gross income from activities subject to apportionment under this rule. A place of business exists in a state when a taxpayer engages in activities in the state that are sufficient to create nexus. Nexus is that minimum level of business activity or connection with the state of Washington which subjects the business to the taxing jurisdiction of this state. Nexus is created when a taxpayer is engaged in activities in the state, either directly or through a representative, for the purpose of performing a business activity. It is not necessary that a taxpayer have a permanent place of business within a state to create nexus.

(b) **Examples.** The following examples demonstrate Washington's nexus principles.

(i) Assume an attorney licensed to practice only in Washington performs services for clients located in both Washington and Florida. All of the services are performed within Washington. The attorney does not have nexus with any state other than Washington.

(ii) Assume the same facts as the example in (b)(i) of this subsection, plus the attorney attends continuing education classes in Florida related to the subject matter for which his Florida clients hired him. The attorney's presence in Florida for the continuing education classes does not create nexus because he is not engaging in business in Florida.

(iii) Assume the same facts as the example in (b)(ii) of this subsection, plus the attorney is licensed to practice law in Florida and frequently travels to Florida for the purpose of conducting discovery and trial work. Even though the attorney does not maintain an office in Florida, the attorney has nexus with both Washington and Florida.

(iv) Assume an architectural firm maintains physical offices in both Washington and Idaho. The architectural firm has nexus with both Washington and Idaho.

(v) Assume an architectural firm maintains its only physical office in Washington, and when the firm needs a presence in Idaho, it contracts with nonemployee architects in Idaho instead of maintaining a physical office in Idaho. Employees of the Washington firm do not travel to Idaho. Instead, the contract architects interact directly with the clients in Idaho, and perform the services the firm contracted to perform in Idaho. The architectural firm has nexus with both Washington and Idaho.

(vi) Assume the same facts as the example in (b)(v) of this subsection except the contracted architects never meet with the firm's clients and instead forward all work products to the firm's Washington office, which then submits that work product to the client. In this case, the architectural firm does not have nexus with Idaho. The mere purchase of services from a subcontractor located in another state that does not act as the business' representative to customers does not create nexus.

(vii) Assume that an accounting firm maintains its only office in Washington. The accounting firm enters into contracts with individual accountants to perform services for the firm in Oregon and Idaho. The contracted accountants represent the firm when they perform services for the firm's clients. The firm has nexus with Washington, Oregon, and Idaho.

(viii) Assume that an accounting firm maintains its only office in Washington and has clients located in Washington, Oregon, and Idaho. The accounting firm's employees frequently travel to Oregon to meet with clients, review client's records, and present their findings, but do not travel to Idaho. The accounting firm has nexus with Washington and Oregon, but does not have nexus with Idaho.

(ix) Assume that a sales representative earns commissions from the sale of tangible personal property. The sales representative is located in Oregon and does not enter Washington for any business purpose. The sales representative contacts Washington customers only by telephone and earns commissions on sales of tangible personal property to Washington customers. The sales representative does not have nexus with Washington and the commissions earned on sales to Washington customers are not subject to Washington's business and occupation tax.

(x) The examples in this subsection (2) apply equally to situations where the Washington activities and out-of-state activities are reversed. For example, in example (b)(ix) of this subsection, if the locations were reversed, the sales representative would have nexus with Washington, but not in Oregon.

(3) **Separate accounting.**

(a) **In general.** "Separate accounting" refers to a method of accounting that segregates and identifies sources or activities which account for the generation of income within the state of Washington. Separate accounting is distinct from cost apportionment, which assigns a formulary portion of total worldwide income to Washington. A separate accounting method must be used by a business entitled to apportion its income under RCW 82.04.460(1) if this use results in an accurate description of gross income attributable to its Washington activities.

(b) **Accuracy.** Separate accounting is accurate only when the activities that significantly contribute, directly or indirectly, to the production of income can be identified and segregated geographically. Separate accounting thus links taxable income to activities occurring in a discrete jurisdiction. The result is inaccurate when services directly supporting these activities occur in different jurisdictions. For example, if a taxpayer provides investment advice to clients in Washington, but performs all of its research and due diligence activities in another state, then separate accounting would not be accurate. However, if instead of research and due diligence, only the client billing activity is performed in another state, then separate accounting would be allowed.

(c) **Approved methods of separate accounting.** The following methods of separate accounting are acceptable to the department, if accurate:

(i) **Billable hours of employees or representative third parties performing services in Washington.** If a business charges clients an hourly rate for the performance of services, and the place of performance of the employee, contractor, or other individual whose time is billed is reasonably ascertainable, then the billable hours may be used as a basis for separate accounting. The gross amount received from hours billed for services performed in Washington should be reported.

(ii) **Specific projects or contracts.** A business may assign the revenue from specific projects or contracts in or out of Washington by the primary place of performance. For example:

(A) A consulting business with no other presence in Washington that agrees to provide on-site management consulting services for a Washington business and receives five hundred thousand dollars in payment for the project must report five hundred thousand dollars in gross income to Washington.

(B) If the same business gets another Washington client for on-site management consulting, and receives another payment of five hundred thousand dollars, the business must report an additional five hundred thousand dollars in gross income to Washington.

(C) If a business contracts to distribute advertisements for another business within the state of Washington, the gross amount received for this action should be reported as Washington income.

(iii) **Other reasonable and accurate methods—Notice to the department.**

(A) A taxpayer may report with, or the department may require, the use of one of the alternative methods of separate accounting.

(B) A taxpayer reporting under this subsection must notify the department at the time of filing that it is using an alternative method and provide a brief description of the method employed. If a taxpayer reports using an alternate method, the same method must be used for all subsequent tax reporting periods unless it is demonstrated another method is necessary under the standard in (c)(iii)(E) of this subsection.

(C) If on review of a taxpayer's return(s) the department determines another method is necessary to fairly represent the extent of a taxpayer's business activity in Washington, then the department may impose the method for all returns within the statute of limitations. Statutory interest applies to both balances due and refund or credit claims arising under this section. Further, applicable penalties will be imposed on balances due arising under this section. However, if the taxpayer reported using the separate accounting method in (c)(i) or (ii) of this subsection or cost apportionment under subsection (4)(a) through (h) of this section, the department may impose the alternate method for future periods only.

(D) A taxpayer may request that the department approve an alternative method of separate accounting by submitting a request for prior ruling pursuant to WAC 458-20-100. Such letter ruling may be subject to audit verification before issuance.

(E) The taxpayer or the department, in requesting or imposing an alternate method of separate accounting, must demonstrate by clear and convincing evidence that the separate accounting methods in (c) of this subsection do not fairly represent the extent of the taxpayer's business activity in Washington.

(4) **Cost apportionment.**

(a) **Apportionment ratio.**

(i) Each cost must be computed according to the method of accounting (cash or accrual basis) used by the taxpayer for Washington state tax purposes for the taxable period. Persons should refer to WAC 458-20-197 (When tax liability arises) and WAC 458-20-199 (Accounting methods) for further guidance on the requirements of each accounting method. Taxpayers must file returns using costs calculated based on the taxpayer's most recent fiscal year for which information is available, unless there is a significant change in business operations during the current period. A significant change in business operations includes commencement, expansion, or termination of business activities in or out of Washington, formation of a new business entity, merger, consolidation, creation of a subsidiary, or similar change. If there is a significant change in business operations, then the taxpayer must estimate its cost apportionment formula based on the best records available and then make the appropriate adjustments when the final data is available.

(ii) The apportionment ratio is the cost of doing business in Washington divided by the total cost of doing business as described in RCW 82.04.460(1). The apportionment ratio is calculated under this section as follows. The denominator of the apportionment ratio is the worldwide costs of the apportionable activity and the numerator is all costs specifically assigned to Washington plus all costs assigned to Washington by formula, as described below. Costs are calculated on a worldwide basis for the tax reporting period in question. The tax due to Washington is calculated by multiplying total income times the apportionment ratio times the tax rate. Available tax credits may be applied against the result. Statutory interest and penalties apply to underreported income. For the purposes of this rule, "total income" means gross income under the tax classification in question, less deductions, calculated as if the B&O tax classification applied on a worldwide basis.

(b) **Place of business requirement.** A taxpayer must maintain places of business within and without Washington that contribute to the rendition of its services in order to apportion its income. This "place of business" requirement, however, does not mean that the taxpayer must maintain a physical location as a place of business in another taxing jurisdiction in order to apportion its income. If a taxpayer has activities in a jurisdiction sufficient to create nexus under Washington standards, then the taxpayer is deemed to have a "place of business" in that jurisdiction for apportionment purposes. See subsection (2) of this section.

(c) **Noncost expenditures.** The following is a list of expenditures that are not costs of doing business within the meaning of RCW 82.04.460 and are therefore excluded from both the numerator and the denominator of the apportionment ratio. Expenditures that are not costs of doing business include expenditures that exchange one business asset for another; that reflect a revaluation of an asset not consumed in the course of business; or federal, state, or local taxes measured by gross or net business income. This list is not exclusive. Costs of an activity taxable under another B&O tax classification are also excluded from the apportionment ratio.

Similarly, the costs of acquiring a business by merger or otherwise, including the financing costs, are not the costs of doing the apportioned business activity and must be excluded from the cost apportionment calculation.

(i) The cost of acquiring assets that are not depreciated, amortized, or otherwise expensed on the taxpayer's books and records on the basis of generally accepted accounting principles (GAAP), or a loss incurred on the sale of such assets. For example, expenditures for land and investments are excluded from the cost apportionment formula.

(ii) Taxes (other then taxes specifically related to items of property such as retail sales or use taxes and real and personal property taxes).

(iii) Asset revaluations such as stock impairment or goodwill impairment.

(iv) Costs of doing a business activity subject to the B&O tax under a classification other than RCW 82.04.290 or 82.04.2908. For example, if a taxpayer were subject to manufacturing, wholesaling and service and other activities B&O tax, the costs associated with a warehouse and a manufacturing plant (property and employee costs) are excluded from the cost apportionment formula. But if costs support both the service activity and either manufacturing or wholesaling (for example, costs associated with headquarters or joint operating centers), then those costs must be included in the cost apportionment formula without segregating the service portion of the costs.

(d) **Specifically assigned costs.** Real or tangible personal property costs, employee costs, and certain payments to third parties are specifically assigned under (e) through (g) of this subsection.

(e) **Property costs.**

(i) **Definitions.** Real or tangible personal property costs are defined to include:

(A) Depreciation as reported on the taxpayer's books and records according to GAAP, provided that if a taxpayer does not maintain its books and records in accordance with GAAP, it may use tax reporting depreciation. A taxpayer may not change its method of calculating depreciation costs without approval of the department;

(B) Maintenance and warranty costs for specific property;

(C) Insurance costs for specific property;

(D) Utility costs for specific property;

(E) Lease or rental payments for specific property;

(F) Interest costs for specific property; and

(G) Taxes for specific property.

(ii) **Assignment of costs.** Real or tangible personal property costs are assigned to the location of the property. Property in transit between locations of the taxpayer to which it belongs is assigned to the destination state. Property in transit between a buyer and seller and included by a taxpayer in the denominator of the apportionment ratio in accordance with its regular accounting practices is assigned to the destination state. Mobile or movable property located both within and without Washington during the measuring period is assigned in proportion to the total time within Washington during the measuring period. An automobile assigned to a traveling employee is assigned to the state to which the employee's compensation is assigned below or to the state in which the automobile is licensed. Where a business contracts for the maintenance, warranty services, or insurance of multiple properties, the relative rental or depreciation expense may be used to assign these costs.

(f) **Employee costs.**

(i) **Definitions.** For the purposes of this subsection:

(A) "Compensation" means wages, salaries, commissions, and any other form of remuneration paid to or accrued to employees for personal services. Employer contributions under a qualified cash plan, deferred arrangement plan, and nonqualified deferred compensation plan are considered compensation. Stock based compensation is considered compensation under this rule to the extent included in gross income for federal income tax purposes.

(B) "Employee" means any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee, but does not include corporate officers.

(ii) **Allocation method.** Employee costs include all compensation paid to employees and all employment based taxes and other fees, for example, amounts paid related to unemployment compensation, labor and industries insurance premiums, and the employer's share of Social Security and medicare taxes. An employee's compensation is assigned to Washington if the taxpayer reports the employee's wages to Washington for unemployment compensation purposes. Employee wages reported for federal income tax purposes may be used to assign the remaining compensation costs.

(g) **Representative third-party costs.**

(i) **Definitions.** For the purposes of this section:

"Representative third party" includes an agent, independent contractor, or other representative of the taxpayer who provides services on behalf of the taxpayer directly to customers. The term includes leased employees who meet the standards under (g) of this subsection.

(ii) **Allocation method.** Payments to a representative third party are assigned to the third party's place of performance. For example, if a business subcontracts with a representative third party who provides services on behalf of the taxpayer from a California location, the cost of compensating the representative third party is assigned to California. This is true even if the third party provides services to Washington customers. Conversely, the cost of compensating a representative third party providing services to California customers from a Washington location is assigned to Washington.

(iii) **Examples.**

(A) X, a Washington business, hires Taxpayer to design and write custom software for a document management system. Taxpayer subcontracts with Z, whose employees determine the needs of X, negotiate a statement of work, write the custom software, and install the software. Z's employees perform all of these services on-site at the X business location. Taxpayer's payments to Z are representative third-party costs and specifically assigned to Washington.

(B) Taxpayer, a service provider, subcontracts with X, who agrees to maintain a customer service center where staff will answer telephone inquiries about Taxpayer's services. X in turn subcontracts with Z, whose employees actually respond to questions from a phone center located in California. The payments by taxpayer to X are representative third-party costs with respect to Taxpayer because X is responsible

for providing the staff of the service center. The payments to X are specifically assigned to California.

(C) Taxpayer sells various manufacturers' products at wholesale on a commission basis. Taxpayer subcontracts with X, who agrees to act as Taxpayer's sales representative on the West Coast. Taxpayer has various other sales representatives working on as independent contractors, who are assigned territories, but may make sales from an office or through in-person visits, or a combination of both. Taxpayer does not maintain records sufficient to show the representatives' places of performance. Taxpayer may use sales records and the standards under (h) of this subsection to assign commissions by each subcontractor.

(h) **Costs assigned by formula.**

(i) Costs not specifically assigned under (e) through (g) of this subsection and not excluded from consideration by (c) of this subsection are assigned to Washington by formula. These costs are multiplied by the ratio of sales in Washington over sales everywhere. For example, if a business has one thousand dollars in other unassigned costs and sales of ten thousand dollars in each of the four states in which it has nexus under Washington standards (including Washington), twenty-five percent ($10,000/$40,000), or two hundred fifty dollars of the other costs are assigned to Washington.

(ii) Sales are assigned to where the customer receives the benefit of the service. If the location where the services are received is not readily determinable, the services are attributed to the location of the office of the customer from which the services were ordered in the regular course of the customer's trade or business. If the ordering office cannot be determined, the services are attributed to the office of the customer to which the services are billed.

(iii) If under the method described above a sale is attributed to a location where the taxpayer does not have nexus under Washington standards, the sale must be excluded from both the numerator and denominator of the sales ratio. For the purposes of this calculation only, the department will presume a taxpayer has nexus anywhere the taxpayer has employees or real property, or where the taxpayer reports business and occupation, franchise, value added, income or other business activity taxes in the state. The burden is on the taxpayer to demonstrate nexus exists in other states.

(i) **Alternative methods.**

(i) A taxpayer may report with, or the department may require, the use of one of the alternative methods of cost apportionment described below:

(A) The exclusion of one or more categories of costs from consideration;

(B) The specific allocation of one or more categories of costs which will fairly represent the taxpayer's business activity in Washington; or

(C) The employment of another method of cost apportionment that will effectuate an equitable apportionment of the taxpayer's gross income.

(ii) A taxpayer reporting under (i) of this subsection must notify the department at the time of filing that it is using an alternative method and provide a brief description of the method employed. If a taxpayer reports using an alternate method, the same method must be used for all subsequent tax reporting periods unless it is demonstrated another method is necessary under the standard in (i)(v) of this subsection.

(iii) If on review of a taxpayer's return(s) the department determines another method is necessary to fairly represent the extent of a taxpayer's business activity in Washington, the department may impose the method for all returns within the statute of limitations. Statutory interest applies to both balances due and refund or credit claims arising under this section. Further, applicable penalties will be imposed on balances due arising under this section. However, if the taxpayer reported using the cost apportionment method in (a) through (h) of this subsection and separate accounting is unavailable, the department may impose the alternate method for future periods only.

(iv) A taxpayer may request that the department approve an alternative method of cost apportionment by submitting a request for prior ruling pursuant to WAC 458-20-100. Such letter ruling may be subject to audit verification before issuance.

(v) The taxpayer or the department, in requesting or imposing an alternate method, must demonstrate by clear and convincing evidence that the cost apportionment method in (a) through (h) of this subsection does not fairly represent the extent of the taxpayer's business activity in Washington.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-22-089, § 458-20-194, filed 11/1/10, effective 12/2/10; WSR 05-24-054, § 458-20-194, filed 12/1/05, effective 1/1/06. Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order ET 83-1), § 458-20-194, filed 3/30/83; Order ET 70-3, § 458-20-194 (Rule 194), filed 5/29/70, effective 7/1/70.]

WAC 458-20-19401 Minimum nexus thresholds for apportionable activities. (1) **Introduction.**

(a) This rule only applies to periods after May 31, 2010.

(b) The state of Washington imposes business and occupation (B&O) tax on apportionable activities measured by the gross income of the business. B&O tax may only be imposed if a person has a "substantial nexus" with this state. For the purposes of apportionable activities, substantial nexus does not require a person to have physical presence in this state.

(c) The following rules may also be helpful:

(i) WAC 458-20-19402, Single factor receipts apportionment—Generally. This rule describes the general application of single factor receipts apportionment and applies only to tax liability incurred after May 31, 2010.

(ii) WAC 458-20-19403, Single factor receipts apportionment—Royalties. This rule describes the application of single factor receipts apportionment to gross income from royalties and applies only to tax liability incurred after May 31, 2010.

(iii) WAC 458-20-19404, Financial institutions—Income apportionment. This rule describes the application of single factor receipts apportionment to certain income of financial institutions and applies only to tax liability incurred after May 31, 2010.

(iv) WAC 458-20-19405, CPI-U adjustments to minimum nexus thresholds for apportionable activities. This rule describes the minimum nexus thresholds adjustment that must be made to account for increases to the consumer price index for tax periods after May 31, 2010.

(v) WAC 458-20-193, Inbound and outbound interstate sales of tangible personal property.

(vi) WAC 458-20-194, Doing business inside and outside the state. This rule describes separate accounting and

cost apportionment and applies only to tax liability incurred from January 1, 2006 through May 31, 2010.

(d) Examples included in this rule identify a number of facts and then state a conclusion; they should be used only as a general guide. The tax results of all situations must be determined after a review of all the facts and circumstances. For the examples in this rule, gross income received by the taxpayer is from engaging in apportionable activities. Also, unless otherwise stated, the examples do not apply to tax liability prior to June 1, 2010.

The minimum nexus thresholds described in this rule and used in examples are subject to change because of consumer price index changes. Refer to WAC 458-20-19405 for the current threshold amounts.

(2) **Definitions.** Unless the context clearly requires otherwise, the definitions in this subsection apply throughout this rule.

(a) **"Apportionable activities"** includes only those activities subject to B&O tax under the following classifications:

(i) Service and other activities;

(ii) Royalties;

(iii) Travel agents and tour operators;

(iv) International steamship agent, international customs house broker, international freight forwarder, vessel and/or cargo charter broker in foreign commerce, and/or international air cargo agent;

(v) Stevedoring and associated activities;

(vi) Disposing of low-level waste;

(vii) Title insurance producers, title insurance agents, or surplus line brokers;

(viii) Public or nonprofit hospitals;

(ix) Real estate brokers;

(x) Research and development performed by nonprofit corporations or associations;

(xi) Inspecting, testing, labeling, and storing canned salmon owned by another person;

(xii) Representing and performing services for fire or casualty insurance companies as an independent resident managing general agent licensed under the provisions of chapter 48.17 RCW;

(xiii) Contests of chance;

(xiv) Horse races;

(xv) International investment management services;

(xvi) Room and domiciliary care to residents of a boarding home;

(xvii) Aerospace product development;

(xviii) Printing or publishing a newspaper (but only with respect to advertising income);

(xix) Printing materials other than newspapers and publishing periodicals or magazines (but only with respect to advertising income); and

(xx) Cleaning up radioactive waste and other by-products of weapons production and nuclear research and development, but only with respect to activities that would be taxable as an "apportionable activity" under any of the tax classifications listed in (a)(i) through (xix) of this subsection if this special tax classification did not exist.

(b) **"Credit card"** means a card or device existing for the purpose of obtaining money, property, labor, or services on credit.

(c) **"Gross income of the business"** means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses. The term gross receipts means gross income from apportionable activities.

(d) **"Loan"** means any extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such extension of credit from another. Loan includes participations, syndications, and leases treated as loans for federal income tax purposes. Loan does not include: Futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; noninterest bearing balances due from depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a real estate mortgage investment conduit (REMIC) or other mortgage-backed or asset-backed security; and other similar items.

(e) **"Net annual rental rate"** means the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(f) The terms **"nexus"** and **"substantial nexus"** are used interchangeably in this rule.

(g) **"Property"** means tangible, intangible, and real property owned or rented and used in this state during the calendar year, except property does not include ownership of or rights in computer software, including computer software used in providing a digital automated service; master copies of software; and digital goods or digital codes residing on servers located in this state. Refer to RCW 82.04.192 and 82.04.215 for definitions of the terms computer software, digital automated services, digital goods, digital codes, and master copies.

(h) **"State"** means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any foreign country or political subdivision of a foreign country.

(i) **"Securities"** includes any intangible property defined as a security under section 2 (a)(1) of the Securities Act of 1933 including, but not limited to, negotiable certificates of deposit and municipal bonds.

(3) **Substantial nexus.**

(a) Substantial nexus exists where a person is:

(i) An individual and is a resident or domiciliary of this state during the calendar year;

(ii) A business entity and is organized or commercially domiciled in this state during the calendar year; or

(iii) A nonresident individual or a business entity that is organized or commercially domiciled outside this state, and in any calendar year the person has:

(A) More than fifty thousand dollars of property in this state;

(B) More than fifty thousand dollars of payroll in this state;

(C) More than two hundred fifty thousand dollars of receipts from this state; or

(D) At least twenty-five percent of the person's total property, total payroll, or total receipts in this state.

Example 1. Company commercially domiciled in Washington. Company C is commercially domiciled in Washington and has one employee in Washington who earns $30,000 per year. Company C has substantial nexus with Washington because it is commercially domiciled in Washington. The minimum nexus thresholds for property, payroll, and receipts do not apply to a business entity commercially domiciled in this state.

(b) The department will adjust the amounts listed in (a) of this subsection based on changes in the consumer price index as required by RCW 82.04.067. (See WAC 458-20-19405 for the current threshold amounts.)

(c) The minimum nexus thresholds are determined on a tax year basis. Generally, a tax year is the same as a calendar year. See RCW 82.32.270. For the purposes of this rule, tax years will be referred to as calendar years. This means that if a person meets the minimum nexus thresholds in a calendar year, that person is subject to B&O taxes for the entire calendar year.

Example 2. Company Q is organized and domiciled outside of Washington. Company Q maintains an office in Washington which houses a single employee. Company Q has $40,000 in property located in Washington, the employee receives $45,000 in compensation, and has $200,000 in apportionable receipts attributed to Washington. Company Q's total property is valued at $200,000, total payroll compensation is $400,000, and total apportionable receipts is $5,000,000. Although Company Q has physical presence in Washington, it does not have substantial nexus with Washington because: (a) It is not organized or domiciled in Washington; and (b) does not have sufficient property, payroll, or receipts to meet the minimum nexus thresholds identified in subsection (2)(a) of this rule.

(4) **Property threshold.**

(a) **Location of property.**

(i) Real property - Real property owned or rented is in this state if the real property is located in this state.

(ii) Tangible personal property - Tangible personal property is in this state if it is physically located in this state.

(iii) Intangible property - Intangible property is in this state based on the following:

A loan is located in this state if:

(A) More than fifty percent of the fair market value of the real and/or personal property securing the loan is in this state. An automobile loan is in this state if the vehicle is properly registered in this state. Other than for property that is subject to registered ownership, the determination of whether the real or personal property securing a loan is in this state must be made as of the time the original agreement was made, and any and all subsequent substitutions of collateral must be disregarded; or

(B) If (a)(iii)(A) of this subsection does not apply and the borrower is located in this state.

(iv) A borrower located in this state if:

(A) The borrower is engaged in business and the borrower's commercial domicile is located in this state; or

(B) The borrower is not engaged in business and the borrower's billing address is located in this state.

(v) A credit card receivable is in this state if the billing address of the card holder is located in this state.

(vi) A nonnegotiable certificate of deposit is property in this state if the issuing bank is in this state.

(vii) Securities:

(A) A negotiable certificate of deposit is property in this state if the owner is located in this state.

(B) A municipal bond is property in this state if the owner is located in this state.

(b) **Value of property.**

(i) Property the taxpayer owns and uses in this state, other than loans and credit card receivables, is valued at its original cost basis.

Example 3. In January 2008, ABC Corp. bought Machinery for $65,000 for use in State X. On January 1, 2011, ABC Corp. brought that Machinery into Washington for the remainder of the year. ABC Corp. has nexus with Washington based on Machinery's original cost basis value of $65,000. The value is $65,000 even though the property has depreciated prior to entering the state.

(ii) Property the taxpayer rents and uses in this state is valued at eight times the net annual rental rate.

Example 4. Out-of-state Business X rents office space in Washington for $6,000 per year and has $5,000 of office furniture and equipment in Washington. Business X has nexus with Washington because the value of the rented office space ($6,000 multiplied by eight, which is $48,000) plus the value of office furniture and equipment exceeds the $50,000 property threshold.

(iii) Loans and credit card receivables owned by the taxpayer are valued at their outstanding principal balance, without regard to any reserve for bad debts. However, if a loan or credit card receivable is actually charged off as a bad debt in whole or in part for federal income tax purposes (see 26 U.S.C. 166), the portion of the loan or credit card receivable charged off is deducted from the outstanding principal balance.

(c) **Calculating property value.** To determine whether the $50,000 property threshold has been met, average the value of property in this state on the first and last day of the calendar year. The department may require the averaging of monthly values during the calendar year if reasonably required to properly reflect the average value of the taxpayer's property in this state throughout the taxable period.

Example 5. Company Y has property in Washington valued at $90,000 on January 1st and $20,000 on December 31st of the same year. The value of property in Washington is $55,000 ((90,000 + 20,000)/2). Company Y has substantial nexus with Washington.

Example 6. Company A has no property located in Washington on January 1st and on December 31st of a calendar year. However, it brought $100,000 in property into Washington on January 15th and removed it from Washington on November 15th of that calendar year. The department may compute the value of Company A's property on a monthly basis in this situation because it is required to properly reflect the average value of Company A's property in

Washington ($100,000 multiplied by ten (months) divided by 12 (months), which is $83,333). Company A has nexus with Washington based on the value of the property averaged over the calendar year.

Example 7. Company B has no property located in Washington on January 1st and on December 31st of a calendar year. However, it brought $100,000 in property into Washington on January 15th and removed it from Washington on February 15th of that calendar year. The department may compute the value of Company A's property on a monthly basis in this situation because it is required to properly reflect the average value of Company B's property in Washington ($100,000 multiplied by one (month) divided by 12 (months), which is $8,333.) Company B does not have nexus with Washington based on the value of the property averaged over the calendar year, unless this amount exceeds 25% of Company B's total property value.

Example 8. IT Co. is domiciled in State X with Employee located in Washington who works from a home office. IT Co. provided to Employee $5,000 of office supplies and $15,000 of equipment owned by IT Co. IT Co. does not have nexus with Washington based on the value of the property in this State ($20,000) because it does not exceed $50,000, unless this amount exceeds 25% of IT Co.'s total property value. This example does not address the payroll threshold.

(5) **Payroll threshold.** "Payroll" is the total compensation defined as gross income under 26 U.S.C. Sec. 61 (section 61 of the Internal Revenue Code of 1986), as of June 1, 2010, paid during the calendar year to employees and to third-party representatives who represent the taxpayer in interactions with the taxpayer's clients and includes sales commissions.

(a) Payroll compensation is received in this state if it is properly reportable in this state for unemployment compensation tax purposes, regardless of whether it was actually reported to this state.

Example 9. Company D is commercially domiciled in State X and has a single Employee whose payroll of $80,000 is properly reportable in Washington for unemployment compensation purposes. Company D has substantial nexus with Washington during the calendar year based on compensation paid Employee.

Example 10. Assume the same facts as Example 9 except only 50% of Employee's payroll is properly reportable in Washington for unemployment compensation purposes for the calendar year. Employee's Washington compensation of $40,000 does not meet the payroll threshold to establish substantial nexus with Washington, unless this amount exceeds 25% of total payroll compensation.

(b) Third-party representatives receive payroll compensation in this state if the service(s) performed occurs entirely or primarily within this state.

(6) **Receipts threshold.** The receipts threshold is met if a taxpayer receives more than $250,000 from apportionable activities that is attributed to Washington.

(a) All receipts from all apportionable activities are accumulated to determine if the receipts threshold is satisfied. Receipts from activities that are not subject to apportionment (e.g., retailing, wholesaling, and extracting) are not used to determine if the receipts threshold has been satisfied.

(b) Receipts are attributed to Washington per WAC 458-20-19402 (general attribution), 458-20-19403 (royalties), and 458-20-19404 (financial institutions).

Example 11. Company E is commercially domiciled in State X. In a calendar year it has $150,000 in royalty receipts attributed to Washington per WAC 458-20-19403 and $150,000 in gross receipts from other apportionable activities attributed to Washington per WAC 458-20-19402. Company E has substantial nexus with Washington because it has a total of $300,000 in receipts from apportionable activities attributed to Washington in a calendar year. It does not matter that the receipts were from apportionable activities that are subject to tax under different B&O tax classifications. The receipts threshold is determined by the totality of the taxpayer's apportionable activities in Washington.

Example 12. Calculation of minimum nexus thresholds during the 2010 transition year. Company F receives $200,000 in gross receipts attributed to Washington on March 15, 2010; $100,000 on July 12, 2010; and $100,000 on November 1, 2010. Company F has substantial nexus with Washington for the period June 1, 2010, through December 31, 2010, because it received $400,000 in gross receipts during 2010.

(7) **Application of 25% threshold.** If at least twenty-five percent of an out-of-state taxpayer's property, payroll, or receipts from apportionable activities is in Washington, then the taxpayer has substantial nexus with Washington. The twenty-five percent threshold is determined by dividing:

(a) The value of property located in Washington by the total value of taxpayer's property;

(b) Payroll located in Washington by taxpayer's total payroll; or

(c) Receipts attributed to Washington by total receipts.

Example 13. Company G is organized and commercially domiciled in State X. In a calendar year it has $45,000 in property, $45,000 in payroll, and $240,000 in gross receipts attributed to Washington. Its total property is valued at $200,000; its worldwide payroll is $150,000; and its total gross receipts are $2,000,000. Company G has twenty-two and a half percent of its property, thirty percent of its payroll, and twelve percent of its receipts attributed to Washington. Company G has substantial nexus with Washington because more than twenty-five percent of its payroll is located in Washington.

(8) **Application to local gross receipts business and occupations taxes.** This rule does not apply to the nexus requirements for local gross receipts business and occupation taxes.

(9) **Continuing substantial nexus.** Pursuant to RCW 82.04.220, if a person meets any of the minimum nexus thresholds in subsection (2) of this section in a calendar year, the person has nexus for the following calendar year and will owe B&O tax on its gross receipts attributable to Washington for that additional year.

Example 14. Assume Corporation J earns receipts attributable to Washington that do not exceed the minimum threshold from apportionable activities in any year, and whose physical presence in Washington ends on July 20, 2008. Corporation J's B&O tax reporting obligation for any gross receipts earned in Washington ends on December 31, 2010.

Example 15. Assume Corporation K earns receipts attributable to Washington from July 1, 2008 through March 1, 2010 and exceeds the minimum threshold from apportionable activities in 2010. Assuming Corporation K does not exceed any of the minimum nexus thresholds in 2011, the taxpayer's B&O tax reporting obligation for any gross receipts attributable to Washington ends on December 31, 2011.

Example 16. Assume Corporation L exceeded Washington's minimum nexus thresholds for apportionable income from 2010 through 2012, but does not meet them in 2013. Corporation L's B&O tax reporting obligation for any gross receipts earned in Washington ends on December 31, 2013.

[Statutory Authority: RCW 82.04.067, 82.32.300, and 82.01.060(2). WSR 13-22-044, § 458-20-19401, filed 10/31/13, effective 12/1/13. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 11-19-038, § 458-20-19401, filed 9/12/11, effective 10/13/11.]

WAC 458-20-19402 Single factor receipts apportionment—Generally.

PART 1. INTRODUCTION.

(101) **General.** RCW 82.04.462 establishes the apportionment method for businesses engaged in apportionable activities and that have nexus with Washington for business and occupation (B&O) tax liability incurred after May 31, 2010. The express purpose of the change in the law was to require businesses "earn(ing) significant income from Washington residents from providing services" to "pay their fair share of the cost of services that this state renders and the infrastructure it provides." Section 101, chapter 23, 1st special session, 2010.

(102) **Guide to this rule.** This rule is divided into six parts, as follows:

1. Introduction.
2. Overview of single factor receipts apportionment.
3. How to attribute receipts.
4. Receipts factor.
5. How to determine Washington taxable income.
6. Reporting instructions.

(103) **Scope of rule.** This rule applies to the apportionment of income from engaging in apportionable activities as defined in WAC 458-20-19401, except:

(a) To the apportionment of income received by financial institutions and taxable under RCW 82.04.290, which is governed by WAC 458-20-19404; and

(b) To the attribution of royalty income from granting the right to use intangible property, which is governed by WAC 458-20-19403.

(104) **Separate accounting and cost apportionment.** The apportionment method explained in this rule replaces the previously allowed separate accounting and cost apportionment methods. Separate accounting and cost apportionment are not authorized for periods after May 31, 2010.

(105) **Other rules.** Taxpayers may also find helpful information in the following rules:

(a) WAC 458-20-19401 **Minimum nexus thresholds for apportionable activities.** This rule describes minimum nexus thresholds applicable to apportionable activities that are effective after May 31, 2010.

(b) WAC 458-20-19403 **Royalty receipts attribution.** This rule describes the attribution of royalty income for the purposes of single factor receipts apportionment and applies only to tax liability incurred after May 31, 2010.

(c) WAC 458-20-19404 **Single factor receipts apportionment—Financial institutions.** This rule describes the application of single factor receipts apportionment to certain income of financial institutions and applies only to tax liability incurred after May 31, 2010.

(d) WAC 458-20-19405, CPI-U adjustments to minimum nexus thresholds for apportionable activities. This rule describes the minimum nexus thresholds adjustment that must be made to account for increases to the consumer price index for tax periods after May 31, 2010.

(e) WAC 458-20-194 **Doing business inside and outside the state.** This rule describes separate accounting and cost apportionment and applies only to tax liability incurred from January 1, 2006, through May 31, 2010.

(f) WAC 458-20-14601 **Financial institutions—Income apportionment.** This rule describes the apportionment of income for financial institutions for tax liability incurred prior to June 1, 2010.

(106) **Definitions.** The following definitions apply to this rule:

(a) **"Apportionable activities"** has the same meaning as used in WAC 458-20-19401 Minimum nexus thresholds for apportionable activities.

(b) **"Apportionable income"** means apportionable receipts less the deductions allowable under chapter 82.04 RCW.

(c) **"Apportionable receipts"** means gross income of the business from engaging in apportionable activities, including income received from apportionable activities attributed to locations outside this state.

(d) **"Business activities tax"** means a tax measured by the amount of, or economic results of, business activity conducted in a state. The term includes taxes measured in whole or in part on net income or gross income or receipts. In the case of sole proprietorships and pass-through entities, the term includes personal income taxes if the gross income from apportionable activities is included in the gross income subject to the personal income tax. The term "business activities tax" does not include retail sales, use, or similar transaction taxes, imposed on the sale or acquisition of goods or services, whether or not named a gross receipts tax or a tax imposed on the privilege of doing business.

(e) **"Customer"** means a person or entity to whom the taxpayer makes a sale, grants the right to use intangible property, or renders services or from whom the taxpayer otherwise directly or indirectly receives gross income of the business. If the taxpayer performs apportionable services for the benefit of a third party, the term "customer" means the third party beneficiary.

Example 1. Assume a parent purchases apportionable services for their child. The child is the customer for the purpose of determining where the benefit is received.

(f) **"Reasonable method of proportionally attributing"** means a method of determining where the benefit of an activity is received and where the receipts are attributed that is uniform, consistent, and accurately reflects the market, and does not distort the taxpayer's market.

(g) **"State"** means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any foreign country or political subdivision of a foreign country.

(h)(i) **"Taxable in another state"** means either:

(A) The taxpayer is subject to a business activities tax by another state on the taxpayer's income received from engaging in apportionable activity; or

(B) The taxpayer is not subject to a business activities tax by another state on the taxpayer's income received from engaging in apportionable activity, but the taxpayer meets the substantial nexus thresholds described in WAC 458-20-19401 for that state.

(ii) The determination of whether a taxpayer is taxable in a foreign country or political subdivision of a foreign country is made at the country or political subdivision level.

Example 2. Assume Taxpayer A is subject to a business activity tax in State X of Mexico (e.g., Taxpayer pays tax to State X), but nowhere else in Mexico. Also, assume that Taxpayer A is not subject to any national business activity tax in Mexico and does not meet the substantial nexus thresholds described in WAC 458-20-19401 for Mexico as a whole. In this case, Taxpayer is taxable in State X, but not taxable in any other portion or any other State of Mexico.

Example 3. Assume Taxpayer B is not subject to any business activity taxes in Mexico, but satisfies the substantial nexus thresholds described in WAC 458-20-19401 for Mexico as a whole. Taxpayer B is taxable in all of Mexico.

PART 2. OVERVIEW OF SINGLE FACTOR RECEIPTS APPORTIONMENT.

(201) **Single factor receipts apportionment generally.** Except as provided in WAC 458-20-19404 persons earning apportionable income who have substantial nexus with Washington as specified in WAC 458-20-19401 and who are also taxable in another state must use the apportionment method provided in this rule to determine their taxable income from apportionable activities for B&O tax purposes. Taxable income is determined by multiplying apportionable income from each apportionable activity by the receipts factor for that apportionable activity.

This formula is:

(Taxable income)	=	(Apportionable income)	x	(Receipts factor)

See Part 4 of this rule for a discussion of the receipts factor.

(202) **Tax year.** The receipts factor applies to each tax year. A tax year is the calendar year, unless the taxpayer has specific permission from the department to use another period. (RCW 82.32.270.) For the purposes of this rule, "tax year" and "calendar year" have the same meaning.

PART 3. HOW TO ATTRIBUTE RECEIPTS.

(301) **Attribution of receipts generally.** Except as specifically provided for in WAC 458-20-19403 for the attribution of apportionable royalty receipts, this Part 3 explains how to attribute apportionable receipts. Receipts are attributed to states based on a cascading method or series of steps. The department expects that most taxpayers will attribute apportionable receipts based on (a)(i) of this subsection because the department believes that either the taxpayer will know where the benefit is actually received or a "reasonable method of proportionally attributing receipts" will generally be available. These steps are:

(a) Where the customer received the benefit of the taxpayer's service (see subsection (302) of this rule for an explanation and examples of the benefit of the service);

(i) If a taxpayer can reasonably determine the amount of a specific apportionable receipt that relates to a specific benefit of the services received in a state, that apportionable receipt is attributable to the state in which the benefit is received. This may be shown by application of a reasonable method of proportionally attributing the benefit among states. The result determines the receipts attributed to each state. Under certain situations, the use of data based on an attribution method specified in (b) through (f) of this subsection may also be a reasonable method of proportionally attributing receipts among states (see Examples 4 and 5 below).

(ii) If a taxpayer is unable to separately determine or use a reasonable method of proportionally attributing the benefit of the services in specific states under (a)(i) of this subsection, and the customer received the benefit of the service in multiple states, the apportionable receipt is attributed to the state in which the benefit of the service was primarily received. Primarily means, in this case, more than fifty percent.

(b) If the taxpayer is unable to attribute an apportionable receipt under (a) of this subsection, the apportionable receipt must be attributed to the state from which the customer ordered the service.

(c) If the taxpayer is unable to attribute an apportionable receipt under (a) or (b) of this subsection, the apportionable receipt must be attributed to the state to which the billing statements or invoices are sent to the customer by the taxpayer.

(d) If the taxpayer is unable to attribute an apportionable receipt under (a), (b), or (c) of this subsection, the apportionable receipt must be attributed to the state from which the customer sends payment to the taxpayer.

(e) If the taxpayer is unable to attribute an apportionable receipt under (a), (b), (c), or (d) of this subsection, the apportionable receipt must be attributed to the state where the customer is located as indicated by the customer's address:

(i) Shown in the taxpayer's business records maintained in the regular course of business; or

(ii) Obtained during consummation of the sale or the negotiation of the contract, including any address of a customer's payment instrument when readily available to the taxpayer and no other address is available.

(f) If the taxpayer is unable to attribute an apportionable receipt under (a), (b), (c), (d), or (e) of this subsection, the apportionable receipt must be attributed to the commercial domicile of the taxpayer.

(g) The taxpayer may not use an attribution method that distorts the apportionment of the taxpayer's apportionable receipts.

(302) **Examples.** Examples included in this rule identify a number of facts and then state a conclusion; they should be used only as a general guide. The tax results of all situations must be determined after a review of all the facts and circumstances. The examples in this rule assume all gross income received by the taxpayer is from engaging in apportionable

activities. Unless otherwise stated, the examples do not apply to tax liability prior to June 1, 2010.

When an example states that a particular attribution method is a reasonable method of proportionally attributing the benefit of a service, this does not preclude the existence of other reasonable methods of proportionally attributing the benefit depending on the specific facts and circumstances of a taxpayer's situation.

Example 4. Assume Law Firm has thousands of charges to clients. It is not commercially reasonable for Law Firm to track each charge to each client to determine where the benefit related to each service is received. Assume the scope of Law Firm's practice is such that it is reasonable to assume that the benefits of Law Firm's services are received at the location of the customer as reflected by the customer's billing address. Under these circumstances, Law Firm can use the billing addresses of each client as a reasonable method of proportionally attributing the benefit of its services.

Example 5. Same facts as Example 4 except, Law Firm has a single client that represents a statistically significant portion of its revenue and whose billing address is unrelated to any of the services provided. In this case, using the billing address of this client would not relate to the benefit of the services. Using the billing address for this client to determine where the benefit is received would significantly distort the apportionment of Law Firm's receipts. Therefore, Law Firm would need to evaluate the specific services provided to that client to determine where the benefits of those services are received and may use billing address to attribute the income received from other clients.

Example 6. Assume Taxpayer R attributes an apportionable receipt based on its customer's billing address, using (c) of this subsection, and the billing address is a P.O. Box located in another state. Taxpayer R also knows that mail delivered to this P.O. Box is automatically forwarded to the customer's actual location. In this case, use of the billing address is not allowed because it would distort the apportionment of Taxpayer R's receipts.

(303) **Benefit of the service explained.** The first two steps (subsection (301)(a)(i) and (ii) of this rule) used to attribute apportionable receipts to a state are based on where the taxpayer's customer receives the benefit of the service. This subsection explains the framework for determining where the benefit of a service is received.

(a) **If the taxpayer's service relates to real property, then the benefit is received where the real property is located.** The following is a nonexclusive list of services that relate to real property:

(i) Architectural;

(ii) Surveying;

(iii) Janitorial;

(iv) Security;

(v) Appraisals; and

(vi) Real estate brokerage.

(b) **If the taxpayer's service relates to tangible personal property, then the benefit is received where the tangible personal property is located or intended/expected to be located.**

(i) Tangible personal property is generally treated as located where the place of principal use occurs. If the tangible personal property is subject to state licensing (e.g., motor vehicles), the principal place of use is presumed to be where the property is licensed; or

(ii) If the tangible personal property will be created or delivered in the future, the principal place of use is where it is expected to be used or delivered.

(iii) The following is a nonexclusive list of services that relate to tangible personal property:

(A) Designing specific/unique tangible personal property;

(B) Appraisals;

(C) Inspections of the tangible personal property;

(D) Testing of the tangible personal property;

(E) Veterinary services; and

(F) Commission sales of tangible personal property.

(c) **If the taxpayer's service does not relate to real or tangible personal property, the service is provided to a customer engaged in business, and the service relates to the customer's business activities, then the benefit is received where the customer's related business activities occur.** The following is a nonexclusive list of business related services:

(i) Developing a business management plan;

(ii) Commission sales (other than sales of real or tangible personal property);

(iii) Debt collection services;

(iv) Legal and accounting services not specific to real or tangible personal property;

(v) Advertising services; and

(vi) Theatre presentations.

(d) **If the taxpayer's service does not relate to real or tangible personal property, is either provided to a customer not engaged in business or unrelated to the customer's business activities; and:**

(i) The service requires the customer to be physically present, then the benefit is received where the customer is located when the service is performed. The following is a nonexclusive list of services that require the customer to be physically present:

(A) Medical examinations;

(B) Hospital stays;

(C) Haircuts; and

(D) Massage services.

(ii) The taxpayer's service relates to a specific, known location(s), then the benefit is received at those location(s). The following is a nonexclusive list of services related to specific, known location(s):

(A) Wedding planning;

(B) Receptions;

(C) Party planning;

(D) Travel agent and tour operator services; and

(E) Preparing and/or filing state and local tax returns.

(iii) If (d)(i) and (ii) of this subsection do not apply, the benefit of the service is received where the customer resides. The following is a nonexclusive list of services whose benefit is received at the customer's residence:

(A) Drafting a will;

(B) Preparing and/or filing federal tax returns;

(C) Selling investments; and

(D) Blood tests (not blood drawing).

(e) **Special rule for extension of credit.** See subsection (305) of this rule for special rules attributing income related

to loans (secured and unsecured) and credit cards that is received by persons who are not financial institutions as defined in WAC 458-20-19404.

(304) **Examples of the application of the benefit of service analysis and reasonable methods of proportionally attributing receipts.**

(a) **Services related to real property:**

Example 7. Architect drafts plans for a building to be built in Washington. Architect's services relate to real property which is located in Washington, therefore the customer receives the benefit of that service in Washington at the location of the real property. Architect's receipts for this service are solely attributed to Washington because the entire benefit is received in Washington.

Example 8. Franchisor hires Taxpayer, an architect, to create a design of a standardized building that will be used at four locations in Washington and two locations in Oregon. Taxpayer's services relate to real property at those six locations, therefore the customer receives the benefit of the service at the four Washington locations and the two Oregon locations. Taxpayer will attribute 2/3 (4 of 6 sites) of the receipts for this service to Washington and 1/3 (2 of 6 sites) of the receipts to Oregon.

Example 9. Assume the same facts as Example 8 except Franchisor will use the same design in all 50 states for all its franchisee's locations. Taxpayer and Franchisor do not know at the time the service is provided (and cannot reasonably estimate) how many franchise locations will exist in each state. Therefore, there is no reasonable means of proportionally attributing receipts at the time the services are performed and it is clear that no state will have a majority of the franchise locations. Accordingly, the apportionable receipts must be attributed following the steps in subsection (301)(b) through (f) of this rule.

Example 10. Real estate broker located in Florida receives a commission for arranging the sale of real property located in Washington. The real estate broker's service is related to the real property, therefore the benefit is received in Washington, where the real property is located, and the commission income is attributed to Washington.

(b) **Services related to tangible personal property.**

Example 11. Big Manufacturing hires an engineer to design a tool that will only be used in a factory located in Brewster, Washington. Big Manufacturing receives the benefit of the engineer's services at a single location in Washington where the tool is intended to be used. Therefore, 100% of engineer's receipts from this service must be attributed to Washington.

Example 12. The same facts as in Example 11, except Big Manufacturing will use the tool equally in factories located in Brewster and in Kapa'a, Hawai'i. Therefore, Big Manufacturer receives the benefit of the service equally in two states. Because the benefit of the service is received equally in both states, a reasonable method of proportionally attributing receipts would be to attribute 1/2 of the receipts to each state.

Example 13. Taxpayer, a commissioned salesperson, sells tangible personal property (100 widgets) for Distributor to XYZ Company for delivery to Spokane. Distributor receives the benefit of Taxpayer's service where the tangible personal property will be delivered. Therefore, Taxpayer will attribute the commission from this sale to Washington.

Example 14. Same facts as in Example 13, but the widgets are to be delivered 50 to Spokane, 25 to Idaho, and 25 to Oregon. In this case, the benefit is received in all three states. Taxpayer shall attribute the receipts (commission) from this sale 50% to Washington, 25% to Idaho, and 25% to Oregon where the tangible personal property is delivered to the buyer.

Example 15. Training Company provides training to Customer's employees on how to operate a specific piece of equipment used solely in Washington. Customer receives the benefit of the service where the equipment is used, which is in Washington. Therefore, Training Company will attribute 100% of its receipts received from Customer to Washington.

(c) **Services related to customer's business activities.** The examples in this subsection assume that the customer is engaged in business and the services relate to the customer's business activities.

Example 16. Manufacturer hires Law Firm to defend Manufacturer in a class action product liability lawsuit involving Manufacturer's Widgets. The benefit of Law Firm's services relates to Manufacturer's widget selling activity in various states. A reasonable method of proportionally attributing receipts in this case would be to attribute the receipts to the locations where the Manufacturer's Widgets were delivered, which relates to Manufacturer's business activities.

Example 17. Debt Collector provides debt collection services to ABC. The benefit of Debt Collector's services relates to ABC's selling activity in various states. It is reasonable to assume that where the debtors are located is the same as where ABC's business activity occurred. If Debt Collector is able to attribute specific receipts to a specific debtor, then the receipt is attributed to where the debtor is located.

Example 18. Same facts as Example 17, except Debt Collector is unable to attribute specific benefits with specific debtors. In this case, a reasonable method of proportionally attributing benefits/receipts should be employed. Depending on Debt Collector's specific facts and circumstances, a reasonable method of proportionally attributing benefits/receipts could be: Relative number of debtors in each state; relative debt actually collected from debtors in each state; the relative amount of debt owed by debtors in each state; or another method that does not distort the apportionment of Debt Collector's receipts.

Example 19. Training Company provides training to Customer's employees who are all located in State A. The training is provided in State B. The training relates to the employees' ethical behavior within Customer's organization. Customer receives the benefit of Training Company's service in State A, where Customer's office is located and the employees presumably practice their ethical behavior. Training Company must attribute the apportionable receipts to State A where the benefit is solely received.

Example 20. Same facts as Example 19, except the training is provided for employees from several states and Training Company knows where each employee works. The benefit of the Training Company's services is received in those several states. Attributing receipts from the training based on where the employees work is a reasonable method of proportionally attributing the receipts income.

Example 21. Call Center provides "customer service" services to Retailer who has customers in all 50 states. Call Center's services relate to Retailer's selling activity in all 50 states, therefore Retailer receives the benefit of Call Center's services in all 50 states. Call Center has offices in Iowa and Alabama that answer questions about Retailer's products. Call Center records Retailer's customer's calls by area code. Call Center may attribute receipts received from Retailer based on the number of calls from area codes assigned to each state. This would be a reasonable method of proportionally attributing receipts notwithstanding the fact that mobile phone numbers and related area codes may not exactly reflect the physical location of the customer in all cases.

Example 22. Taxpayer provides internet advertising services to national retail chains, regional businesses, businesses with a single location, and businesses that operate solely over the Internet. Generally, the benefit of the advertising services is received where the customer's related business activities occur. Depending on what products or services are being provided by Taxpayer's customers, the use of relative population in the customer's market may be a reasonable method of proportionally attributing the benefit of Taxpayer's services.

Example 23. Oregon Newspaper sells newspaper advertising to Merlin's Potion Shop. Merlin's only makes over-the-counter sales from its single location in Vancouver, Washington. Merlin's Potion Shop receives the benefit of the Oregon Newspaper's advertising services in Washington where it makes sales to its customers. In this case Oregon Newspaper will report 100% of its receipts received from Merlin's to Washington.

Example 24. Company A provides human resources services to Racko, Inc. which has three offices that use those services in Washington, Oregon, and Idaho. Racko sells widgets and has customers for its widgets in all 50 states. The benefit of the service performed by Company A is received at Racko's locations in Washington, Oregon, and Idaho. Assuming that each office is approximately the same size and uses the services to approximately the same extent, then attributing 1/3 of the receipts to each of the states in which Racko has locations using the services is a reasonable method of proportionally attributing Company A's receipts from Racko.

Example 25. Director serves on the board of directors for DEF, Inc. Director's services relate to the general management of DEF, Inc. DEF, Inc. is Director's customer and receives the benefit of Director's services at its corporate domicile. Therefore, Director must attribute the receipts earned from Director's services to DEF to DEF's corporate domicile.

(d) **Services not related to real or tangible personal property and either provided to customers not engaged in business or unrelated to the customer's business activities.**

Example 26. A Washington resident travels to California for a medical procedure. Because the Washington resident must be physically in California, the Washington resident receives the benefit of the service in California. Therefore, the service provider must attribute its income from the procedure to California.

Example 27. Washington accountant prepares a Nevada couple's Arizona and Oregon state income tax returns as well as their federal income tax return. The benefit of the accountant's service associated with the state income tax returns is attributed to Arizona and Oregon because these returns relate to specific locations (states). The benefit associated with the federal income tax return is attributed to the couple's residence. The fees for the state tax returns are attributed to Arizona and Oregon, respectively, and the fee for the federal income tax return is attributed to Nevada.

Example 28. Tour Operator provides cruises through Washington's San Juan Islands for four days and Victoria, British Columbia for one day. The benefit of the tour is received where the tour occurs. Tour Operator may use a reasonable method of proportionally attributing the benefit to determine that its customers receive 80% of the benefit in Washington and 20% outside of Washington. Therefore, Tour Operator must attribute 80% of apportionable receipts to Washington and 20% to British Columbia.

Example 29. A Washington couple hires a Washington attorney to prepare a last will and testament for Daughter who lives in California. Daughter is a third-party beneficiary and receives the benefit of the attorney's services in California because that is where Daughter lives. Washington Attorney must attribute the fee to California.

Example 30. A Washington couple hires a California accountant to prepare their joint federal income tax return. Because the couple does not have to be physically present for the accountant to perform services and services are not related to a specific location, the Washington couple receives the benefit of the accountant's services at their residence in Washington. California accountant must attribute its fee for this service to Washington.

Example 31. An Arizona resident retains a Washington stock broker to handle its investments. The stock broker receives orders from the client and executes trades of securities on the New York Stock Exchange. Because (a) the Arizona resident is not investing as part of a business; (b) the activity does not relate to real or tangible personal property; (c) and the client does not need to be physically present for the stock broker to perform its services; and (d) the services are not related to a specific location, the client receives the benefit of the services at client's place of residence. Washington stockbroker must attribute the fee to Arizona.

Example 32. Investment Manager manages a mutual fund. Investment Manager receives a fee for managing the fund based on the value of the assets in the fund on particular days. Investment Manager knows or should know the identity of the investors in the fund and their mailing addresses. The fees received by Investment Manager (whether from the mutual fund or from individual investor's accounts) are for the services provided to the investors. Investment Manager's services do not relate to real or tangible personal property and do not require that the client be physically present, therefore, the benefit of Investment Manager's services is received where the investors are located and Investment Manager's apportionable receipts must be attributed to those locations.

(305) **Special rules related to extending credit performed by nonfinancial institutions.** Businesses not included in the definition of a financial institution under WAC 458-20-19404 that provide services related to the extension of credit must attribute their income from such activities as follows:

(a) **Activities related to extending credit where real property secures the debt.** Such activities include, but are not limited to, servicing loans, making loans subject to deeds of trust or mortgages (including any fees in the nature of interest related to the loan), and buying and selling loans. Apportionable receipts from these activities are attributed in the same manner as a financial institution attributes these apportionable receipts under WAC 458-20-19404.

(b) **Activities related to credit cards.** Such activities include, but are not limited to, issuing credit cards, servicing, and billing. Apportionable receipts from these activities are attributed to the billing address of the card holder.

(c) **Other activities related to extending credit where real property does not secure the debt.** Such activities include, but are not limited to, servicing loans, making loans (including any fees related to such loans), and buying and selling loans. Apportionable receipts from these activities are attributed in the same manner a financial institution attributes income under WAC 458-20-19404.

(d) **All other apportionable receipts from such businesses are attributed using subsections (301) through (304) of this rule or WAC 458-20-19403.**

(306) **What does "unable to attribute" mean?** A taxpayer is "unable to attribute" apportionable receipts when the taxpayer has no commercially reasonable means to acquire the information necessary to attribute the apportionable receipts. Cost and time may be considered to determine whether a taxpayer has no commercially reasonable means to acquire the information necessary to attribute apportionable receipts.

Example 33. One office of ZYX LLC has information that can easily be used to determine a reasonable proportional attribution of receipts, but does not provide this information to the office preparing the tax returns. ZYX LLC must use the information maintained by the marketing office to attribute its receipts.

Example 34. CBA, Inc. is entitled to receive information from an affiliate or unrelated third party which it could use to determine where the benefit of its services is received but chooses not to obtain that information. CBA, Inc. must use the information maintained by the affiliate or unrelated third party to attribute its apportionable receipts.

Example 35. Same facts as Example 34, except that the information is raw data that must be formatted and otherwise processed at a cost that exceeds a reasonable estimate of the possible difference in the amount of tax CBA, Inc. would owe if used another attribution method authorized in subsection 301(b) through (f). In this case, it is not commercially reasonable for CBA, Inc. to use this data to determine where to attribute its income.

PART 4. RECEIPTS FACTOR.

(401) **General.** The receipts factor is a fraction that applies to apportionable income for each calendar year. Taxpayers must calculate a separate receipts factor for each apportionable activity (business and occupation tax classification) engaged in.

(402) **Receipts factor calculation.** The receipts factor is: Washington attributed apportionable receipts divided by world-wide apportionable receipts less throw-out income (see subsection (403) of this section). The receipts factor expressed algebraically is:

$$\text{(Receipts factor)} = \frac{\text{(Washington apportionable receipts)}}{\text{((Worldwide apportionable receipts) - (Throw-out income))}}$$

(a) The numerator of the receipts factor is: The total apportionable receipts attributable to Washington during the calendar year from engaging in the apportionable activity.

(b) The denominator of the receipts factor is: The total (worldwide, including Washington) apportionable receipts from engaging in the apportionable activity during the calendar year, less throw-out income.

Example 36. NOP, Inc. has $400,000 of receipts attributed to Washington and $1,000,000 of worldwide receipts. Assuming that there is no throw-out income, NOP's receipts factor is 40% (400,000/1,000,000).

(c) In the very rare situation where the receipts factor (after reducing the denominator by the throw-out income) is zero divided by zero, the receipts factor is deemed to be zero.

(403) **Throw-out income.** Throw-out income includes all apportionable receipts attributed to states where the taxpayer:

(a) Is not taxable (see subsection (107) of this rule); and

(b) At least part of the activity of the taxpayer related to the throw-out income is performed in Washington.

Example 37. XYZ Corp. performs all services in Washington and has apportionable receipts attributed using the criteria listed in subsections (301) through (305) of this rule or WAC 458-20-19403 as follows: Washington $500,000; Idaho $200,000; Oregon $100,000; and California $300,000. XYZ Corp. is subject to Oregon and Idaho corporate income tax, but does not owe any California business activities taxes. XYZ does not have any throw-out income because Oregon and Idaho impose a business activities tax on its activities and it is deemed to be taxable in California because it satisfies the minimum nexus standards explained in WAC 458-20-19401 (more than $250,000 in receipts). XYZ's receipts factor is: 500,000/1,100,000 or 45.45%.

Example 38. Same facts as Example 37 except Idaho does not impose any tax on XYZ Corp. The $200,000 attributed to Idaho is throw-out income that is excluded from the denominator because: XYZ Corp. is not subject to Idaho business activities taxes; does not have substantial nexus with Idaho under Washington standards; and performs in Washington at least part of the activities related to the receipts attributed to Idaho. The receipts factor is 500,000/900,000 or 55.56%.

Example 39. The same facts as Example 38 except XYZ Corp. performs no activities in Washington related to the $200,000 attributed to Idaho. In this situation, the $200,000 is not throw-out income and remains in the denominator. The receipts factor is: 500,000/1,100,000 or 45.45%.

PART 5. HOW TO DETERMINE WASHINGTON TAXABLE INCOME.

(501) **General.** Washington taxable income is determined by multiplying apportionable income by the receipts factor for each apportionable activity the taxpayer engages in. While the receipts factor is calculated without regard to deductions authorized under chapter 82.04 RCW, apportionable income is determined by reducing the apportionable

receipts by amounts that are deductible under chapter 82.04 RCW regardless of where the deduction may be attributed. This formula can be expressed algebraically as:

(Taxable Income)	=	(Receipts Factor)	x	(Apportionable receipts - deductions)

Example 40. Calculating apportionable income. Corporation A received $2,000,000 in apportionable receipts from its worldwide apportionable activities, which included $500,000 of receipts that are deductible under Washington law. Corporation A's total apportionable income is $1,500,000 ($2,000,000 minus $500,000 of deductions). If Corporation A's receipts factor is 31.25%, then its taxable income is $468,750 ($1,500,000 multiplied by 0.3125).

PART 6. REPORTING INSTRUCTIONS.

(601) **General.**

(a) Taxpayers required to use this rule's apportionment method may report their taxable income based on their apportionable income for the reporting period multiplied by the receipts factor for the most recent calendar year the taxpayer has available.

(b) If a taxpayer does not calculate its taxable income using (a) of this subsection, the taxpayer must use actual current calendar year information.

(602) **Reconciliation.** Regardless of how a taxpayer reports its taxable income under subsection (601)(a) or (b) of this rule, when the taxpayer has the information to determine the receipts factor for an entire calendar year, it must file a reconciliation and either obtain a refund or pay any additional tax due. The reconciliation must be filed on a form approved by the department. In either event (refund or additional taxes due), interest will apply in a manner consistent with tax assessments. If the reconciliation is completed prior to October 31st of the following year, no penalties will apply to any additional tax that may be due.

[Statutory Authority: RCW 82.04.067, 82.32.300, and 82.01.060(2). WSR 13-22-044, § 458-20-19402, filed 10/31/13, effective 12/1/13. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 12-19-071, § 458-20-19402, filed 9/17/12, effective 10/18/12.]

WAC 458-20-19403 Apportionable royalty receipts attribution.

PART 1. INTRODUCTION.

(101) **General.** Effective June 1, 2010, Washington changed its method of apportioning royalty receipts. This rule only addresses how apportionable royalty receipts must be attributed for the purposes of economic nexus and single factor receipts apportionment. This rule is limited to the attribution of apportionable royalty receipts for periods after May 31, 2010.

(102) **Guide to this rule.** This rule is divided into two parts as follows:

1. Introduction.
2. How to attribute apportionable royalty receipts.

(103) **Reference to WAC 458-20-19402.** This rule only provides a method to attribute apportionable royalty receipts in lieu of the attribution methods specified in WAC 458-20-19402 (301)(a) and (b). Otherwise, WAC 458-20-19402 controls the apportionment of royalty receipts. Specifically, WAC 458-20-19402 provides: (a) An overview of single factor receipts apportionment (Part 2); (b) guidance on how to attribute apportionable royalty receipts if this rule does not apply (Part 3); (c) guidance on how to calculate the receipts factor (Part 4); (d) guidance on how to determine taxable income (Part 5); and (e) reporting instructions (Part 6).

(104) **Other rules.** Taxpayers may also find helpful information in the following rules:

(a) WAC 458-20-19401 **Minimum nexus thresholds for apportionable activities.** This rule describes minimum nexus thresholds applicable to apportionable activities that are effective after May 31, 2010.

(b) WAC 458-20-19402 **Single factor receipts apportionment—Generally.** This rule describes the general application of single factor receipts apportionment and applies only to tax liability incurred after May 31, 2010.

(c) WAC 458-20-19404 **Single factor receipts apportionment—Financial institutions.** This rule describes the application of single factor receipts apportionment to certain income of financial institutions and applies only to tax liability incurred after May 31, 2010.

(d) WAC 458-20-19405, CPI-U adjustments to minimum nexus thresholds for apportionable activities. This rule describes the minimum nexus thresholds adjustment that must be made to account for increases to the consumer price index for tax periods after May 31, 2010.

(e) WAC 458-20-194 **Doing business inside and outside the state.** This rule describes separate accounting and cost apportionment and applies only to tax liability incurred from January 1, 2006, through May 31, 2010.

(f) WAC 458-20-14601 **Financial institutions—Income apportionment.** This rule describes the apportionment of income for financial institutions for tax liability incurred prior to June 1, 2010.

(105) **Examples.** Examples included in this rule identify a number of facts and then state a conclusion; they should be used only as a general guide. The tax results of all situations must be determined after a review of all the facts and circumstances. The examples in this rule assume all gross income received by the taxpayer is apportionable royalty receipts. Unless otherwise stated, the examples do not apply to tax liability prior to June 1, 2010.

When an example states that a particular attribution method is a reasonable method of proportionally attributing the use of an intangible, this does not preclude the existence of other reasonable methods of proportionally attributing the use depending on the specific facts and circumstances of a taxpayer's situation.

(106) **Definitions.** The definitions included in WAC 458-20-19401 and 458-20-19402 apply to this rule unless the context clearly requires otherwise. Additionally, the definitions in this subsection apply specifically to this rule.

(a) **"Apportionable royalty receipts"** means all compensation for the use of intangible property, including charges in the nature of royalties, regardless of where the intangible property will be used. Apportionable royalty receipts does not include:

(i) Compensation for any natural resources;

(ii) The licensing of prewritten computer software to an end user;

(iii) The licensing of digital goods, digital codes, or digital automated services to an end user as defined in RCW 82.04.190(11); or

(iv) Receipts from the outright sale of intangible property.

(b) **"Intangible property"** includes: Copyrights, patents, licenses, franchises, trademarks, trade names, and other similar intangible property/rights.

(c) **"Reasonable method of proportionally attributing"** means a method of determining where the use occurs, and thus where receipts are attributed that is uniform, consistent, accurately reflects the market, and is not distortive.

PART 2. HOW TO ATTRIBUTE APPORTIONABLE ROYALTY RECEIPTS.

(201) **Attribution of income.** Apportionable royalty receipts are attributed to states based on a cascading method or series of steps. The department expects that most taxpayers will attribute apportionable royalty receipts based on (a)(i) of this subsection because the department believes that either taxpayers will know the place of use or a "reasonable method of proportionally attributing" receipts will generally be available. These steps are:

(a) **Where the customer uses the intangible property.**

(i) If a taxpayer can reasonably determine the amount of a specific apportionable royalty receipt that relates to a specific use in a state, that royalty receipt is attributable to that state. This may be shown by application of a reasonable method of proportionally attributing use, and thus receipts, among the states. The result determines the apportionable royalty receipts attributed to each state. Under certain situations, the use of data based on an attribution method specified in (b) and (c) of this subsection may also be a reasonable method of proportionally attributing receipts among states.

(ii) If a taxpayer is unable to separately determine, or use a reasonable method of proportionally attributing, the use and receipts in specific states under (a)(i) of this subsection, and the customer used the intangible property in multiple states, the apportionable royalty receipts are attributed to the state in which the intangible property was primarily used. Primarily means, in this case, more than fifty percent.

(b) **Office of negotiation.** If the taxpayer is unable to attribute apportionable royalty receipts to a location under (a) of this subsection, then apportionable royalty receipts must be attributed to the office of the customer from which the royalty agreement with the taxpayer was negotiated.

(c) If the taxpayer is unable to attribute apportionable royalty receipts to a location under (a) and (b) of this subsection, then the steps specified in WAC 458-20-19402 (301)(c) through (g) shall apply to apportionable royalty receipts.

(202) **Framework for analysis of the "use of intangible property."** The use of intangible property and therefore the attribution of apportionable royalty receipts from the use of intangible property will generally fall into one of the following three categories:

(a) **Marketing use** means the intangible property is used by the taxpayer's customer for purposes that include, but are not limited to, marketing, displaying, selling, and exhibiting. The use of the intangible property is connected to the sale of goods or services. Typically, this category includes trademarks, copyrights, trade names, logos, or other intangibles with promotional value. Receipts from the marketing use of intangible property are generally attributed to the location of the consumer of the goods or services promoted using the intangible property.

Example 1. SportsCo licenses to AthleticCo the right to use its trademark on a basketball that AthleticCo manufactures, markets, and sells at retail on its web site. This is a marketing use. SportsCo is paid a fee based on AthleticCo's basketball sales in multiple states. SportsCo knows that sales from the AthleticCo web site delivered to Washington represent 10% of AthleticCo's total sales. Pursuant to subsection (201)(a)(i) of this section, SportsCo will attribute 10% of its apportionable royalty receipts received from AthleticCo to Washington. The remaining 90% will be attributed to other states.

Example 2. Same facts as Example 1, except that AthleticCo sells its basketballs at wholesale to MiddleCo, a distributor with its receiving warehouse located in Idaho. MiddleCo then sells the basketballs to RetailW, a retailer with stores in Washington, Oregon, and California. SportsCo would generally attribute its apportionable royalty receipts to the location of RetailW's customers. However, SportsCo does not have any data, and cannot reasonably obtain any data, relating to RetailW's customer locations. Pursuant to subsection (201)(a)(i) of this section, SportsCo may reasonably attribute receipts to Washington based on the percentage of RetailW's store locations in Washington as long as such attribution does not distort the number of customers in each state. SportsCo knows that 15% of RetailW's store locations are in Washington therefore it is reasonable for SportsCo to attribute 15% of its apportionable royalty receipts to Washington. The remaining 85% will be attributed to other states.

Example 3. MusicCo licenses to RetailCo the right to make copies of a digital song and sell those copies at retail on the internet for the U.S. market only. This is a marketing use. RetailCo has a single copy of the song on its server in Virginia. Each time a customer comes to RetailCo's web site and makes a purchase of the song, RetailCo creates a copy of the song (e.g., a new file) that is then available for sale to the customer. MusicCo would usually attribute its apportionable royalty receipts to the location of RetailCo's customers. However, MusicCo does not have any data, and cannot reasonably obtain any specific data, relating to RetailCo's customers' locations. Pursuant to subsection (201)(a)(i) of this section, MusicCo may reasonably attribute receipts to each state based on the percentage that each state's population represents in relation to the total market population, which in this case is the U.S. population, as long as such attribution does not distort the number of customers in each state.

Example 4. A local baseball star, Joe Ball, plays for a professional athletic franchise located in Washington. Joe Ball licenses to T-ShirtCo the right to put his image on t-shirts and sell them on the internet in the U.S. market. This is a marketing use limited to the U.S. by license. Joe Ball does not know where T-ShirtCo's customers are located and cannot reasonably obtain data to reasonably attribute receipts. In the absence of actual sales data from T-ShirtCo, Joe Ball cannot use relative population data to attribute receipts to the states as was done in Example 3 above. This is because Joe Ball is an overwhelmingly "local" celebrity in Washington. Joe Ball does not have a "national appeal" such that t-shirt

sales by T-ShirtCo would be significant outside Washington. In this case, Joe Ball is unable to separately determine the use of the intangible property in specific states pursuant to subsection (201)(a)(i) of this section. However, it is reasonable for Joe Ball to assume that sales by T-ShirtCo of Joe Ball shirts are primarily delivered to customers in Washington. Accordingly, Joe Ball should assign all receipts received from T-ShirtCo to Washington, pursuant to subsection (201)(a)(ii) of this section.

Example 5. MegaComputer ("Mega") manufactures and sells computers. SoftwareCo licenses to MegaComputer the right to copy and install the software on Mega's computers, which are then offered for sale to consumers. This is a marketing use by Mega. Mega sells its computers to DistributorX that in turn sells the computers to RetailerY. Mega uses the intangible property at the location of the consumer. If SoftwareCo can attribute its receipts to the location of the consumer (e.g., through the use of software registration data obtained from consumer), SoftwareCo should do so. In the absence of that more precise information, and pursuant to subsection (201)(a)(i) of this section, it would be "reasonable" for SoftwareCo to attribute its receipts in proportion to the number of RetailerY stores in each state.

(b) **Nonmarketing use** means the intangible property is used for purposes other than marketing, displaying, selling, and exhibiting. This use of the intangible property is often connected to manufacturing, research and development, or other similar nonmarketing uses. Typically, this category includes patents, know-how, designs, processes, models, and similar intangibles. Receipts from the nonmarketing use of intangible property are generally attributed to a specific location or locations where the manufacturing, research and development, or other similar nonmarketing use occurs.

Example 6. RideCo licenses the right to use its patented scooter brake to FunRide for the purpose of manufacturing scooters. FunRide will market the scooter under its own brand. This is a nonmarketing use. RideCo knows that FunRide will manufacture scooters in Michigan and Washington and that the scooter design is used equally in Michigan and Washington. Pursuant to subsection (201)(a)(i) of this section, RideCo will attribute its receipts from the license of its patent equally to Michigan and Washington.

Example 7. BurgerZ licenses to JoeHam the right to use its jumbo hamburger making process and know-how. This is a nonmarketing use. JoeHam markets the jumbo hamburgers under its own brand. JoeHam has two restaurant locations, one in Washington and one in Oregon. BurgerZ's fee for the intangible rights is based on a percentage of sales at each location. Pursuant to subsection (201)(a)(i) of this section, BurgerZ will attribute receipts from its license with JoeHam to each location based on sales at those locations.

Example 8. WidgetCo licenses the use of its patent to ManuCo, to manufacture widgets. ManuCo has three manufacturing plants located in Michigan where it will use the patent for manufacturing widgets. ManuCo also has a single research and development (R&D) facility in Washington where it will use the patented technology to develop the next generation of its widgets. These are nonmarketing uses. WidgetCo charges ManuCo a single price for the use of the patent in manufacturing and R&D. In the absence of information to the contrary, it is reasonable for WidgetCo to assume ManuCo's use of the patent is equal at all of ManuCo's relevant locations. Pursuant to subsection (201)(a)(i) of this section, because there are four locations where the patent is used equally, WidgetCo will attribute 25% of its apportionable royalty receipts to each of the four locations. Accordingly, 75% of the apportionable royalty receipts will be attributed to Michigan to reflect the use of the patent at the three manufacturing locations, and 25% of the apportionable royalty receipts will be attributable to Washington to reflect the use of the patent at the single R&D location.

(c) **Mixed use** means licensing the use of intangible property for both marketing and nonmarketing uses. Mixed use licenses may be sold for a single fee or more than one fee.

(i) **Single fee.** Where a single fee is charged for the mixed use license, it will be presumed that receipts were earned for a "marketing use" pursuant to the guidelines provided in (a) of this subsection, except to the extent that the taxpayer can reasonably establish otherwise or the department of revenue determines otherwise.

Example 9. ProcessCo licenses to KimchiCo, for a single fee, the right to use its patent and trademark for manufacturing and marketing a food processing device. KimchiCo has a single manufacturing plant in Washington and markets the finished product solely in Korea. This mixed use license for a single fee is presumed to be for a marketing use. Accordingly, ProcessCo must attribute receipts under the guidelines established for marketing uses. Pursuant to subsection (201)(a)(i) of this section, KimchiCo is marketing and selling the device only in Korea; therefore, all receipts will be attributed to Korea.

Example 10. FranchiseCo operates a restaurant franchising business and licenses the right to use its trademark, patent, and know-how to EatQuick for a single fee. EatQuick will use the intangibles to create and market its food product. This is a mixed use license for a single fee and will be presumed to be for a marketing use. EatQuick has a single restaurant location in Washington, where all sales are made. Pursuant to subsection (201)(a)(i) of this section, the intangible property is used by EatQuick in Washington at its restaurant location. Taxpayer will attribute 100% of its apportionable royalty receipts earned under the EatQuick license to Washington.

Example 11. Same facts as Example 10, except that EatQuick has five restaurant locations, one each in: Washington, California, Oregon, Idaho, and Montana. EatQuick pays an annual lump sum to FoodCo. This is a mixed use license for a single fee and will be presumed to be for marketing use. Further, FranchiseCo knows that EatQuick's use of the intangible property is equal at all locations. The intangible property is used equally by EatQuick in five states including Washington. Accordingly, pursuant to subsection (201)(a)(i) of this section, FoodCo will attribute 20% of its apportionable royalty receipts to each location, including Washington.

(ii) **More than one fee.** Where the mixed use license involves separate fees for each type of use and separate itemization is reasonable, then each fee will receive separate attribution treatment pursuant to (a) and (b) of this subsection. If the department determines that the separate itemization is not reasonable, the department may provide for more accurate attribution using the guidelines in (a) and (b) of this subsection.

Example 12. Same as Example 9, except the license agreement states that the nonmarketing use of the patent is valued at $450,000, and the marketing use of the trademark is valued at $550,000. This is a mixed use license with more than one fee. The stated values for the separate uses are reasonable. Pursuant to subsection (201)(a)(i) of this section, the receipts associated with the nonmarketing use are $450,000 and attributable to Washington where the patent is used in manufacturing. The receipts associated with the marketing use are $550,000 and attributed to Korea where the trademark is used for marketing and selling the finished product.

[Statutory Authority: RCW 82.04.067, 82.32.300, and 82.01.060(2). WSR 13-22-044, § 458-20-19403, filed 10/31/13, effective 12/1/13. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 12-19-072, § 458-20-19403, filed 9/17/12, effective 10/18/12.]

WAC 458-20-19404 Financial institutions—Income apportionment. (1) **Introduction.**

(a) Effective June 1, 2010, section 108, chapter 23, Laws of 2010 1st sp. sess. changed Washington's method of apportioning certain gross income from engaging in business as a financial institution. This rule addresses how such gross income must be apportioned when the financial institution engages in business both within and outside the state.

(b) Taxpayers may also find helpful information in the following rules:

(i) WAC 458-20-19401, Minimum nexus thresholds for apportionable activities. This rule describes minimum nexus standards that are effective after May 31, 2010.

(ii) WAC 458-20-19402, Single factor receipts apportionment—Generally. This rule describes the general application of single factor receipts apportionment that is effective after May 31, 2010.

(iii) WAC 458-20-19403, Single factor receipts apportionment—Royalties. This rule describes the application of single factor receipts apportionment to gross income from royalties and applies only to tax liability incurred after May 31, 2010.

(iv) WAC 458-20-19405, CPI-U adjustments to minimum nexus thresholds for apportionable activities. This rule describes the minimum nexus thresholds adjustment that must be made to account for increases to the consumer price index for tax periods after May 31, 2010.

(v) WAC 458-20-194, Doing business inside and outside the state. This rule describes separate accounting and cost apportionment. It applies only to the periods January 1, 2006, through May 31, 2010.

(vi) WAC 458-20-14601, Financial institutions—Income apportionment. This rule describes the apportionment of income for financial institutions for periods prior to June 1, 2010.

(c) Financial institutions engaged in making interstate sales of tangible personal property should also refer to WAC 458-20-193, Inbound and outbound interstate sales of tangible personal property.

(2) **Apportionment and allocation.**

(a) Except as otherwise specifically provided, a financial institution taxable under RCW 82.04.290 and taxable in another state must attribute and apportion its service and other activities income as provided in this rule. Any other apportionable income must be apportioned pursuant to WAC 458-20-19402, Single factor receipts apportionment—Generally or WAC 458-20-19403, Single factor receipts apportionment—Royalties. "Apportionable income" means gross income of the business generated from engaging in apportionable activities as defined in WAC 458-20-19401, Minimum nexus thresholds for apportionable activities, including income received from apportionable activities performed outside this state if the income would be taxable under chapter 82.04 RCW if received from activities in this state, less any deductions allowable under chapter 82.04 RCW. All gross income that is not includable from apportionable activities must be allocated pursuant to chapter 82.04 RCW. A financial institution organized under the laws of a foreign country, the Commonwealth of Puerto Rico, or a territory or possession of the United States, except such institutions that are exempt under RCW 82.04.315, whose effectively connected income (as defined under the federal Internal Revenue Code) is taxable both in this state and another state, other than the state in which it is organized, must allocate and apportion its gross income as provided in this rule.

(b) All apportionable income shall be apportioned to this state by multiplying such income by the apportionments percentage. The apportionment percentage is determined by the taxpayer's receipts factor (as described in subsection (4) of this rule).

(c) The receipts factor must be computed according to the method of accounting (cash or accrual basis) used by the taxpayer for Washington state tax purposes for the taxable period. Persons should refer to WAC 458-20-197, When tax liability arises and WAC 458-20-199, Accounting methods for further guidance on the requirements of each accounting method. Generally, financial institutions are required to file returns on a monthly basis. To enable financial institutions to more easily comply with this rule, financial institutions may file returns using the receipts factor calculated based on the most recent calendar year for which information is available. If a financial institution does not calculate its receipts factor based on the previous calendar year for which information is available, it must use the current year information to make that calculation. In either event, a reconciliation must be filed for each year not later than October 31st of the following year. The reconciliation must be filed on a form approved by the department. In the case of consolidations, mergers, or divestitures, a taxpayer must make the appropriate adjustments to the factors to reflect its changed operations.

(d) Interest and penalties on reconciliations under (c) of this subsection apply as follows:

(i) In either event (refund or additional taxes due), interest will apply in a manner consistent with tax assessments.

(ii) Penalties as provided in RCW 82.32.090 will apply to any such additional tax due only if the reconciliation for a tax year is not completed and additional tax is not paid by October 31st of the following year.

(e) If the allocation and apportionment provisions of this rule do not fairly represent the extent of its business activity in this state, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's business activity:

(i) Separate accounting;

(ii) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(iii) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's receipts.

(3) **Definitions.** The following definitions apply throughout this rule unless the context clearly requires otherwise:

(a) **"Billing address"** means the location indicated in the books and records of the taxpayer on the first day of the taxable period (or on such later date in the taxable period when the customer relationship began) as the address where any notice, statement and/or bill relating to a customer's account is mailed.

(b) **"Borrower or credit card holder located in this state"** means:

(i) A borrower, other than a credit card holder, that is engaged in a trade or business and maintains its commercial domicile in this state; or

(ii) A borrower that is not engaged in a trade or business or a credit card holder, whose billing address is in this state.

(c) **"Commercial domicile"** means:

(i) The headquarters of the trade or business, that is, the place from which the trade or business is principally managed and directed; or

(ii) If a taxpayer is organized under the laws of a foreign country, or of the Commonwealth of Puerto Rico, or any territory or possession of the United States, such taxpayer's commercial domicile is deemed for the purposes of this rule to be the state of the United States or the District of Columbia from which such taxpayer's trade or business in the United States is principally managed and directed. It is presumed, subject to rebuttal by a preponderance of the evidence, that the location from which the taxpayer's trade or business is principally managed and directed is the state of the United States or the District of Columbia to which the greatest number of employees are regularly connected or out of which they are working, irrespective of where the services of such employees are performed, as of the last day of the taxable period.

(d) **"Credit card"** means credit, travel or entertainment card.

(e) **"Credit card issuer's reimbursement fee"** means the fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit card has charged merchandise or services to the credit card.

(f) **"Department"** means the department of revenue.

(g) **"Employee"** means, with respect to a particular taxpayer, any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee of that taxpayer.

(h) **"Financial institution"** means:

(i) Any corporation or other business entity chartered under Title 30, 31, 32, or 33 RCW, or registered under the Federal Bank Holding Company Act of 1956, as amended, or registered as a savings and loan holding company under the Federal National Housing Act, as amended;

(ii) A national bank organized and existing as a national bank association pursuant to the provisions of the National Bank Act, 12 U.S.C. Sec. 21 et seq.;

(iii) A savings association or federal savings bank as defined in the Federal Deposit Insurance Act, 12 U.S.C. Sec. 1813 (b)(1);

(iv) Any bank or thrift institution incorporated or organized under the laws of any state;

(v) Any corporation organized under the provisions of 12 U.S.C. Secs. 611 to 631;

(vi) Any agency or branch of a foreign depository as defined in 12 U.S.C. Sec. 3101 that is not exempt under RCW 82.04.315;

(vii) Any credit union, other than a state or federal credit union exempt under state or federal law;

(viii) A production credit association organized under the Federal Farm Credit Act of 1933, all of whose stock held by the Federal Production Credit Corporation has been retired.

(i) **"Gross income of the business," "gross income,"** or **"income"**:

(i) Has the same meaning as in RCW 82.04.080 and means the value proceeding or accruing by reason of the transaction of the business engaged in and includes compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses; and

(ii) Does not include amounts received from an affiliated person if those amounts are required to be determined at arm's length per sections 23A or 23B of the Federal Reserve Act. For the purpose of (3)(i) of this subsection, affiliated means the affiliated person and the financial institution are under common control. Control means the possession (directly or indirectly), of more than fifty percent of power to direct or cause the direction of the management and policies of each entity. Control may be through voting shares, contract, or otherwise.

(iii) Financial institutions must determine their gross income of the business from gains realized from trading in stocks, bonds, and other evidences of indebtedness on a net annualized basis.

(j) **"Loan"** means any extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such extension of credit from another. Loan includes participations, syndications, and leases treated as loans for federal income tax purposes. Loan does not include: Futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; noninterest bearing balances due from depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a real estate mortgage investment conduit (REMIC), or other mortgage-backed or asset-backed security; and other similar items.

(k) **"Loan secured by real property"** means that fifty percent or more of the aggregate value of the collateral used to secure a loan or other obligation was real property, when valued at fair market value as of the time the original loan or obligation was incurred.

(l) **"Merchant discount"** means the fee (or negotiated discount) charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit card is accepted in payment for merchandise or services sold to the card holder.

(m) **"Participation"** means an extension of credit in which an undivided ownership interest is held on a *pro rata* basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.

(n) **"Person"** has the meaning given in RCW 82.04.030.

(o) **"Regular place of business"** means an office at which the taxpayer carries on its business in a regular and systematic manner and which is continuously maintained, occupied and used by employees of the taxpayer.

(p) **"Service and other activities income"** means the gross income of the business taxable under RCW 82.04.290, including income received from activities outside this state if the income would be taxable under RCW 82.04.290 if received from activities in this state, less the exemptions and deductions allowable under chapter 82.04 RCW.

(q) **"State"** means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any foreign country or political subdivision of a foreign country.

(r) **"Syndication"** means an extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.

(s) **"Taxable in another state"** means either:

(i) The taxpayer is subject to business activities tax by another state on its service and other activities income; or

(ii) The taxpayer is not subject to a business activities tax by another state on its service and other activities income, but that state has jurisdiction to subject the taxpayer to a business activities tax on such income under the substantial nexus standards explained in WAC 458-20-19401. For purposes of (s) of this subsection, "business activities tax" means a tax measured by the amount of, or economic results of, business activity conducted in a state. The term includes taxes measured in whole or in part on net income or gross income or receipts. Business activities tax does not include a sales tax, use tax, or a similar transaction tax, imposed on the sale or acquisition of goods or services, whether or not denominated a gross receipts tax or a tax imposed on the privilege of doing business.

(t) **"Taxable period"** means the calendar year during which tax liability is incurred.

(4) **Receipts factor.**

(a) General. The receipts factor is a fraction, the numerator of which is the apportionable income of the taxpayer in this state during the taxable period and the denominator of which is the apportionable income of the taxpayer inside and outside this state during the taxable period. The method of calculating receipts for purposes of the denominator is the same as the method used in determining receipts for purposes of the numerator.

(b) Interest from loans secured by real property.

(i) The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans secured by real property if the property is located within this state. If the property is located both within this state and one or more other states, the income described in this subsection (b)(i) is included in the numerator of the receipts factor if more than fifty percent of the fair market value of the real property is located within this state. If more than fifty percent of the fair market value of the real property is not located within any one state, then the income described in this subsection (b)(i) must be included in the numerator of the receipts factor if the borrower is located in this state.

(ii) The determination of whether the real property securing a loan is located within this state must be made as of the time the original agreement was made and any and all subsequent substitutions of collateral must be disregarded.

(c) Interest from loans not secured by real property. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans not secured by real property if the borrower is located in this state.

(d) Net gains from the sale of loans. The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans includes income recorded under the coupon stripping rules of Section 1286 of the federal Internal Revenue Code.

(i) The amount of net gains (but not less than zero) from the sale of loans secured by real property included in the numerator is determined by multiplying such net gains by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to (b) of this subsection and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(ii) The amount of net gains (but not less than zero) from the sale of loans not secured by real property included in the numerator is determined by multiplying such net gains by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to (c) of this subsection (4) and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(e) Receipts from credit card receivables. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from credit card receivables and income from fees charged to card holders, such as annual fees, if the billing address of the card holder is in this state.

(f) Net gains from the sale of credit card receivables. The numerator of the receipts factor includes net gains (but not less than zero) from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to (e) of this subsection and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(g) Credit card issuer's reimbursement fees. The numerator of the receipts factor includes all credit card issuer's

reimbursement fees multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to (e) of this subsection and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(h) Receipts from merchant discount. The numerator of the receipts factor includes receipts from merchant discount if the commercial domicile of the merchant is in this state. Such receipts must be computed net of any cardholder charge backs, but must not be reduced by any interchange transaction fees or by any issuer's reimbursement fees paid to another for charges made by its card holders.

(i) Loan servicing fees.

(i)(A) The numerator of the receipts factor includes loan servicing fees derived from loans secured by real property multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor under (b) of this subsection and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(B) The numerator of the receipts factor includes loan servicing fees derived from loans not secured by real property multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor under (c) of this subsection and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(ii) If the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, the numerator of the receipts factor includes such fees if the borrower is located in this state.

(j) Receipts from services. The numerator of the receipts factor includes receipts from services not otherwise apportioned under this subsection (4) if the service is performed in this state. If the service is performed both inside and outside this state, the numerator of the receipts factor includes receipts from services not otherwise apportioned under this subsection (4), if a greater proportion of the activity producing the receipts is performed in this state based on cost of performance.

(k) Receipts from investment assets and activities and trading assets and activities.

(i) Interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities are included in the receipts factor. Investment assets and activities and trading assets and activities include, but are not limited to: Investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options; futures contracts; forward contracts; notional principal contracts such as swaps; equities; and foreign currency transactions. With respect to the investment and trading assets and activities described in (k)(i)(A) and (B) of this subsection, the receipts factor includes the following:

(A) The receipts factor includes the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under repurchase agreements.

(B) The receipts factor includes the amount by which interest, dividends, gains and other receipts from trading assets and activities including, but not limited to, assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, exceed amounts paid in lieu of interest, amounts paid in lieu of dividends, and losses from such assets and activities.

(ii) The numerator of the receipts factor includes interest, dividends, net gains (but not less than zero) and other receipts from investment assets and activities and from trading assets and activities described in (k)(i) of this subsection that are attributable to this state.

(A) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the average value of such assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in (k)(i)(A) of this subsection from such funds and such securities by a fraction, the numerator of which is the average value of federal funds sold and securities purchased under agreements to resell which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such funds and such securities.

(C) The amount of interest, dividends, gains and other income from trading assets and activities including, but not limited to, assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in (k)(i)(A) and (B) of this subsection), attributable to this state and included in the numerator is determined by multiplying the amount described in (k)(i)(B) of this subsection by a fraction, the numerator of which is the average value of such trading assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(D) For purposes of (k)(ii) of this subsection, the average value of trading assets owned by the taxpayer is the original cost or other basis of such property for federal income tax purposes without regard to depletion, depreciation, or amortization.

(iii) In lieu of using the method set forth in (k)(ii) of this subsection, the taxpayer may elect, or the department may require in order to fairly represent the business activity of the taxpayer in this state, the use of the method set forth in this paragraph.

(A) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the gross receipts from

such assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in (k)(i)(A) of this subsection from such funds and such securities by a fraction, the numerator of which is the gross income from such funds and such securities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such funds and such securities.

(C) The amount of interest, dividends, gains and other receipts from trading assets and activities including, but not limited to, assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in (k)(ii)(A) or (B) of this subsection), attributable to this state and included in the numerator is determined by multiplying the amount described in (k)(i)(B) of this subsection by a fraction, the numerator of which is the gross income from such trading assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(iv) If the taxpayer elects or is required by the department to use the method set forth in (k)(iii) of this subsection, it must use this method on all subsequent returns unless the taxpayer receives prior permission from the department to use, or the department requires a different method.

(v) The taxpayer has the burden of proving that an investment asset or activity or trading asset or activity was properly assigned to a regular place of business outside of this state by demonstrating that the day-to-day decisions regarding the asset or activity occurred at a regular place of business outside this state. If the day-to-day decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business and one such regular place of business is in this state and one such regular place of business is outside this state, such asset or activity is considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Such policies and guidelines are presumed, subject to rebuttal by preponderance of the evidence, to be established at the commercial domicile of the taxpayer.

(l) Attribution of certain receipts to commercial domicile. All receipts which would be assigned under this rule to a state in which the taxpayer is not taxable are included in the numerator of the receipts factor, if the taxpayer's commercial domicile is in this state.

(5) **Effective date.** This rule applies to gross income that is reportable with respect to tax liability beginning on and after June 1, 2010.

[Statutory Authority: RCW 82.04.067, 82.32.300, and 82.01.060(2). WSR 13-22-044, § 458-20-19404, filed 10/31/13, effective 12/1/13. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 12-19-064, § 458-20-19404, filed 9/14/12, effective 10/15/12.]

WAC 458-20-19405 CPI-U adjustments to minimum nexus thresholds for apportionable activities. (1) **Introduction.**

(a) RCW 82.04.067(5) directs the department of revenue (department) to review the "substantial nexus thresholds" (thresholds) in RCW 82.04.067 (1)(c)(i) through (iii) each December. When the cumulative percentage change in the consumer price index for all urban consumers (CPI-U) changes by five percent or more from the measurement date, the department must adjust the thresholds to reflect that cumulative change in the CPI-U. For the first review, the measurement date is June 1, 2010. For all subsequent annual reviews, the measurement date is the date the thresholds were last adjusted.

(b) For purposes of determining the cumulative percentage change in the CPI-U, the department must compare the CPI-U available as of December 1st of the current year with the consumer price index as of the measurement date. For purposes of this subsection, the "measurement date" means the same as in (a) of this subsection.

(c) Adjustments to the thresholds will (i) be rounded to the nearest one thousand dollars, (ii) be effective as of January 1st immediately following the most recent annual review of the thresholds, and (iii) apply to tax periods beginning after the adjustments are made.

(2) **Adjusted substantial nexus thresholds**.

(a) The table below reflects the changes in the CPI-U and adjustments to the thresholds.

Calendar Year	CPI-U % Change	Time Period Measured	Receipts Threshold	Property Threshold	Payroll Threshold
2010			$250,000	$50,000	$50,000
2011	0.9%	6/1/2010 – 10/31/2010	$250,000	$50,000	$50,000
2012	4.5%	6/1/2010 – 10/31/2011	$250,000	$50,000	$50,000
2013	6.8%	6/1/2010 – 10/31/2012	$267,000	$53,000	$53,000
2014	TBD	1/1/2013 – 10/31/2013	TBD	TBD	TBD

CPI-U data through the month of October is generally the most current data available as of December 1st.

(b) The calendar year's thresholds in this subsection apply to the thresholds in RCW 82.04.067 and WAC 458-20-19401.

[Statutory Authority: RCW 82.04.067, 82.32.300, and 82.01.060(2). WSR 13-22-044, § 458-20-19405, filed 10/31/13, effective 12/1/13.]

WAC 458-20-195 Taxes, deductibility. (1) **Introduction.** This rule explains the circumstances under which taxes may be deducted from the gross amount reported as the mea-

sure of tax under the business and occupation tax, retail sales tax, and public utility tax. It also lists deductible and nondeductible taxes.

(2) **Deductibility of taxes.** In computing tax liability, the amount of certain taxes may be excluded or deducted from the gross amount reported as the measure of tax under the business and occupation (B&O) tax, the retail sales tax, and the public utility tax. These taxes may be deducted provided they have been included in the gross amount reported under the classification with respect to which the deduction is sought, and have not been otherwise deducted through inclusion in the amount of another allowable deduction, such as credit losses.

The amount of taxes which are not allowable as deductions or exclusions must in every case be included in the gross amount reported. License and regulatory fees are not deductible. Questions regarding the deductibility or exclusion of a tax that is not specifically identified in this rule should be submitted to the department of revenue for determination.

(3) **Motor vehicle fuel taxes.** RCW 82.04.4285 provides a B&O tax deduction for certain state and federal motor vehicle fuel taxes when the taxes are included in the sales price. These taxes include:

State motor vehicle fuel tax . .	chapter 82.36 RCW;
State special fuel tax	chapter 82.38 RCW;
Federal tax on diesel and special motor fuels (including leaking underground storage tank taxes), except train and aviation fuels	26 U.S.C.A. Sec. 4041;
Federal tax on inland waterway commercial fuel	26 U.S.C.A. Sec. 4042;
Federal tax on gasoline and diesel fuel for use in highway vehicles and motorboats	26 U.S.C.A. Sec. 4081.

(4) **Taxes collected as an agent of municipalities, the state, or the federal government.** The amount of taxes collected by a taxpayer, as agent for municipalities, the state of Washington or its political subdivisions, or the federal government, may be deducted from the gross amount reported. These taxes are deductible under each tax classification of the Revenue Act under which the gross amount from such sales or services must be reported.

This deduction applies only where the amount of such taxes is received by the taxpayer as collecting agent and is paid by the agent directly to a municipality, the state, its political subdivisions, or to the federal government. When the taxpayer is the person upon whom a tax is primarily imposed, no deduction or exclusion is allowed, since in such case the tax is a part of the cost of doing business. The mere fact that the amount of tax is added by the taxpayer as a separate item to the price of goods sold, or to the charge for services rendered, does not in itself, make such taxpayer a collecting agent for the purpose of this deduction. Examples of deductible taxes include:

FEDERAL—	
Tax on communications services (telephone and teletypewriter exchange services)	26 U.S.C.A. Sec. 4251;
Tax on transportation of persons	26 U.S.C.A. Sec. 4261;
Tax on transportation of property	26 U.S.C.A. Sec. 4271;
STATE—	
Aviation fuel tax collected from buyers by a distributor as defined by RCW 82.42.010	chapter 82.42 RCW;
Leasehold excise tax collected from lessees	chapter 82.29A RCW;
Oil spill response tax collected from taxpayers by marine terminal operators	chapter 82.23B RCW;
Retail sales tax collected from buyers	chapter 82.08 RCW;
Solid waste collection tax collected from buyers	chapter 82.18 RCW;
State enhanced 911 tax collected from subscribers.	chapter 82.14B RCW;
Use tax collected from buyers	chapter 82.12 RCW;
MUNICIPAL—	
City admission tax	RCW 35.21.280;
County admissions and recreations tax.	chapter 36.38 RCW;
County enhanced 911 tax collected from subscribers.	chapter 82.14B RCW;
Local retail sales and use taxes collected from buyers	chapter 82.14 RCW.

(5) **Specific taxes which are not deductible.** Examples of specific taxes which may be neither deducted nor excluded from the measure of the tax include the following:

FEDERAL—	
A.A.A. compensating tax	7 U.S.C.A. Sec. 615(e);
A.A.A. processing tax .	7 U.S.C.A. Sec. 609;
Aviation fuel	26 U.S.C.A. Sec. 4091;
Distilled spirits, wine and beer taxes	26 U.S.C.A. chapter 51;
Diesel and special motor fuel tax for fuel used for purposes other than motor vehicles and motorboats	26 U.S.C.A. Sec. 4041;
Employment taxes	26 U.S.C.A. chapters 21-25;

Estate taxes	26 U.S.C.A. chapter 11;
Firearms, shells and cartridges	26 U.S.C.A. Sec. 4181;
Gift taxes	26 U.S.C.A. chapter 12;
Importers, manufacturers and dealers in firearms	26 U.S.C.A. Sec. 5801;
Income taxes	26 U.S.C.A. Subtitle A;
Insurance policies issued by foreign insurers	26 U.S.C.A. Sec. 4371;
Sale and transfer of firearms tax	26 U.S.C.A. Sec. 5811;
Sporting goods	26 U.S.C.A. Sec. 4161;
Superfund tax	26 U.S.C.A. Sec. 4611;
Tires	26 U.S.C.A. Sec. 4071;
Tobacco excise taxes	26 U.S.C.A. chapter 52;
Wagering taxes	26 U.S.C.A. chapter 35;
STATE —	
Ad valorem property taxes	Title 84 RCW;
Alcoholic beverages licenses and stamp taxes (Breweries, distillers, distributors and wineries)	chapter 66.24 RCW;
Aviation fuel tax when not collected as agent for the state	chapter 82.42 RCW;
Boxing, sparring and wrestling tax	chapter 67.08 RCW;
Business and occupation tax	chapter 82.04 RCW;
Cigarette tax	chapter 82.24 RCW;
Gift and inheritance taxes	Title 83 RCW;
Insurance premiums tax	chapter 48.14 RCW;
Hazardous substance tax	chapter 82.21 RCW;
Litter tax	chapter 82.19 RCW;
Pollution liability insurance fee	RCW 70.149.080;
Parimutuel tax	RCW 67.16.100;
Petroleum products - underground storage tank tax	chapter 82.23A RCW;
Public utility tax	chapter 82.16 RCW;
Real estate excise tax	chapter 82.45 RCW;
Tobacco products tax	chapter 82.26 RCW;
Use tax when not collected as agent for state	chapter 82.12 RCW;
MUNICIPAL—	
Local use tax when not collected as agent for cities or counties	chapter 82.14 RCW;
Municipal utility taxes	chapter 54.28 RCW;
Municipal and county real estate excise taxes	chapter 82.46 RCW.

[Statutory Authority: RCW 82.32.300. WSR 00-16-015, § 458-20-195, filed 7/21/00, effective 8/21/00; WSR 99-13-053, § 458-20-195, filed 6/9/99, effective 7/10/99; WSR 83-08-026 (Order ET 83-1), § 458-20-195, filed 3/30/83; Order ET 70-3, § 458-20-195 (Rule 195), filed 5/29/70, effective 7/1/70.]

WAC 458-20-196 Bad debts. (1) **Introduction.**

This section provides information about the tax treatment of bad debts under the business and occupation (B&O), public utility, retail sales, and use taxes.

(a) **Bad debt deduction for accrual basis taxpayers.** Bad debt credits, refunds, and deductions occur when income reported by a taxpayer is not received. Taxpayers who report using the cash method do not report income until it is received. For this reason, bad debts are most relevant to taxpayers reporting income on an accrual basis. However, some transactions must be reported on an accrual basis by all taxpayers, including installment sales and leases. These transactions are eligible for a bad debt credit, refund, or deduction as described in this section. For information on cash and accrual accounting methods, refer to WAC 458-20-197 (When tax liability arises) and WAC 458-20-199 (Accounting methods). Refer to WAC 458-20-198 (Installment sales, method of reporting) and WAC 458-20-199(3) for information about reporting installment sales.

(b) **Relationship between retailing B&O tax deduction and retail sales tax credit.** Generally, a retail sales tax credit for bad debts is reported as a deduction from the measure of sales tax on the excise tax return. The amount of this deduction, or the measure of a recovery of sales tax that must be reported, may differ from the amount reported as a deduction or recovery from the retailing B&O tax classification due to exempt sales (for example: Sales of motor vehicles and trailers for use in interstate or foreign commerce (RCW 82.08.0263); sales of manufacturing machinery and equipment (RCW 82.08.02565).)

(c) **Relationship to federal income tax return.** Washington credits, refunds, and deductions for bad debts are based on federal standards for worthlessness under section 166 of the Internal Revenue Code. If a federal income tax return is not required to be filed (for example, where the taxpayer is an exempt entity for federal purposes), the taxpayer is eligible for a bad debt credit, refund, or deduction on the Washington tax return if the taxpayer would otherwise be eligible for the federal bad debt deduction.

(2) **Retail sales and use tax.**

(a) **General rule.** Under RCW 82.08.037 and 82.12.037, sellers are entitled to a credit or refund for sales and use taxes previously paid on "bad debts" under section 166 of the Inter-

nal Revenue Code, as amended or renumbered as of January 1, 2003. Taxpayers may claim the credit or refund for the tax reporting period in which the bad debt is written off as uncollectible in the taxpayer's books and records and would be eligible for a bad debt deduction for federal income tax purposes. However, "bad debts" do not include:

(i) Amounts due on property that remains in the possession of the seller until the full purchase price is paid;

(ii) Expenses incurred in attempting to collect debt;

(iii) Debts sold or assigned by the seller to third parties, where the third party is without recourse against the seller (see (c) of this subsection for additional information about this restriction); and

(iv) The value of repossessed property taken in payment of debt.

(b) **Recoveries.** If a taxpayer takes a credit or refund for sales or use taxes paid on a bad debt and later collects some or all of the debt, the amount of sales or use tax recovered must be repaid in the tax-reporting period during which collection was made. The amount of tax that must be repaid is determined by applying the recovered amount first proportionally to the taxable price of the property or service and the sales or use tax thereon and secondly to any interest, service charges, and any other charges.

(c) **Assigned debt and installment sales.** Effective July 1, 2010, RCW 82.08.037 and 82.12.037 limit who can claim a credit or refund for retail sales or use tax. Only the original seller in the transaction that generated the bad debt, or a certified service provider (CSP) used by the seller, is entitled to claim a credit or refund on or after July 1, 2010. If the original seller in the transaction that generated the bad debt has sold or assigned the debt instrument to a third party with recourse, the original seller may claim a credit or refund only after the debt instrument is reassigned by the third party to the original seller. In the case where the seller uses a CSP to administer its sales tax responsibilities the CSP may claim, on behalf of the seller, the credit or refund allowed. See chapter 23, Laws of 2010, 1st sp. sess., (2ESSB 6143).

(3) **Business and occupation tax.**

(a) **General rule.** Under RCW 82.04.4284, taxpayers may deduct from the measure of B&O tax "bad debts" under section 166 of the Internal Revenue Code, as amended or renumbered as of January 1, 2003, on which tax was previously paid. Taxpayers may claim the deduction for the tax reporting period in which the bad debt is written off as uncollectible in the taxpayer's books and records and would be eligible for a bad debt deduction for federal income tax purposes. However, the amount of the deduction must be adjusted to exclude amounts attributable to:

(i) Amounts due on property that remains in the possession of the seller until the full purchase price is paid;

(ii) Sales or use taxes payable to a seller;

(iii) Expenses incurred in attempting to collect debt; and

(iv) The value of repossessed property taken in payment of debt.

(b) **Recoveries.** Recoveries received by a taxpayer after a bad debt is claimed are applied under the rules described in subsection (2)(b) of this section if the transaction involved is a retail sale. The amount attributable to "taxable price" is reported under the retailing B&O tax classification. If the recovery of debt is not related to a retail sale, recovered amount is applied proportionally against the components of the debt (e.g., interest and principal remaining on a wholesale sale).

(c) **Extracting and manufacturing classifications.** Bad debt deductions are only allowed under the extracting or manufacturing classifications when the value of products is computed on the basis of gross proceeds of sales.

(4) **Public utility tax.** Under RCW 82.16.050(5), taxpayers may deduct from the measure of public utility tax "bad debts" under section 166 of the Internal Revenue Code, as amended or renumbered as of January 1, 2003, on which tax was previously paid. Taxpayers may claim the deduction for the tax reporting period in which the bad debt is written off as uncollectible in the taxpayer's books and records and would be eligible for a bad debt deduction for federal income tax purposes. No deduction is allowed for collection or other expenses.

(5) **Application of payments - General rule.** The special rules for application of payments received in recovery of previously claimed bad debts described in subsections (2)(b) and (3)(b) of this section are not used for other payments. Payments received before a bad debt credit, refund, or deduction is claimed should be applied first against interest and then ratably against other charges. Another commercially reasonable method may be used if approved by the department.

(6) **Private label credit cards.** If a business contracts with a financial company to provide a private label credit card program, and the financial company becomes the exclusive owner of the credit card accounts and solely bears the risk of all credit losses, the business that contracted with the financial company is not entitled to any bad debt deduction if a customer fails to pay his or her credit card invoice.

Example. Hot Shot Ski Equipment (Hot Shot) is a sporting equipment retailer. Hot Shot contracts with ABC Financial Institution (ABC) to issue a Hot Shot private label credit card. ABC has the authority to accept or reject an applicant's credit card application. After Hot Shot transmits the credit card sales records to ABC, ABC pays Hot Shot the proceeds of the sales including the retail sales tax minus any applicable service fees. Hot Shot remits the retail sales tax to the Department of Revenue. If a customer using the Hot Shot credit card fails to pay ABC the outstanding amount on the credit card invoice, ABC suffers the loss. Hot Shot is not entitled to a bad debt deduction or credit as it has no bad debt loss when a customer defaults on a debt to ABC.

(7) **Reserve method.** Ordinarily, taxpayers must report bad debt refunds, credits or deductions for specifically identified transactions. However, taxpayers who are allowed by the Internal Revenue Service to use a reserve method of reporting bad debts for federal income tax purposes, or who secure permission from the department to do so, may deduct a reasonable addition to a reserve for bad debts. What constitutes a reasonable addition to a reserve for bad debts must be determined in light of the facts and will vary between classes of business and with conditions of business prosperity. An addition to a reserve allowed as a deduction by the Internal Revenue Service for federal income tax purposes, in the absence of evidence to the contrary, will be presumed reasonable. When the reserve method is employed, an adjustment to the amount of loss deducted must be made annually to make

the total loss claimed for the tax year coincide with the amount actually sustained.

(8) **Statute of limitations for claiming bad debts.** No credit, refund, or deduction, as applicable, may be claimed for debt that became eligible for a bad debt deduction for federal income tax purposes more than four years before the beginning of the calendar year in which the credit, refund, or deduction is claimed.

(9) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

In all cases, an eight percent combined state and local sales tax rate is assumed. Figures are rounded to the nearest dollar. Payments are applied first against interest and then ratably against the taxable price, sales tax, and other charges except when the special rules for subsequent recoveries on a bad debt apply (see subsections (2) and (3) of this section). It is assumed that the income from all retail sales described has been properly reported under the retailing B&O tax classification and that all interest or service fees described have been accrued and reported under the service and other activities B&O tax classification.

(a) **Scenario 1.** Joe's Hardware makes a retail sale of goods with a selling price of $500 and pays $40 in sales tax to the department. No payment is received by Joe at the time of sale.

(i) Bad debt. One and a half years later, no payment has been received by Joe, and the balance with interest is $627. Joe is entitled to claim a bad debt deduction on his federal income tax return. He is also entitled to claim a bad debt sales tax credit or refund in the amount of $40, a B&O tax deduction of $500 under the retailing B&O tax classification, and a B&O tax deduction of $87 under the service and other activities B&O tax classification.

(ii) Recoveries. Six months after the credit and deduction are claimed, a $50 payment is received on the debt. Recoveries received on a retail sale after a credit and deduction have already been claimed must be applied first proportionally to the taxable price and sales tax thereon in order to determine the amount of tax that must be repaid. Therefore, Joe must report $4, or $50 x ($40/$540), of sales tax on the current excise tax return and $46, or $50 x ($500/$540) under the retailing B&O tax classification. Additional recoveries should be applied in the same manner until the original $40 credit for sales tax is reduced to zero.

(b) **Scenario 2.** Joe makes a retail sale of goods on credit for $500 and pays $40 in sales tax to the department. No payment is received at the time of sale. Over the following year, regular payments are received and the debt is reduced to $345, exclusive of any interest or service charges. The $345 represents sales tax due to Joe in the amount of $26, or $345 x ($40/$540), and $319 remaining of the original purchase price, or $345 x ($500/$540). Payments cease.

(i) Bad debt. Six months later the balance with interest and service fees is $413. Joe is entitled to claim a bad debt deduction on the federal income tax return. He is also entitled to claim a sales tax refund or credit on the current excise tax return of $26, a deduction under the retailing B&O tax classification of $319, and a deduction under the service and other activities B&O tax classification of $68.

(ii) Recoveries. Before Joe charges off the debt, he repossesses the goods. At that time, the goods have a fair market value of $250. No credit is allowed for repossessed property, so the value of the collateral must be applied against the outstanding balance. After the value of the collateral is applied, Joe has a remaining balance of $163, or $413 - $250. The allocation rules for recoveries do not apply because a bad debt credit or refund has not yet been taken. The value is applied first against the $68, or $413 - $345, of interest, so the $163 remaining is attributable entirely to taxable price and sales tax. Any costs Joe may incur related to locating, repossessing, storing, or selling the goods do not offset the value of the collateral because no credit is allowed for collection costs. Joe is entitled to a sales tax refund or credit in the amount of $12, or $163 x ($40/$540) and deduction of $151, or $163 x ($500/$540) under the retailing B&O tax classification.

(iii) Sales of repossessed goods. If Joe later sells the repossessed goods, he must pay B&O tax and collect retail sales tax as applicable. If the sales price of the repossessed goods is different from the fair market value previously reported and the statute of limitations applicable to the original transaction has not expired, Joe must report the difference between the selling price and the claimed fair market value as an additional bad debt credit or deduction or report it as an additional recovery, as appropriate.

(c) **Scenario 3.** Phil, of Phil's Fine Cars, sells a car at retail for $1000 and charges Alice, the buyer, an additional $50 for license and registration fees.

(i) Trade-in accepted. Phil accepts trade-in property with a value of $500 in which Alice has $300 of equity. (The value of trade-in property of like kind is excluded from the selling price for purposes of the retail sales tax. Refer to WAC 458-20-247 for further information.) Phil properly bills Alice for $40 of sales tax, for a total of $1090 owed to Phil by Alice. Phil pays the department the $40 in sales tax. No payment other than the trade-in is received by Phil at the time of sale.

(ii) Bad debt. Eight months later, Phil has not received any payment. Phil is entitled to claim a bad debt deduction on his federal income tax return. The equity in the trade-in is equivalent to a payment received at the time of purchase, reducing the balance remaining on the initial sale to $790, or $1090 - $300. Phil is entitled to claim a sales tax credit or refund of $29, or $790 x ($40/$1090) of sales tax, and a deduction of $725, or $790 x ($1000/$1090) under the retailing B&O tax classification, exclusive of any deduction for accrued interest.

(d) **Scenario 4.** Phil sells a car at retail for $1000, and charges Jake an additional $50 for license and registration fees. Phil properly bills Jake for $80 of sales tax and remits it to the department. No money is received from Jake at the time of sale.

(i) Bad debt. Eight months later Phil is entitled to claim a bad debt deduction on the federal income tax return. Phil claims an $80 sales tax credit, a $1000 retailing B&O tax deduction, and an additional amount under the service and other activities classification for accrued interest.

(ii) Recoveries. Six months after claiming a bad debt, Phil receives a $200 payment from Jake. Recoveries must be

allocated first proportionally to the taxable price (the measure of the sales tax) and the sales tax thereon, and secondly to other charges. B&O tax consequences follow the same rules. Accordingly, Phil must report $15, or $200 x ($80/$1080) of sales tax and $185, or $200 x ($1000/$1080) of income under the retailing B&O tax classification. Additional recoveries should be applied in the same manner until the original $80 sales tax credit is reduced to zero.

(e) **Scenario 5.** Phil sells a car at retail for $1000, and charges Robin an additional $50 for license and registration fees.

(i) Trade-in accepted. Phil accepts trade-in property with a value of $500 in which Robin has $300 of equity. Phil properly bills Robin for $40 of sales tax for a total of $1090 owed to Phil by Robin. No payment other than the trade-in is received by Phil at the time of sale.

(ii) Bad debt. Eight months later, no payment has been received by Phil. Phil is entitled to claim a bad debt deduction on the federal income tax return. The equity in the trade-in is equivalent to a payment received at the time of purchase, reducing the balance remaining on the initial sale to $790, or $1090 - $300. Phil is entitled to claim a sales tax credit or refund of $29, or $790 x ($40/$1090) of sales tax, and a deduction of $725, or $790 x ($1000/$1090) under the retailing B&O tax classification, exclusive of any deduction for accrued interest.

(iii) Recoveries. Six months after that, Phil receives a $200 payment from Robin. Recoveries must be allocated first proportionally to the taxable price (the measure of the sales tax) and sales tax thereon, and secondly to other charges. B&O tax consequences follow the same rules. Accordingly, Phil must report $15, or $200 x ($40/$540) in sales tax, and $185, or $200 x ($500/$540) under the retailing B&O tax classification. Additional recoveries should be applied in the same manner until the original $29 sales tax credit is reduced to zero.

(f) **Scenario 6.** The facts are the same as in Scenario 3 (c) of this subsection, except that immediately after the sale, Phil assigns the contract to a finance company without recourse, receiving face value for the contract. The finance company may not claim the retail sales tax credit or refund. The finance company may not claim any deductions for Phil's B&O tax liability. No bad debt deduction or credit is available to Phil, as the contract was sold without recourse.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.08.037, and 82.12.037. WSR 10-21-012, § 458-20-196, filed 10/7/10, effective 11/7/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 06-01-005, § 458-20-196, filed 12/8/05, effective 1/8/06. Statutory Authority: RCW 82.32.300, 82.01.060(1), and 34.05.230. WSR 05-04-048, § 458-20-196, filed 1/27/05, effective 2/27/05. Statutory Authority: RCW 82.32.300. WSR 83-07-032 (Order ET 83-15), § 458-20-196, filed 3/15/83; Order ET 70-3, § 458-20-196 (Rule 196), filed 5/29/70, effective 7/1/70.]

WAC 458-20-197 When tax liability arises. (1) Gross proceeds of sales and gross income shall be included in the excise tax return for the period in which the value proceeds or accrues to the taxpayer. For the purpose of determining tax liability of persons making sales of tangible personal property, a sale takes place when the goods sold are delivered to the buyer in this state. With respect to leases or rentals of tangible personal property, liability for retail sales tax arises as of the time the rental payments fall due (see WAC 458-20-211).

(2) **Accrual basis.**

(a) When excise tax returns are made upon the accrual basis, value accrues to a taxpayer at the time:

(i) The taxpayer becomes legally entitled to receive the consideration, or,

(ii) In accord with the system of accounting regularly employed, enters as a charge against the purchaser, customer, or client the amount of the consideration agreed upon, whether payable immediately or at a definitely determined future time.

(b) Amounts actually received do not constitute value accruing to the taxpayer in the period in which received if the value accrues to the taxpayer during another period. It is immaterial if the act or service for which the consideration accrues is performed or rendered, in whole or in part, during a period other than the one for which excise tax return is made. The controlling factor is the time when the taxpayer is entitled to receive, or takes credit for, the consideration.

(3) **Cash receipts basis.**

(a) When returns are made upon cash receipts and disbursements basis, value proceeds to a taxpayer at the time the taxpayer receives the payment, either actually or constructively. It is immaterial that the contract is performed, in whole or in part, during a period other than the one in which payment is received.

(b) See: WAC 458-20-199 for limitation as to persons who may report on the cash receipts basis.

(4) **Special application, contractors.**

Value accrues for a building or construction contractor who maintains his accounting records on the accrual basis, as of the time the contractor becomes entitled to compensation under the contract.

(a) If by the terms of the contract the taxpayer becomes entitled to compensation upon estimates as the work progresses, value, to the extent of such estimates, accrues as of the time that each estimate is made and the balance at the time of the completion of the work or of the final estimate.

(b) If by the terms of the contract the taxpayer becomes entitled to compensation only upon the completion of the work, value accrues as of the earlier of the completion of the work, or, any use of the facilities being constructed, or, 60 days after the facility is substantially complete.

(i) Example: A contractor agrees to build two buildings for a buyer. Under the terms of the contract, payment is to be made only upon completion of both buildings. One building is substantially completed and occupied on April 15, 1991, the other building is substantially completed on May 15, 1991 and occupied on July 1, 1991. The work on both buildings is completed under the contract on June 15, 1991. Value accrues for the first building on April 15, 1991, the date it was used. Value accrues for the remainder of the contract on June 15, 1991, the date the work was completed.

(ii) Example: A contractor agrees to build a building for a buyer. Under the terms of the contract, the buyer is to make payment for the building only upon completion of the building. The building is completed, except for minor alterations, and available for planned occupancy on August 15, 1990. However, because of a contract dispute between the buyer and his tenant for the building, the buyer is unable to pay the

contractor until February 25, 1991 when the building is finally occupied. The building is completed under the contract on November 15, 1990. Value accrues on the building for sales tax and B&O tax purposes on October 14, 1990, 60 days after August 15, 1990, the date the building was substantially complete.

(5) **Warehouse operators.** In the case of warehouse operators value proceeds or accrues to the taxpayer as follows:

(a) When the taxpayer is reporting upon the accrual basis, value accrues at the time the charge is entered against the owner of the goods stored in accordance with the terms of the contract between the parties and the regular system of accounting employed by the taxpayer.

(i) Value accrues when the charge is entered whether the consideration for storage is at a fixed rate per unit per month or other period, or, at a flat charge regardless of the length of time, or, whether payable periodically or at the time of withdrawal.

(ii) Thus, where a warehouse operator, keeping books on accrual basis, customarily enters as a charge to the owner of the goods and a credit to storage income the full amount of a flat storage charge as of the time the goods are received, even though the time for payment is deferred until withdrawal of the goods, value accrues as of the time the goods are received. However, if the warehouse operator customarily does not enter such charge until the time of withdrawal, value accrues as of such later date.

(b) When the taxpayer is reporting upon a cash receipts basis, value proceeds at the time the payment for storage is received.

(c) **Exception for grain warehouse operators.** Persons operating grain warehouses, licensed under chapter 22.09 RCW, may report the value proceeding or accruing from their grain warehouse operations on either a cash receipts or accrual basis. RCW 82.04.090.

For effect of rate changes, see WAC 458-20-235 (Effect of rate changes on prior contracts and sales agreements).

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 07-17-111, § 458-20-197, filed 8/17/07, effective 9/17/07. Statutory Authority: RCW 82.32.300. WSR 90-10-082, § 458-20-197, filed 5/2/90, effective 6/2/90; Order ET 70-3, § 458-20-197 (Rule 197), filed 5/29/70, effective 7/1/70.]

WAC 458-20-198 Installment sales, method of reporting. (1) **Introduction.** This rule explains the tax-reporting responsibilities of persons making installment sales of tangible personal property under the business and occupation (B&O), retail sales, and use taxes.

(2) **How is income from installment sales of tangible personal property reported?** The seller must report the full selling price of installment sales of tangible personal property in the tax-reporting period during which the sale is made. This is true even when the buyer pays the tax to the seller in installments over time.

(a) **Leases not taxable as installment sales.** A lease under WAC 458-20-211 (Leases or rentals of tangible personal property, bailments) is not taxable as an installment sale.

(b) **Interest income.** Persons who receive interest or finance charges from an installment sale must pay B&O tax under the service and other business activities classification on receipt of these amounts. Retail sales and use taxes do not generally apply to these amounts. Refer to WAC 458-20-109 (Finance charges, carrying charges, interest, penalties) for further information.

(c) **Assignment of rights to receive payments.** A seller may sell or assign the right to receive payments on an installment sale to another business. The assignee should not report any sales or use taxes on such payments because the seller is responsible for remitting the full amount of sales tax. For information on how to report a buyer's default on an installment obligation, refer to WAC 458-20-196 (Bad debts).

[Statutory Authority: RCW 82.32.300, 82.01.060(1), and 34.05.230. WSR 05-04-048, § 458-20-198, filed 1/27/05, effective 2/27/05. Statutory Authority: RCW 82.32.300. WSR 83-07-032 (Order ET 83-15), § 458-20-198, filed 3/15/83; Order ET 70-3, § 458-20-198 (Rule 198), filed 5/29/70, effective 7/1/70.]

WAC 458-20-199 Accounting methods. (1) **Introduction.** In computing tax liability under the business and occupation tax and the retail sales tax, one of the following accounting methods must be used. This is true for all businesses, whether their activity involves the sale of tangible personal property or the rendering of services. (See WAC 458-20-197 for an explanation of when tax liability arises under the accrual method versus the cash receipts method.)

(2) **Method one, cash basis.** A taxpayer may file excise tax returns in each reporting period with figures based upon cash receipts only if the taxpayer's books of account are regularly kept on a cash receipts basis. (See RCW 82.04.090.) A taxpayer whose books of account recognize income at the time a sale is made or a service is rendered, regardless of when payment is received, is keeping its records on an accrual basis and must report and pay tax on the accrual basis. For those taxpayers who maintain formal accounting records, the department of revenue will generally look to the revenue accounts of the general ledger of the taxpayer and to the method of accounting used for reporting of federal income taxes to determine when the income is recognized. However, all records of the taxpayer will be considered by the department in determining whether the records are being kept on an accrual basis, particularly for those taxpayers who do not maintain formal records such as a general ledger.

The fact that a taxpayer makes sales "on account" and has records to identify the accounts receivable does not preclude the taxpayer from reporting on a cash receipts basis. Taxpayers can have accounts receivable and still report on the cash basis, provided the accounting records, such as the general ledger or federal income tax returns, do not record the sales on account as income until the cash is actually received. If a taxpayer keeps a general ledger on an accrual basis and federal income tax returns on a cash basis, the taxpayer may elect to report state tax returns on either the cash basis or the accrual basis. However, once a reporting basis is selected, the reporting basis may not be changed without authorization from the department unless the method for reporting federal taxes changes or the method used in keeping the records changes. A taxpayer who maintains its records throughout the year on a cash basis, including a general ledger, and elects to make a worksheet adjustment at year-end to report federal taxes on an accrual basis, will be permitted to report state taxes on a cash basis.

(3) **Method two, accrual basis.** A taxpayer who does not regularly keep books of account on a cash receipts basis must file returns with figures based on the accrual method. These taxpayers must report the gross proceeds from all cash sales made in the tax reporting period in which the sales are made, together with the total amount of charge sales during such period. The law does not require a taxpayer to use a particular accounting system. However, the taxpayer must report based on the system of accounting used by the business, regardless of the taxpayer's reasons for selecting a particular accounting system. It will be presumed that a taxpayer who is permitted under federal law or regulations to report its federal income taxes on a cash basis and does do so is maintaining the records on a cash basis. A taxpayer who maintains a general ledger on an accrual basis and files federal tax returns on an accrual basis must also report state tax returns on an accrual basis.

(a) Taxpayers who make installment sales or leases of tangible personal property must use the accrual method when they compute their tax liability. (See RCW 82.08.090, WAC 458-20-198 and 458-20-211.)

(b) In the case of rentals or leases, the income is considered to have accrued to the seller in the tax reporting period in which the seller is entitled to receive the rental or lease payment.

(4) **Constructive receipt.** "Constructive receipt" means income that a cash basis taxpayer is entitled to receive, but will not receive because of an action taken by the taxpayer. Constructive receipts are taxable in the tax reporting period in which the taxpayer gives up the entitlement to actual future receipt of the income. The following examples show how this applies to a cash basis taxpayer.

(a) XYZ has $10,000 in accounts receivable which XYZ expects to collect over the next six months. XYZ elects to sell these accounts receivable for eighty percent of their face value. Even though the taxpayer only receives $8,000 from the sale of the accounts receivable, XYZ is taxable on the full $10,000 because it has taken constructive receipt of the full $10,000 by taking an action to give up entitlement to the $2,000.

(b) XYZ has $1,500 in accounts receivable from customers who are delinquent in making payment. XYZ turns these accounts receivable over to a collection agency with the understanding that the collection agency may keep half of whatever is collected. The collection agency over the next month collects $500 and keeps $250 of this amount for its services. XYZ is taxable on the full $500 collected by the collection agency. XYZ has constructive receipt of this amount and the $250 retained by the collection agency is a cost of doing business to the taxpayer.

(c) XYZ is involved in a bankruptcy proceeding. The receipt of cash from accounts receivable will be placed in an escrow account. These funds will be used to pay creditors and a portion of these amounts will be given to the taxpayer. The full amount of the accounts receivable collected and going into the escrow is taxable income to XYZ. XYZ has received the full benefit of the cash received from the accounts receivable through payment of XYZ's creditors.

[Statutory Authority: RCW 82.32.300. WSR 96-12-024, § 458-20-199, filed 5/30/96, effective 6/30/96; WSR 92-03-026, § 458-20-199, filed 1/8/92, effective 2/8/92; WSR 83-07-032 (Order ET 83-15), § 458-20-199, filed 3/15/83; Order ET 70-3, § 458-20-199 (Rule 199), filed 5/29/70, effective 7/1/70.]

WAC 458-20-200 Leased departments. (1) Any person leasing departments of the business conducted may include in its tax returns the business done and sales made by the lessee where such lessor keeps the books for the lessee and makes collection on the latter's account: Provided, however, That each lessee must apply for and obtain from the department of revenue a certificate of registration, as provided under WAC 458-20-101. The lessee will remain liable for its tax liability if the lessor fails to make the proper return or fails to pay taxes due.

(2) **Business and occupation tax and retail sales tax.** Any taxpayer making returns for any leased department shall report the total tax liability thereof under both the business and occupation tax and the retail sales tax, including therein all cash and charge sales. The leased department in such case is not entitled to the taxable minimum provided in WAC 458-20-104.

(a) Where the lessor receives a flat monthly rental or a percentage of sales as rental for a leased department, such income is presumed to be from the rental of real estate and is not taxable. In a determination of whether an occupancy is a rental of real estate, all the facts and circumstances, including the actual relationship of the parties, are to be considered (see: WAC 458-20-118). Written agreements, while not required, are preferred and are given considerable weight in deciding the nature of the occupancy. While the fact that the written agreement may identify the occupancy as a "lease" is not controlling, agreements which contain the following provisions support the presumption that the occupancy is a rental of real estate:

i. The occupant is granted exclusive possession and control of the space.

ii. The occupancy is for a time certain which is more than 30 days, i.e. month to month, yearly, etc.

iii. The parties are required to notify each other in the event of termination of the occupancy.

(b) If the lessor provides any clerical, credit, accounting, janitorial, or other services to the lessee, the lessor must report the income from these services under the service B&O tax classification. The amounts for providing these services must be segregated from the amounts received from the rental of real estate. In the absence of a reasonable segregation, it will be presumed that the entire income is for providing these services.

(3) Examples. The following examples identify a number of facts and then state a conclusion as to whether the situation is a rental of real estate. These examples should be used only as a general guide. The tax status of each occupancy must be determined after a review of the agreement and all of the facts and circumstances.

(a) A retailer enters into a written occupancy agreement for rental of space within a mall for a one year term. The agreement can be terminated upon thirtieth days written notice of either party, subject to some penalty provisions for early termination. The agreement provides that the retailer can decorate the store and arrange the inventory in any manner desired by the retailer so long as the facility does not create a safety hazard to the mall or other tenants and is consis-

tent with the overall decor of the mall. The mall owner may enter the premises of the retailer during nonbusiness hours only with the consent of the retailer except for emergencies where physical property is at risk. The retailer's area is separated from other lessees by walls with the exception of the front area which is open to the mall common area and is used as the entrance by potential customers and the retailer. The retailer does have a movable partition that can be locked and is used to close off the entrance from the mall common area. The agreement calls for the retailer to be open for business at all times during the hours stipulated by the mall.

This is a rental of real estate with the rental term being for a fixed period. The agreement and the facts and circumstances have established a rental of real estate. The retailer has exclusive possession and control over a specific area as indicated by the control the retailer has over the premises, even to the exclusion of the mall owner. The restriction which requires the retailer to maintain the same business hours as other lessees does not make this a license to use real estate. The lessor can exclude from the B&O tax that portion of the income which is from the rental of the real estate. The lessor must identify and pay a B&O tax on the portion of the income which is from providing services such as security, janitorial, or accounting.

(b) A hairdresser enters into an oral occupancy agreement with the operator of a hair salon for the use of a work station. The hairdresser has use of a specific work station during specific hours of every day. A particular work station may be used by more than one hairdresser during a particular month or even during a given day. This work station can not be closed off from other areas within the shop. The hairdresser must obtain advance permission from the owner to make any changes to the work area. This hairdresser also shares a sink, telephone, and other facilities with others in the shop.

This occupancy is not a rental of real estate. The hairdresser does not have EXCLUSIVE possession and control over the premises to the exclusion of others as is indicated by the requirement that the hairdresser must obtain approval for any changes in the work area. This is further indicated by hairdressers use of a specific work station only during specific hours of every day with multiple users of the same work station. The work station could not be closed off from other areas of the shop, but this in itself is not determinative of whether this is a rental of real estate or a license to use. The presence of walls or the lack of walls is not controlling. The fact that the agreement uses the term "lease" is also not controlling. This is a "license to use" taxable under the service B&O tax classification.

(c) Department store agrees to sell household paint for a paint supplier. The paint supplier checks on the inventory on a monthly basis and provides additional paint as needed. The department store handles stocking of shelves and all aspects of the sale. The department store makes a charge to the paint supplier based on the space required to maintain the inventory. By agreement of the parties, the department store agrees to report the retailing and retail sales tax on paint sales.

This is not a leased department or a rental of real estate. The income is merely tied to the amount of space being used. However, the income is a commission from the sale of merchandise for the paint supplier and held on consignment. The retailing tax is the liability of the paint supplier and is paid by the department store only by agreement. The commission is taxable under the service B&O tax classification. See WAC 458-20-159.

[Statutory Authority: RCW 82.32.300. WSR 91-02-057, § 458-20-200, filed 12/28/90, effective 1/28/91; Order ET 70-3, § 458-20-200 (Rule 200), filed 5/29/70, effective 7/1/70.]

WAC 458-20-201 Interdepartmental charges. The term "interdepartmental charges" means amounts credited to the sales account or other gross income account of a taxpayer for goods, materials or services furnished by one department or branch of a business organization to another department or branch of the same business concern or firm.

Tax may be due upon interdepartmental charges covering transfers of goods from a central location to two or more retail outlets. See WAC 458-20-231, Tax on internal distributions. Tax is also due upon the value of products extracted or manufactured by one branch or department of a business for commercial or industrial use of another branch or department of the same business. See WAC 458-20-134. In other cases amounts representing interdepartmental charges may be excluded in computing tax due. This does not permit the exclusion or deduction of charges against or income derived from an affiliated corporation or other affiliated association.

Municipal corporations are entitled to an exclusion of interdepartmental charges in computing tax whether or not the charges represent an actual transfer of money or merely a bookkeeping entry (see WAC 458-20-189).

[Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order ET 83-1), § 458-20-201, filed 3/30/83; Order ET 70-3, § 458-20-201 (Rule 201), filed 5/29/70, effective 7/1/70.]

WAC 458-20-202 Pool purchases. The term "pool purchase" means the joint purchase by two or more persons, engaging in independent business activities, of commodities in carload or truck load quantities for the purpose of obtaining a purchase price or freight rate which is less than when purchased or delivered in smaller quantities.

The term "principal member" means that member of the pool to whom the goods are charged by the vendor of the commodities purchased.

In computing tax liability of the principal member under chapter 82.04 RCW, there may be deducted from gross proceeds of sales the amount received by him from other members of the pool of their proportionate share of the cost thereof of the commodities purchased.

This deduction is allowed only when all of the following conditions are met:

(1) The amount received is included in gross proceeds of sales.

(2) The pool purchase agreement was entered into prior to the time of placing the order for the commodities purchased.

(3) The pool purchase agreement provides that each member shall accept a specific portion of the shipment.

(4) Division of the shipment is made prior to warehousing of the commodities by a member of the pool.

In no event will a "pool purchase" deduction be allowed when an agreement relative to the amount of the share to be distributed to any member is made after the date of the pur-

chase order, or where one member of a pool pays an amount for his portion in excess of the proportionate amount paid by another member.

Revised June 1, 1970.

[Order ET 70-3, § 458-20-202 (Rule 202), filed 5/29/70, effective 7/1/70.]

WAC 458-20-203 Corporations, Massachusetts trusts. Each separately organized corporation is a "person" within the meaning of the law, notwithstanding its affiliation with or relation to any other corporation through stock ownership by a parent corporation by the same group of individuals.

Each corporation shall file a separate return and include therein the tax liability accruing to such corporation. This applies to each corporation in an affiliated group, as the law makes no provision for filing of consolidated returns by affiliated corporations or for the elimination of intercompany transactions from the measure of tax.

Each unincorporated association organized under the Massachusetts Trust Act of 1959 (chapter 23.90 RCW) is likewise taxable in the same way as are separate corporations.

Revised June 20, 1959.

[Order ET 70-3, § 458-20-203 (Rule 203), filed 5/29/70, effective 7/1/70.]

WAC 458-20-204 Outdoor advertising and advertising display services. The term "outdoor advertising" means the business of rendering an advertising service to others by posting or painting advertising copy upon billboards owned or controlled by the outdoor advertiser.

The term "advertising display service" means the business of installing and maintaining advertising displays upon property of others, when title to the property used in the display is retained by the person engaged in such business.

Business and Occupation Tax

Service and other business activities. Taxable under the service and other business activities classification upon the gross income from advertising services.

Retail Sales Tax

Persons engaged in the business of outdoor advertising or advertising display services are performing an advertising service, and are not required to collect the retail sales tax. Persons purchasing or producing tangible personal property for use in the performance of advertising services are required to pay the retail sales tax upon purchasing such property, or the use tax upon the value of the property produced and used in the performance of such services.

Revised May 1, 1943.

[Order ET 70-3, § 458-20-204 (Rule 204), filed 5/29/70, effective 7/1/70.]

WAC 458-20-205 Sales of utility services by building companies. When building companies, apartment house owners or other real estate owners or lessors furnish utility services such as heat and electrical energy to their own tenants of office buildings, apartment houses and storerooms under circumstances indicating it is a part of the normal and customary landlord-tenant relationship and the charge made therefor is the cost of this utility service to the owner or lessor prorated among his tenants based upon the use or consumption of such services, the income derived therefrom is construed to be incidental to and a part of gross income from the renting or leasing of real estate and not subject to the provisions of the business and occupation tax. This is true whether the charge therefor is included in a lump sum rental or is billed separately. However, when the furnishing of utility services is not in accordance with the foregoing, the income derived therefrom is considered to be a separate business activity and is taxable under the appropriate chapter of the Revenue Act.

Revised June 1, 1970.

[Order ET 70-3, § 458-20-205 (Rule 205), filed 5/29/70, effective 7/1/70.]

WAC 458-20-207 Legal, arbitration, and mediation services. (1) **Introduction.** This rule explains the taxability of amounts received for legal, arbitration, and mediation services.

(2) **Definitions.**

(a) "Arbitration" means the process by which the parties to a dispute submit to the hearing and judgment of an impartial person or group appointed by mutual consent or statute.

(b) "Arbitration services" means services relating to the resolution of a dispute submitted to arbitration.

(c) "Attorney" means an active member of a state Bar Association engaged in the practice of law. The term also includes a professional service corporation incorporated under chapter 18.100 RCW, a professional limited liability company formed under chapter 18.190 RCW, or a partnership, provided the ownership of these business entities are properly restricted to attorneys and organized primarily for engaging in the practice of law.

(d) "Legal services" means services relating to or concerned with the law. Such services include, but are not limited to, representation by an attorney (or other person, when permitted) in an administrative or legal proceeding, legal drafting, paralegal services, legal research services, arbitration, mediation, and court reporting services.

(e) "Mediation" means the process by which the parties to a dispute or negotiations agree to have an intermediary hear their differences and/or positions and facilitate and/or make suggestions concerning an agreement and/or the resolution of their dispute.

(3) **Business and occupation tax.** Gross income from legal, arbitration, or mediation services is subject to the service and other activities classification.

(a) Gross income. The gross income of the business generally includes the amount of compensation paid for legal, arbitration, or mediation services and amounts attributable to providing those services (i.e., charges for tangible personal property directly used or consumed in supplying legal, arbitration, or mediation services). Reimbursed general overhead costs are generally included in the gross income of the business even though indirectly related to litigation. Any reimbursed costs (not directly related to litigation) for which the attorney assumes personal liability for payment are also included in gross income.

(b) Overhead costs. Amounts received (or, for taxpayers reporting under the accrual accounting method, accrued) to compensate for overhead costs are fully subject to tax. Such overhead costs are taxable even though they may be sepa-

rately stated on the billings or expressly denominated as costs of the client. Examples of such overhead costs include, but are not limited to:

(i) Photocopy or other reproduction charges, except charges paid to the provider, or the agent of the provider, for the official or original copy of a record, or other document, provided for litigation;

(ii) Long distance telephone tolls;

(iii) Secretarial expenses;

(iv) Office rent;

(v) Office supplies;

(vi) Travel, meals and lodging;

(vii) Utilities, including facsimile telephone charges; and

(viii) Postage, unless paid for service of legal papers as a direct cost of litigation.

(c) Excluded amounts. The following amounts are excluded from gross income if complete and accurate records are maintained of these amounts.

(i) Client trust accounts. The gross income of the business does not include amounts held in trust for the client.

(ii) Litigation expenses. Attorneys are bound by the rules of professional conduct. RPC 1.8(e) prohibits an attorney from financing the expenses of contemplated or pending litigation unless the client remains ultimately liable for these expenses. This means that an attorney normally acts solely as the agent for the client when financing litigation. Accordingly, amounts received from a client for the direct expenses of litigation do not constitute gross income to the attorney. Amounts received (or, for taxpayers reporting under the accrual accounting method, accrued) to compensate for the following direct litigation expenses are not included in gross income:

(A) Filing fees and court costs;

(B) Process server and messenger fees;

(C) Court reporter fees;

(D) Expert witness fees; and

(E) Costs of associate counsel.

A cash basis taxpayer cannot exclude or deduct amounts of unreimbursed litigation expenses. For example, an attorney advances all the litigation expenses for a contingency fee case. The case is ultimately resolved against the attorney's client and the expenses are not repaid because of the client's bankruptcy. The attorney cannot then deduct these expenses as a bad debt or otherwise exclude them against other income earned by the attorney.

(iii) Expense advances and reimbursements. Sometimes in the regular course of business an attorney may receive amounts from a client for expenses of third-party providers or other costs incurred in connection with a legal matter other than litigation. Such amounts are excluded from the business and occupation tax only if the attorney has no obligation for payment other than as agent for the client or equivalent commitment for their payment (see WAC 458-20-111, Advances and reimbursements). Generally, such amounts will be for third-party service providers (for example, accountants, appraisers, architects, artists, drafters, economists, engineers, investigators, physicians, etc.). However, these costs could also include client expenses for registration, licensing or maintenance fees, title and other insurance premiums, and escrow fees paid to third-party escrow agents. These costs are excludable only when the attorney does not have any personal liability to the third-party provider for their payment.

(iv) Records requirement. In order to support the exclusion from taxable gross income of any of the foregoing expenses, the attorney must maintain records which indicate the amount of the payment received from the client, the name of the client, the name of the person to whom the attorney has made payment, and a description of the item for which payment was made. If the foregoing expenses are incurred outside the context of litigation or contemplated litigation, the attorney must maintain records which indicate the amount of the payment received, the name of the client, and the person to whom the attorney makes payment. In addition, the attorney must provide the person to whom payment is made with written notice that:

(A) Payment is made, or will be made on behalf of a named client; and

(B) The attorney assumes no liability for payment, other than as agent for the named client.

(d) Multiple business activities. Attorneys and other persons engaged in providing legal, arbitration, and mediation services sometimes engage in other business activities which are classified under a different tax classification (i.e., escrow services). In some circumstances, income from these other business activities will be subject to tax under a different tax classification.

(i) Independent business activities. If the other activities engaged in by the person are independent from the legal, arbitration, or mediation services provided to the client, these activities are taxed based on the tax classification that applies to each of those other activities, provided these other activities are separately accounted for and/or itemized as a separate amount in billings or invoices to the client. Failure to separately account and/or itemize for such activities will result in classification of all activities under the service and other activities classification.

(ii) Combined business activities. If the other activities are related to the legal, arbitration, or mediation services provided to the client, the primary activity provided the client in each taxable period will determine the tax classification. Generally, the activity will be considered as related when there is some interaction between the two activities to reach an ultimate goal (i.e., a law firm which provides legal advice and brokers the financing of a business arrangement). There are a number of elements which may be examined to determine whether a sufficient relationship between the multiple activities exist. Some elements considered are the timing for the selection and provision of services, the relationship between the contracting parties, the procedure used in the selection process, the dependence of the relationship between the two or more activities, the relationship of the prices between the two activities, and the means of payment selected for the activities.

(iii) Examples. The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(A) A law firm has an escrow department. This escrow department is run by employees who are not attorneys (but the supervising employee is a limited practice officer who

has experience as a certified escrow agent), has a separate phone number, separate bank account, separate trust account, separate computer system, and maintains its own accounting system. Contracts for the escrow services state that the law firm is being retained as an independent escrow agent and not to represent any person involved in the transaction. Further, the contract states that the law firm shall not offer legal advice upon the transaction. The escrow department of this law firm would be considered an independent business activity and be taxed separately under the retailing classification for escrow businesses (see WAC 458-20-156, Abstract, title insurance, and escrow business).

(B) A law firm limits its practice to real estate. It primarily provides escrow services and real estate closings. Even though this firm has chosen to limit its practice, it is the nature and the character of its activities which will determine the primary activity for each closing. When a closing includes the preparation, selection, or drafting of the deed between the purchaser and seller, drafting legal documents to obtain clear title, and/or the preparation, selection or drafting of the promissory notes, deeds of trust, mortgages, and agreements modifying these documents, it will be presumed that the primary activity performed for the client is providing these legal services.

(I) The law firm closed a real estate transaction performing all the escrow services**.** Except for the escrow services provided, the firm represented the buyer in the closing. Although an attorney from the firm reviewed and approved the legal documents provided by the seller, the attorney did not prepare any legal documents for the transaction. Since the firm was representing a specific client in this real estate closing, the escrow services are considered incidental to the legal services provided. Accordingly, the firm will report the income from this transaction under the service and other activities classification.

(II) The firm was engaged by both parties in a real estate transaction to handle a real estate closing. An attorney for the firm selected and prepared the earnest money escrow agreement, the purchase and sales agreement, the closing agreement, and the deeds for the transfer. Title was clear and did not require any additional drafting. The firm also entered into an escrow agreement with both parties and held in escrow the buyer's deposit and the seller's deed. Since an attorney for the law firm was required to select, analyze, and review the legal documents in this transaction, the escrow activity will be considered incidental. This closing is reported under the service and other activities classification for legal services.

(III) A certified escrow agency, owned by a principal qualified under APR 12 (the limited practice rule for limited practice officers), provides both escrow and the limited legal services allowed under APR 12 to its clients. The escrow company itemizes the services provided. APR 12(d) allows a limited practice officer to select, prepare and complete documents in a form previously approved by the board for use in closing a loan, extension of credit, sale or other transfer of real or personal property. The nature of this limited license prevents an escrow company using limited practice officers from ever engaging in legal services as a primary activity in a real estate closing. Accordingly, the escrow company will report the income from escrow and closings under the retail sales classification (see WAC 458-20-156, Abstract, title insurance, and escrow business).

(IV) The same facts as above, but the escrow company hires employees who are attorneys to provide the allowable limited legal services. The result is the same. Under RPC 5.4, an attorney is prohibited from sharing legal fees with a non-lawyer and, under RPC 5.5, cannot assist a person who is not a member of the Bar Association in the performance of an activity that constitutes the unauthorized practice of law, and under RPC 7.1 a lawyer cannot make false or misleading communications about the lawyer or the lawyer's services. Accordingly, an attorney hired by an escrow company would not be providing legal services to the escrow companies' clients except to the extent authorized for a limited practice officer. Since only limited legal services can be offered, the escrow company would continue to report all fees from both the escrow and closing services under the retail sales tax classification.

(4) **Retail sales tax.** Sales of tangible personal property to attorneys for use in rendering professional services are retail sales upon which the retail sales tax must be collected. Such sales include, among others, sales of office furniture and equipment, stationery, office supplies, law books, and reference materials.

(5) **Use tax.**

(a) The use tax applies upon the use of articles purchased or manufactured for use upon which retail sales tax has not been paid or collected. This includes, but is not limited to, the following:

(i) Materials used and consumed while rendering legal, arbitration, or mediation services; and

(ii) Office supplies and office equipment purchased by the firm for its own use.

(b) The use tax also applies to all purchases of tangible personal property acquired without payment of retail sales tax and resold to clients but not separately stated from legal services rendered on the agency's billing.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 04-13-091, § 458-20-207, filed 6/18/04, effective 7/19/04. Statutory Authority: RCW 82.32.300. WSR 99-13-092, § 458-20-207, filed 6/14/99, effective 7/15/99. Statutory Authority: RCW 82.32.300 and 34.05.410. WSR 95-15-013, § 458-20-207, filed 7/7/95, effective 8/7/95. Statutory Authority: RCW 82.32.300. WSR 85-20-012 (Order ET 85-4), § 458-20-207, filed 9/20/85; Order ET 70-3, § 458-20-207 (Rule 207), filed 5/29/70, effective 7/1/70.]

WAC 458-20-208 Exemptions for wholesale sales of new motor vehicles between new car dealers and for accommodation sales. (1) **Introduction.** This rule discusses the business and occupation (B&O) tax exemptions for certain wholesale sales of new motor vehicles between new car dealers. The rule also discusses the B&O tax exemption for accommodation sales and clarifies the applicability of the accommodation sale exemption to exchanges of fungible products, such as gasoline and oil.

(2) **Wholesale sales of new motor vehicles by new car dealers.** Effective July 1, 2001, RCW 82.04.422 provides a B&O tax exemption for wholesale sales of new motor vehicles by new car dealers to other new car dealers. This exemption does not apply to amounts derived by a manufacturer, distributor, or factory branch as defined in chapter 46.70 RCW.

New car dealers will in most cases find the statutory requirements of this exemption to be less restrictive than those of the accommodation sales exemption discussed in subsection (3) of this rule. Unlike the exemption for accommodations sales, there is no restriction on the amount that the selling dealer can charge the buying dealer, nor is there any requirement that the sale be made to fill an existing order from a customer. While these circumstances may be present in a particular transaction, there is no need to use or rely upon the B&O tax exemption for accommodation sales when the requirements for the exemption for wholesale sales between new car dealers are met. The exemption for wholesale sales of new motor vehicles between new car dealers provided by RCW 82.04.422 is subject to the following conditions.

(a) **New motor vehicle.** The property sold must be a new motor vehicle. For the purposes of this rule, "new motor vehicle" means every motor vehicle that is self-propelled and is required to be registered and titled under Title 46 RCW, has not been previously titled to a retail purchaser, and is not a "used motor vehicle" as defined under RCW 46.04.660. RCW 46.70.011. Examples of motor vehicles include passenger cars, trucks, motorcycles, and motor homes.

(b) **Wholesale sale between new car dealers selling the same make of new motor vehicles.** The sale must be a wholesale sale and must occur between new car dealers selling the same make of vehicle. For purposes of determining whether the exemption applies to transactions involving trades, the trade of each new motor vehicle is considered a separate sale.

(i) **Example 1.** A new car dealer sells a new light pickup truck, Make A, to another new car dealer. The purchasing dealer also sells new Make A passenger vehicles. This sale qualifies for the exemption.

(ii) **Example 2.** New Car Dealer ABC and New Car Dealer XYZ both sell new motor vehicles by Make A and Make X. New Car Dealer ABC sells Make A passenger vehicle to Dealer XYZ. Dealer XYZ sells Make X passenger vehicle to Dealer ABC. Both dealers regularly engage in the business of selling both new motor vehicle makes. Both sales qualify for the exemption.

(iii) **Example 3.** A new car dealer sells a new passenger vehicle, Make X, to another new car dealer. The purchasing dealer is not regularly engaged in the business of selling new Make X vehicles. This sale does not qualify for the exemption.

(iv) **Example 4.** New Car Dealer DEF sells new motor vehicles by Make A and Make X. New Car Dealer LMN sells new motor vehicles by Make A and Make Y. New Car Dealer DEF sells Make A passenger truck to New Car Dealer LMN. New Car Dealer LMN sells Make Y passenger truck to New Car Dealer DEF. Both dealers regularly engage in the business of selling Make A new motor vehicles while only New Car Dealer DEF engages in the business of selling Make Y. The sale of new motor vehicle Make A by Dealer DEF qualifies for the exemption while the sale of Make Y by Dealer LMN does not.

(c) **Documentation.** A person claiming the B&O tax exemption under RCW 82.04.422 for a wholesale sale of a new motor vehicle must maintain sufficient documentation to verify the exemption. The documentation should identify:

(i) The buyer's name and address;

(ii) The seller's name and address;

(iii) The buyer's UBI/tax registration number;

(iv) The make, model, and serial number of the motor vehicle;

(v) The date of purchase;

(vi) That the buyer and seller both regularly engage in making sales of the same make of new motor vehicle; and

(vii) The buyer's signature and title.

(3) **Accommodation sales.** RCW 82.04.425 provides a B&O tax exemption for wholesale sales of tangible personal property by persons who regularly engage in making sales of the type of property so sold to other persons who similarly engage in the business of selling such property.

The following conditions must be satisfied for the exemption to apply.

(a) **Amount paid by buyer may not exceed amount paid by seller.** The amount the buyer pays to the seller may not exceed the amount the seller paid to the seller's vendor in the acquisition of the property. Thus, a seller who manufactured the property sold cannot claim the exemption because the property has not been acquired from a vendor.

(i) **Expenses associated with preparing property for sale.** A seller may add reasonable expenses for preparing the property for sale, such as actual freight or delivery costs incurred by the seller and billed as such to the buyer. Questions concerning whether the exemption is available when other costs are included should be submitted to the department for determination at:

Department of Revenue
Taxpayer Services
P.O. Box 47478
Olympia, WA 98504-7478

(ii) **What is the effect of holdbacks or discounts on amount paid?** The amount paid by the seller may not be reduced by the amount of any manufacturer's holdbacks or discounts received after an article has been sold to adjust inventory levels even though the seller may retain such holdbacks or discounts.

For the following examples, presume an equipment dealer receives two tractors from the manufacturer on June 1st. The manufacturer's sales invoice indicates an invoice price of $16,600 and a holdback of $500 for each tractor. The dealer is entitled to receive the holdback on July 1st, thirty days after being billed for the tractors by the manufacturer.

(A) **Example 1.** The equipment dealer sells one of the tractors to another equipment dealer on June 10th. The amount paid by the selling dealer in the acquisition of the vehicle is $16,600.

(B) **Example 2.** The equipment dealer sells the other tractor to another equipment dealer on July 18th. The amount paid by the selling dealer in the acquisition of the vehicle is $16,100.

(b) **Sale is an accommodation to fill an existing order.** The sale must occur as an accommodation to allow the buyer to fill a bona fide existing order of a customer or occur within fourteen days to reimburse in-kind a previous accommodation sale by the buyer to the seller. A bona fide existing order is present if there is a commitment by the buyer's customer to purchase the property. The buyer must retain records demon-

strating the customer's commitment to purchase, such as a written agreement or deposit.

For example, Recreational Vehicle Dealer A purchases a fifth-wheel trailer from Recreational Vehicle Dealer B as an accommodation. Ten days later, Dealer A sells a travel trailer to Dealer B as reimbursement in-kind of the previous accommodation sale. For Dealer A to claim the B&O tax exemption for the sale of the travel trailer to Dealer B, Dealer A must keep sufficient records to document a bona fide existing customer order for the fifth-wheel trailer purchased from Dealer B.

(c) **Documentation.** A person claiming the exemption for an accommodation sale must maintain sufficient documentation to verify the exemption. In addition to the documentation noted above establishing, where pertinent, the existence of a bona fide existing customer order, this documentation must include:

(i) The buyer's name and address;

(ii) The seller's name and address;

(iii) The buyer's UBI/tax registration number;

(iv) Description of the property purchased, including make, model, and serial numbers as appropriate;

(v) The date of purchase and the purchase price;

(vi) A statement by the buyer as to whether the purchase is to fill a bona fide existing order or to reimburse a previous in-kind accommodation sale, including information identifying the previous accommodation sale; and

(vii) The buyer's signature and title.

(4) **Exchanges of fungible products.** Persons engaged in the selling and distributing of fungible products often enter into exchange agreements. An exchange is a sale regardless of whether it results in a profit because a transfer of the ownership of, title to, or possession of property for valuable consideration occurs. RCW 82.04.040. Exchanges are subject to the B&O tax unless otherwise exempt by law.

(a) **What is a fungible product?** Fungible products are products that lose their physical identity to the point that they cannot be distinguished from like-kind items when commingled. Examples of fungible products include gasoline, bulk oil products, grains, logs, wood chips, fruits, and vegetables.

(b) **What is an exchange?** Under typical exchange agreements, a person is required to furnish products to another person selling and distributing the same products, sometimes receiving payment in-kind or with a substitute product at a later date. Exchange agreements may require the person to arrange for direct delivery from his or her vendor to the third party distributor. In some cases, actual title and/or possession of the product may pass directly from the vendor to the third-party distributor.

Persons exchanging fungible products often do so on a regular and continuing basis to cover shortages occurring because of a lack of storage or production facilities, and/or to effect savings in transportation costs. Exchanges may be carried as loans on the books of account (in which case the exchanges are often referred to as "intercompany loans"). Products acquired via an exchange may or may not be carried as regular inventory on the books of account.

(c) **May an exchange of fungible products qualify as an accommodation sale?** The fact that the product sold is a fungible product does not preclude a claim that the sale is exempt as an accommodation sale. However, such a claim will be recognized only if the statutory requirements of RCW 82.04.425 are met.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 04-17-025, § 458-20-208, filed 8/9/04, effective 9/9/04. Statutory Authority: RCW 82.32.300, 82.01.060(2), and 34.05.230. WSR 03-07-066, § 458-20-208, filed 3/17/03, effective 4/17/03; Order ET 70-3, § 458-20-208 (Rule 208), filed 5/29/70, effective 7/1/70.]

WAC 458-20-209 Farming for hire and horticultural services performed for farmers. (1) **Introduction.** This section provides tax reporting information for persons performing horticultural services for farmers. Persons providing horticultural services to persons other than farmers should refer to WAC 458-20-226 (Landscape and horticultural services). Farmers and persons making sales to farmers may also want to refer to the following sections:

(a) WAC 458-20-210 (Sales of tangible personal property for farming—Sales of agricultural products by farmers); and

(b) WAC 458-20-239 (Sales to nonresidents of farm machinery or implements, and related services).

(2) **Definitions.** For the purposes of this section, the following definitions apply:

(a) "Farmer" means any person engaged in the business of growing, raising, or producing, upon the person's own lands or upon the lands in which the person has a present right of possession, any agricultural product to be sold. "Farmer" does not include a person growing, raising, or producing such products for the person's own consumption; a person selling any animal or substance obtained therefrom in connection with the person's business of operating a stockyard or a slaughter or packing house; or a person in respect to the business of taking, cultivating, or raising timber. RCW 82.04.-213.

(b) "Agricultural product" means any product of plant cultivation or animal husbandry including, but not limited to: A product of horticulture, grain cultivation, vermiculture, viticulture, or aquaculture as defined in RCW 15.85.020; plantation Christmas trees; short-rotation hardwoods as defined in RCW 84.33.035; turf; or any animal including, but not limited to, an animal that is a private sector cultured aquatic product as defined in RCW 15.85.020, or a bird, or insect, or the substances obtained from such an animal. "Agricultural product" does not include animals defined as pet animals under RCW 16.70.020. RCW 82.04.213.

(c) "Horticultural services" include services related to the cultivation of vegetables, fruits, grains, field crops, ornamental floriculture, and nursery products. The term "horticultural services" includes, but is not limited to, the following:

(i) Soil preparation services such as plowing or weed control before planting;

(ii) Crop cultivation services such as planting, thinning, pruning, or spraying; and

(iii) Crop harvesting services such as threshing grain, mowing and baling hay, or picking fruit.

(3) **Business and occupation (B&O) tax.** Persons performing horticultural services for farmers are generally subject to the service and other business activities B&O tax upon the gross proceeds. However, if the person providing horticultural services also sells tangible personal property for a separate and distinct charge, the charge made for the tangible

personal property will be subject to either the wholesaling or retailing B&O tax, depending on the nature of the sale. Persons making sales of tangible personal property to farmers should refer to WAC 458-20-210 to determine whether the wholesaling or retailing tax applies, and under what circumstances retail sales tax must be collected.

(a) A farmer who occasionally assists another farmer in planting or harvesting a crop is generally not considered to be engaged in the business of performing horticultural services. These activities are generally considered to be casual and incidental to the farming activity. For example, a farmer owning baling equipment which is used primarily for baling hay produced by the farmer, but who may occasionally accommodate neighboring farmers by baling small quantities of hay produced by them, is not considered to be in business with respect thereto.

(b) The extent to which horticultural services are performed for others is determinative of whether or not they are considered taxable business activities. Persons who advertise or hold themselves out to the public as being available to perform farming for hire will be considered as being engaged in business. For example, a person who regularly engages in baling hay or threshing grain for others is engaged in business and taxable upon the gross proceeds derived therefrom, irrespective of the amount of such business or that this person also does some farming of his or her own land.

(c) In cases where doubt exists in determining whether or not a person is engaged in the business of performing horticultural services, all pertinent information should be submitted to the department of revenue (department) for a specific ruling.

(4) **Deferred sales or use tax.** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

(a) Purchases of machinery, machinery parts and repair, tools, and cleaning materials by persons performing horticultural services are subject to retail sales tax.

(b) Persons taxable under the service and other business activities B&O tax classification are defined as consumers of anything they use in performing their services. (Refer to RCW 82.04.190.) As such, these persons are required to pay retail sales or use tax upon the purchase of all items used in performing the service, such as fertilizers, spray materials, and baling wire, which are not sold separate and apart from the service they perform.

(5) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(a) John Doe is a wheat farmer owning threshing equipment which is generally used only for threshing his own wheat. Occasionally a neighbor's threshing equipment may break down and John will use his own equipment to assist the neighbor in completing the neighbor's wheat harvest. While John receives payment for providing the threshing assistance, this activity is considered to be a casual and isolated sale. John does not hold himself out as being in the business of performing farming (threshing) for hire. John Doe is not considered to be engaging in taxable business activities. The amounts John Doe receives for assisting in the harvest of his neighbors' wheat is not subject to tax.

(b) X Spraying applies fertilizer to orchards owned by Farmer A. The sales invoice provided to Farmer A by X Spraying reflects a "lump sum" amount with no segregation of charges for the fertilizer and the application. When reporting its tax liability, X Spraying would report the total charge under the service B&O tax classification. X Spraying must also remit retail sales or use tax upon the purchase of the fertilizer. The entire amount charged by X Spraying is for horticultural services, and X Spraying is considered the consumer of the fertilizer.

(c) Z Flying aerial sprays pesticides on crops owned by Farmer B. The sales invoice Z Flying provides to Farmer B segregates the charge for the pesticides and the charge for the application. When reporting its tax liability, Z Flying would report the charge for the application under the service B&O tax classification. The charge for the sale of the spray materials is subject to the wholesaling B&O tax, provided Z Flying obtains a resale certificate for sales made before January 1, 2010, or a reseller permit for sales made on or after January 1, 2010, from Farmer B to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Z Flying's purchase of the pesticides is a purchase for resale and not subject to the retail sales tax. Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by Z Flying for five years from the date of last use or December 31, 2014.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-070, § 458-20-209, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 94-07-050, § 458-20-209, filed 3/10/94, effective 4/10/94; WSR 83-08-026 (Order ET 83-1), § 458-20-209, filed 3/30/83; Order ET 70-3, § 458-20-209 (Rule 209), filed 5/29/70, effective 7/1/70.]

WAC 458-20-210 Sales of tangible personal property for farming—Sales of agricultural products by farmers. (1) **Introduction.** This rule explains the application of business and occupation (B&O), retail sales, and use taxes to the sale and/or use of feed, seed, fertilizer, spray materials, and other tangible personal property for farming. This rule also explains the application of B&O, retail sales, and litter taxes to the sale of agricultural products by farmers. Farmers should refer to WAC 458-20-101 to determine whether they must obtain a tax registration endorsement or a temporary registration certificate from the department of revenue (department).

Farmers and persons making sales to farmers may also want to refer to the following rules for additional information:

(a) WAC 458-20-209 (Farming for hire and horticultural services provided to farmers);

(b) WAC 458-20-222 (Veterinarians);

(c) WAC 458-20-239 (Sales to nonresidents of farm machinery or implements, and related services); and

(d) WAC 458-20-262 (Retail sales and use tax exemptions for agricultural employee housing).

(2) **Who is a farmer?** A "farmer" is any person engaged in the business of growing, raising, or producing, upon the person's own lands or upon the lands in which the person has

a present right of possession, any agricultural product to be sold. A "farmer" does not include a person growing, raising, or producing agricultural products for the person's own consumption; a person selling any animal or substance obtained therefrom in connection with the person's business of operating a stockyard, slaughterhouse, or packing house; or a person in respect to the business of taking, cultivating, or raising timber. RCW 82.04.213 and chapter 118, Laws of 2001.

(3) **What is an agricultural product?** An "agricultural product" is any product of plant cultivation or animal husbandry including, but not limited to: A product of horticulture, grain cultivation, vermiculture, viticulture, or aquaculture as defined in RCW 15.85.020; plantation Christmas trees; short-rotation hardwoods as defined in RCW 84.33.035 (as of July 22, 2001); turf; or any animal, including, but not limited to, an animal that is a private sector cultured aquatic product as defined in RCW 15.85.020, a bird, an insect, or the substances obtained from such animals. An "agricultural product" does not include animals defined under RCW 16.70.020 as "pet animals." RCW 82.04.213 and chapter 118, Laws of 2001.

(4) **Sales to farmers.** Persons making sales of tangible personal property to farmers are generally subject to wholesaling or retailing B&O tax, as the case may be, on the gross proceeds of sales. Sales of some services performed for farmers, such as installing or repairing tangible personal property, are retail sales and subject to retailing B&O tax on the gross proceeds of such sales. Persons making retail sales must collect retail sales tax from the buyer, unless the sale is specifically exempt by law. Readers should refer to subsection (6) of this rule for information about specific sales tax exemptions available for sales to farmers.

(a) **Documenting wholesale sales.** A seller must obtain a resale certificate from the buyer to document the wholesale nature of any transaction. (Refer to WAC 458-20-102 for detailed information about resale certificates.)

(b) **Buyer's responsibility when the seller does not collect retail sales tax on a retail sale.** If the seller does not collect retail sales tax on a retail sale, the buyer must pay the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department, unless the sale is specifically exempt by law. The "Combined Excise Tax Return" does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's Combined Excise Tax Return. If a deferred sales tax or use tax liability is incurred by a farmer who is not required to obtain a tax registration endorsement from the department (see WAC 458-20-101), the farmer must report the tax on a "Consumer Use Tax Return" and remit the appropriate tax to the department. Refer to WAC 458-20-178 for detailed information regarding use tax.

The Consumer Use Tax Return can be obtained by calling the department's telephone information center at 1-800-647-7706. The return may also be obtained from the department's web site at: http://dor.wa.gov.

(c) **Feed, seed, seedlings, fertilizer, spray materials, and agents for enhanced pollination.** Sales to farmers of feed, seed, seedlings, fertilizer, spray materials, and agents for enhanced pollination, including insects such as bees, to be used for the purpose of producing an agricultural product, whether for wholesale or retail sale, are wholesale sales.

However, when these items are sold to consumers for purposes other than producing agricultural products for sale, the sales are retail sales. For example, sales of feed to riding clubs, racetrack operators, boarders, or similar persons who do not resell the feed at a specific charge are retail sales. Sales of feed for feeding pets or work animals, or for raising animals for the purpose of producing agricultural products for personal consumption are also retail sales. Sales of seed, fertilizer, and spray materials for use on lawns and gardens, or for any other personal use, are likewise retail sales.

(i) **What is feed?** "Feed" is any substance used as food to sustain or improve animals, birds, fish, or insects, including whole and processed grains or mixtures thereof, hay and forages or meals made therefrom, mill feeds and feeding concentrates, stock salt, hay salt, bone meal, fish meal, cod liver oil, double purpose limestone grit, oyster shell, and other similar substances. Food additives that are given for their beneficial growth or weight effects are "feed."

Hormones or similar products that do not make a direct nutritional or energy contribution to the body are not "feed," nor are products used as medicines.

(ii) **What is seed?** "Seed" is the propagative portions of plants commonly used for seeding or planting whether true seed, bulbs, plants, seed-like fruits, seedlings, or tubers.

(iii) **What is fertilizer?** "Fertilizer" is any substance containing one or more recognized plant nutrients and is used for its plant nutrient content and/or is designated for use in promoting plant growth. "Fertilizer" includes limes, gypsum, and manipulated animal and vegetable manures. There is no requirement that fertilizers be applied directly to the soil.

(iv) **What are spray materials?** "Spray materials" are any substance or mixture of substances in liquid, powder, granular, dry flowable, or gaseous form, which is intended to prevent, destroy, control, repel, or mitigate any insect, rodent, nematode, mollusk, fungus, weed, and any other form of plant or animal life normally considered to be a pest. The term includes treated materials, such as grains, that are intended to destroy, control, or repel such pests. "Spray materials" also include substances that act as plant regulators, defoliants, desiccants, or spray adjuvants.

(v) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(A) Sue grows vegetables for retail sale at a local market. Sue purchases fertilizers and spray materials that she applies to the vegetable plants. She also purchases feed for poultry that she raises to produce eggs for her personal consumption. Because the vegetables are an agricultural product produced for sale, retail sales tax does not apply to Sue's purchases of fertilizers and spray materials, provided she gives the seller a resale certificate. Retail sales tax does apply to her purchases of poultry feed, as the poultry are raised to produce eggs for Sue's personal consumption.

(B) WG Vineyards (WG) grows grapes that it uses to manufacture wine for sale. WG purchases pesticides and fertilizers that are applied to its vineyards. WG may purchase

these pesticides and fertilizers at wholesale, provided WG gives the seller a resale certificate.

(C) Seed Co. contracts with farmers to raise seed. Seed Co. provides the seed and agrees to purchase the crop if it meets specified standards. The contracts provide that ownership of the crop is retained by Seed Co., and the risk of crop loss is borne by the farmers. The farmers are obligated to pay for the seed whether or not the crop meets the specified standard. The transfer of the possession of the seed to the farmers is a wholesale sale, provided Seed Co. obtains a resale certificate from the farmers.

(d) **Chemical sprays or washes.** Sales of chemical sprays or washes, whether to farmers or other persons, for the purpose of post-harvest treatment of fruit for the prevention of scald, fungus, mold, or decay are wholesale sales.

(e) **Farming equipment.** Sales to farmers of farming equipment such as machinery, machinery parts and repair, tools, and cleaning materials are retail sales and subject to retailing B&O and retail sales taxes, unless specifically exempt by law. Refer to subsections (4)(i) and (6) of this rule for information about sales tax exemptions available to farmers.

(f) **Packing materials and containers.** Sales of packing materials and containers, or tangible personal property that will become part of a container, to a farmer who will sell the property to be contained therein are wholesale sales, provided the packing materials and containers are not put to intervening use by the farmer. Thus, sales to farmers of binder twine for binding bales of hay that will be sold or wrappers for fruit and vegetables to be sold are subject to wholesaling B&O tax. However, sales of packing materials and containers to a farmer who will use the items as a consumer are retail sales and subject to retailing B&O and retail sales taxes. Thus, sales of binder twine to a farmer for binding bales of hay that will be used to feed the farmer's livestock are retail sales.

(g) **Purchases for dual purposes.** A buyer normally engaged in both consuming and reselling certain types of tangible personal property and not able to determine at the time of purchase whether the particular property purchased will be consumed or resold must purchase according to the general nature of his or her business. RCW 82.08.130. If the buyer principally consumes the articles in question, the buyer should not give a resale certificate for any part of the purchase. If the buyer principally resells the articles, the buyer may issue a resale certificate for the entire purchase. For the purposes of this subsection, the term "principally" means greater than fifty percent.

If a buyer makes a purchase for dual purposes and does not give a resale certificate for any of the purchase and thereafter resells some of the articles purchased, the buyer may claim a "taxable amount for tax paid at source" deduction. Refer to WAC 458-20-102 for additional information regarding purchases for dual purposes and the "taxable amount for tax paid at source" deduction.

(i) **Potential deferred sales tax liability.** If the buyer gives a resale certificate for all purchases and thereafter consumes some of the articles purchased, the buyer is liable for deferred sales tax and must remit the tax directly to the department. Refer to subsection (4)(b) of this rule and WAC 458-20-102 for more information regarding deferred sales tax.

(ii) **Example.** A farmer purchases binder twine for binding bales of hay. Some of the hay will be sold and some will be used to feed the farmer's livestock. More than fifty percent of the binder twine is used for binding bales of hay that will be sold. Because the farmer principally uses the binder twine for binding bales of hay that will be sold, the farmer may issue a resale certificate to the seller for the entire purchase. The farmer is liable for deferred sales tax on the binder twine used for binding bales of hay that are used to feed the farmer's livestock and must remit the tax directly to the department.

(h) **"Fruit bin rentals" by fruit packers.** Fruit packers often itemize their charges to farmers for various services related to the packing and storage of fruit. An example is a charge for the bins which the packer uses in the receiving, sorting, inspecting, and storing of fruit (commonly referred to as "bin rentals"). The packer delivers the bins to the grower, who fills them with fruit for eventual storage in the packer's warehouse. Charges by fruit packers to farmers for such bin rentals do not constitute the rental of tangible personal property to the farmer where the bins are under the control of the packer for use in the receiving, sorting, inspecting, and storing of fruit. These charges are income to the packer related to the receipt or storage of fruit. The packer, as the consumer of the bins, is subject to retail sales or use tax on the purchase or use of the bins. (Information regarding the taxability of fruit packing is contained in WAC 458-20-214.)

(i) **Machinery and equipment used directly in a manufacturing operation.** Machinery and equipment used directly in a manufacturing operation by a manufacturer or processor for hire is exempt from sales or use tax provided that all requirements for the exemption are met. RCW 82.08.-02565 and 82.12.02565. This exemption is commonly referred to as the M&E exemption. Farmers who use agricultural products that they have grown, raised, or produced as ingredients in a manufacturing process may be entitled to the M&E exemption on the acquisition of machinery and equipment used directly in their manufacturing operation. Refer to WAC 458-20-13601 for detailed information regarding the M&E exemption.

See subsection (5)(b) of this rule for an example illustrating a farmer using agricultural products that the farmer has grown as an ingredient in a manufacturing process.

(5) **Sales by farmers.** Farmers are not subject to B&O tax on wholesale sales of agricultural products. RCW 82.04.-330. Farmers who manufacture products using agricultural products that they have grown, raised, or produced should refer to subsection (5)(b) of this rule for tax-reporting information.

Farmers are subject to retailing B&O tax on retail sales of agricultural products and retailing or wholesaling B&O tax on sales of nonagricultural products, as the case may be, unless specifically exempt by law. Also, B&O tax applies to sales of agricultural products that the seller has not grown, raised, or produced upon the seller's own land or upon land in which the seller has a present right of possession, whether these products are sold at wholesale or retail. Likewise, B&O tax applies to sales of animals or substances derived from animals in connection with the business of operating a stockyard, slaughterhouse, or packing house. Farmers may be eligible to claim a small business B&O tax credit if the amount of B&O tax liability in a reporting period is under a certain

amount. For detailed information about this credit, refer to WAC 458-20-104.

(a) **Litter tax.** The gross proceeds of sales of certain products, including food for human or pet consumption, are subject to litter tax. RCW 82.19.020. Litter tax does not apply to sales of agricultural products that are exempt from B&O tax under RCW 82.04.330. RCW 82.19.050 and chapter 118, Laws of 2001. Thus, farmers are not subject to litter tax on wholesale sales of agricultural products but are liable for litter tax on the gross proceeds of retail sales of agricultural products that constitute food for human or pet consumption. Also, farmers that manufacture products for use and consumption within this state (e.g., a farmer who produces wine from grapes that the farmer has grown) may be liable for litter tax measured by the value of the products manufactured. For detailed information about the litter tax, refer to chapter 82.19 RCW and WAC 458-20-243.

For example, RD Orchards (RD) grows apples at its orchards. Most apples are sold at wholesale, but RD operates a seasonal roadside fruit stand from which it makes retail sales of apples. The wholesale sales of apples are exempt from both B&O and litter taxes. The retail sales of apples are subject to retailing B&O and litter taxes but are exempt from sales tax because the apples are sold as a food product for human consumption. (See subsection (6)(d) of this rule for information about the retail sales tax exemption applicable to sales of food products for human consumption.)

(b) **Farmers using agricultural products in a manufacturing process.** The B&O tax exemption provided by RCW 82.04.330 does not apply to any person selling manufactured substances or articles. Thus, farmers who manufacture products using agricultural products that they have grown, raised, or produced are subject to manufacturing B&O tax on the value of products manufactured. Farmers who sell their manufactured products at retail or wholesale in the state of Washington are also generally subject to the retailing or wholesaling B&O tax, as the case may be. In such cases, a multiple activities tax credit (MATC) may be available. For detailed information regarding the manufacturing B&O tax and the MATC, refer to WAC 458-20-136 and 458-20-19301, respectively.

For example, WG Vineyards (WG) produces wine from grapes that it grows in its vineyards located within this state. WG makes wholesale sales of its wine to customers both within and outside of this state. WG is subject to manufacturing B&O tax on the value of the wine it produces. WG is also subject to wholesaling B&O tax on wholesale sales of wine delivered to buyers within this state, and WG is entitled to a multiple activities tax credit. In addition, WG is subject to litter tax on the value of wine sold within this state. (See subsection (5)(a) of this rule for information on the litter tax.)

(i) **Special B&O tax rate for manufacturing fresh fruits and vegetables.** A special lower B&O tax rate is provided by RCW 82.04.260 to persons manufacturing fresh fruits or vegetables by canning, preserving, freezing, processing, or dehydrating. Thus, farmers and other persons manufacturing fresh fruits and vegetables using these processes should report their manufacturing activity under the manufacturing fresh fruits and vegetables B&O tax classification.

Wholesale sales of fresh fruits or vegetables canned, preserved, frozen, processed, or dehydrated by the seller and sold to purchasers who transport the goods out of this state in the ordinary course of business are also subject to the lower B&O tax rate provided by RCW 82.04.260.

(ii) **Special B&O tax rate for manufacturing dairy products.** Effective September 20, 2001, a special lower B&O tax rate is provided by RCW 82.04.260 to persons manufacturing dairy products that, as of that date, are identified in 21 C.F.R., chapter 1, parts 131, 133, and 135. These products include milk, buttermilk, cream, yogurt, cheese, and ice cream, and also include by-products from the manufacturing of dairy products such as whey and casein. Thus, farmers and other persons manufacturing qualifying dairy products should report their manufacturing activity under the manufacturing dairy products B&O tax classification. This special rate does not apply, however, when dairy products are used merely as an ingredient or component of a manufactured product that is not a dairy product (e.g., milk-based soups or pizza).

The special B&O tax rate provided by RCW 82.04.260 also applies to persons selling manufactured dairy products to purchasers who transport the goods outside of this state in the ordinary course of business. Unlike the special B&O tax rate for certain wholesale sales of fresh fruits or vegetables (see subsection (5)(b)(i) of this rule), the special B&O tax rate for sales of qualifying dairy products does not require that the sales be made by the person who manufactured the dairy products nor that they be sales at wholesale.

(c) **Raising cattle for wholesale sale.** Persons who raise cattle for wholesale sale are exempt from B&O tax under RCW 82.04.330 provided that the cattle are held for at least sixty days prior to the sale. Persons who purchase and hold cattle for fewer than sixty days before reselling the cattle are not considered to be engaging in the normal activities of growing, raising, or producing livestock for sale.

For example, a feedlot operation purchases cattle and feeds them until they attain a good market condition. The cattle are then sold at wholesale. The feedlot operator is exempt from B&O tax on wholesale sales of cattle if the cattle are held for at least sixty days while they are prepared for market. However, the feedlot operator is subject to wholesaling B&O tax on wholesale sales of cattle held for fewer than sixty days prior to the sale.

(d) **B&O tax exemptions available to farmers.** In addition to the exemption for wholesale sales of agricultural products, there are several other B&O tax exemptions available to farmers which are discussed in this subsection.

(i) **Growing, raising, or producing agricultural products owned by other persons.** RCW 82.04.330 exempts amounts received by a farmer for growing, raising, or producing agricultural products owned by others, such as custom feed operations.

For example, a farmer is engaged in the business of raising cattle owned by others (commonly referred to as "custom feeding"). After the cattle attain a good market condition, the owner then sells them. Amounts received by the farmer for custom feeding are exempt from B&O tax under RCW 82.04.330, provided that the cattle are held by the farmer for at least sixty days. Farmers are not considered to be engaging in the activity of raising cattle for sale unless the cattle are held for at least sixty days while the cattle are prepared for market. (See subsection (5)(c) of this rule.)

(ii) **Sales of hatching eggs or poultry.** RCW 82.04.410 exempts amounts received for the sale of hatching eggs or poultry by farmers producing hatching eggs or poultry, when these agricultural products are for use in the production for sale of poultry or poultry products.

(iii) **Processed hops shipped outside Washington for first use.** RCW 82.04.337 exempts amounts received by hop growers or dealers for hops shipped outside the state of Washington for first use, if those hops have been processed into extract, pellets, or powder in this state. However, the processor or warehouser of such products is not exempt on amounts charged for processing or warehousing such products.

(e) **B&O tax credit to encourage alternatives to field burning.** Persons who qualify for a sales or use tax exemption under RCW 82.08.840 or 82.12.840 (machinery, equipment, or structures that reduce emissions from field burning) also qualify for a B&O tax credit. RCW 82.04.4459. The amount of the credit is equal to fifty percent of the amount of costs expended for constructing structures or acquiring machinery and equipment for which an exemption was taken under RCW 82.08.840 or 82.12.840. (See subsection (6)(l) of this rule for information about the sales and use tax exemptions provided by RCW 82.08.840 and 82.12.840.) No application is necessary for the credit. Persons taking the credit must keep records necessary for the department to verify eligibility for the credit. This credit is subject to the following limitations:

(i) No credit may be taken in excess of the amount of B&O tax that would otherwise be due;

(ii) Credit may not be carried over to subsequent calendar years;

(iii) The credit must be claimed by the due date of the last tax return for the calendar year in which the payment is made;

(iv) Any unused credit expires;

(v) Refunds will not be given in place of credits;

(vi) The credit may not be claimed for expenditures that occurred before March 22, 2000; and

(vii) The credit expires on January 1, 2006.

(6) **Retail sales and use tax exemptions.** This subsection provides information about a number of retail sales tax and corresponding use tax exemptions available to farmers and persons buying tangible personal property at retail from farmers. Some exemptions require the buyer to provide the seller with an exemption certificate. Readers should refer to subsection (7) of this rule for additional information regarding exemption certificates.

This subsection contains a number of examples which illustrate these exemptions. The examples identify a number of facts and then state a conclusion. The examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(a) **Pollen.** Pollen is exempt from retail sales and use taxes. RCW 82.08.0277 and 82.12.0273.

(b) **Semen.** Semen used in the artificial insemination of livestock is exempt from retail sales and use taxes. RCW 82.08.0272 and 82.12.0267.

(c) **Feed for livestock at public livestock markets.** Feed to be consumed by livestock at a public livestock market is exempt from retail sales and use taxes. RCW 82.08.0296 and 82.12.0296.

(d) **Food products.** Food products for human consumption are exempt from retail sales and use taxes. RCW 82.08.0293 and 82.12.0293. This exemption also applies to the sale and/or use of livestock for personal consumption as food. For detailed information about food products that qualify for this exemption, refer to WAC 458-20-244.

(e) **Auction sales of farm property.** Retail sales and use taxes do not apply to tangible personal property, including household goods, which have been used in conducting a farm activity, if the property was purchased from a farmer at an auction sale held or conducted by an auctioneer upon a farm. RCW 82.08.0257 and 82.12.0258.

(f) **Poultry.** Poultry used in the production for sale of poultry or poultry products is exempt from retail sales and use taxes. RCW 82.08.0267 and 82.12.0262.

For example, a poultry hatchery produces poultry from eggs. The resulting poultry are sold to egg producers. These sales are exempt from retail sales taxes under RCW 82.08.0267. (They are also exempt from B&O tax. See subsection (5)(d)(ii) of this rule.)

(g) **Leases of irrigation equipment.** Retail sales and use taxes do not apply to the lease or use of irrigation equipment, but only if:

(i) The lessor purchased the irrigation equipment for the purpose of irrigating land controlled by the lessor;

(ii) The lessor has paid retail sales or use tax upon the irrigation equipment;

(iii) The irrigation equipment is attached to the land in whole or in part; and

(iv) The irrigation equipment is leased to the lessee as an incidental part of the lease of the underlying land and is used solely on such land. RCW 82.08.0288 and 82.12.0283.

(h) **Beef and dairy cattle.** Beef and dairy cattle to be used by a farmer in producing an agricultural product are exempt from retail sales and use taxes. RCW 82.08.0259 and 82.12.0261.

For example, John operates a farm where he raises beef and dairy cattle for sale. He also raises other livestock for sale including hogs, sheep, and goats. All of John's sales of dairy and beef cattle for use on a farm are exempt from retail sales tax. However, John must collect retail sales tax on all retail sales of sheep, goats, and hogs unless the sales qualify for either the food products exemption described in subsection (6)(d) of this rule, or the exemption for sales of livestock for breeding purposes which is described immediately below.

(i) **Livestock for breeding purposes.** The sale or use of livestock, as defined in RCW 16.36.005, for breeding purposes where the animals are registered in a nationally recognized breed association is exempt from retail sales and use taxes. RCW 82.08.0259 and 82.12.0261. This exemption is available only when the buyer provides the seller with an exemption certificate in a form and manner prescribed by the department.

For example, ABC Farms raises and sells quarter horses registered in the American Quarter Horse Association (AQHA). Quarter horses are generally recognized as a definite breed of horse, and the AQHA is a nationally recognized breed association. Therefore, ABC Farms is not required to collect sales tax on retail sales of quarter horses for breeding

purposes, provided it receives a completed exemption certificate from the buyer.

(j) **Bedding materials for chickens.** Retail sales and use taxes do not apply to bedding materials used by farmers to accumulate and facilitate the removal of chicken manure provided that the farmer is raising chickens that are sold as agricultural products. RCW 82.08.920 and 82.12.920. The exemption became effective September 20, 2001, and is available only when the buyer provides the seller with an exemption certificate in a form and manner prescribed by the department.

(i) **What are bedding materials?** "Bedding materials" are wood shavings, straw, sawdust, shredded paper, and other similar materials.

(ii) **Example.** Farmer raises chickens for use in producing eggs for sale. When the chickens are no longer useful for producing eggs, Farmer sells the chickens to food processors for soup and stew meat. Farmer purchases bedding materials used to accumulate and facilitate the removal of chicken manure. The purchases of bedding materials by Farmer are exempt from retail sales tax. The law merely requires that the chickens be sold as agricultural products. It is immaterial that Farmer primarily raises the chickens to produce eggs.

(k) **Propane or natural gas used to heat structures housing chickens.** Retail sales and use taxes do not apply to propane or natural gas used by farmers to heat structures used to house chickens. The propane or natural gas must be used exclusively to heat the structures, and the structures must be used exclusively to house chickens that are sold as agricultural products. RCW 82.08.910 and 82.12.910. The exemption became effective September 20, 2001, and is available only when the buyer provides the seller with an exemption certificate in a form and manner prescribed by the department.

(i) **What are "structures"?** "Structures" are barns, sheds, and other similar buildings in which chickens are housed.

(ii) **Example.** Farmer purchases natural gas that is used to heat structures housing chickens. The natural gas is used exclusively to heat the structures, and the structures are used exclusively to house chickens. The chickens are used to produce eggs. When the chickens are no longer useful for producing eggs, Farmer sells the chickens to food processors for soup and stew meat. The purchase of natural gas by Farmer is exempt from retail sales tax. The law merely requires that the chickens be sold as agricultural products. It is immaterial that Farmer primarily houses these chickens to produce eggs.

(iii) **Example.** Farmer purchases natural gas that is used to heat structures used in the incubation of chicken eggs and structures used for washing, packing, and storing eggs. The natural gas used to heat these structures is not exempt from retail sales tax because the structures are not used exclusively to house chickens that are sold as agricultural products.

(l) **Machinery, equipment, and structures used to reduce emissions from field burning.** RCW 82.08.840 and 82.12.840 provide a sales and use tax exemption for certain property used to reduce field burning of cereal grains and field and turf grass grown for seed, or to reduce air emissions resulting from such field burning. The retail sales tax exemption applies to sales of machinery and equipment, and to services rendered in respect to constructing structures, installing, constructing, repairing, cleaning, decorating, altering, or improving of structures or eligible machinery and equipment, and to sales of tangible personal property that becomes an ingredient or component of eligible structures or eligible machinery and equipment, if all of the requirements for the exemption listed below in this subsection are met. The sales tax exemption is effective March 22, 2000. The use tax exemption applies to the use of machinery and equipment, and of tangible personal property that becomes an ingredient or component of eligible machinery and equipment, if all of the requirements for the exemption listed below in this subsection are met. This use tax exemption is also effective March 22, 2000. The use tax exemption also applies to the use of services rendered in respect to installing, repairing, cleaning, altering, or improving of eligible machinery and equipment, if all of the requirements for the exemption are met. This component of the use tax exemption is effective June 1, 2002.

These exemptions expire January 1, 2006. Persons taking an exemption must keep records necessary for the department to verify eligibility for the exemption. Persons who have taken an exemption and then discover that they do not meet the requirements for the exemption are subject to a deferred sales tax or use tax liability. (For additional information about deferred sales tax and use tax, refer to subsection (4)(b) of this rule.)

(i) **Majority use requirement.** To qualify for an exemption, the machinery, equipment, or structure must be used more than half (50%) of the time:

(A) For gathering, densifying, processing, handling, storing, transporting, or incorporating straw or straw-based products that results in a reduction in field burning of cereal grains and field and turf grass grown for seed; or

(B) To decrease air emissions resulting from field burning of cereal grains and field and turf grass grown for seed.

(ii) **Exemption certificates.** For the sales tax exemption, the buyer must provide the seller with an exemption certificate in a form and manner prescribed by the department.

(iii) **Examples.** The following examples illustrate this exemption:

(A) Farmer cultivates turf grass. Farmer purchases spray equipment. As an alternative to field burning, the fields in which the spray equipment is used must be sprayed five times instead of twice. The use of the spray equipment meets the requirement that the equipment be used more than half of the time to decrease air emissions resulting from field burning; therefore, the purchase of the spray equipment is exempt.

(B) Farmer, who performs custom baling, purchases a new baler for use in baling hay and straw. The purchase of the baler is exempt if it will be used more than half of the time to bale straw, which results in a reduction in field burning.

(C) Farmer purchases a new combine for use in harvesting wheat. In addition to cutting the stalks, separating the kernels from the chaff, and unloading the kernels, the combine also chops the residual chaff before discharging it onto the field. While the need for field burning may decrease because the smaller residue more readily decomposes, the purchase of the combine does not qualify for the exemption. The combine is not used more than half of the time to decrease air emissions from field burning.

(m) **Dairy nutrient management equipment and facilities.** RCW 82.08.890 and 82.12.890 provide a sales and use tax exemption for persons operating dairy nutrient management equipment and facilities. The retail sales tax exemption applies to sales to eligible persons of services rendered in respect to operating, repairing, cleaning, altering, or improving of dairy nutrient management equipment and facilities, or to sales of tangible personal property that becomes an ingredient or component of the equipment and facilities. The sales tax exemption became effective July 13, 2001. The use tax exemption applies to the use by an eligible person of tangible personal property that becomes an ingredient or component of dairy nutrient management equipment and facilities. This use tax exemption also became effective July 13, 2001. The use tax exemption also applies to the use of labor and services rendered in respect to repairing, cleaning, altering, or improving eligible tangible personal property. This component of the use tax exemption is effective June 1, 2002. The sales and use tax exemption applies to sales made or to the use of tangible personal property or labor and services made after the dairy nutrient management plan is certified under chapter 90.64 RCW.

(i) These exemptions are available only if all of the following requirements are met:

(A) The equipment and facilities must be used exclusively for activities necessary to maintain a dairy nutrient management plan as required under chapter 90.64 RCW; and

(B) The buyer provides the seller with an exemption certificate in a form and manner prescribed by the department which must be retained in the seller's files. The department will provide an exemption certificate to an eligible person upon application. A sample letter for use in applying for an exemption certificate can be obtained from the department as provided in subsection (7) of this rule.

(ii) For purposes of this exemption, the following definitions apply:

(A) "Eligible person" means a person licensed to produce milk under chapter 15.36 RCW who has a certified dairy nutrient management plan by December 31, 2003, as required by chapter 90.64 RCW.

(B) "Dairy nutrient management equipment and facilities" means machinery, equipment, and structures used exclusively in the handling and treatment of dairy manure, such as aerators, agitators, alley scrapers, augers, dams, gutter cleaners, loaders, lagoons, pipes, pumps, separators, and tanks. The term also includes tangible personal property that becomes an ingredient or component of the equipment and facilities, including repair and replacement parts.

(n) **Animal pharmaceuticals.** Certain animal pharmaceuticals are exempt from retail sales and use taxes when sold to, or used by, farmers or veterinarians. RCW 82.08.880 and 82.12.880. To qualify for the exemption, the animal pharmaceutical must be administered to an animal that is raised by a farmer for the purpose of producing an agricultural product for sale. Also, the animal pharmaceutical must be approved by the United States Department of Agriculture (USDA) or the United States Food and Drug Administration (FDA).

This exemption became effective August 1, 2001, and is available only when the buyer provides the seller with an exemption certificate in a form and manner prescribed by the department.

(i) **What is a "veterinarian"?** A "veterinarian" means a person who is licensed to practice veterinary medicine, surgery, or dentistry under chapter 18.92 RCW.

(ii) **How can I determine whether the FDA or USDA has approved an animal pharmaceutical?** The FDA and USDA have an established approval process set forth in federal regulations. The FDA maintains a list of all approved animal pharmaceuticals called the "*Green Book*." The USDA maintains a list of approved biotechnology products called the "*Veterinary Biologics Product Catalogue*." Pharmaceuticals that are not on either of these lists have not been approved and are not eligible for the exemption.

(iii) **Example.** Dairy Farmer purchases sterilizing agents. The sterilizing agents are applied to the equipment and facilities where Dairy Farmer's cows are milked. Dairy Farmer also purchases teat dips, antiseptic udder washes, and salves that are not listed in either the FDA's *Green Book* of approved animal pharmaceuticals or the USDA's *Veterinary Biologics Product Catalogue* of approved biotechnology products. The purchases of sterilizing agents are not exempt as animal pharmaceuticals because the sterilizing agents are not administered to animals. The teat dips, antiseptic udder washes, and salves are likewise not exempt because they have not been approved by the FDA or USDA. This is the case even if these products are approved by the United States Environmental Protection Agency or any other governmental agency.

(iv) **What type of animal must the pharmaceutical be administered to?** As noted above, the exemption is limited to the sale and/or use of animal pharmaceuticals administered to an animal that is raised by a farmer for the purpose of producing an agricultural product for sale. The conditions under which a farmer may purchase tax-exempt animal pharmaceuticals are similar to those under which a farmer may purchase feed at wholesale. Both types of purchases require that the particular product be sold to a farmer (or a veterinarian in the case of animal pharmaceuticals), and that the product be given or administered to an animal raised by a farmer for the purpose of producing an agricultural product for sale.

(v) **Examples of animals raised for the purpose of producing agricultural products for sale.** The animal pharmaceutical exemption is available in the following nonexclusive list of examples because the animals are being raised for the purpose of producing an agricultural product for sale, presuming all other requirements for the exemption are met:

(A) Horses, cattle, or other livestock raised by a farmer for sale;

(B) Cattle raised by a farmer for the purpose of slaughtering, if the resulting products are sold;

(C) Milk cows raised and/or used by a dairy farmer for the purpose of producing milk for sale;

(D) Horses raised by a farmer for the purpose of producing foals for sale;

(E) Sheep raised by a farmer for the purpose of producing wool for sale; and

(F) "Private sector cultured aquatic products" as defined by RCW 15.85.020 (e.g., salmon, catfish, and mussels) raised by an aquatic farmer for the purpose of sale.

(vi) **Examples of animals that are not raised for the purpose of producing agricultural products for sale.** The animal pharmaceutical exemption is not available in the fol-

lowing nonexclusive list of examples because the animals are not being raised for the purpose of producing an agricultural product for sale:

(A) Cattle raised for the purpose of slaughtering if the resulting products are not produced for sale;

(B) Sheep and other livestock raised as pets;

(C) Dogs or cats, whether raised as pets or for sale. Dogs and cats are pet animals; therefore, they are not considered to be agricultural products. (See subsection (3) of this rule); and

(D) Horses raised for the purpose of racing, showing, riding, and jumping. However, if at some time in the future the horses are no longer raised for racing, showing, riding, or jumping and are instead being raised by a farmer for the purpose of producing foals for sale, the exemption will apply if all other requirements for the exemption are met.

(vii) **Do products that are used to administer animal pharmaceuticals qualify for the exemption?** Sales of products that are used to administer animal pharmaceuticals (e.g., syringes) do not qualify for the exemption, even if they are later used to administer a tax-exempt animal pharmaceutical. However, sales of tax-exempt animal pharmaceuticals contained in a product used to administer the animal pharmaceutical (e.g., a dose of a tax-exempt pharmaceutical contained in a syringe or cotton applicator) do qualify for the exemption.

(7) **Sales tax exemption certificates.** As indicated in subsection (6) of this rule, certain sales of tangible personal property and retail services either to or by farmers are exempt from retail sales tax. Except as provided below, for those exemptions that require the buyer to provide the seller with an exemption certificate at the time of sale, farmers may use the department's "Farmers' Retail Sales Tax Exemption Certificate" or another certificate with substantially the same information as it relates to the claimed exemption. Sellers must retain a copy of the exemption certificate in their files. Without proper documentation, sellers are liable for payment of the retail sales tax on sales claimed as exempt.

The Farmers' Retail Sales Tax Exemption Certificate cannot be used for the dairy nutrient management exemption discussed in subsection (6)(m) of this rule. However, as noted above, the department will provide eligible persons, upon application, with an exemption certificate for this exemption. The Farmers' Retail Sales Tax Exemption Certificate and a sample letter for use in applying for the Dairy Nutrient Management Exemption Certificate can be obtained by calling the department's taxpayer information center at 1-800-647-7706. These documents can also be downloaded from the department's web site at http://dor.wa.gov/.

[Statutory Authority: RCW 82.01.060(2), 82.32.300, and 34.05.230. WSR 03-18-024, § 458-20-210, filed 8/25/03, effective 9/25/03. Statutory Authority: RCW 82.32.300. WSR 94-07-048, § 458-20-210, filed 3/10/94, effective 4/10/94; WSR 86-21-085 (Order ET 86-18), § 458-20-210, filed 10/17/86; WSR 86-07-005 (Order ET 86-3), § 458-20-210, filed 3/6/86; WSR 83-08-026 (Order ET 83-1), § 458-20-210, filed 3/30/83. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order ET 78-4), § 458-20-210, filed 6/27/78; Order ET 70-3, § 458-20-210 (Rule 210), filed 5/29/70, effective 7/1/70.]

WAC 458-20-211 Leases or rentals of tangible personal property, bailments. (1) **Introduction.** This section explains how persons are taxable who rent or lease tangible personal property or rent equipment with an operator. It explains that some activities performed by operated equipment may be taxable under classifications other than retail sales if the operator and equipment perform activities as a prime contractor or subcontractor and these activities are specifically classified under other tax classifications by the revenue act.

(2) **Definitions.**

(a) The terms "leasing" and "renting" are used interchangeably and refer generally to the act of granting to another the right of possession to and use of tangible personal property for a consideration. When "lease," "leasing," "lessee," or "lessor" are used in this section, these terms are intended to include rentals as well, even if not specifically stated.

Persons may not claim to be leasing or renting equipment to themselves since they are not granting to another the right of possession.

(b) The term "bailment" refers to the act of granting to another the temporary right of possession to and use of tangible personal property for a stated purpose without consideration to the grantor.

(c) The term "subcontractor" refers to a person who has entered into a contract for the performance of an act with the person who has already contracted for its performance. A subcontractor is generally responsible for performing the work to contract specification and determines how the work will be performed. In purchasing subcontract services, the customer is primarily purchasing the knowledge, skills, and expertise of the contractor to perform the task, as distinguished from the operation of the equipment.

(d) The term "rental of equipment with operator" means the provision of equipment with an operator to a lessee to perform work under the specific direction of the lessee. In such cases the lessor is generally not responsible for performing work to contract specification and does not determine how the work will be performed. Though not controlling, persons who rent equipment with an operator typically bill on the basis of the amount of time the equipment was used.

(e) The term "true object test" as it relates to this section means the analysis of a transaction involving equipment and an operator to determine if the lessee is simply purchasing the use of the equipment or purchasing the knowledge, skills, and expertise of the operator beyond those needed to operate the equipment. Even if it is determined that the customer is purchasing the knowledge, skills, and expertise of the operator, the transaction may still be a retail sale if the activity is specifically included by statute within the definition of a retail sale. This test can also be applied to rentals of tangible personal property when the seller performs some service in connection with the rental.

(f) The term "true lease" (often referred to as an "operating lease") refers to the act of leasing property to another for consideration with the property under the dominion and control of the lessee for the term of the lease with the intent that the property will revert back to the lessor at the conclusion of the lease.

(g) The term "financing lease" (often referred to as a "capital lease") typically involves the lease of property for a stated period of time with ownership transferring to the "lessee" at the conclusion of the lease for a nominal or minimal payment. The transaction is structured as a lease, but retains

some elements of an installment sale. Financing leases will generally be taxed as if they are installment sales. The presence of some or all of the following factors indicates a financing lease with the transaction treated as an installment sale:

(i) The lessee is given an option to purchase the equipment, and, if so, the option price is nominal (sometimes referred to as a "bargain purchase option");

(ii) The lessee acquires equity in the equipment;

(iii) The lessee is required to bear the entire risk of loss;

(iv) The lessee pays all the charges and taxes imposed on ownership;

(v) There is a provision for acceleration of rent payments; and

(vi) The property was purchased specifically for lease to this lessee.

(3) A true lease, rental, or bailment of personal property does not arise unless the lessee or bailee, or employees or independent operators hired by the lessee or bailee actually takes possession of the property and exercises dominion and control over it. Where the owner/lessor of the equipment or the owner's/lessor's employees or agents maintain dominion and control over the personal property and actually operate it, the owner/lessor has not generally relinquished sufficient control over the property to give rise to a true lease, rental, or bailment of the property.

(4) RCW 82.04.050 excludes from the definition "retail sale" any purchases for the purpose of resale, "as tangible personal property." Persons who use equipment in performing services either as prime contractors or as subcontractors are not purchasing the equipment for purposes of reselling the equipment as tangible personal property. These contractors must pay retail sales tax or use tax at the time the equipment is acquired. Generally persons who rent equipment with an operator are not purchasing the equipment for resale as tangible personal property and must pay retail sales or use tax at the time the equipment is acquired. Persons renting operated equipment to others may purchase the equipment without payment of retail sales tax only when the equipment is rented as tangible personal property. This can be demonstrated only when:

(a) The agreement between the parties is designated as an outright lease or rental, without reservations; and

(b) The lessee acquires the right of possession, dominion, and control of the equipment, even to the exclusion of the lessor.

This last requirement is a factual question and the burden of proof is upon the owner/operator of the equipment to establish that the degree of control has been relinquished necessary to constitute a lessor-lessee relationship. Weight will be given to such factors as who has physical, operating control of the equipment; who is responsible for its maintenance, fueling, repair, storage, insurance (risk of loss or damage), safety and security of operation, and whether the operator is a loaned employee. If control of these factors is left with the owner/operator, then as a matter of fact, there has not been a relinquishing of control of the equipment to the degree necessary to create a lessor-lessee relationship for the rental of tangible personal property. This is true, even though the customer exercises some constructive control over such matters as when and where the equipment is used in connection with the construction work being performed, i.e., the contractor controls the job site.

(5) **Business and occupation (B&O) tax.**

(a) Outright rentals of bare (unoperated) equipment or other tangible personal property as well as leases of operated equipment are generally subject to the retailing classification of the business and occupation tax.

(i) When a lessor purchases equipment for bare rental or lease, the seller of the equipment is making a wholesale sale to the lessor and is required to obtain a resale certificate for sales made before January 1, 2010, or a reseller permit for sales made on or after January 1, 2010, from the lessor to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(ii) Under unique circumstances when equipment is rented for rerent by the lessee, without intervening use, then the original rental is subject to the wholesaling classification of tax and the subsequent rental is subject to the retailing classification. The original seller is required to obtain a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, for these wholesale sales.

(iii) Persons who purchase equipment for use as prime contractors or subcontractors are considered to be the consumers of these purchases. They are the consumers because they are not specifically reselling the tangible personal property. Persons selling equipment to these persons are retailers and subject to the retailing B&O tax.

(b) Persons who provide equipment or other tangible personal property and, in addition, operate the equipment or supply an employee to operate the same for a charge, without relinquishing substantial dominion and control to the customer, are providing a service that is classified as a retail sale unless the nature of the activity is specifically classified under another tax classification. Where a specific tax classification applies to the activity, the income is subject to the business and occupation tax (or public utility tax) according to the classification of the activities performed by the equipment and operator. In the case of building construction, it will be presumed that the rental of equipment with operator to a contractor is a retail sale unless the operator has responsibility for performing construction to contract specifications and assumes control over how the work will be performed.

(c) Under some circumstances, the leasing or renting of tangible personal property can be subject to the special "retailing of interstate transportation equipment" B&O tax classification. This classification applies if the sale is exempt from retail sales tax because of the specific tax exemptions of RCW 82.08.0261, 82.08.0262, or 82.08.0263. These exemptions apply primarily to sales to private or common carriers who are engaged in interstate or foreign commerce.

(d) The following examples show how the tax would be applied to certain situations.

(i) The charge made by a subcontractor to a prime construction contractor for use of equipment with an operator used in the paving of a parking lot as part of the construction of a building would be taxable under wholesaling—other

when the subcontractor has the responsibility to perform the work to contract specification and determines how the work will be performed.

(ii) A contractor performing work to contract specification making a charge to a city for use of equipment and operator in the construction of a publicly owned road would be taxable under public road construction.

(iii) Income for loading of a vessel using equipment with an operator is taxable under the stevedoring classification.

(iv) Income from transporting persons or property for hire by motor vehicle, including leasing or renting motor carrier equipment with driver, is generally taxable under either motor transportation or urban transportation.

(v) A customer rents scaffolding and the seller is responsible for a technician to setup, move, and dismantle it. This is the rental of tangible personal property since the true object of the transaction is having the scaffolding available for use by the customer. The customer also assumes dominion or control over the scaffolding by determining who will use the scaffolding and by controlling the use of the scaffolding.

(vi) Income from transporting persons or property for hire by vessel is not a retail equipment rental with operator.

(6) **Retail sales tax.** Persons who rent or lease tangible personal property to users or consumers are required to collect from their lessees the retail sales tax measured by gross income from rentals as of the time the rental payments fall due.

(a) RCW 82.04.050 excludes from the definition of the term "retail sale," purchases for resale "as tangible personal property." Thus the retail sales tax does not apply upon sales of tangible personal property to persons who purchase the same solely for the purpose of renting or leasing such property without operators. However, the retail sales tax applies upon sales to persons who provide such property with operators for a charge, without relinquishing substantial dominion and control, or who intend to make some use of the property other than or in addition to renting or leasing.

(b) Financing leases are treated for state tax purposes as installment sales. The retail sales tax applies to the full selling price. Refer to WAC 458-20-198.

(c) The retail sales tax does not apply to lease payments made by a seller/lessee under a sale/leaseback agreement in respect to property, equipment, and components used by the seller/lessee primarily in the business of canning, preserving, freezing, or dehydrating fresh fruits, vegetables, and fish. Nor does the sales tax apply to the purchase amount paid by the lessee pursuant to an option to purchase this specific kind of processing equipment at the end of the lease term. (See RCW 82.08.0295.) In both situations the availability of this special sales tax exemption is contingent upon the seller/lessee having paid retail sales tax or use tax at the time of acquisition of such special processing property, equipment, and components. The use tax will also not apply if the sales tax does not apply.

(7) **Use tax and/or deferred retail sales tax.** Consumers who rent or lease tangible personal property from others and who have not paid the retail sales tax to their lessors are liable for the retail sales tax or use tax on the amount of the rental payments as of the time the payments fall due unless an exemption from the tax applies. However, if the rental payments do not represent a reasonable rental value for the article, the taxable value shall be determined according to the rental charges made by other sellers of similar articles of like quality and character. This can include using the rate of return as a percentage of the capitalized value that lessors of the particular type of property are generally using in rate setting.

In some cases lessors may lease articles wherein the lease payments do not include property taxes or insurance. These leases are often referred to as "net leases" with the insurance and taxes paid directly by the lessee. If the lessor is the party insured and the party legally liable for payment of the taxes, the payments made directly by the lessee must be treated as additional consideration to the lessor and subject to the retailing and retail sales tax.

(a) Bailment. The value of tangible personal property held or used under bailment is subject to use tax if the property was purchased or acquired under conditions whereby the retail sales tax was not paid by the bailor. Tax liability is that of the bailor, or of the bailee if the bailor has not paid the tax. The measure of the tax to the bailor is the fair market value of the article at the time the article was first put to use in Washington. The measure of the use tax to the bailee for articles acquired by bailment is the reasonable rental with the value to be determined as nearly as possible according to the rental price at the place of use of similar products of like quality and character. In the absence of rental prices for similar products, the reasonable rental may be computed by prorating the retail selling price over the period of possession had by a bailee and payable in monthly installments. No further use tax is due upon property acquired by bailment after tax has been paid by the bailee or any previous bailee upon the full original value of the article.

(b) Use tax does not apply to use by a bailee of any article of tangible personal property which is entirely consumed in the course of research, development, experimental, and testing activities conducted by the user, providing the acquisition or use of such articles by the bailor are exempt from sales or use tax. (RCW 82.12.0265.)

(8) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances. In some situations it may be difficult to determine if the transaction is a retail equipment rental with operator. If in doubt as to whether a particular rental with an operator is a retail sale, taxpayers should contact the department for a specific ruling.

(a) ABC Crane is hired to supply a crane and operator to lift air conditioning equipment from the ground and hold it in place on the roof of a six-story building while the prime construction contractor bolts the unit down. ABC Crane's operator will retain control over the crane. ABC Crane has no responsibility to attach wiring, plumbing, or otherwise make the unit operational. ABC Crane is renting equipment with an operator since it has no responsibility to perform actual construction to contract specification. The activity of renting a crane with an operator is a service included within the definition of a retail sale and is not otherwise tax classified elsewhere within the revenue act. The purchase of the crane by ABC is also a retail transaction because ABC retained control

over the crane and is not renting the crane as tangible personal property.

(b) ABC Crane is hired by a prime contractor to install a neon sign on the side of a new six-story building which is being constructed. ABC is responsible for making certain that the sign is correctly fastened to the side of the building and for installation of the electrical connections and meets the proper building codes. ABC is directly involved in construction and performs work to contract specification. Since the work is being done for the prime contractor for further resale, this is a wholesale sale, provided a resale certificate (WAC 458-20-102A) is obtained for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010. Had ABC only been hired to hold the sign in place while the prime contractor fastened it, this would have been a retail rental of equipment with operator.

(c) XYZ Concrete Pumping is hired by a prime contractor to supply a concrete pump and operator to pump concrete from a premix concrete delivery truck to the location of the forms. XYZ has no responsibility to build forms, do the concrete finishing, or otherwise see that the concrete meets or is placed according to contract specifications. In short, the pump functions similarly to a wheelbarrow, but in a more efficient manner. XYZ is not a subcontractor and is making a retail rental of equipment with an operator.

(d) ABC Company purchases a crane which it rents to others as a bare rental. It periodically rents the crane to lessees on this basis for two years. Beginning in the third year of ownership of this crane, ABC decides to start providing these customers with an employee to operate the crane. The employee will operate under the direction of ABC with ABC retaining dominion and control over the crane. Does ABC owe use tax on the crane, and if so, what is the measure of the use tax?

ABC owes use tax upon the first use of the crane as a consumer. This occurred in the third year of ownership when ABC began supplying an operator. The measure of the tax is the retail market value of the crane at the time it is put to use by ABC.

(e) Farm Services, Inc. specializes in the cutting and baling of hay for farmers. The hay, after being cut and baled, is sold by the farmer. Farm Services is not making a retail rental of equipment with operator, but is engaged in a farming for hire activity which is taxable under the service and other business activities B&O tax classification. See WAC 458-20-209.

(f) Helicopter, Inc. contracts with Logs, Inc. to move logs from where they have been cut in the woods to a landing approximately one mile away where the logs will be sorted, loaded on trucks, and transported to a mill. Total control over the helicopter operation rests with Helicopter, Inc. This is not a rental of equipment with an operator, nor is it considered as an air transportation service. This activity is directly part of the timber extracting and harvesting activity and is taxable as extracting for hire.

(g) ABC Sound Productions provides lighting, amplifying equipment, and speakers as part of the services it sells to entertainment promoters. ABC also provides several operators of the equipment. This is a rental of equipment with operator. In applying the true object test, the promoter is primarily purchasing the use of the lighting and sound equipment. The performer or promoter could be expected to specify the color, location, and degree of lighting and may also request changes and modifications to the level of sound amplification during the performance.

(h) John Doe purchased a vessel which will be rented to others as a bare boat rental. The rentals will be arranged through an agent at a marina. The marina receives a commission based on any usage of the vessel, including usage by the owner. The rental of the boat is a retail sale when the boat is rented to others. The usage of the boat by John Doe is not a rental. Since John Doe will be using the boat at times for his own use, he may not purchase the boat for resale.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-070, § 458-20-211, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300 and 82.08.010(1). WSR 96-03-139, § 458-20-211, filed 1/24/96, effective 2/24/96. Statutory Authority: RCW 82.32.300. WSR 87-17-015 (Order 87-4), § 458-20-211, filed 8/11/87; WSR 83-08-026 (Order ET 83-1), § 458-20-211, filed 3/30/83; Order ET 71-1, § 458-20-211, filed 7/22/71; Order ET 70-3, § 458-20-211 (Rule 211), filed 5/29/70, effective 7/1/70.]

WAC 458-20-214 Cooperative marketing associations and independent dealers acting as agents of others with respect to the sale of fruit and produce. (1) Persons engaged in the business of buying and selling fruit or produce, as agents of others, are taxable under the provisions of the business and occupation tax and the retail sales tax as provided in this section. Tax is due on the business activities of such persons, irrespective of whether the business is conducted as a cooperative marketing association or as an independent produce agent.

(2) Persons who derive income from receiving, washing, sorting, packing, or otherwise preparing for sale, perishable horticultural products for others are also subject to business and occupation tax, except when such activities are performed for the growers of such products (RCW 82.04.4287.)

(3) Business and occupation tax.

(a) Retailing. Taxable with respect to the sale of ladders, picking bags, and similar equipment to consumers.

(b) Wholesaling. Taxable with respect to:

(i) The sale of boxes, nails, labels and similar supplies sold to growers for their use in packing fruit and produce for sale;

(ii) The sale of insecticides used as spray for fruits and produce;

(c) Warehousing. Taxable with respect to gross income from cold storage warehousing, but not including the rental of cold storage lockers. See also WAC 458-20-182.

(d) Service and other business activities. Taxable with respect to:

(i) Commissions for buying or selling;

(ii) Charges made for interest, no deduction being allowed for interest paid;

(iii) Charges for handling;

(iv) Charges for receiving, washing, sorting, and packing of fresh perishable horticultural products and the material and supplies used therein, when performed for persons other than the growers thereof;

(v) Rentals of cold storage lockers; and

(vi) Other miscellaneous charges, including analysis fees, but excepting actual charges made for foreign brokerage and bona fide charges for receiving, washing, sorting and

packing fresh perishable horticultural crops and the materials and supplies used therein when performed for the grower, either as agent or independent contractor.

(4) Where a seller performs packing services for the grower and furnishes the materials and supplies used therein, the amount of the charge therefor is deductible, even though the boxes and other packing material are loaned or charged to the grower prior to the time the fruit or produce is received for packing, provided that the boxes and packing materials are returned by the grower to the seller for use in packing fruit and produce for the grower.

(5) Retail sales tax.

(a) The retail sales tax applies to sales of ladders, picking bags, and other equipment sold to consumers, whether sold by associations to members, or by agents to their principals.

(b) Retail sales tax does not apply to sales of materials and supplies directly used by cooperative marketing associations, agents, or independent contractors for the purpose of packing fresh perishable horticultural products for the growers thereof. "Growers" are those persons described as exempt orchardists or farmers under RCW 82.04.330.

(c) Sales of food products are not subject to retail sales tax. See WAC 458-20-244.

(6) Use tax.

(a) The use tax applies upon the use by consumers of any article of tangible personal property which is subject to retail sales tax as noted above, but upon which retail sales tax has not been paid for any reason.

[Statutory Authority: RCW 82.32.300. WSR 88-20-014 (Order 88-6), § 458-20-214, filed 9/27/88; WSR 83-08-026 (Order ET 83-1), § 458-20-214, filed 3/30/83. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-07-045 (Order ET 78-4), § 458-20-214, filed 6/27/78; Order ET 70-3, § 458-20-214 (Rule 214), filed 5/29/70, effective 7/1/70.]

WAC 458-20-216 Successors, quitting business. (1) **Introduction.** RCW 82.32.140 requires a taxpayer to remit any outstanding tax liability to the department of revenue (department) within ten days of quitting business. If this tax is not paid by the taxpayer, any successor to the taxpayer becomes liable for the outstanding tax. This rule explains under what circumstances a person is considered a successor to a person quitting business. It explains the successor's responsibility for payment of an outstanding tax liability owed by the taxpayer quitting business, whether that liability is known at the time of purchase or not. This rule also provides examples illustrating when successorship does or does not apply.

(2) **Who is a "successor"?**

(a) **"Successor" on or after July 1, 2003.**

(i) RCW 82.04.180 provides that a "successor" is:

(A) Any person to whom a taxpayer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys, directly or indirectly, in bulk and not in the ordinary course of the taxpayer's business, more than fifty percent of the fair market value of either the (I) tangible assets or (II) intangible assets of the taxpayer;

(B) Any surviving corporation of a statutory merger; or

(C) Any person obligated to fulfill the terms of a contract as a surety or guarantor of a defaulting contractor, in which case the person is deemed a successor only to tax liability arising out of that contract.

(ii) A person, however, is not a "successor" if the person acquires more than fifty percent of the fair market value of the tangible or intangible assets of the taxpayer through insolvency proceedings, regular legal proceedings to enforce a lien, security interest, or judgment, or by repossession under a security agreement.

(b) **"Successor" prior to July 1, 2003.**

(i) For the periods prior to July 1, 2003, a "successor" is:

(A) Any person to whom a taxpayer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys, directly or indirectly, in bulk and not in the ordinary course of business, a major part of the taxpayer's materials, supplies, merchandise, inventory, fixtures, or equipment, whether he or she operates the business or not. RCW 82.04.-180. A person acquires a "major part" of the taxpayer's materials, supplies, merchandise, inventory, fixtures, or equipment if he or she acquired more than fifty percent of the fair market value of such property at the time of the sale or conveyance;

(B) Any person obligated to fulfill the terms of a contract as a surety or guarantor of a defaulting contractor, in which case the person is deemed a successor only to tax liability arising out of that contract.

(ii) A person, however, is not a "successor" if the person acquires a major part of a taxpayer's materials, supplies, merchandise, inventory, fixtures, or equipment through insolvency proceedings, regular legal proceedings to enforce a lien, security interest, or judgment, or by repossession under a security agreement.

(c) **Surviving corporation of statutory merger taken effect prior to July 1, 2003.** A surviving corporation of a statutory merger that takes effect prior to July 1, 2003, is liable for the full tax liability of the nonsurviving corporation, plus any interest or penalties due, under RCW 23B.11.060 or similar laws in other jurisdictions.

(3) **What are tangible and intangible assets for purposes of this rule?**

(a) **Tangible assets.** "Tangible assets" include, but are not limited to, materials, supplies, merchandise, inventory, equipment, or other tangible personal property.

(b) **Intangible assets.** "Intangible assets" include, but are not limited to, all moneys and credits including mortgages, notes, accounts, certificates of deposit; tax certificates; judgments; state, county and municipal bonds; bonds of the United States and of foreign countries; bonds, stocks, or shares of private corporations; personal service contracts; trademarks; trade names; brand names; patents; copyrights; trade secrets; franchise agreements; licenses; permits; core deposits of financial institutions; noncompete agreements; business name; telephone numbers and internet addresses; customer or patient lists; favorable contracts and financing agreements; reputation; exceptional management; prestige; good name; integrity of a business; or other intangible personal property.

(4) **What are taxpayer's responsibilities for outstanding tax liability?** Whenever a taxpayer quits business, or sells out, exchanges, or otherwise disposes of more than fifty percent of the tangible or intangible assets of the business, any tax administered by the department and for which the taxpayer is liable is immediately due and payable. The tax-

payer must, within ten days, complete a tax return and pay the tax due. RCW 82.32.140.

(5) **What are successor's responsibilities for taxpayer's outstanding tax liability?**

(a) Withholding tax or obtaining documentation that no tax is due from taxpayer. A successor must withhold from the purchase price a sum sufficient to pay any tax due from the taxpayer until the taxpayer produces either a statement of tax status from the department showing payment in full of any tax due or a certificate from the department that no tax is due. If the tax is not paid by the taxpayer within ten days from the date of sale, exchange, or disposal of the business, the successor will become liable for the payment of the full amount of tax. A successor as defined in RCW 82.04.180 is not liable for interest or penalties associated with the taxpayer's tax liability. RCW 82.32.140.

(b) **Payment of successor liability is payment against purchase price.** The payment of the taxpayer's tax liability by the successor is deemed a payment upon the purchase price. If the sum of the payment to the department plus any payments made, directly or indirectly, to the taxpayer is greater in amount than the purchase price, the amount of the difference becomes a debt due the successor from the taxpayer. RCW 82.32.140.

(c) **Limitation on successor's responsibility for taxpayer's outstanding tax liability.** Effective July 1, 2003, if the fair market value of the assets acquired by a successor is less than fifty thousand dollars, the successor's liability for payment of the unpaid tax is limited to the fair market value of the assets acquired from the taxpayer. The burden of establishing the fair market value of the assets acquired is on the successor.

(6) **Can a successor avoid responsibility for taxpayer's outstanding tax liability?**

(a) **What must a successor do to avoid responsibility for tax due by a taxpayer?** A successor is not liable for any tax due from the taxpayer if the successor provides written notice of the acquisition to the department and within six months of receiving the written notice, the department has not issued a tax assessment against the taxpayer and mailed a copy of a notice of tax due to the successor. RCW 82.32.140. The six-month period begins upon the department's receipt of the written notice, or the date the person becomes a successor, whichever is later.

If there are circumstances that prohibit an audit from being completed within six months of the department receiving a proper written notice, the successor and the department may execute a Liability of Successor Waiver Agreement (Form Rev 31 0068) to extend the time in which the department may issue a tax assessment, and the successor will remain liable for the taxes. In lieu of executing such agreement, the department may issue a protective assessment under RCW 82.32.100 if the records cannot be made available for examination in a timely manner.

(b) **How does a successor notify to the department of the acquisition of a taxpayer?** Written notice of the acquisition must be made on a form prescribed by the department, or it must contain substantially the same information. The written notice must be provided by mailing to the Department of Revenue, Attn: Successorship Notices, P.O. Box 47476, Olympia, Washington 98504-7476.The written notice is available on the department's internet web site at www.dor.wa.gov under forms. The written notice must contain the following information:

(i) The (predecessor) taxpayer's name, business name, address, and UBI number;

(ii) The successor's name, business name, address, and UBI number;

(iii) The date of the acquisition;

(iv) Whether or not the successor acquired more than fifty percent of the tangible or intangible assets of the (predecessor) taxpayer;

(v) A description of the assets acquired and their estimated fair market value;

(vi) The total costs of acquisition; and

(vii) How the person became a successor (i.e., asset purchase, merger, guarantor of a defaulting contractor, etc.).

(7) **Disclosure.** The department is not prohibited from disclosing to a person against whom the department has asserted liability as a successor under RCW 82.32.140 return or tax information pertaining to the specific business of the taxpayer to which the person has succeeded. RCW 82.32.-330. For example, a successor is liable under RCW 82.32.140 for payment of an outstanding tax liability of the predecessor taxpayer. The department is only authorized to provide the successor return or tax information related to that outstanding tax liability.

(8) **Tax deferrals not terminated.** A tax deferral granted to a (predecessor) taxpayer may be transferred to the successor if the successor meets the eligibility requirements for the remaining periods of the deferral and the parties agree in writing that the successor will assume liability for the tax deferral. RCW 82.60.060, 82.63.045, 82.68.050 and 82.69.-050. If the deferral is transferred, the successor of the investment project is liable for the full amount of any unpaid, deferred taxes under the same terms and conditions as the original recipient of the deferral. If the deferral is not transferred, the successor's liability for deferred tax is limited to the deferred taxes due at the time of the transfer. Refer to WAC 458-20-24001 and 458-20-24001A (Sales and use tax deferral—Manufacturing and research/development activities in distressed areas), 458-20-24002 (Sales and use tax deferral—New manufacturing and research/development facilities), and 458-20-24003 (Tax incentives for high technology businesses) for further reference regarding successors of deferral investment projects.

(9) **Examples.** The following factual situations illustrate the application of successorship. These factual situations should be used only as a general guide. The successorship status of each situation depends on all the facts and circumstances. Assume all the examples below occur on or after July 1, 2003.

(a) **Example 1.** Taxpayer quits business and sells all equipment and inventory to one purchaser. The taxpayer may be either solvent or insolvent at the time of sale. The purchaser is a successor.

(b) **Example 2.** Taxpayer quits business, selling all of its intangible assets consisting of customer lists and a covenant not to compete. The purchaser is a successor.

(c) **Example 3.** Taxpayer sells its entire business, including all equipment (60% of its tangible assets) to Purchaser A,

and all inventory (40% of its tangible assets) to Purchaser B. Purchaser A is a successor. Purchaser B is not a successor.

(d) **Example 4.** Taxpayer sells its entire business, including all assets as follows to three purchasers on January 1, 2004:

PURCHASER A	PURCHASER B	PURCHASER C
Inventory of $200,000	Equipment of $100,000	Receivable of $45,000

Purchaser A is a successor because it has acquired more than 50% of the fair market value, of the tangible assets of the taxpayer. Purchaser B is not a successor because it has acquired less than 50% of the fair market value of the tangible assets of the taxpayer. Purchaser C is a successor because it has acquired more than 50% of the intangible assets of the taxpayer. Purchaser C's tax liability is limited to $45,000 because the fair market value of the assets acquired is less than $50,000.

(i) On February 1, 2004, Purchaser C provides a proper written notice to the department regarding its purchase from the taxpayer. Purchaser A does not provide any written notice to the department regarding its purchase from the taxpayer. On September 30, 2004, the department issues a tax assessment to the taxpayer for $100,000 in taxes owed, plus penalties and interest. A copy of the tax assessment is also mailed to Purchaser A as a successor to the taxpayer. Purchaser A is liable for the $100,000 in taxes owed by the taxpayer since it did not provide a proper written notice to the department. Purchaser C is not liable for the $100,000 in taxes because it provided a proper written notice, and the department did not issue an assessment within six months of receiving the notice.

(ii) Same facts as in the previous example except the department issues its tax assessment on July 15, 2004, and mails a copy of the tax assessment to both Purchasers A and C as successors. Both Purchasers A and C are liable as successors for the taxes owed by the taxpayer. However, Purchaser C's liability is limited to $45,000 in taxes since the fair market value of the assets it acquired was less than $50,000.

(e) **Example 5.** Taxpayer obtains a loan from a financial institution to purchase equipment and inventory. The financial institution secures the loan by taking a security interest in the equipment and inventory. Taxpayer quits business, leaving the equipment and inventory behind. The financial institution repossesses these items. The financial institution is not a successor.

(f) **Example 6.** Taxpayer purchases all equipment and inventory under a line of credit extended by a bank and guaranteed by a third party. The third party perfects a security interest in the equipment and inventory. Taxpayer quits business, surrendering the equipment and inventory to the third party guarantor. The third party guarantor is not a successor.

(g) **Example 7.** Taxpayer leaves business, including equipment, materials, and inventory, which the landlord holds for unpaid rent. The landlord forecloses the landlord's lien using the summary foreclosure provisions of RCW 60.10.030, or holds a foreclosure sale by the sheriff, or accepts a bill of sale in satisfaction of the landlord's lien for rent created by RCW 60.72.010. The landlord is not a successor.

(h) **Example 8.** Taxpayer purchases all equipment and inventory under a security agreement.

(i) If the property is repossessed by the vendor, the vendor is not a successor.

(ii) If the taxpayer sells his or her equity under the security agreement to a third person, the third person is a successor.

(iii) If the equipment and inventory is not repossessed and the vendor buys back the interest of the taxpayer without following the summary foreclosure provisions of RCW 60.10.030, the vendor is a successor.

(i) **Example 9.** Taxpayer dies or becomes bankrupt, goes into receivership, or makes an assignment for the benefit of creditors. The executor, administrator, trustee, receiver, or assignee is not a successor but stands in the place of the taxpayer and is responsible for payment of tax out of the proceeds derived upon disposition of the assets. A purchaser from the executor, administrator, trustee, receiver, or assignee is not a successor, unless under the terms of the purchase agreement the purchaser assumes and agrees to pay taxes and/or lien claims.

(j) **Example 10.** Taxpayer is a contractor and is required to post a bond to insure completion of the contract. Taxpayer defaults on the contract and the bonding company completes it. The bonding company is a successor to the contractor to the extent of the contractor's liability for that particular contract and is also liable for taxes incurred in the completion of the contract.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 05-14-107, § 458-20-216, filed 6/30/05, effective 7/31/05. Statutory Authority: RCW 82.32.300. WSR 99-08-034, § 458-20-216, filed 3/31/99, effective 5/1/99; Order ET 70-3, § 458-20-216 (Rule 216), filed 5/29/70, effective 7/1/70.]

WAC 458-20-217 Lien for taxes. (1) **Introduction.** This rule provides an overview of the administrative collection remedies and procedures available to the department of revenue (department) to collect unpaid and overdue tax liabilities. It discusses tax liens and the liens that apply to probate, insolvency, assignments for the benefit of creditors, bankruptcy and public improvement contracts. The rule also explains the personal liability of persons in control of collected but unpaid sales tax. Although the department may use judicial remedies to collect unpaid tax, most of the department's collection actions are enforced through the administrative collection remedies discussed in this rule.

(2) **Tax liens.** The department is not required to obtain a judgment in court to have a tax lien. A tax lien is created when a warrant issued under RCW 82.32.210 is filed with a superior court clerk who enters it into the judgment docket. A copy of the warrant may be filed in any county in this state in which the department believes the taxpayer has real and/or personal property. The department is not required to give a taxpayer notice prior to filing a tax warrant. *Peters v Sjoholm*, 95 Wn.2d 871, 877, 631 P.2d 937 (1981) *appeal dismissed, cert. denied* 455 U.S. 914 (1982). The tax lien is an encumbrance on property. The department may enforce a tax lien by administrative levy, seizure or through judicial collection remedies.

(a) **Attachment of lien.** The filed warrant becomes a specific lien upon all personal property used in the conduct of the business and a general lien against all other real and per-

sonal property owned by the taxpayer against whom the warrant was issued.

(i) The specific lien attaches to all goods, wares, merchandise, fixtures, equipment or other personal property used in the conduct of the business of the taxpayer. Other personal property includes both tangible and intangible property. For example, the specific lien attaches to business assets such as accounts receivable, chattel paper, royalties, licenses and franchises. The specific lien also attaches to property used in the business which is owned by persons other than the taxpayer who have a beneficial interest, direct or indirect, in the operation of the business. (See subsection (3) of this section for what constitutes a beneficial interest.) The lien is perfected on the date it is filed with the superior court clerk. The lien does not attach to property used in the business that was transferred prior to the filing of the warrant. It does attach to all property existing at the time the warrant is filed as well as property acquired after the filing of the warrant. No sale or transfer of such personal property affects the lien.

(ii) The general lien attaches to all real and personal nonbusiness property such as the taxpayer's home and nonexempt personal vehicles.

(b) **Lien priorities.** The department does not need to levy or seize property to perfect its lien. The lien is perfected when the warrant is filed. The tax lien is superior to liens that vest after the warrant is filed.

(i) The lien for taxes is superior to bona fide interests of third persons that vested prior to the filing of the warrant if such persons have a beneficial interest in the business.

(ii) The lien for taxes is also superior to any interest of third persons that vested prior to the warrant if the interest is a mortgage of real or personal property or any other credit transaction that results in the mortgagee or the holder of the security acting as the trustee for unsecured creditors of the taxpayer mentioned in the warrant.

(iii) In most cases, to have a vested or perfected security interest in personal property, the secured party must file a UCC financing statement indicating its security interest. RCW 62A.9-301. See RCW 62A.9-302 for the exceptions to this general rule. The financing statement must be filed prior to the filing of the tax warrant for the lien to be superior to the department's lien.

(c) **Period of lien.** A filed tax warrant creates a lien that is enforceable for the same period as a judgment in a civil case that is docketed with the clerk of the superior court. RCW 82.32.210(4). A judgment lien expires ten years from the date of filing. RCW 4.56.310. The department may extend the lien for an additional ten years by filing a petition for an order extending the judgment with the clerk of the superior court. The petition must be filed within ninety days of the expiration of the original ten-year period. RCW 6.17.-020.

(3) **Persons who have a beneficial interest in a business.** A third party who receives part of the profit, a benefit, or an advantage resulting from a contract or lease with the business has a beneficial interest in the operation of the business. A party whose only interest in the business is securing the payment of debt or receiving regular rental payments on equipment does not have a beneficial interest. Also, the mere loaning of money by a financial institution to a business and securing that debt with a UCC filing does not constitute a beneficial interest in the business. Rather, a party who owns property used by a delinquent taxpayer must also have a beneficial interest in the operation of that business before the lien will attach to the party's property. The definition of the term "beneficial interest" for purposes of determining lien priorities is not the same as the definition used for tax free transfers described in WAC 458-20-106.

(a) **Third party.** A third party is simply a party other than the taxpayer. For example, if the taxpayer is a corporation, an officer or shareholder of that corporation is a "third party" with a beneficial interest in the operation of the business. If the corporate insider has a security interest in property used by the business, the tax lien will be superior even if the corporate insider's lien was filed before the department's lien.

(b) **Beneficial interest of lessor.** In some cases a lessor or franchisor will have a beneficial interest in the leased or franchised business. For example, an oil company that leases a gas station and other equipment to an operator and requires the operator to sell its products is a third party with a beneficial interest in the business. Factors which support a finding of a beneficial interest in a business include the following:

(i) The business operator is required to pay the lessor or franchisor a percentage of gross receipts as rent;

(ii) The lessor or franchisor requires the business operator to use its trade name and restricts the type of business that may be operated on the premises;

(iii) The lease places restrictions on advertising and hours of operation; and/or

(iv) The lease requires the operator to sell the lessor's products.

(c) A third party who has a beneficial interest in a business with a filed lien is not personally liable for the amounts owing. Instead, the amount of tax, interest and penalties as reflected in the warrant becomes a specific lien upon the third party's property that is used in the business.

(4) **Notice and order to withhold and deliver.** A tax lien is sufficient to support the issuance of a writ of garnishment authorized by chapter 6.27 RCW. RCW 82.32.210(4). A tax lien also allows the department to issue a notice and order to withhold and deliver. A notice and order to withhold and deliver (order) is an administrative garnishment used by the department to obtain property of a taxpayer from a third party such as a bank or employer. See RCW 82.32.235. The department may issue an order when it has reason to believe that a party is in the possession of property that is or shall become due, owing or belonging to any taxpayer against whom a warrant has been filed.

(a) **Service of order.** The department may serve an order to withhold and deliver to any person, or to any political subdivision or department of the state. The order may be served by the sheriff or deputy sheriff of the county where service is made, by any authorized representative of the department, or by certified mail.

(b) **Requirement to answer order.** A person upon whom service has been made is required to answer the order in writing within twenty days of service of the order. The date of mailing or date of personal service is not included when calculating the due date of the answer. All answers must be true and made under oath. If an answer states that it cannot presently be ascertained whether any property is or shall

become due, owing, or belonging to such taxpayer, the person served must answer when such fact can be ascertained. RCW 82.32.235.

(i) If the person served with an order possesses property of the taxpayer subject to the claim of the department, the party must deliver the property to the department or its duly authorized representative upon demand. If the indebtedness involved has not been finally determined, the department will hold the property in trust to apply to the indebtedness involved or for return without interest in accordance with the final determination of liability or nonliability. In the alternative, the department must be furnished a satisfactory bond conditioned upon final determination of liability. RCW 82.32.235.

(ii) If the party upon whom service has been made fails to answer an order to withhold and deliver within the time prescribed, the court may enter a default judgment against the party for the full amount claimed owing in the order plus costs. RCW 82.32.235.

(c) **Continuing levy.** A notice and order to withhold and deliver constitutes a continuing levy until released by the department. RCW 82.32.237.

(d) **Assets that may be attached.** Both tangible assets, as a vehicle, and intangible assets may be attached. Examples of intangible assets that may be attached by an order to withhold and deliver include, but are not limited to, checking or savings accounts; accounts receivable; refunds or deposits; contract payments; wages and commissions, including bonuses; liquor license deposits; rental income; dealer reserve accounts held by service stations or auto dealers; and funds held in escrow pending sale of a business. Certain insurance proceeds are subject to attachment such as the cash surrender value of a policy. The department may attach funds in a joint account that are owned by the delinquent taxpayer. Funds in a joint account with the right of survivorship are owned by the depositors in proportion to the amount deposited by each. RCW 30.22.090. The joint tenants have the burden to prove the separate ownership.

(e) **Assets exempt from attachment.** Examples of assets which are not attachable include Social Security, railroad retirement, welfare, and unemployment benefits payable by the federal or state government.

(5) **Levy upon real and/or personal property.** The department may issue an order of execution, pursuant to a filed warrant, directing the sheriff of the county in which the warrant was filed to levy upon and sell the real and/or personal property of the taxpayer in that county. RCW 82.32.-220. If the department has reason to believe that a taxpayer has personal property in the taxpayer's possession that is not otherwise exempt from process or execution, the department may obtain a warrant to search for and seize the property. A search warrant is obtained from a superior or district court judge in the county in which the property is located. See RCW 82.32.245.

(6) **Probate, insolvency, assignment for the benefit of creditors or bankruptcy.** In all of these cases or conditions, the claim of the state for unpaid taxes and increases and penalties thereon, is a lien upon all real and personal property of the taxpayer. RCW 82.32.240. All administrators, executors, guardians, receivers, trustees in bankruptcy, or assignees for the benefit of creditors are required to notify the department of such administration, receivership, or assignment within sixty days from the date of their appointment and qualification. In cases of insolvency, this includes the duty of the person who is winding down the business to notify the department.

(a) The state does not have to take any action to perfect its lien. The lien attaches the date of the assignment for the benefit of creditors or of the initiation of the probate or bankruptcy. In cases of insolvency, the lien attaches at the time the business becomes insolvent. The lien, however, does not affect the validity or priority of any earlier lien that may have attached in favor of the state under any other provision of the Revenue Act.

(b) Any administrator, executor, guardian, receiver, or assignee for the benefit of creditors who does not notify the department as provided above is personally liable for payment of the taxes and all increases and penalties thereon. The personal liability is limited to the value of the property subject to administration that otherwise would have been available to pay the unpaid liability.

(c) In probate cases in which a surviving spouse or surviving domestic partner is separately liable for unpaid taxes and increases and penalties thereon, the department does not need to file a probate claim to protect the state's interest against the surviving spouse or surviving domestic partner. The department may collect from the separate property of the surviving spouse or surviving domestic partner and any assets formerly community property or property of the domestic partnership which become the property of the surviving spouse or the surviving domestic partner. If the deceased spouse or deceased domestic partner and/or the community or domestic partnership also was liable for the tax debt, the claim also could be asserted in the administration of the estate of the deceased spouse or deceased domestic partner.

(7) **Lien on retained percentage of public improvement contracts.** Every public entity engaging a contractor under a public improvement project of twenty thousand dollars or more, shall retain five percent of the total contract price, including all change orders, modifications, etc. This retainage is a trust fund held for the benefit of the department and other statutory claimants. In lieu of contract retainage, the public entity may require a bond. All taxes, increases, and penalties due or to become due under Title 82 RCW from a contractor or the contractor's successors or assignees with respect to a public improvement contract of twenty thousand dollars or more shall be a lien upon the amount of the retained percentage withheld by the disbursing officer under such contract. RCW 60.28.040.

(a) **Priorities.** The employees of a contractor or the contractor's successors or assignees who have not been paid the prevailing wage under the public improvement contract have a first priority lien against the bond or retainage. The department's lien for taxes, increases, and penalties due or to become due under such contract is prior to all other liens. The amount of all other taxes, increases and penalties due from the contractor is a lien upon the balance of the retained percentage after all other statutory lien claims have been paid. RCW 60.28.040.

(b) **Release of funds.** Upon final acceptance by the public entity or completion of the contract, the disbursing officer

shall contact the department for its consent to release the funds. The officer cannot make any payment from the retained percentage until the department has certified that all taxes, increases, and penalties due have been paid or are readily collectible without recourse to the state's lien on the retained percentage. RCW 60.28.050 and 60.28.051.

(8) **Personal liability for unpaid trust funds.** The retail sales tax is to be held in trust. RCW 82.08.050. As a trust fund, the retail sales tax is not to be used to pay other corporate or personal debts. RCW 82.32.145 imposes personal liability on any responsible person who willfully fails to pay or cause to be paid any collected but unpaid retail sales tax. Collection authority and procedures prescribed in chapter 82.32 RCW apply to the collection of trust fund liability assessments.

(a) **Responsible person.** A responsible person is any officer, member, manager, or other person having control or supervision of retail sales tax funds collected and held in trust or who has the responsibility for filing returns or paying the collected retail sales tax.

(i) A responsible person may have "control and supervision" of collected retail sales tax or the responsibility to report the tax under corporate bylaws, job description, or other proper delegation of authority. The delegation of authority may be established by written documentation or by conduct.

(ii) A responsible person must have significant but not necessarily exclusive control or supervision of the trust funds. Neither a sales clerk who only collects the tax from the customer nor an employee who only deposits the funds in the bank has significant supervision or control of the retail sales tax. An employee who has the responsibility to collect, account for, and deposit trust funds does have significant supervision or control of the tax.

(iii) A person is not required to be a corporate officer or have a proprietary interest in the business to be a responsible person.

(iv) A member of the board of directors, a shareholder, or an officer may have trust fund liability if that person has the authority and discretion to determine which corporate debts should be paid and approves the payment of corporate debts out of the collected retail sales trust funds.

(v) More than one person may have personal liability for the trust funds if the requirements for liability are present for each person.

(b) **Requirements for liability.** In order for a responsible person to be held personally liable for collected and unpaid retail sales tax:

(i) The tax must be the liability of a corporate or limited liability business;

(ii) The corporation must be terminated, dissolved, or abandoned;

(iii) The failure to pay must be willful; and

(iv) The department must not have a reasonable means of collecting the tax from the corporation.

(c) **Willful failure to pay.** A willful failure to pay means that the failure was an intentional, conscious, and voluntary course of action. An intent to defraud or a bad motive is not required. For example, using collected retail sales tax to pay other corporate obligations is a willful failure to pay the trust funds to the state.

(i) A responsible person depositing retail sales tax funds in a bank account knowing that the bank might use the funds to off-set amounts owing to it is engaging in a voluntary course of action. It is a willful failure to pay if the bank does exercise its right of set off which results in insufficient funds to pay the corporate retail sales tax that was collected and deposited in the account. To avoid personal liability in such a case, the responsible party can set aside the collected retail sales tax and not commingle it with other funds that are subject to attachment or set off.

(ii) If the failure to pay the trust funds to the state was due to reasons beyond that person's control, the failure to pay is not willful. For example, if the person responsible for remitting the tax provides evidence that the trust funds were unknowingly stolen or embezzled by another employee, the failure to pay is not considered willful. To find that a failure to pay the trust funds to the state was due to reasons beyond that person's control, the facts must show both that the circumstances caused the failure to pay the tax and that the circumstances were beyond the person's control.

(iii) If a responsible person instructs an employee or hires a third party to remit the collected sales tax, the responsible person is not relieved of personal liability for the tax if the tax is not paid.

(d) **Extent of liability.** Trust fund liability includes the collected but unpaid retail sales tax as well as the interest and penalties due on the tax.

(i) An individual is only liable for trust funds collected during the period he or she had the requisite control, supervision, responsibility, or duty to remit the tax, plus interest and penalties on those taxes. RCW 82.32.145(2).

(ii) Any retail sales taxes that were paid to the department but not collected may be deducted from the retail sales taxes collected but not paid.

(e) **No reasonable means of collection.** The department has "no reasonable means of collection" if the costs of collection would be more than the amount that could be collected; if the amount that might be recovered through a levy, foreclosure or other collection action would be negligible; or if the only means of collection is against a successor corporation.

(f) **Appeal of personal liability assessment.** Any person who receives a personal liability assessment is encouraged to request a supervisory conference if the person disagrees with the assessment. The request for the conference should be made to the department representative that issued the assessment or the representative's supervisor at the department's field office. A supervisory conference provides an opportunity to resolve issues with the assessment without further action. If unable to resolve the issue, the person receiving the assessment is entitled to administrative and judicial appeal procedures. RCW 82.32.145(4). See also RCW 82.32.160, 82.32.170, 82.32.180, 82.32.190, and 82.32.200.

While encouraged to request a supervisory conference, any person receiving a personal liability assessment may elect to forego the supervisory conference and proceed directly with an appeal of the assessment. Refer to WAC 458-20-100 for information about the department's administrative appeal procedures, including how to timely file a petition for appeal.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 08-16-073, § 458-20-217, filed 7/31/08, effective 8/31/08. Statutory Authority: RCW

82.32.300. WSR 02-15-158, § 458-20-217, filed 7/23/02, effective 8/23/02; WSR 00-16-016, § 458-20-217, filed 7/21/00, effective 8/21/00; WSR 88-01-050 (Order 87-9), § 458-20-217, filed 12/15/87; Order ET 71-1, § 458-20-217, filed 7/22/71; Order ET 70-3, § 458-20-217 (Rule 217), filed 5/29/70, effective 7/1/70.]

WAC 458-20-21701 Enhanced collection tools. (1) **Introduction.** This section explains procedures for electronic notice and order to withhold and deliver service, and mitigation options for financial institutions required to respond to service by the department of revenue (department). This new service option is in addition to other forms of service authorized in RCW 82.32.235 and described in WAC 458-20-217 (4). Electronic service under this rule will be referred to as "E-Withhold."

(2) **What is E-Withhold?** E-Withhold is a data-driven effort to identify assets that may satisfy unpaid tax lien liabilities. RCW 82.32.235 provides thirty days for financial institutions to respond to E-Withhold service. The department will perform an additional review/validation after the initial response is received from a financial institution to ensure accuracy before directing a financial institution to withhold and remit funds.

The department has developed detailed instructions for E-Withholds, which include information about file formats, response codes, payment references, access to the secured file transfer service, and other details needed by financial institutions. This information can be viewed at dor.wa.gov/E-Withhold.

(3) **Who can be served by E-Withhold?** E-Withhold service applies to "financial institutions." Financial institutions are defined as banks, trust companies, mutual savings banks, savings and loan associations, or credit unions authorized to do business and accept deposits in this state under state or federal law.

(4) **How will E-Withholds be served?** The department will serve a list of all or a portion of all properly filed and unsatisfied tax warrants (the E-Withhold list) to financial institutions by secured file transfer (SFT) service. Tax warrants with established and maintained payment agreements, or taxpayers under federal bankruptcy protection at the time the list is created will not be included. The department will not serve an E-Withhold list to a financial institution more than once per calendar month. The department will send an e-mail notification to a financial institution when service has occurred, and also send a courtesy copy via U.S. mail. The department will maintain contact information for each financial institution for E-Withhold service and processing issues. Financial institutions should notify the department of changes to contact information using the e-mail address referenced in subsection (7) of this section.

(5) **What is included on an E-Withhold list?** A list will contain information provided on a manually issued notice and order to withhold and deliver plus tax identification numbers provided to the department by taxpayers. Financial institutions served via E-Withhold must ensure that the data provided remains confidential and secure per RCW 82.32.330.

Assets subject to E-Withhold include, but are not limited to:

- Checking, saving, or share accounts;
- Time or certificates of deposit;
- Investment or brokerage accounts;
- Contents of safe deposit boxes;
- Credit card receipts; and
- Contract collections.

Examples of assets exempt from E-Withhold are described in WAC 458-20-217(4).

(6) **When are funds withheld and due to the department?** Funds withheld through E-Withhold must be remitted by the thirty-first day after official service. For example, if official service occurs on May 15th, the financial institution must remit the withheld funds by June 15th. Official service occurs when the E-Withhold list is placed into the financial institution's designated SFT folder. The SFT service records a date and time stamp for actions occurring on it.

The department has established response steps and dates between official service and final remittance in order to verify/validate potential withholding. These response steps and dates are provided in the E-Withhold procedures document at dor.wa.gov/E-Withhold. Instructions for the contents of safe deposit boxes are also included in the procedures document at dor.wa.gov/E-Withhold.

(7) **What if a financial institution can't meet E-Withhold procedural requirements?** When a financial institution faces significant issues in meeting any of the requirements of this rule or the operational procedures referenced in subsection (2) of this section, it must submit a written request to the department for special handling. The request must identify the condition(s) creating the challenge(s). The department will work with financial institutions on a case-by-case basis to develop a mitigation plan that will achieve the desired outcome of locating and recovering assets to pay filed tax liens.

Criteria the department will consider when analyzing ways to mitigate impact include:

- A financial institution's lack of staff or technical inability to respond to electronic service; and
- Membership limits or restrictions that significantly reduce the potential of locating assets for some or most of the delinquent taxpayers, geographic remoteness from large numbers of taxpayers.

Requests for a mitigation plan or other E-Withhold questions should be sent via:

E-mail to: dorewithholds@dor.wa.gov

U.S. mail to:
Department of Revenue
Attn: Compliance Division - CRRT
P.O. Box 14699
Tumwater, WA 98511-4699

[Statutory Authority: RCW 82.01.060 and 82.32.235. WSR 10-07-035, § 458-20-21701, filed 3/10/10, effective 4/10/10.]

WAC 458-20-218 Advertising agencies. Advertising agencies are primarily engaged in the business of rendering professional services, but may also make sales of tangible personal property to their clients or others or make purchases of such articles as agents in behalf of their clients. Articles acquired or produced by advertising agencies may be for their own use in connection with the rendition of an advertising service or may be for resale as tangible personal property to their clients.

Business and Occupation (B&O) Tax

The gross income received for advertising services, including commissions or discounts received upon articles purchased as agents in behalf of clients, is taxable under the service and other business activities B&O tax classification. (See WAC 458-20-144 for discounts or commissions allowed by printers.) Included in this classification are amounts attributable to sales of tangible personal property, unless charges for such articles are separately stated in billings rendered to clients.

The retailing or wholesaling classification B&O tax applies to articles of tangible personal property sold to persons for whom no advertising service is rendered and also to charges to clients for such articles if separately stated from charges for advertising services in billings rendered.

The manufacturing classification applies to articles manufactured for sale or commercial or industrial use (see WAC 458-20-134), and also to interstate sales of manufactured articles separately stated from advertising services. (General principles covering sales or services to persons in other states are contained in WAC 458-20-193.)

Retail Sales Tax

The retail sales tax applies upon all sales of plates, engravings, electrotypes, etchings, mats, and other articles to advertising agencies for use by them in rendering an advertising service and not resold to clients.

The retail sales tax must be paid by advertising agencies to vendors upon retail purchases made by them as agent in behalf of clients.

Advertising agencies are required to collect the retail sales tax upon charges taxable under the retailing B&O tax classification. Advertising agencies must provide a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to the vendor to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the vendor for five years from the date of last use or December 31, 2014.

Use Tax

The use tax applies upon the use of articles purchased or manufactured for use in rendering an advertising service. Articles acquired without payment of retail sales tax which are resold to clients, but not separately stated from charges for advertising service, are also subject to use tax.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-070, § 458-20-218, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order ET 83-1), § 458-20-218, filed 3/30/83; Order ET 70-3, § 458-20-218 (Rule 218), filed 5/29/70, effective 7/1/70.]

WAC 458-20-221 Collection of use tax by retailers and selling agents. (1) **Statutory requirements.** RCW 82.12.040(1) provides that every person who maintains a place of business in this state, maintains a stock of goods in this state, or engages in business activities within this state must obtain a certificate of registration and must collect use tax from purchasers at the time it makes sales of tangible personal property for use in this state. The legislature has directed the department of revenue to specify, by rule, activities which constitute engaging in business activities within this state. These are activities which are sufficient under the Constitution of the United States to require the collection of use tax.

(2) **Definitions.**

(a) "Maintains a place of business in this state" includes:

(i) Maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business; or

(ii) Soliciting sales or taking orders by sales agents or traveling representatives.

(b) "Engages in business activities within this state" includes:

(i) Purposefully or systematically exploiting the market provided by this state by any media-assisted, media-facilitated, or media-solicited means, including, but not limited to, direct mail advertising, unsolicited distribution of catalogues, computer-assisted shopping, telephone, television, radio or other electronic media, or magazine or newspaper advertisements or other media; or

(ii) Being owned or controlled by the same interests which own or control any seller engaged in business in the same or similar line of business in this state; or

(iii) Maintaining or having a franchisee or licensee operating under the seller's trade name in this state if the franchisee or licensee is required to collect use tax.

(c) "Purposefully or systematically exploiting the market provided by this state" is presumed to take place if the gross proceeds of sales of tangible personal property delivered from outside this state to destinations in this state exceed five hundred thousand dollars during a period of twelve consecutive months.

(3) **Liability of buyers for use tax.** Persons in this state who buy articles of tangible personal property at retail are liable for use tax if they have not paid sales tax. See WAC 458-20-178.

(4) **Obligation of sellers to collect use tax.** Persons who obtain a certificate of registration, maintain a place of business in this state, maintain a stock of goods in this state, or engage in business activities within this state are required to collect use tax from persons in this state to whom they sell tangible personal property at retail and from whom they have not collected sales tax. Use tax collected by sellers shall be deemed to be held in trust until paid to the department. Any seller failing to collect the tax or, if collected, failing to remit the tax is personally liable to the state for the amount of tax. (For exceptions as to sale to certain persons engaged in interstate or foreign commerce see WAC 458-20-175.)

(5) **Local use tax.** Persons who are obligated to collect use tax solely because they are engaged in business activities within this state as defined in subsection (2)(b)(i) of this section may elect to collect local use tax at a uniform statewide rate of .005 without the necessity of reporting taxable sales to the local jurisdiction of delivery. Amounts collected under the uniform rate shall be allocated by the department to counties and cities in accordance with ratios reflected by the dis-

tribution of local sales and use taxes collected from all other taxpayers. Persons not electing to collect at the uniform statewide rate or not eligible to collect at the uniform state rate shall collect local use tax in accordance with WAC 458-20-145.

(6) **Reporting frequency.** Persons who are obligated to collect use tax solely because they are engaged in business activities within this state as defined in subsection (2)(b) of this section shall not be required to file returns and remit use tax more frequently than quarterly.

(7) **Selling agents.** RCW 82.12.040 of the law provides, among other things, as follows:

(a) "Every person who engages in this state in the business of acting as an independent selling agent for persons who do not hold a valid certificate of registration, and who receives compensation by reason of sales of tangible personal property of his principals made for use in this state, shall, at the time such sales are made, collect from the purchasers the tax imposed under this chapter, and for that purpose shall be deemed a retailer as defined in this chapter."

(b) However, in those cases where the agent receives compensation by reason of a sale made pursuant to an order given directly to his principal by the buyer, and of which the agent had no knowledge at the time of sale, the said agent will be relieved of all liability for the collection of or payment of the tax. Furthermore, in other cases where payment is made by the buyer direct to the principal and the agent is unable to collect the tax from the buyer, the agent will be relieved from all liability for the collection of the tax from the buyer and for payment of the tax to the department, provided that within ten days after receipt of commission on any such sale, the agent shall forward to the department a written statement showing the following: Name and address of purchaser, date of sale, type of goods sold, and selling price. (Agents may avoid all liability for collection of this tax, provided their principals obtain a certificate of registration.)

(8) **Time and manner of collection.** The use tax is computed upon the value of the property sold. At the time of making a sale of tangible personal property, the use of which is taxable under the use tax, the seller must collect the tax from the purchaser and upon request give to the purchaser a receipt therefor. This receipt need not be in any particular form, and may be an invoice which identifies the property sold, shows the sale price thereof and the amount of the tax. It is a misdemeanor for a retailer to refund, remit, or rebate to a purchaser or transferee, either directly or indirectly, by whatever means, all or any part of the use tax.

(9) **Effective date.** This rule shall take effect on April 1, 1989.

[Statutory Authority: RCW 82.32.300. WSR 89-06-016 (Order 89-4), § 458-20-221, filed 2/23/89, effective 4/1/89; WSR 83-08-026 (Order ET 83-1), § 458-20-221, filed 3/30/83; Order ET 70-3, § 458-20-221 (Rule 221), filed 5/29/70, effective 7/1/70.]

WAC 458-20-222 Veterinarians. (1) **Introduction.** This section explains Washington's business and occupation (B&O), retail sales, and use tax applications to sales and services provided by veterinarians. It explains the tax liability resulting from the performance of professional services and the sale of medicines and supplies for use in the care of animals. This section also explains the tax liability of persons who provide other services for live animals including grooming, boarding, training, artificial insemination, and stud services.

(2) **Business and occupation tax.** Persons providing services for live animals are subject to the B&O tax as follows:

(a) **Service and other activities.** The service and other activities B&O tax applies to the gross income derived from veterinary services. For purposes of this section, "veterinary services" includes the diagnosis, cure, mitigation, treatment, or prevention of disease, deformity, defect, wounds, or injuries of animals. It also includes the administration of any drug, medicine, method or practice, or performance of any operation, or manipulation, or application of any apparatus or appliance for the diagnosis, cure, mitigation, treatment, or prevention of any animal disease, deformity, defect, wound, or injury. "Veterinary services" does not include the therapeutic use of an item of personal property opened and partly administered by the veterinarian or by an assistant under his or her direction, and taken by the customer for further administration by the customer to the animal, provided the charge for the item is separately stated on the invoice.

(i) The gross income derived from veterinary services includes the amount paid by a customer for any drug, medicine, apparatus, appliance, or supply administered by the veterinarian or by an assistant under his or her direction, even when the charge is separately stated on the invoice from charges for other veterinary services.

(ii) The service and other activities B&O tax applies to the gross income derived from grooming, boarding, training, artificial insemination, stud services, or other services provided to live animals. However, if the person providing these services also sells tangible personal property to a consumer for a separate and distinct charge, the charge made for the tangible personal property is subject to the retailing classification of B&O tax.

(b) **Retailing.** The retailing classification of B&O tax applies to the gross income from the sale of drugs, medicines, or other substances or items of personal property to consumers when the sale is not part of veterinary services. The retailing classification applies only when the veterinarian does not administer, or only administers part of the drug, medicine, or other substance or item of personal property to the animal with further administration to be completed by the customer. Adequate records must be kept by the veterinarian to distinguish drugs, medicines, or other substances or items of personal property that are administered as part of veterinary services from those that are sold at retail. The retailing classification also applies to gross income from the sale of tangible personal property for which there is a separate and distinct charge, when sold by persons providing grooming, boarding, training, artificial insemination, stud services, or other services for live animals.

(3) **Retail sales tax.** The retail sales tax applies to all the retail sales identified under subsection (2) of this section, unless a specific exemption applies.

(a) **Sales to veterinarians and others who provide services to live animals.** Sales of tangible personal property to veterinarians for use or consumption by them in performing veterinary services are retail sales upon which the retail sales tax must be collected. Such sales include, among others, sales

of medicines, bandages, splints and other supplies primarily for use by veterinarians in performing their professional services. Sales of tangible personal property to persons who provide grooming, boarding, training, artificial insemination, stud services, or other services for live animals for use or consumption by those persons in performing their services are also retail sales upon which the retail sales tax must be collected.

Sales to veterinarians and others who purchase tangible personal property for the purpose of resale in the regular course of business without intervening use by the buyer are sales at wholesale, and not subject to the retail sales tax. The buyer must present the seller with a resale certificate for purchases made before January 1, 2010, or a reseller permit for sales made on or after January 1, 2010, to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(b) **Sales to consumers.** Tangible personal property sold by a veterinarian to a consumer that is carried away by or left with the consumer is a retail sale and the retail sales tax must be collected. Items of personal property include those that the veterinarian may have opened and used for therapy but were taken by the consumer to complete the therapy. The tax applies whether the tangible personal property was sold at the time the professional services were performed or was sold subsequently, provided the charge for the item is separately stated. Sales to a consumer of tangible personal property by a person who provides other than veterinary services to live animals and who separately states the charges, are subject to retail sales tax and the retail sales tax must be collected. (See WAC 458-20-210 for additional information regarding sales to farmers.)

(c) **Exemptions.** A retail sales tax exemption is available for sales of feed for purebred livestock used for breeding purposes, provided the seller obtains a completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions certificate from the buyer. Also exempt are sales of semen for use in the artificial insemination of livestock. These sales remain subject to the retailing B&O tax. (See WAC 458-20-210 for additional information regarding exemptions for farmers.)

(4) **Use tax.** The use tax complements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer of any tangible personal property purchased at retail, where the user has not paid retail sales tax with respect to the purchase of the property used. (See also WAC 458-20-178.) If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the retail sales or use tax directly to the department unless the purchase and/or use is exempt from tax. Complementary use tax exemptions are available for the use of those items identified in subsection (3)(c) of this section. Veterinarians and others who provide services to live animals are required to pay use tax on any samples that they acquire or give away unless retail sales tax or use tax has been previously paid on these samples.

(5) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of other situations must be determined after a review of all of the facts and circumstances.

(a) A dog owner brings her dog to a veterinarian for professional services. The dog has multiple wounds and a broken leg. The veterinarian sets the broken bone and uses a cast and other appropriate therapeutic medicines on the dog in the course of treatment. The veterinarian also applies some salve to the wounds and gives the remainder of the salve to the dog's owner for application over the next few days. The veterinarian segregates the charges for the veterinary services, including the cast materials, and the medicines. The charge for the salve is also separately stated on the billing invoice. The gross income for the veterinary services is subject to the service and other activities B&O tax classification. This includes the charges for the cast materials and the medicines. The charge for the salve is considered a retail sale, and subject to the retailing B&O and retail sales taxes. If the veterinarian had previously paid sales or use tax on the salve, he or she is allowed a tax paid at source deduction. (See also the discussion of tax paid at source deductions in WAC 458-20-102.)

(b) AB boards other person's horses for a fee. When AB bills the customer, AB separately lists the charges for the boarding services and the feed. The gross income received by AB for boarding services is subject to B&O tax under the service classification. The charges for the feed are subject to the retailing B&O and retail sales taxes. However, a retail sales tax exemption is available for any sales of feed for purebred livestock, if the livestock is used for breeding purposes and AB obtains a completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions certificate from the customer.

(c) CD trains and boards dogs for various lengths of time. CD bills the customer a lump sum amount for the training and boarding, including feed for the dogs. The gross income received by CD is subject to B&O tax under the service classification. CD must pay retail sales tax or use tax on the feed it purchases for the dogs.

(d) EF is a farrier and shoes horses for others. When EF performs this service, he lists a separate charge on the invoice for the horseshoes. The charge for the horseshoeing service is subject to B&O tax under the service classification, and the separate charge for the horseshoes is subject to the retailing B&O and retail sales taxes. EF's purchases of the horseshoes are purchases for resale and not subject to the retail sales tax.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-070, § 458-20-222, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 99-08-033, § 458-20-222, filed 3/31/99, effective 5/1/99; WSR 83-08-026 (Order ET 83-1), § 458-20-222, filed 3/30/83; Order ET 70-3, § 458-20-222 (Rule 222), filed 5/29/70, effective 7/1/70.]

WAC 458-20-223 Persons performing contracts on the basis of time and material, or cost-plus-fixed-fee.

Business and Occupation Tax

Such persons are subject to business tax in accordance with the principles laid down in the department of revenue's published rules, as follows:

As to manufacturing or processing for hire, WAC 458-20-136;

As to constructing and repairing of new or existing buildings, WAC 458-20-170;

As to building or improving of publicly owned roads, etc., WAC 458-20-171;

As to contracts involving only the grading and clearing of land, WAC 458-20-172;

As to service and other business activities, WAC 458-20-224.

The measure of the tax under each of the foregoing types of contracts is the amount of profit or fixed fee received, plus the amount of reimbursements or prepayments received on account of sales of materials and supplies, on account of labor costs, on account of taxes paid, on account of payments made to subcontractors, and on account of all other costs and expenses incurred by the contractor, plus all payments made by his principal direct to a creditor of the contractor in payment of a liability incurred by the latter.

Retail Sales Tax

The retail sales tax applies upon sales made to or by contractors to the extent set forth in said WAC 458-20-136, 458-20-170, 458-20-171, 458-20-172 and 458-20-224.

[Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order ET 83-1), § 458-20-223, filed 3/30/83; Order ET 70-3, § 458-20-223 (Rule 223), filed 5/29/70, effective 7/1/70.]

WAC 458-20-224 Service and other business activities. (1) Chapter 82.04 RCW imposes a tax upon every person for the privilege of engaging in business in this state. Persons engaged in the certain specifically named business activities are subject to a tax rate set out in the statute which is measured by value of products, gross sales or gross income, e.g.: Extracting, manufacturing, retailing, wholesaling, printing and publishing, and building and repairing of publicly owned streets and roads.

(2) Persons engaged in any business activity, other than or in addition to those for which a specific rate is provided in the statute, are taxable under a classification known as service and other business activities, and so designated upon return forms. In general, it includes persons rendering professional or personal services to persons (as distinguished from services rendered to personal property of persons) such as accountants, aerial surveyors and map makers, agents, ambulances, appraisers, architects, assayers, attorneys, automobile brokers, barbers, baseball clubs, beauty shop owners, brokers, chemists, chiropractors, collection agents, community television antenna owners, court reporters, dentists, detectives, employment agents, engineers, financiers, funeral directors, refuse collectors, hospital owners, janitors, kennel operators, laboratory operators, landscape architects, lawyers, loan agents, music teachers, oculists, orchestra or band leaders contracting to provide musical services, osteopathic physicians, physicians, real estate agents, school bus operators, school operators, sewer services other than collection, stenographers, warehouse operators who are not subject to other specific statutory tax classifications, teachers, theater operators, undertakers, veterinarians, and numerous other persons.

(3) It does not include persons engaged in the business of cleaning, repairing, improving, etc., the personal property of others, such as automobile, house, jewelry, radio, refrigerator and machinery repairmen, laundry or dry cleaners. Also, it does not include certain personal and professional services specifically included within the definition of the term "sale at retail" in RCW 82.04.050, such as amusement and recreation businesses of a participatory nature (see WAC 458-20-183); abstract, title insurance and escrow businesses, credit bureau businesses and automobile parking and storage garage businesses. Furthermore, it does not include persons who render services to others in the capacity of employees as distinguished from independent contractors. (See WAC 458-20-105.)

(4) Business and occupation tax. Persons engaged in any business activity, other than or in addition to those for which a specific rate is provided in chapter 82.04 RCW, are taxable under the service and other business activities classification upon gross income from such business.

(5) Persons engaged in a public service business taxable under chapter 82.16 RCW (see WAC 458-20-179) are exempt from business tax under chapter 82.04 RCW with respect to such businesses.

(6) Retail sales tax. The retail sales tax applies upon all sales of tangible personal property made to persons for use or consumption in performing a business activity which is taxable under the service and other business activities classification of chapter 82.04 RCW.

[Statutory Authority: RCW 82.32.300. WSR 86-18-069 (Order 86-16), § 458-20-224, filed 9/3/86; WSR 83-17-099 (Order ET 83-6), § 458-20-224, filed 8/23/83; WSR 83-07-032 (Order ET 83-15), § 458-20-224, filed 3/15/83; Order ET 70-3, § 458-20-224 (Rule 224), filed 5/29/70, effective 7/1/70.]

WAC 458-20-226 Landscape and horticultural services. (1) **Introduction.** This section provides tax reporting instructions for persons who provide landscape and horticultural services. This section does not apply to silvicultural activities or to horticultural services provided to farmers. Silviculture means the commercial production of timber and includes activities such as growing seed into seedlings, planting, fertilizer and pesticide application, pruning and thinning as provided to timber growers. Silvicultural activities are generally subject to the extracting B&O tax classification or the service and other business activities B&O tax classification. (See WAC 458-20-135 and 458-20-224.)

(2) **Retail landscape and horticultural services.** Landscape and horticultural services which are retail sales include:

(a) Grading, filling, leveling, planting, seeding, sodding, removing, cutting, trimming, pruning, mulching, aerating, applying chemicals, watering, and fertilizing to establish, promote, or control the growth of trees, shrubs, flowers, grass, ground cover and other flora for ornamentation or other nonagricultural purposes.

(b) The sale or rental of landscaping materials and the construction of sprinkling systems, walks, pools, fences, trellises, rockeries, and retaining walls.

(c) Cultivating fruits, flowers, and vegetables for consumers other than farmers.

(d) All tree trimming other than for farmers or persons engaged in silviculture. This includes all trimming for size,

shape, aesthetics, removal of diseased branches, and removal of limbs because they are too close to structures. It does not include tree trimming performed for public and private electric utilities or at the direction of electric utilities to keep power lines, distribution lines, or equipment free of tree branches or brush.

(3) **Nonretail landscape and horticultural services.** Landscape and horticultural services which are not retail sales include:

(a) Landscape design services performed by a landscape architect separate from a contract for landscape maintenance.

(b) Planting trees for farmers.

(c) Thinning or planting of trees for persons who are involved in the commercial production of timber. These are silvicultural activities and silvicultural activities are not considered to be horticultural or landscape maintenance activities. (See WAC 458-20-135 and 458-20-209.)

(d) Landscape services performed for municipal corporations or political subdivisions of the state on real property owned by those entities if the real property is used or held for public road purposes. (See WAC 458-20-171.)

(e) Horticultural services, including spraying and fertilizing, performed for farmers for agricultural purposes. See WAC 458-20-209 for examples of horticultural services performed for farmers.

(f) Pruning, trimming, repairing, removing, and clearing of trees and brush near electric transmission or distribution lines or equipment, if performed by or at the direction of an electric utility. The removing and clearing of trees includes the stump removal by grinding, digging, or any other means, if performed by or at the direction of an electric utility. These are retail activities when not performed by or at the direction of an electric utility.

(4) **Business and occupation tax.** The business and occupation (B&O) tax applies as follows.

(a) **Retailing.** The gross income from landscape and horticultural services which are retail sales and which are performed for consumers is taxable under the retailing classification.

(b) **Wholesaling.** The gross income from services which are retail sales and which are performed for other contractors for resale is taxable under the wholesaling classification.

(c) **Service.** The gross income from horticultural services provided to farmers is taxable under the service and other activities classification. This tax classification also applies to income received from pruning, tree trimming, removing and clearing of trees and brush near electric lines, if performed by or at the direction of an electric utility. Income from services performed by landscape architects is also subject to the service and other activities classification. RCW 82.04.290.

(d) **Public road construction.** Persons who perform landscape services for municipal corporations or political subdivisions of the state on real property owned by those entities are taxable under the public road construction B&O tax classification, but only if the real property is used or held for public road purposes.

(e) **Government contracting.** This classification applies to persons engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures for the United States, or a city or county housing authority created under chapter 35.82 RCW. This classification would include the construction or maintenance of items such as walls, fences, walks, pools and other structures. This classification does not include the planting of lawns or trees or the cutting of grass or tree trimming performed for these customers. These activities are subject to the retailing classification.

(5) **Retail sales and use tax.** Landscape gardeners and horticulturists, except horticulturists performing services for farmers, must generally collect and report the retail sales tax upon the full contract price when performing landscaping or horticultural services for consumers. For purposes of collecting the local option retail sales tax, the sale takes place where the service is performed. See WAC 458-20-145. The retail sales tax does not apply to charges to the United States for landscape services, including landscape maintenance services, and sellers may take a deduction from the retail sales tax classification in reporting those sales which are taxable under the retailing B&O tax classification.

(a) Persons performing a landscaping or horticultural service for a contractor for resale must provide a resale certificate for sales made before January 1, 2010, or a reseller permit for sales made on or after January 1, 2010, to document the wholesale nature of any sale as provided by WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by a seller for five years from the date of last use or December 31, 2014.

(b) Landscape gardeners and horticulturists must pay the retail sales tax to their vendors when purchasing tools, equipment, and supplies which are not resold, either directly or as a component part of the finished work. They must pay deferred sales or use tax directly to the department upon the value of any such property that was purchased or acquired without payment of Washington retail sales tax.

(c) Plants, shrubs, trees, sod, seed, chemicals, fertilizer, peat moss, sprinkler systems, rocks, building materials and any other tangible personal property which becomes a part of the finished work may be purchased for resale, except items used in providing horticultural services for farmers and items used in performing public road construction, government contracting, or services for timber growers.

(d) Retail sales tax or use tax is due with respect to items purchased by horticulturists for use in performing services for farmers. (See also WAC 458-20-209.)

(e) Retail sales tax or use tax is due with respect to items purchased for use in performing services for timber growers or which are taxable as either public road construction or government contracting. This includes items such as sod, seed, trees, building materials, fertilizers, spray materials, etc.

(f) The retail sales tax does not apply to the charge made by persons performing tree trimming near electric transmission or distribution lines, but only if the work is performed at the direction of an electric utility. Persons performing these services must pay retail sales or use tax on all materials, supplies, tools, and equipment used in performing the service.

(6) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of

other situations must be determined after a review of all facts and circumstances.

(a) John Doe, a landscaper, was hired by a city to maintain the landscaping around the buildings at the city's municipal golf courses. He must collect and report the retail sales tax and pay retailing B&O tax on the full contract amount.

(b) John Doe purchased several plants, some fertilizer, and insect spray to use in landscaping the golf course. He also purchased some solvent and mineral oil to clean and maintain some of his landscaping tools. His purchases of the plants, fertilizer and insect spray are purchases for resale. He must pay retail sales tax to his vendors on his purchases of the solvent and mineral oil.

(c) Landscaping company provides complete landscaping services including landscape design by a licensed landscape architect, installation, and maintenance. Landscaping charged Jane Smith two hundred dollars for a landscaping plan for her new home. She planned to purchase the plants and do the landscaping work herself. Landscaping must report B&O tax on the charge for the design service at the service and other activities classification rate.

(d) Landscaping company entered into a contract to landscape the yard for a client's new home. The company must collect and report retail sales tax and pay retailing B&O on the full contract amount, even though part of Landscaping's services included drawing a landscaping plan.

(e) Landscaping company entered into a two-phase contract with a county. Phase one required the company to plant trees and shrubs and put in a sprinkling system as part of a public road project. The sprinkler system is located in the public road right of way. The contract provided Landscaping would receive five hundred thousand dollars for phase one of the project. Phase two provided that Landscaping would maintain the trees and shrubs for a period of five years. The contract provided for payments of four thousand dollars per month plus costs for fertilizer and spray for maintaining the planted strips.

(i) Phase one is part of public road construction and Landscaping is taxable under the public road construction classification upon the five hundred thousand dollars received for phase one. The company must pay sales tax when purchasing the trees and shrubs and materials for the sprinkling system for use in phase one of the project. See WAC 458-20-171 for the tax liability for public road construction.

(ii) Phase two for the maintenance of the completed project is also public road construction. This is not a retail sale because the work is performed for a municipal corporation or political subdivision of the state on land owned by that entity and which is being used for public road purposes. See RCW 82.04.190.

Landscaping will owe B&O tax under the public road construction classification and must pay retail sales or use tax on any items used in performing this work, including purchases of fertilizers, chemicals and other materials.

(f) John Doe operates a tree trimming business and has a contract with a public utility district (PUD) to trim trees along the PUD's power lines. Some of these trees are on private property with the PUD obtaining the permission of the owners to trim the trees. Some trees are also located on land for which the PUD has an easement, including along public road right of ways. This tree trimming is not a retail sale, but taxable under the service and other activities classification. This includes trimming performed along the road right of way. The property on the road right of way is not owned by the PUD for whom the work is being performed. The easement is not for use as a public road and as such the tree trimming is not public road construction.

(g) John Doe provides a tree trimming service to his residential customers. The tree trimming is performed at the direction of the residential customer to remove diseased limbs, limbs too close to the house, limbs which are a safety hazard because of their proximity to power lines, and limbs which are objectionable to the desired shape of the tree. All of this tree trimming is a retail activity, regardless of the specific reason for cutting the limbs.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-070, § 458-20-226, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 99-09-013, § 458-20-226, filed 4/13/99, effective 5/14/99. Statutory Authority: RCW 82.32.300 and to implement RCW 82.04.050. WSR 96-05-080, § 458-20-226, filed 2/21/96, effective 3/23/96. Statutory Authority: RCW 82.32.300 and 82.04.050 (3)(e). WSR 94-23-053, § 458-20-226, filed 11/10/94, effective 12/11/94. Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order ET 83-1), § 458-20-226, filed 3/30/83; Order ET 70-3, § 458-20-226 (Rule 226), filed 5/29/70, effective 7/1/70.]

WAC 458-20-227 Subscriber television services. (1) **Definitions.** The following definitions apply to this section.

(a) "Subscriber television" refers to all businesses providing television programming to consumers for a fee. It includes, but is not limited to, cable television and satellite television. Subscriber television often transmits to its customers special channels offering a variety of programming such as movies, sporting events, children's entertainment, news and other informational services.

(b) "Fee" includes the amount paid by the subscriber to receive the subscription television service. Generally, the fee consists of an amount for installation and a monthly charge for maintenance or service.

(2) **Business and occupation tax.** Persons engaging in the business of subscriber television are subject to the business and occupation tax as follows:

(a) Gross income derived from the charge made for installation and the monthly rental or service fee is subject to tax under the classification service and other activities. (See WAC 458-20-224.)

(b) Gross income derived from advertising revenues is subject to tax under the classification radio and television broadcasting. (See WAC 458-20-241.)

(c) No deductions from gross income may be taken for affiliate fees, video service fees, satellite fees, copyright fees, or any other amounts paid to other firms for special programming provided to subscribers.

(3) **Use tax.** Persons engaging in the business of subscriber television are subject to retail sales tax or use tax on all purchases of tangible personal property utilized or required in providing service to subscribers. (See WAC 458-20-178.)

[Statutory Authority: RCW 82.32.300. WSR 91-05-039, § 458-20-227, filed 2/13/91, effective 3/16/91; WSR 83-08-026 (Order ET 83-1), § 458-20-227, filed 3/30/83; Order ET 70-3, § 458-20-227 (Rule 227), filed 5/29/70, effective 7/1/70.]

WAC 458-20-228 Returns, payments, penalties, extensions, interest, stay of collection. (1) **Introduction.** This section discusses the responsibility of taxpayers to pay their tax by the appropriate due date, and the acceptable methods of payment. It discusses the interest and penalties that are imposed by law when a taxpayer fails to pay the correct amount of tax by the due date. It also discusses the circumstances under which the law allows the department of revenue (department) to waive interest or penalties.

(a) **Where can I get my questions answered, or learn more about what I owe and how to report it?** Washington's tax system is based largely on voluntary compliance. Taxpayers have a legal responsibility to become informed about applicable tax laws, to register with the department, to seek instruction from the department, to file accurate returns, and to pay their tax liability in a timely manner (chapter 82.32A RCW, Taxpayer rights and responsibilities). The department has a taxpayer services program to provide taxpayers with accurate tax-reporting assistance and instructions. The department staffs local district offices, maintains a toll-free question and information phone line (1-800-647-7706), provides information and electronic forms on the internet (http://dor.wa.gov), and conducts free public workshops on tax reporting. The department also publishes notices, interpretive statements, and sections discussing important tax issues and changes.

(b) **What is electronic filing (or e-file), and how can it help me?** E-file is an internet-based application that provides a secure and encrypted way for taxpayers to file and pay many of Washington state's business related excise taxes online. The e-file system automatically performs math calculations and checks for other types of reporting errors. **Using e-file to file electronically will help taxpayers avoid penalties and interest related to unintentional underpayments and delinquencies.** E-file can be accessed on the department's internet site http://dor.wa.gov. Open the page for electronic filing. The page contains additional links to pages answering frequently asked questions, and explains the registration process for e-file. Taxpayers may also call the department's toll-free electronic filing help desk for more information, during regular business hours.

All taxpayers are required to electronically file and electronically pay their taxes unless the department waives the requirement for good cause, or the taxpayer has an assigned reporting frequency that is less than quarterly. The requirement for electronic filing and payment also includes taxpayers who once met the criteria for being assigned to a monthly reporting frequency, but who since have been authorized by the department to file and remit taxes on a less frequent basis. For more detailed information on the requirement and exceptions for electronic filing (e-file) and electronic payment (e-pay), see WAC 458-20-22802 (Electronic filing and payment).

(c) **Index of subjects addressed in this section:**

Topic—Description	See subsection
Where can I get my questions answered, or learn more about what I owe and how to report it? - By phone or online, the department provides a number of free and easy resources to help you find answers.	(1)(a) of this section, (see above)
What is electronic filing (or e-file), and how can it help me? - E-filing guides you through the return and helps you avoid many common mistakes.	(1)(b) of this section, (see above)
Do I need to file a return? - How do I access returns and file them?	(2) of this section
What methods of payment can I use? - What can I use to pay my taxes?	(3) of this section
When is my tax payment due? - Different reporting frequencies can have different due dates. What if the due date is a weekend or a holiday? If my payment is in the mail on the due date, am I late or on time?	(4) of this section
Penalties - What types of penalty exist? How big are they? When do they apply?	(5) of this section
Statutory restrictions on imposing penalties - More than one penalty can apply at the same time, but there are restrictions. Which penalties can be combined?	(6) of this section
Interest - In most cases interest is required. What interest rates apply? How is interest applied?	(7) of this section
Application of payment towards liability - Interest, penalties, and taxes are paid in a particular order. If my payment doesn't pay the entire liability, how can I determine what parts have been paid?	(8) of this section
Waiver or cancellation of penalties - I think I was on time, or I had a good reason for not paying the tax when I should have. What reasons qualify me for a waiver of penalty? How can I get a penalty removed?	(9) of this section
Waiver or cancellation of interest - Interest will only be waived in two limited situations. What are they?	(10) of this section
Interest and penalty waiver for active duty military personnel - Is a majority owner of the business on active duty with the military? BOTH interest and penalty can be waived if all the statutory requirements are met. What are the requirements?	(11) of this section
Stay of collection - Revenue will sometimes temporarily delay collection action on unpaid taxes. When can this happen? Can I request that revenue delay collection?	(12) of this section

Topic—Description	See subsection
Extensions - Can I get an extension of my due date? How long does an extension last? A special extension may be available if the governor proclaims a state of emergency in your area.	(13) of this section

(2) **Do I need to file a return?** A "return" is defined as any paper or electronic document a person is required to file by the state of Washington in order to satisfy or establish a tax or fee obligation which is administered or collected by the department, and that has a statutorily defined due date. RCW 82.32.045.

(a) Electronic returns and payments are to be filed with the department by every person liable for any tax which the department administers and/or collects, except for the taxes imposed under chapter 82.24 RCW (Tax on cigarettes), which are collected through sales of revenue stamps. Returns must be filed through the electronic filing (e-file) system (see subsection (1)(b) of this section), or by other means if approved by the department.

E-file taxpayers do not receive paper returns. However, if an e-file taxpayer specifically requests it, the department will send an electronic reminder for each upcoming return as the time to file approaches.

(b) Taxpayers whose accounts are placed on an "active nonreporting" status do not automatically receive a tax return and must request a return, or register to file by e-file, if they no longer qualify for this reporting status. (See WAC 458-20-101, Tax registration, for an explanation of the active nonreporting status.)

(c) Some consumers may not be required to register with the department and obtain a tax registration endorsement. (Refer to WAC 458-20-101 for detailed information about tax registration and when it is required.) But even if they do not have to be registered, consumers may be required to pay use tax directly to the department if they have purchased items without paying Washington's sales tax. An unregistered consumer must report and pay their use tax liability directly to the department. Use tax can be reported and paid on a "Consumer Use Tax Return" or the consumer can create an online account at the department's web site to conveniently report and pay use tax electronically. Consumer use tax returns are available from the department at any of the local district offices. A consumer may also call the department's toll free number 1-800-647-7706 to request a consumer use tax return by fax or mail. Finally, the consumer use tax return is available for download from the department's internet site at http://dor.wa.gov, along with a number of other returns and forms which are available there.

The interest and penalty provisions of this rule may apply if use tax is not paid on time. Unregistered consumers should refer to WAC 458-20-178 (Use tax) for an explanation of their tax reporting responsibilities.

(3) **What methods of payment can I use?** The law requires taxpayers to file and pay their taxes electronically. There are two electronic payment methods: Electronic funds transfer (EFT) and credit card. The department may waive the electronic payment requirement for any taxpayer or class of taxpayers, for good cause or for whom the department has assigned a reporting frequency that is less than quarterly. Waivers may be temporary or permanent, and may be made on the department's own motion. (See WAC 458-20-22802 for more information on electronic filing and payment.)

(a) For taxpayers not required to pay electronically, payment may be made by cash, check, cashier's check, or money order.

(b) Payment by cash should only be made at an office of the department to ensure that the payment is safely received and properly credited.

(c) Payment may be made by uncertified bank check, but if the check is not honored by the financial institution on which it is drawn, the taxpayer remains liable for the payment of the tax, as well as any applicable interest and penalties. RCW 82.32.080. The department may refuse to accept any check which, in its opinion, would not be honored by the financial institution on which that check is drawn. If the department refuses a check for this reason the taxpayer remains liable for the tax due, as well as any applicable interest and penalties.

(4) **When is my tax payment due?** RCW 82.32.045 provides that payment of the taxes due with the excise tax return must be made monthly and within twenty-five days after the end of the month in which taxable activities occur, unless the department assigns the taxpayer a longer reporting frequency. Payment of taxes due with returns covering a longer reporting frequency is due on or before the last day of the month following the period covered by the return. (For example, payment of the tax liability for a first quarter tax return is due on April 30th.) WAC 458-20-22801 (Tax reporting frequency—Forms) explains the department's procedure for assigning a quarterly or annual reporting frequency.

(a) If the date for payment of the tax due on a tax return falls upon a Saturday, Sunday, or legal holiday, the filing will be considered timely if performed on the next business day. RCW 1.12.070 and 1.16.050.

(b) When a taxpayer is not required to electronically file and pay taxes and chooses to file or pay taxes through the U.S. Postal Service, the postmark date as shown by the post office cancellation mark stamped on the envelope will be considered conclusive evidence by the department in determining if a tax return or payment was timely filed or received. RCW 1.12.070. It is the responsibility of the taxpayer to mail the tax return or payment sufficiently in advance of the due date to assure that the postmark date is timely.

(c) Taxpayers required to file and pay taxes electronically should refer to WAC 458-20-22802 (Electronic filing and payment) for more information regarding electronic filing (e-file), electronic payment (e-pay) due dates, and when electronic payments are considered received.

(d) If a taxpayer suspects that it will not be able to file and pay by the coming due date, it may be able to obtain an extension of the due date to temporarily avoid additional penalties. Refer to subsection (12) of this section for details on requesting an extension.

(5) **Penalties.** Various penalties may apply as a result of the failure to correctly or accurately compute the proper tax liability, or to timely pay the tax. Separate penalties may apply and be cumulative for the same tax. Interest may also apply if any tax has not been paid when it is due, as explained

in subsection (7) of this section. (The department's electronic filing system (e-file) can help taxpayers avoid additional penalties and interest. See subsection (1)(b) of this section for more information.)

The penalty types and rates addressed in this subsection are:

Penalty Type—Description	Penalty Rate	See subsection
Late payment of a return - Five percent added when payment is not received by the due date, and increases if the tax due remains unpaid.	5/15/25%	(5)(a) of this section
Unregistered taxpayer - Five percent added against unpaid tax when revenue discovers a taxpayer who has taxable activity but is not registered.	5%	(5)(b) of this section
Assessment - Five percent added when a tax assessment is issued if the tax was "substantially underpaid," and increases if the tax due remains unpaid.	5/15/25% or 0/15/25%	(5)(c) of this section
Issuance of a warrant - Ten percent added when a warrant is issued to collect unpaid tax, and does not require actual filing of a lien.	10%	(5)(d) of this section
Disregard of specific written instructions - Ten percent added when the department has provided specific, written reporting instructions and tax is underpaid because the instructions are not followed.	10%	(5)(e) of this section
Evasion - Fifty percent added when tax is underpaid and there is an intentional effort to hide that fact.	50%	(5)(f) of this section
Misuse of resale certificates or a reseller permit - Fifty percent added against unpaid sales tax when a buyer uses a resale certificate or reseller permit, but should not have.	50%	(5)(g) of this section
Failure to remit sales tax to seller - Ten percent added against sales tax when the department proceeds directly against a buyer who fails to pay sales tax to the seller as part of a sales taxable retail purchase.	10%	(5)(h) of this section
Failure to obtain the contractor's unified business identifier (UBI) number - A two hundred fifty dollar maximum penalty (does not require any tax liability) when specified businesses hire certain contractors but do not obtain and keep the contractor's UBI number.	$250 (max)	(5)(i) of this section
Disregarded transaction - A thirty-five percent penalty of the additional tax found to be due as a result of engaging in a disregarded transaction.	35%	(5)(j) of this section

(a) **Late payment of a return.** RCW 82.32.090(1) imposes a five percent penalty if the tax due on a taxpayer's return is not paid by the due date. A total penalty of fifteen percent is imposed if the tax due is not paid on or before the last day of the month following the due date, and a total penalty of twenty-five percent is imposed if the tax due is still not paid on or before the last day of the second month following the due date. The minimum penalty for late payment is five dollars.

Various sets of circumstances can affect how the late payment of a return penalty is applied. See (a)(i) through (iii) of this subsection for some of the most common circumstances.

(i) **Will I avoid the penalty if I file my return without the payment?** The department may refuse to accept any return which is not accompanied by payment of the tax shown to be due on the return. If the return is not accepted, the taxpayer is considered to have failed or refused to file the return. RCW 82.32.080. Failure to file the return can result in the issuance of an assessment for the actual, or an estimated, amount of unpaid tax. Any assessment issued may include an assessment penalty. (See RCW 82.32.100 and (c) of this subsection for details of when and how the assessment penalty applies.) If the tax return is accepted without payment and payment is not made by the due date, the late payment of return penalty will apply.

(ii) **What if my account is given an active nonreporting status, but I later have taxes I need to report and pay?** WAC 458-20-101 provides information about the active nonreporting status available for tax reporting accounts. In general, the active nonreporting status allows persons, under certain circumstances, to engage in business activities subject to the Revenue Act without filing excise tax returns. Persons placed on an active nonreporting status by the department are required to timely notify the department if their business activities no longer meet the conditions to be in active nonreporting status. One of the conditions is that the person is not required to collect or pay a tax the department is authorized to collect. The late payment of return penalty will be imposed if a person on active nonreporting status incurs a tax liability that is not paid by the due date for taxpayers that are on an annual reporting basis (i.e., the last day of January next succeeding the year in which the tax liability accrued).

(iii) **I didn't register my business with the department when I started it, and now I think I was supposed to be paying taxes! What should I do?** You should fill out and send in a business license application to get your business registered. It is important for you to register before the department identifies you as an unregistered taxpayer and contacts you about your business activities. (WAC 458-20-101 provides information about registering your business.) Except as noted below, if a person engages in taxable activities while unregistered, but then registers prior to being contacted by the department, the registration is considered voluntary. When a person voluntarily registers, the late payment of return penalty does not apply to those specific tax-reporting periods representing the time during which the person was unregistered.

(A) However, even if the person has voluntarily registered as explained above, the late payment of return penalty will apply if the person:

(I) Collected retail sales tax from customers and failed to remit it to the department; or

(II) Engaged in evasion or misrepresentation with respect to reporting tax liabilities or other tax requirements; or

(III) Engaged in taxable business activities during a period of time in which the person's previously open tax reporting account had been closed.

(B) Even though other circumstances may warrant retention of the late payment of return penalty, if a person has voluntarily registered, the unregistered taxpayer penalty (see (b) of this subsection) will not be due.

(b) **Unregistered taxpayer.** RCW 82.32.090(4) imposes a five percent penalty on the tax due for any period of time where a person engages in a taxable activity and does not voluntarily register prior to being contacted by the department. "Voluntarily register" means to properly complete and submit a master application to any agency or entity participating in the unified business identifier (UBI) program for the purpose of obtaining a UBI number, all of which is done before any contact from the department. For example, if a person properly completes and submits a business license application to the department of labor and industries for the purpose of obtaining a UBI number, and this is done prior to any contact from the department of revenue, the department considers that person to have voluntarily registered. A person has not voluntarily registered if a UBI number is obtained by any means other than submitting a properly completed business license application. WAC 458-20-101 (Tax registration and tax reporting) provides additional information regarding the UBI program.

(c) **Assessment.** If the department issues an assessment for substantially underpaid tax, a five percent penalty will be added to the assessment when it is issued. If any tax included in the assessment is not paid by the due date, or by any extended due date, the penalty will increase to a total of fifteen percent against the amount of tax that remains unpaid. If any tax included in the assessment is not paid within thirty days of the original or extended due date, the penalty will further increase to a total of twenty-five percent against the amount of tax that remains unpaid. The minimum for this penalty is five dollars. RCW 82.32.090(2).

(i) As used in this section, "substantially underpaid" means that:

(A) The taxpayer has paid less than eighty percent of the amount of tax determined by the department to be due for all of the types of taxes included in, and for the entire period of time covered by, the department's examination; and

(B) The amount of underpayment is at least one thousand dollars. If both of these conditions are true when an assessment is issued, it will include the initial five percent assessment penalty. If factual adjustments are made after issuance of an assessment, and those adjustments change whether a taxpayer paid less than eighty percent of the tax due, the department will reevaluate imposition of the original five percent penalty.

(ii) If the initial five percent assessment penalty is included with an assessment when it is issued, the penalty is calculated against the total amount of tax that was not paid when originally due and payable (see RCW 82.32.045). Audit payments made prior to issuance of an assessment will be applied to the assessment after calculation of the initial five percent assessment penalty. At the discretion of the department, preexisting credits or amendments paid prior to an audit or unrelated to the scope of the assessment may be applied before the five percent assessment penalty is calculated, reducing the amount of the penalty. Additional assessment penalty is assessed against the amount of tax that remains unpaid at that particular time, after payments are applied to the assessment.

(d) **Issuance of a warrant.** If the department issues a tax warrant for the collection of any fee, tax, increase, or penalty, an additional penalty will immediately be added in the amount of ten percent of the amount of the tax due, but not less than ten dollars. RCW 82.32.090(3). Refer to WAC 458-20-217 for additional information on the application of warrants and tax liens.

(e) **Disregard of specific written instructions.** If the department finds that all or any part of a deficiency resulted from the disregard of specific written instructions as to reporting of tax liabilities, an additional penalty of ten percent of the additional tax found due will be imposed because of the failure to follow the instructions. RCW 82.32.090(5).

(i) **What is "disregard of specific written instructions"?** A taxpayer is considered to have received specific written instructions when the department has informed the taxpayer in writing of its tax obligations and specifically advised the taxpayer that failure to act in accordance with those instructions may result in this penalty being imposed. The specific written instructions may be given as a part of a tax assessment, audit, determination, or closing agreement. The penalty applies when a taxpayer does not follow the specific written instructions, resulting in underpayment of the tax due. The penalty may be applied only against the taxpayer given the specific written instructions. However, the taxpayer will not be considered to have disregarded the instructions if the taxpayer has appealed the subject matter of the instructions and the department has not issued its final instructions or decision.

(ii) **What if I try to follow the written instructions, but I still don't get it quite right?** The penalty will not be applied if the taxpayer has made a good faith effort to comply with specific written instructions.

(f) **Evasion.** If the department finds that all or any part of the deficiency resulted from an intent to evade the tax due, a penalty of fifty percent of the additional tax found to be due will be added. RCW 82.32.090(7). The evasion penalty is imposed when a taxpayer knows a tax liability is due but attempts to escape detection or payment of the tax liability through deceit, fraud, or other intentional wrongdoing. An intent to evade does not exist where a deficiency is the result of an honest mistake, miscommunication, or the lack of knowledge regarding proper accounting methods. The department has the burden of showing the existence of an intent to evade a tax liability through clear, cogent and convincing evidence.

(i) **Evasion penalty only applies to the specific taxes that a taxpayer intended to evade.** To the extent that the evasion involved only specific taxes, the evasion penalty will be added only to those taxes. The evasion penalty will not be applied to those taxes which were inadvertently underpaid. For example, if the department finds that the taxpayer intentionally understated the purchase price of equipment in reporting use tax and also inadvertently failed to collect or remit the sales tax at the correct rate on retail sales of merchandise, the evasion penalty will be added only to the use tax deficiency and not the sales tax.

(ii) **What actions may establish an intent to evade?** The following is a nonexclusive list of actions that are generally considered to establish an intent to evade a tax liability. This list should only be used as a general guide. A determination of whether an intent to evade exists may be ascertained only after a review of all the facts and circumstances.

(A) The use of an out-of-state address by a Washington resident to register property to avoid a Washington excise or use tax, when at the time of registration the taxpayer does not reside at the out-of-state address on a more than temporary basis. Examples of such an address include, but are not limited to, the residence of a relative, mail forwarding or post office box location, motel, campground, or vacation property;

(B) The willful failure of a seller to remit retail sales taxes collected from customers to the department; and

(C) The alteration of a purchase invoice or misrepresentation of the price paid for property (e.g., a used vehicle) to reduce the amount of tax owing.

(g) **Misuse of resale certificates, reseller permits, and other documents.** Any buyer who uses a resale certificate, a reseller permit, or other documentation authorized under RCW 82.04.470, to purchase items or retail services without payment of sales tax, and who is not entitled to use the certificate, permit, or other documentation for the purchase, will be assessed a penalty of fifty percent of the tax due. RCW 82.32.291. The penalty can apply even if there was no intent to evade the payment of the tax. For more information concerning this penalty or the proper use of resale certificates, reseller permits, and other documentation, refer to WAC 458-20-102 (Resale certificates).

(h) **Failure to remit sales tax to seller.** The department may assert an additional ten percent penalty against a buyer who has failed to pay the seller the retail sales tax on taxable purchases, if the department proceeds directly against the buyer for the payment of the tax. This penalty is in addition to any other penalties or interest prescribed by law. RCW 82.08.050.

(i) **Failure to obtain the contractor's unified business identifier (UBI) number.** If a person who is liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW contracts with another person or entity for work subject to chapter 18.27 RCW (Registration of contractors) or chapter 19.28 RCW (Electricians and electrical installations), that person must obtain and preserve a record of the UBI number of the person or entity performing the work. A person failing to do so is subject to the public works contracting restrictions in RCW 39.06.010 (Contracts with unregistered or unlicensed contractors prohibited), and a penalty determined by the director, but not to exceed two hundred and fifty dollars. RCW 82.32.070(2).

(j) **Engaging in disregarded transactions.** Chapter 23 (2ESSB 6143), Laws of 2010 1st sp. s. imposes a thirty-five percent penalty for engaging in a disregarded transaction as defined in RCW 82.32.655(3). See RCW 82.32.090(6), 82.32.655, and 82.32.660.

(6) **Statutory restrictions on imposing penalties.** Depending on the circumstances, the law may impose more than one type of penalty on the same tax liability. However, those penalties are subject to the following restrictions:

(a) The penalties imposed for the late payment of a return, unregistered taxpayer, assessment, and issuance of a warrant (see subsection (5)(a) through (d) of this section) may be applied against the same tax concurrently, each unaffected by the others, up to their combined maximum rates. Application of one or any combination of these penalties does not prohibit or restrict full application of other penalties authorized by law, even when they are applied against the same tax. RCW 82.32.090(8).

(b) The department may impose either the evasion penalty (subsection (5)(f) of this section) or the penalty for disregarding specific written instructions (subsection (5)(e) of this section), but may not impose both penalties on the same tax. RCW 82.32.090(9). The department also will not impose the penalty for the misuse of a resale certificate (subsection (5)(g) of this section) in combination with either the evasion penalty or the penalty for disregarding specific written instructions on the same tax.

(c) The penalty provided in subsection (5)(j) of this section may be assessed together with any other applicable penalties provided in this section on the same tax found to be due, except for the evasion penalty provided in subsection (5)(f) of this section.

(7) **Interest.** The department is required by law to add interest to assessments for tax deficiencies and overpayments. RCW 82.32.050 and 82.32.060. Interest accrued against an underpayment only applies to underpaid tax. (Refer to WAC 458-20-229 for a discussion of interest as it relates to refunds and WAC 458-20-230 for a discussion of the statute of limitations as applied to interest.)

(a) For interest imposed after December 31, 1998, interest will be added from the last day of the month following each calendar year included in a notice, or the last day of the month following the final month included in a notice if not the end of the calendar year, until the due date of the notice. However, for 1998 taxes only, interest may not begin to accrue any earlier than February 1, 1999, even if the last

period included in the notice is not at the end of calendar year 1998. If payment in full is not made by the due date of the notice, additional interest will be due until the date of payment. The rate of interest continues at the annual variable interest rates described below in (e) of this subsection. For information on interest imposed before December 31, 1998, see RCW 82.32.050.

(b) **How is interest applied to an assessment that includes underpaid tax from multiple years?** The following is an example of how the interest provisions apply. Assume that a tax assessment is issued with a due date of June 30, 2010. The assessment includes periods from January 1, 2008, through September 30, 2009.

(i) For calendar year 2008 tax, interest begins February 1, 2009, (from the last day of the month following the end of the calendar year). When the assessment is issued interest is computed through June 30, 2010, (the due date).

(ii) For the 2009 tax period ending with September 30, 2009, interest begins November 1, 2009, (from the last day of the month following the last month included in the assessment period). When the assessment is issued interest is computed through June 30, 2010, (the due date).

(iii) Interest will continue to accrue on any portion of the assessed taxes which remain unpaid after the due date, until the date those taxes are paid.

(c) **How is each year's interest rate determined?** The annual variable interest rate will be an average of the federal short-term rate as defined in 26 U.S.C. Sec. 1274(d) plus two percentage points. The rate for each new year will be computed by taking an arithmetical average to the nearest percentage point of the federal short-term rate, compounded annually. The average is calculated using the federal short-term rates from January, April, July of the calendar year immediately preceding the new year, and October of the previous preceding year, as published by the United States Secretary of the Treasury. The interest rate will be adjusted on the first day of January of each year.

(d) **How is the interest applied if an assessment includes some years that are underpaid and some that are overpaid?** If the assessment contains tax deficiencies in some years and overpayments in other years with the net difference being a tax deficiency, the interest rate for tax deficiencies will also be applied to the overpayments. (Refer to WAC 458-20-229 for interest on refunds.)

(8) **Application of payment towards liability.** The department will apply taxpayer payments in the following order:

- Interest,
- penalties,
- fees,
- other nontax amounts,
- tax, except spirits tax,
- spirits tax,

without regard to any direction of the taxpayer. RCW 82.32.080.

In applying a partial payment to a tax assessment, the payment will first be applied against the oldest tax liability. For purposes of RCW 82.32.145 (Limited liability business entity – Terminated, dissolved, abandoned, insolvent – Collection of unpaid trust fund taxes), it will be assumed that any payments applied to the tax liability will be first applied against any retail sales tax liability, and then to other trust fund tax liabilities. For example, an audit assessment is issued covering a period of two years, which will be referred to as "YEAR 1" (the earlier year) and "YEAR 2" (the most recent year). The tax assessment includes total interest and penalties for YEAR 1 and YEAR 2 of five hundred dollars, retail sales tax of four hundred dollars for YEAR 1, six hundred dollars retail sales tax for YEAR 2, two thousand dollars of other taxes for YEAR 1, and seven thousand dollars of other taxes for YEAR 2. The order of application of any payments will be first against the five hundred dollars of total interest and penalties, second against the four hundred dollars retail sales tax in YEAR 1, third against the two thousand dollars of other taxes in YEAR 1, fourth against the six hundred dollars retail sales tax of YEAR 2, and finally against the seven thousand dollars of other taxes in YEAR 2.

(9) **Waiver or cancellation of penalties.** RCW 82.32.105 authorizes the department to waive or cancel penalties under limited circumstances.

(a) **Circumstances beyond the control of the taxpayer.** The department will waive or cancel the penalties imposed under chapter 82.32 RCW upon finding that the underpayment of the tax, or the failure to pay any tax by the due date, was the result of circumstances beyond the control of the taxpayer. It is possible that a taxpayer will qualify for a waiver of one type of penalty, without obtaining a waiver for all penalties associated with a particular tax liability. Circumstances determined to be beyond the control of the taxpayer when considering a waiver of one type of penalty are not necessarily pertinent when considering a waiver of a different penalty type. For example, circumstances that qualify for waiver of a late payment of return penalty do not necessarily also justify waiver of the substantial underpayment assessment penalty. Refer to WAC 458-20-102 (Resale certificates) for examples of circumstances which are beyond the control of the taxpayer specifically regarding the penalty for misuse of a resale certificate or reseller permit found in RCW 82.32.291.

(i) A request for a waiver or cancellation of penalties should contain all pertinent facts and be accompanied by such proof as may be available. The taxpayer bears the burden of establishing that the circumstances were beyond its control and directly caused the late payment. The request should be made in the form of a letter; however, verbal requests may be accepted and considered at the discretion of the department. Any petition for correction of assessment submitted to the department's appeals division for waiver of penalties must be made within the period for filing under RCW 82.32.160 (within thirty days after the issuance of the original notice of the amount owed or within the period covered by any extension of the due date granted by the department), and must be in writing, as explained in WAC 458-20-100 (Appeals, small claims and settlements). Refund requests must be made within the statutory limitation period.

(ii) The circumstances beyond the control of the taxpayer must actually cause the late payment. Circumstances beyond the control of the taxpayer are generally those which are immediate, unexpected, or in the nature of an emergency. Such circumstances result in the taxpayer not having reasonable time or opportunity to obtain an extension of the due date or otherwise timely file and pay. Circumstances beyond

the control of the taxpayer include, but are not necessarily limited to, the following.

(A) The return payment was mailed on time but inadvertently sent to another agency.

(B) Erroneous written information given to the taxpayer by a department officer or employee caused the delinquency. A penalty generally will not be waived when it is claimed that erroneous oral information was given by a department employee. The reason for not canceling the penalty in cases of oral information is because of the uncertainty of the facts presented, the uncertainty of the instructions or information imparted by the department employee, and the uncertainty that the taxpayer fully understood the information given. Reliance by the taxpayer on incorrect advice received from the taxpayer's legal or accounting representative is not a basis for cancellation of a penalty.

(C) The delinquency was directly caused by death or serious illness of the taxpayer, or a member of the taxpayer's immediate family. The same circumstances apply to the taxpayer's accountant or other tax preparer, or their immediate family. This situation is not intended to have an indefinite application. A death or serious illness which denies a taxpayer reasonable time or opportunity to obtain an extension or to otherwise arrange timely filing and payment is a circumstance eligible for penalty waiver.

(D) The delinquency was caused by the unavoidable absence of the taxpayer or key employee, prior to the filing date. "Unavoidable absence of the taxpayer" does not include absences because of business trips, vacations, personnel turnover, or terminations.

(E) The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.

(F) The delinquency was caused by an act of fraud, embezzlement, theft, or conversion on the part of the taxpayer's employee or other persons contracted with the taxpayer, which the taxpayer could not immediately detect or prevent, provided that reasonable safeguards or internal controls were in place. See (a)(iii)(E) of this subsection.

(G) The department does not respond to the taxpayer's request for a tax return (or other forms necessary to compute the tax) within a reasonable period of time, which directly causes delinquent filing and payment on the part of the taxpayer. This assumes that, given the same situation, if the department had provided the requested form(s) within a reasonable period of time, the taxpayer would have been able to meet its obligation for timely payment of the tax. In any case, the taxpayer has responsibility to insure that its return is filed in a timely manner (e.g., by keeping track of pending due dates) and must anticipatively request a return for that purpose, if one is not received. (Note: Tax returns and other forms are immediately available to download at no cost from the department's internet site, http://dor.wa.gov. When good cause exists, taxpayers are advised to contact the department and request an extension of the due date for filing, before the due date of concern has passed. See subsection (12) of this section. Taxpayers who have registered to file electronically with e-file will avoid potential penalties relating to paper returns not received. See subsection (1)(b) of this section.)

(iii) The following are examples of circumstances that are generally not considered to be beyond the control of the taxpayer and will not qualify for a waiver or cancellation of penalty:

(A) Financial hardship;

(B) A misunderstanding or lack of knowledge of a tax liability;

(C) The failure of the taxpayer to receive a tax return form, EXCEPT where the taxpayer timely requested the form and it was still not furnished in reasonable time to mail the return and payment by the due date, as described in (a)(ii)(G) of this subsection;

(D) Registration of an account that is not considered a voluntary registration, as described in subsection (5)(a)(iii) and (b) of this section;

(E) Mistakes or misconduct on the part of employees or other persons contracted with the taxpayer (not including conduct covered in (a)(ii)(F) of this subsection); and

(F) Reliance upon unpublished, written information from the department that was issued to and specifically addresses the circumstances of some other taxpayer.

(b) **Waiver of the late payment of return penalty.** The late payment of return penalty (see subsection (5)(a) of this section) may be waived either as a result of circumstances beyond the control of the taxpayer (RCW 82.32.105(1) and (a) of this subsection) or after a twenty-four month review of the taxpayer's reporting history, as described below.

(i) If the late payment of return penalty is assessed on a return but is not the result of circumstances beyond the control of the taxpayer, the penalty will still be waived or canceled if the following two circumstances are satisfied:

(A) The taxpayer requests the penalty waiver for a tax return which was required to be filed under RCW 82.32.045 (taxes reported on the combined excise tax return), RCW 82.23B.020 (oil spill response tax), RCW 82.27.060 (tax on enhanced food fish), RCW 82.29A.050 (leasehold excise tax), RCW 84.33.086 (timber and forest lands), RCW 82.14B.030 (tax on telephone access line use); and

(B) The taxpayer has timely filed and paid all tax returns due for that specific tax program for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested. RCW 82.32.105(2).

If a taxpayer has obtained a tax registration endorsement with the department prior to engaging in business within the state and has engaged in business activities for a period less than twenty-four months, the taxpayer is eligible for the waiver if the taxpayer had no delinquent tax returns for periods prior to the period covered by the return for which the waiver is being requested. As a result, the taxpayer's very first return due can qualify for a waiver under the twenty-four month review provision. (See also WAC 458-20-101 for more information regarding the tax registration and tax reporting requirements.) This is the only situation under which the department will consider a waiver when the taxpayer has not timely filed and paid tax returns covering an immediately preceding twenty-four month period.

(ii) A return will be considered timely for purpose of the waiver if there is no tax liability on it when it is filed. Also, a return will be considered timely if any late payment penalties assessed on it were waived or canceled due to circumstances beyond the control of the taxpayer (see (a) of this subsection). The number of times penalty has been waived due to circum-

stances beyond the control of the taxpayer does not influence whether the waiver in this subsection will be granted. A taxpayer may receive more than one of the waivers in this subsection within a twenty-four month period if returns for more than one of the listed tax programs are filed, but no more than one waiver can be applied to any one tax program in a twenty-four month period.

For example, a taxpayer files combined excise tax returns as required under RCW 82.32.045, and timber tax returns as required under RCW 84.33.086. This taxpayer may qualify for two waivers of the late payment of return penalty during the same twenty-four month period, one for each tax program. If this taxpayer had an unwaived late payment of return penalty for the combined excise tax return during the previous twenty-four month period, the taxpayer may still qualify for a penalty waiver for the timber tax program.

(iii) The twenty-four month period reviewed for this waiver is not affected by the due date of the return for which the penalty waiver is requested, even if that due date has been extended beyond the original due date.

For example, assume a taxpayer's September 2012 return has had the original due date of October twenty-fifth extended to November twenty-fifth. The return and payment are received after the November twenty-fifth extended due date. A penalty waiver is requested. Since the delinquent return represented the month of September 2012, the twenty-four months which will be reviewed begin on September 1, 2010, and end with August 31, 2012, (the twenty-four months prior to September 2012). All of the returns representing that period of time will be included in the review. The extension of the original due date has no effect on the twenty-four month period under review.

(iv) A twenty-four month review is only valid when considering waiver of the late payment of return penalty described in subsection (5)(a) of this section. The twenty-four month review process cannot be used as justification for a waiver of interest, assessment penalty, or any penalty other than the late payment of return penalty.

(10) **Waiver or cancellation of interest.** The department will waive or cancel interest imposed under chapter 82.32 RCW only in the following situations:

(a) The failure to pay the tax prior to issuance of the assessment was the direct result of written instructions given the taxpayer by the department; or

(b) The extension of the due date for payment of an assessment was not at the request of the taxpayer and was for the sole convenience of the department. RCW 82.32.105(3).

(11) **Interest and penalty waiver for active duty military personnel.** RCW 82.32.055 provides a waiver of BOTH interest and penalty imposed under chapter 82.32 RCW when:

(a) The majority owner of the business is:

(i) On active duty in the military;

(ii) Participating in an armed conflict;

(iii) Assigned to a location outside the territorial boundaries of the United States; and

(b) The gross income of the business is one million dollars or less for the calendar year immediately prior to the year in which the majority owner is initially deployed outside the United States for the armed conflict.

Interest and penalty may not be waived or canceled for a period longer than twenty-four months. The waiver applies to interest or penalty based on the date they are imposed, which must be within the twenty-four month waiver period.

To receive a waiver or cancellation of interest and penalty under this subsection, the taxpayer must submit a copy of the majority owner's deployment orders for deployment outside the territorial boundaries of the United States.

(12) **Stay of collection.** RCW 82.32.190 allows the department to initiate a stay of collection, without the request of the taxpayer and without requiring any bond, for certain tax liabilities when they may be affected by the outcome of a question pending before the courts (see (a) of this subsection). RCW 82.32.200 provides conditions under which the department, at its discretion, may allow a taxpayer to file a bond in order to obtain a stay of collection on a tax assessment (see (b) of this subsection). The department will grant a taxpayer's stay of collection request, as described in RCW 82.32.200, only when the department determines that a stay is in the best interests of the state.

(a) Circumstances under which the department may consider initiating a stay of collection without requiring a bond (RCW 82.32.190) include, but are not necessarily limited to, the existence of the following:

(i) A constitutional issue to be litigated by the taxpayer, the resolution of which is uncertain;

(ii) A matter of first impression for which the department has little precedent in administrative practice; or

(iii) An issue affecting other similarly situated taxpayers for whom the department would be willing to stay collection of the tax.

(b) The department will give consideration to a request for a stay of collection of an assessment (RCW 82.32.200) if:

(i) A written request for the stay is made prior to the due date for payment of the assessment; and

(ii) Payment of any unprotested portion of the assessment and other taxes due is made timely; and

(iii) The request is accompanied by an offer of a cash bond, or a security bond that is guaranteed by a specified authorized surety insurer. The amount of the bond will generally be equal to the total amount of the assessment, including any penalties and interest. However, where appropriate, the department may require a bond in an increased amount not to exceed twice the amount for which the stay is requested.

(c) Claims of financial hardship or threat of litigation are not grounds that justify the granting of a stay of collection. However, the department will consider a claim of significant financial hardship as grounds for staying collection procedures, but this will be done only if a partial payment agreement is executed and kept in accordance with the department's procedures and with such security as the department deems necessary.

(d) If the department grants a stay of collection, the stay will be for a period of no longer than two calendar years from the date of acceptance of the taxpayer request, or thirty days following a decision not appealed from by a tribunal or court of competent jurisdiction upholding the validity of the tax assessed, whichever date occurs first. The department may extend the period of a stay originally granted, but only for good cause shown.

(e) Interest will continue to accrue against the unpaid tax portion of a liability under stay of collection. Effective January 1, 1997, the interest rates prescribed by RCW 82.32.190 and 82.32.200 changed from nine percent and twelve percent per annum, respectively, to the same predetermined annual variable rates as are described in subsection (7)(c) of this rule.

(13) **Extensions.** The department, for good cause, may extend the due date for filing any return.

(a) Any permanent extension more than ten days beyond the due date, and any temporary extension in excess of thirty days, must be conditional upon deposit by the taxpayer with the department of an amount equal to the estimated tax liability for the reporting period or periods for which the extension is granted. This deposit is credited to the taxpayer's account and may be applied to the taxpayer's liability upon cancellation of the permanent extension or upon reporting of the tax liability where a temporary extension of more than thirty days has been granted.

The amount of the deposit is subject to departmental approval. The amount will be reviewed from time to time, and a change may be required at any time that the department concludes that such amount does not approximate the tax liability for the reporting period or periods for which the extension was granted.

(b) Chapter 181, Laws of 2008 (Senate Bill No. 6950), allows department of revenue to grant extensions of the due date for any taxes due to department of revenue when the governor has proclaimed a state of emergency under RCW 43.06.040. In general, the bill gives department of revenue the authority to provide extensions on its own initiative, or at the specific request of any taxpayers affected by the emergency. The specific details of how, where, and to whom any extensions are granted will depend on the type and scope of each unique emergency and will be determined when an emergency is declared.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.32.080, 82.32.085, 82.32.655, and 82.04.470. WSR 13-22-049, § 458-20-228, filed 11/1/13, effective 12/2/13. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-07-134, § 458-20-228, filed 3/23/10, effective 4/23/10; WSR 07-06-077, § 458-20-228, filed 3/6/07, effective 4/6/07; WSR 05-22-095, § 458-20-228, filed 11/1/05, effective 12/2/05. Statutory Authority: RCW 82.32.-300. WSR 01-05-022, § 458-20-228, filed 2/9/01, effective 3/12/01; WSR 00-04-028, § 458-20-228, filed 1/24/00, effective 2/24/00; WSR 92-03-025, § 458-20-228, filed 1/8/92, effective 2/8/92; WSR 85-04-016 (Order 85-1), § 458-20-228, filed 1/29/85; WSR 83-16-052 (Order ET 83-4), § 458-20-228, filed 8/1/83; Order ET 74-1, § 458-20-228, filed 5/7/74; Order ET 71-1, § 458-20-228, filed 7/22/72; Order ET 70-3, § 458-20-228, filed 5/29/70, effective 7/1/70.]

WAC 458-20-22801 Tax reporting frequency. (1) Introduction. Every person liable for an excise tax imposed by the laws of the state of Washington for which the department of revenue has primary or secondary administrative responsibility, i.e., Title 82 RCW and chapters 67.28 (Hotel/motel tax), 70.93 (Litter tax), 70.95 (Tax on tires), and 84.33 RCW (Forest excise tax), must file an electronic tax return with the department of revenue accompanied by an electronic payment of the tax due; however, the taxes under chapter 82.24 RCW (Tax on cigarettes) must be collected through sales of revenue stamps.

(2) Reporting frequency. Taxpayers are required to electronically file and pay their excise taxes on a monthly basis. However, the department may relieve any taxpayer or class of taxpayers from this monthly obligation and may require the return to cover other longer reporting periods, but not in excess of one year. See: RCW 82.32.045.

(a) General rule. Unless otherwise provided by the department, a taxpayer must report and pay taxes due according to the following schedule:

IF ANNUAL ESTIMATED TAX LIABILITY IS:	REPORTING FREQUENCY
Over $4800.00 per year	Monthly returns:
Between $1050.00 & $4800.00 per year	Quarterly returns:
Less than $1050.00 per year	Annual returns:

(b) When requested by a taxpayer or group of taxpayers, the department may approve more frequent or less frequent reporting if, in the opinion of the department, the change assists the department in the efficient and effective administration of the tax laws of this state.

(c) For the same reasons, the department may require a taxpayer or group of taxpayers to report more frequently or less frequently. Changes in reporting frequency are effective only after the department has consented to or required the change, and notice of the change has been given by the department to the taxpayer or group of taxpayers.

(d) Situations when changes in reporting frequency may be approved or required include, but are not limited to, the following:

(i) An increase or decrease in the estimated annual tax liability of a taxpayer results in a different threshold as provided in section (2)(a) above;

(ii) A taxpayer or group of taxpayers has substantial periods of no taxable business activity during the calendar year, i.e., temporary businesses;

(iii) The department finds a taxpayer or a group of taxpayers has repeatedly failed to comply with tax reporting and/or payment obligations;

(iv) The type of tax reported is required to be filed on a specific reporting frequency.

(e) Notice. No change in reporting frequency will be effective except upon at least thirty days advance written or electronic notice from the department to the taxpayer at the taxpayer's last provided e-mail address or reported business address.

(f) Filing. Returns must be submitted electronically. Taxpayers approved by the department may continue to submit paper returns that are either provided by the department, or approved and accepted by the department. Paper forms (including multipurpose returns for past and present reporting periods) are available for download from the department's web site.

(g) Taxes not reported upon the combined excise tax return, i.e. forest excise tax, etc. must be reported at such times and upon such forms as are otherwise provided by the department.

(3) See WAC 458-20-228 for information on returns, remittances, penalties, extensions, stay of collection.

(4) See WAC 458-20-22802 for information on available electronic methods for filing and paying taxes.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and 82.32.080. WSR 13-22-048, § 458-20-22801, filed 11/1/13, effective 12/2/13. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-07-134, § 458-20-22801, filed 3/23/10, effective 4/23/10. Statutory Authority: RCW 82.32.300

and 82.32.045. WSR 90-05-044, § 458-20-22801, filed 2/15/90, effective 3/18/90.]

WAC 458-20-22802 Electronic filing and payment. (1) **Introduction.** The department of revenue makes electronic filing (also known as e-file) and electronic payment available to taxpayers. The law requires certain taxpayers to file and pay excise taxes electronically. RCW 82.32.080.

(a) Taxpayers who are required to electronically file and pay their excise taxes must register to use e-file. If they choose to pay using certain electronic payment methods they must also furnish the department with the necessary banking information. Taxpayers who are not specifically required to file or pay taxes electronically are encouraged to voluntarily take advantage of e-file and pay electronically.

(b) Electronic filing and electronic payment are available for taxes reported on the combined excise tax return, which includes those taxes administered by the department under chapter 82.32 RCW. Electronic filing and electronic payment are not available for city and town taxes on financial institutions (chapter 82.14A RCW), cigarette tax (chapter 82.24 RCW), leasehold excise tax (chapter 82.29A RCW), and forest tax (chapter 84.33 RCW).

(2) **Electronic filing and electronic payment.** E-file is an internet-based application that provides a secure and encrypted method for taxpayers to file and pay Washington state's business related excise taxes.

(a) All taxpayers are required to use e-file and pay electronically unless the department waives the requirement for good cause, or the taxpayer has an assigned reporting frequency that is less than quarterly.

(b) If good cause exists, the department may waive the e-file and/or electronic payment requirement for any taxpayer. Waiver for "good cause" is generally temporary. Reasons for good cause include, but are not limited to:

(i) The taxpayer does not have the necessary equipment or software;

(ii) The equipment or software necessary is not functioning properly;

(iii) The taxpayer does not have access to the internet using the taxpayers own equipment;

(iv) The taxpayer does not have a bank account or credit card;

(v) The taxpayer's bank is unable to send or receive electronic funds transfer transactions; or

(vi) Some other circumstance or condition exists that, in the department's judgment, prevents the taxpayer from complying.

(3) **Electronic payments.** There are two electronic payment methods: Electronic funds transfer (EFT) and credit card.

Those taxpayers who are required to use e-file to submit their tax return must also pay the associated taxes electronically. For a taxpayer who is required to pay electronically, electronic funds transfer (EFT) must be used, unless the department authorizes some other type of electronic payment for that particular taxpayer.

(a) **Payment by electronic funds transfer (EFT)**. EFT is a method of transferring funds from a taxpayer's bank account into the department's bank account.

(i) **Definitions.** For the purposes of this section, the following terms will apply:

(A) "Electronic funds transfer" or "EFT" means any transfer of funds, other than a transaction originated or accomplished by conventional check, drafts, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit a checking or other deposit account. Electronic funds transfer includes payments made by electronic check (e-check).

(B) "ACH" or "automated clearing house" means a central distribution and settlement system for the electronic clearing of debits and credits between financial institutions.

(C) "EFT debit" means the electronic transfer of funds cleared through the ACH system that is generated by the taxpayer instructing the department's bank to charge the taxpayer's account and deposit the funds to the department's account. E-check is a singular payment transaction that functions in the same manner as an EFT debit transaction.

(D) "EFT credit" means the electronic transfer of funds cleared through the ACH system that is generated by the taxpayer instructing the taxpayer's bank to charge the taxpayer's account and deposit the funds to the department's account.

(E) "Department's bank" means the bank with which the department of revenue has a contract to assist in the receipt of taxes and includes any agents of the bank.

(F) "Collectible funds" means funds that have completed the electronic funds transfer process and are available for immediate use by the state.

(G) "ACH CCD+addenda" and "ACH CCD+record" mean the information in a required ACH format that needs to be transmitted to properly identify the payment.

(ii) **EFT methods.** Taxpayers paying by EFT must use the EFT debit, EFT credit, or e-check methods. In an emergency, the taxpayer should contact the department for alternative methods of payment.

(iii) **Form and content of EFT**. The form and content of EFT will be as follows:

(A) If the taxpayer wishes to use EFT debit, the taxpayer must furnish the department with the information needed to complete the transaction by registering for electronic funds transfer on the department's web site.

(B) If the taxpayer wishes to use EFT credit, the taxpayer is responsible for ensuring that its bank has the information necessary in order to complete the payment. The payment must be submitted using the ACH CCD+addenda format. The EFT credit payment method requires the taxpayer to complete an EFT authorization form.

(C) If the taxpayer wishes to use e-check, they must enter their bank account and routing number for each payment transaction. The e-check transaction authorizes the department to withdraw the payment amount from the taxpayer's bank account.

(iv) **Due date of EFT payment.** The EFT payment is due on or before the next banking day following the tax return due date.

(A) An EFT payment made using the EFT debit or e-check method is timely if the payment is initiated on or before 11:59 p.m. Pacific Time on the tax return due date, and

the effective date for that payment is on or before the next banking day following the tax return due date.

(B) An EFT payment made using the EFT credit method is timely when the state receives collectible U.S. funds on or before 5:00 p.m., Pacific Time, on the EFT payment due date.

(C) The ACH system, either EFT debit or EFT credit, requires that the necessary information be in the originating bank's possession on the banking day preceding the date for completion of the transaction. Each bank generally has its own transaction deadlines and it is the responsibility of the taxpayer to ensure timely payment.

(D) The tax return due date is the next business day after the statutory due date if the statutory due date falls on a Saturday, Sunday, or legal holiday. Legal holidays are determined under state of Washington law and banking holidays are those recognized by the Federal Reserve System.

Example. The tax return due date is December 25th, a legal and banking holiday, which, for the example, falls on a Friday. The next business day is Monday, December 28th, and this is the new tax return due date. This means EFT debit and e-check users must initiate their debit payment by 11:59 p.m., Pacific Time, on December 28th, with a payment effective date of Tuesday December 29th, in order for the payment to be considered timely. EFT credit users must contact their bank to ensure funds are deposited in the department's bank no later than 5:00 p.m., Pacific Time, on Tuesday, December 29th, in order for the payment to be considered timely.

(b) **Payment by credit card**. Payment by credit card is available using American Express, Discover, Visa, or MasterCard. Taxpayers who wish to make their payment with one of these credit cards are directed to the web site of a third-party, nonstate, vendor when they submit their electronic return. Taxpayers then provide their credit card number in the same manner as with any other credit card payment transaction. A credit card payment is considered timely if the payment is completed, including the time it takes to enter the required information on the credit card vendor's web site, on or before 11:59 p.m., Pacific Time, on the tax return due date. Each credit card payment may be subject to a convenience fee charged by the third-party, nonstate, vendor.

(4) **Electronic refunds.** If the taxpayer pays taxes on the combined excise tax return by EFT debit, the taxpayer is entitled to a refund of those taxes by EFT. If the taxpayer wishes to have the refund made by EFT, the taxpayer must provide the department with the information necessary to make an appropriate EFT transaction or the refund will be issued as a paper check. No electronic adjustments or refunds are made directly to taxpayer credit card accounts or on e-check transactions. Overpayments of tax will either be retained to be credited to future tax liabilities or, at the taxpayer's request, will be refunded.

(5) **Coordinating a paper return and an electronic payment.** When a taxpayer voluntarily uses the EFT credit payment method but files a paper return, the department will match the payment with the return. A return will be considered timely filed only if it is received by the department on or before the tax return due date. The associated EFT credit payment must be received by the next banking day after the tax return due date. If the return is sent through the U.S. Postal Service, it will be considered received on the date shown by the post office cancellation mark stamped on the envelope. RCW 82.32.080. If both events occur, there is timely filing and payment and no penalties apply.

(6) **Crediting and proof of payment.** The department will credit the taxpayer with the amount paid as of the date the payment is received by the department's bank. The proof of payment by the taxpayer will depend on the means of transmission.

(a) EFT debit and e-check transactions may be proved by use of the confirmation number received from the department that the transaction was initiated and bank statements or other evidence from the bank that the transaction was settled.

(b) An EFT credit transaction is initiated by the taxpayer through the taxpayer's bank. The taxpayer is responsible for completion of the transaction. The taxpayer generally will be given a verification number by the taxpayer's bank. This verification number with proof of the ACH CCD+record showing the department's bank and account number, plus confirmation that the transaction has been settled will constitute proof of payment.

(c) Taxpayers using any other electronic payment method are responsible for completion of the transaction. Proof of payment will include transaction initiation date and any other evidence from a financial institution or credit card company that the transaction was settled.

(7) **Correcting errors.** Errors in the electronic payment process may result in either an underpayment or an overpayment of the tax. In either case, the taxpayer needs to contact the department to arrange for appropriate action. Overpayments may be used as a credit or the taxpayer may apply for a refund. The department will expedite a refund where it is caused by an error in transmission. Underpayments should be corrected by the taxpayer immediately to avoid any penalties.

(8) **Penalties.** There are no special provisions for penalties when payment is made by electronic means. To avoid the imposition of penalties, the taxpayer must provide correct bank account information to the department, and ensure their payment is timely.

(a) If the department finds that a taxpayer disregarded specific written instructions to file returns or remit payments electronically, as provided by RCW 82.32.080, the department will add a penalty of ten percent to the amount of the tax that should have been reported and/or paid electronically or the additional tax found due if there is a deficiency because of failure to follow written instructions.

(b) A taxpayer will be considered to have willfully disregarded the requirement to file returns or remit payment electronically if the department:

(i) Has mailed or otherwise delivered the specific written instructions to the taxpayer on at least two occasions; and

(ii) Has provided the taxpayer at least forty-five days after the second written notice to come into compliance with its electronic filing and/or payment obligations. WAC 458-20-228 discusses the various penalties that may apply and the limited circumstances under which they may be waived.

(c) In an EFT debit and e-check transaction, the department's bank is the originating bank and is responsible for the accuracy of transmission. If the taxpayer has timely initiated the EFT debit or e-check transaction, provided accurate bank account information, received a confirmation number, and shows adequate funds were available in the account, no late

payment penalties will apply with respect to those funds authorized.

(d) In an EFT credit transaction, the taxpayer's bank is the originating bank and the taxpayer is primarily responsible for its accuracy. The taxpayer must have timely initiated the transaction, provided the correct information for the ACH CCD+record, and shown that there were sufficient funds in the account, in order to prove timely compliance. If the taxpayer can make this showing, then no late payment penalties will apply with respect to those funds authorized if the transaction is not completed.

(e) When a payment is made using an approved credit card, the credit card company acts as the taxpayer's agent and the taxpayer is primarily responsible for the accuracy of this transaction. If the taxpayer can prove the payment was initiated and submitted timely, no late payment penalties will apply to those funds authorized.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.32.080, and 82.32.085. WSR 13-22-047, § 458-20-22802, filed 11/1/13, effective 12/2/13. Statutory Authority: RCW 82.32.085, 82.32.300, and 82.01.060(2). WSR 06-23-066, § 458-20-22802, filed 11/9/06, effective 12/10/06. Statutory Authority: RCW 82.32.300 and 82.32.085. WSR 01-07-017, § 458-20-22802, filed 3/13/01, effective 4/13/01. Statutory Authority: RCW 82.32.300. WSR 91-24-070, § 458-20-22802, filed 12/2/91, effective 1/2/92; WSR 90-19-052, § 458-20-22802, filed 9/14/90, effective 10/15/90.]

WAC 458-20-229 Refunds. (1) **Introduction.** This section explains the procedures relating to refunds or credits for the overpayment of taxes, penalties, or interest. It describes the statutory time limits for refunds and the interest rates that apply to those refunds.

References to a "refund application" in this section include a request for a credit against future tax liability as well as a refund to the taxpayer.

Examples provided in this section should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(2) **What are the time limits for a tax refund or credit?**

(a) **Time limits.** No refund or credit may be made for taxes, penalties, or interest paid more than four years before the beginning of the calendar year in which a refund application is made or examination of records by the department is completed. See RCW 82.32.060. This is a nonclaim statute rather than a statute of limitations. This means a valid application must be filed within the statutory period, which may not be extended or tolled, unless a waiver extending the time for assessment has been entered into as described in (c) of this subsection.

For example, a refund or credit may be granted for any overpayment made in a shaded year in the following chart:

Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
					Refund application is filed no later than December 31st

(b) **Relation back to date paid.** Because the time limits relate to the date the taxes, penalties, or interest is paid, a refund application can be timely even though the payment concerned liabilities for a tax year normally outside the time limits. For example, Taxpayer P owes $1,000 in B&O tax for activity undertaken in December 2000. In January 2001, Taxpayer P makes an arithmetic error and submits a payment of $1,500 with its December 2000 tax return. In December 2005, Taxpayer P requests a refund of $500 for the overpayment of taxes for the December 2000 period. This request is timely because the overpayment occurred within the time limits, even though the payment concerned tax liabilities incurred (December 2000) outside the time limits.

Fact situations can be complicated. For example, Taxpayer P pays B&O taxes in Years 1 through 4. The department subsequently conducts an audit of Taxpayer P that includes Years 1-4. The audit is completed in Year 5. As a result of the audit, the department issues an assessment in Year 5 for $50,000 in additional retail sales taxes that were due from Years 1-4. Taxpayer P pays the assessment in full in Year 6. In Year 10, Taxpayer P files an application requesting a refund of B&O taxes. Taxpayer P's application is timely because it relates to a payment (payment of the assessment in Year 6) made no more than four years before the year in which the application is filed. It does not matter that the taxes relate to years outside the time limits; the actual payment occurred within four years before the refund application. Nor does it matter that the refund is based on an overpayment of B&O taxes while the assessment involved retail sales taxes, because both taxes relate to the same tax years. However, the amount of any refund is limited to $50,000 - the amount of the payment that occurred within the time limits.

Assume the same facts as described above. When the department reviews Taxpayer P's refund application, it determines that the refund is valid. After reviewing the new information, however, the department also determines that Taxpayer P should have paid $20,000 in additional B&O taxes during Years 1-4. Because Taxpayer P paid $30,000 more than the amount properly due ($50,000 overpayment less $20,000 underpayment), the amount of the refund will be $30,000.

(c) **Waiver.** Under RCW 82.32.050 or 82.32.100, a taxpayer may agree to waive the time limits and extend the time for the assessment of taxes, penalties and interest. If the taxpayer executes such a waiver, the time limits for a refund or credit are extended for the same period.

(3) **How do I get a refund or credit?**

(a) **Departmental examination of returns.** If the department performs an examination of the taxpayer's records and determines that the taxpayer has overpaid taxes, penalties, or interest, the department will issue a refund or a credit, at the taxpayer's option. In this situation, the taxpayer does not need to apply for a refund.

(b) **Taxpayer application.**

(i) If a taxpayer discovers that it has overpaid taxes, penalties, or interest, it may apply for a refund or credit. Refund application forms are available from the following sources:

• The department's internet web site at http://dor.wa.gov

• By facsimile by calling Fast Fax at 360-705-6705 or 800-647-7706 (using menu options)

• By writing to:

Taxpayer Services
Washington State Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478.

The application form should be submitted to the department at the following location:

Taxpayer Account Administration
P.O. Box 47476
Olympia, WA 98504-7476.

Taxpayers are encouraged to use the department's refund application form to ensure that all necessary information is provided for a timely valid application. However, while use of the department's application form is encouraged, it is not mandatory and any written request for refund or credit meeting the requirements of this section shall constitute a valid application. Filing an amended return showing an overpayment will also constitute an application for refund or credit, provided that the taxpayer also specifically identifies the basis for the refund or credit.

(ii) A taxpayer must submit a refund application within the time limits described in subsection (2)(a) of this section. An application must contain the following five elements:

(A) The taxpayer's name and UBI/TRA number must be on the application.

(B) The amount of the claim must be stated. Where the exact amount of the claim cannot be specifically ascertained at time of filing, the taxpayer may submit an application containing an estimated claim amount. Taxpayers must explain why the amount of the claim cannot be stated with specificity and how the estimated amount of the claim was determined.

(C) The tax type and taxable period must be on the application.

(D) The specific basis for the claim must be on the application. Any basis for a refund or credit not specifically identified in the initial refund application will be considered untimely, except that an application may be refiled to add additional bases at any time before the time limits in subsection (2) of this section expire.

(E) The signature of the taxpayer or the taxpayer's representative must be on the application. If the taxpayer is represented, the confidential taxpayer information waiver signed by the taxpayer specifically for that refund claim must be received by the department by the date the substantiation documents are first required, without regard to any extensions. If the signed confidential taxpayer information waiver for the refund claim lists the representative as an entity, every member or employee of that entity is authorized to represent the taxpayer. If the signed confidential taxpayer information waiver for the refund claim lists the representative as an individual, only that individual is authorized to represent the taxpayer.

(iii) If the nonclaim statute has run prior to the filing of the application, the department will deny the application and notify the taxpayer.

(iv) If the department determines that the taxpayer is not entitled to a refund as a matter of law, the application may be denied without requiring substantiation. The taxpayer shall be responsible for maintaining substantiation as may eventually be needed should taxpayer appeal.

(v) The taxpayer is encouraged to file substantiation documents at the time of filing the application. However, once an application is filed, the taxpayer must submit sufficient substantiation to support the claim for refund or credit before the department can determine whether the claim is valid. The department will notify the taxpayer if additional substantiation is required. The taxpayer must provide the necessary substantiation within ninety days after such notice is sent, unless the documentation is under the control of a third party, not affiliated with or under the control of the taxpayer, in which case the taxpayer will have one hundred eighty days to provide the documentation. The department may request any other books, records, invoices or electronic equivalents and, where appropriate, federal and state tax returns to determine whether to accept or deny the claimed refund and to assess an existing deficiency.

(vi) In its discretion and upon good cause shown, the department may extend the period for providing substantiation upon its own or the taxpayer's request, which may not be unreasonably denied.

(vii) If the department does not receive the necessary substantiation within the applicable time period, the department shall deny the claim for lack of adequate substantiation and shall so notify the taxpayer. Any application denied for lack of adequate substantiation may be filed again with additional substantiation at any time before the time limits in subsection (2) of this section expire. Once the department determines that substantiation is sufficient, the department shall process the refund claim within ninety days, except that the department may extend the time of processing such claim upon notice to the taxpayer and explanation of why the claim cannot be completed within such time.

(viii) The following examples illustrate the refund application process:

(A) A taxpayer discovers in January 2005 that its June 2004 excise tax return was prepared using incorrect figures that overstated its sales, resulting in an overpayment of tax. The taxpayer files an amended June 2004 tax return with the department's taxpayer account administration division. The department will treat the taxpayer's amended June 2004 tax return as an application for a refund or credit of the amounts overpaid during that tax period, except that the taxpayer must also specifically identify the basis for the refund or credit and provide sufficient substantiation to support the claim for refund or credit. The taxpayer may satisfy this obligation by submitting a completed refund application form with its

amended return or providing the additional required substantiation by other means.

(B) On December 31, 2005, a taxpayer files an amended return for the 2001 calendar year. The return includes changed figures indicating that an overpayment occurred, but does not provide any supporting substantiation. No written waiver of the time limits, under subsection (2)(c) of this section, for this time period exists. The department sends a letter notifying the taxpayer that the taxpayer's application is not complete and substantiation must be provided within ninety days or the application will be denied. If the taxpayer does not provide the necessary substantiation by the stated date, the claim will be denied and, if refiled, will not be granted because it is then past the nonclaim limit of the statute.

(C) Taxpayer submits a refund application on December 31, 2004, claiming that taxpayer overpaid use tax in 2000 on certain machinery and equipment obtained by the taxpayer at that time. No substantiation is provided with the application and no written waiver of the time limit, under subsection (2)(c) of this section, for this taxable period exists. The department sends a letter notifying the taxpayer that the taxpayer's application is not complete and substantiation must be provided within ninety days or the application will be denied. The taxpayer does not respond by the stated date. The claim will be denied and, if refiled, will not be granted since it is then past the nonclaim limit of the statute.

(D) Assume the same facts as in (b)(viii)(B) and (C) of this subsection, except that within ninety days from the date the department sent the letter the taxpayer submits substantiation, which the department deems sufficient. The taxpayer's claim is valid, notwithstanding that the substantiation was provided after the nonclaim limit expired.

(E) Assume the same facts as in (b)(viii)(B) and (C) of this subsection, except that before the ninety-day period expires, the taxpayer requests an additional fifteen days in which to respond, explaining why the substantiation will require the additional time to assemble. The department agrees to the extended deadline. If the taxpayer submits the requested substantiation within the resulting one hundred five-day period, the department will not deny the claim for failure to provide timely substantiation.

(F) Assume the same facts as in (b)(iii)(B) and (C) of this subsection, except that the taxpayer submits substantiation within ninety days. The department reviews the substantiation and finds that it is still insufficient. The department, in its discretion, may extend the deadline and request additional substantiation from the taxpayer or may deny the refund claim as not substantiated.

(4) **May I get a refund of retail sales tax paid in error?**

(a) **Refund from seller.** Except as provided for in RCW 82.08.130 regarding deductions for tax paid at source, if a buyer pays retail sales tax on a transaction that the buyer later believes was not taxable, the buyer should request a refund or credit directly from the seller from whom the purchase was made. If the seller determines the tax was not due and issues a refund or credit to the buyer, the seller may seek its own refund from the department. It is better for a buyer to seek a retail sales tax refund directly from the seller. This is because the seller has the records to know if retail sales tax was collected on the original sale, knows the buyer, knows the circumstances surrounding the original sale, is aware of any disputes between itself and the buyer concerning the product, and may already be aware of the circumstances as to why a refund of sales tax is or is not appropriate. If a seller questions whether he or she should refund sales tax to a buyer, the seller may request advice from the department's telephone information center at 1-800-647-7706.

(b) **Refund from department.** In certain situations where the buyer has not received a refund from the seller, the department will refund retail sales tax directly to a buyer. The buyer must file a complete refund application as described in subsection (3)(b) of this section and either a seller's declaration or a buyer's declaration, under penalty of perjury, must be provided for each seller.

(i) If the buyer is able to obtain a waiver from the seller of the seller's right to claim the refund, the buyer should file a seller's declaration, under penalty of perjury, with the refund application. A seller's declaration substantiates that:

(A) Retail sales tax was collected and paid to the department on the purchase for which a refund is sought;

(B) The seller has not refunded the retail sales tax to the buyer or claimed a refund from the department; and

(C) The seller will not seek a refund of the sales tax from the department.

(ii) If the seller no longer exists, the seller refuses to sign the declaration, under penalty of perjury, or the buyer is unable to locate the seller, the buyer should file a buyer's declaration, under penalty of perjury, with the refund application. The buyer's declaration explains why the buyer is unable to obtain a seller's declaration and provides information about the seller and declares that the buyer has not obtained and will not in the future seek a refund from the seller for that claim.

(iii) Seller's declaration, under penalty of perjury, and buyer's declaration, under penalty of perjury, forms are available from the following sources:

• The department's internet web site at http://dor.wa.gov

• By facsimile by calling Fast Fax at 360-705-6705 or 800-647-7706 (using menu options)

• By writing to:

Taxpayer Services
Washington State Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478.

(5) **May I use statistical sampling to substantiate a refund?** Sampling will only be used when a detailed audit is not possible. However, if your applications for refund or credit involve voluminous documents, the preferred method for substantiating your application is the use of statistical sampling. Alternative methods of sampling, including but not limited to, random sampling, time period sampling, transaction sampling, and block sampling, may be used when the department agrees that such methods are appropriate.

When using statistical sampling or an alternative method to substantiate an application for refund or credit, the applicant must contact the department prior to preparing the sampling to obtain the department's approval of the sampling plan. The sampling plan will describe the following:

• Population and sampling frame;

• Sampling unit;

• Source of the random numbers;

• Who will physically locate the sample units and how and where they will be presented for review;

• Any special instructions to those who were involved in reviewing the sample units;

• Special valuation guidelines to any of the sample units selected in the sample;

• How the sample will be evaluated, including the precision and confidence levels; and

• The applicant must obtain a seller's declaration from those sellers identified in the sample and separately certify, under penalty of perjury, that applicant will not otherwise request or accept a refund or credit for sales or deferred sales tax paid to any seller or any use tax remitted during the taxable period covered by the audit.

Failure to contact the department before preparing the sampling may result in the department rejecting the application on the grounds that the results are not statistically valid.

Contact the department prior to performing a statistical sampling at these locations:

• The department's internet web site at http://dor.wa.gov

• By facsimile by calling Fast Fax at 360-705-6705 or 800-647-7706 (using menu options)

• By writing to:

Taxpayer Services
Washington State Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478.

(6) **Is my refund final?** The department may review a refund or credit provided on the basis of a taxpayer application without an examination by audit. If the refund or credit is granted and the department subsequently determines that the refund or credit exceeded the amount properly due the taxpayer, the department may issue an assessment to recover the excess amount. This assessment must be made within the time limits of RCW 82.32.050.

(7) **Refunds made as a result of a court decision.** The department will grant refunds or credits required by a court or Board of Tax Appeals decision, if the decision is not under appeal.

If the court action requires the refund or credit of retail sales taxes, the department will not require that buyers attempt to obtain a refund directly from the seller if it would be unreasonable and an undue burden on the buyer. In such a case, the department may refund the retail sales tax directly to the buyer and may use the public media to notify persons that they may be entitled to refunds or credits. The department will make available special refund application forms that buyers must use for these situations. The application will request the appropriate information needed to identify the buyer, item purchased, amount of sales tax to be refunded, and the seller. The department may, at its discretion, request additional documentation that the buyer could reasonably be expected to retain, based on the particular circumstances and value of the transaction. The department will approve or deny such refund requests within ninety days after the buyer has submitted all documentation.

(8) **What interest is due on my refund?** Interest is due on a refund or credit granted to a taxpayer as provided in this subsection.

(a) **Rate for overpayments made between 1992 through 1998.** For amounts overpaid by a taxpayer between January 31, 1991 and December 31, 1998, the rate of interest on refunds and credits is:

(i) Computed the same way as the rate provided under (b) of this subsection minus one percent, for interest allowed through December 31, 1998; and

(ii) Computed the same way as the rate provided under (b) of this subsection, for interest allowed after December 31, 1998.

(b) **Rate for overpayments after 1998.** For amounts overpaid by a taxpayer after December 31, 1998, the rate of interest on refunds and credits is the average of the federal short-term rate as defined in 26 U.S.C. Sec. 1274(d) plus two percentage points. The rate is adjusted on the first day of January of each year by taking an arithmetical average to the nearest percentage point of the federal short-term rate, compounded annually, for the months of January, April and July of the immediately preceding calendar year and October of the previous preceding year, as published by the United States Secretary of Treasury.

(c) **Start date for the calculation of interest.** If the taxpayer made all overpayments for each calendar year and all reporting periods ending with the final month included in a credit notice or refund on or before the due date of the final return for each calendar year or the final reporting period included in the notice or refund, interest is computed from either:

(i) January 31st following each calendar year included in a notice or refund; or

(ii) The last day of the month following the final month included in a notice or refund.

If the taxpayer did not make all overpayments for each calendar year and all reporting periods ending with the final month included in the notice or refund, interest is computed from the last day of the month following the date on which payment in full of the liabilities was made for each calendar year included in a notice or refund, and the last day of the month following the date on which payment in full of the liabilities was made if the final month included in a notice or refund is not the end of a calendar year.

(d) **Calculation of interest on credits.** The department will include interest on credit notices with the interest computed to the date the taxpayer could reasonably be expected to use the credit notice, generally the due date of the next tax return. If a taxpayer requests that a credit notice be converted to a refund, interest is recomputed to the date the refund (warrant) is issued, but not to exceed the interest that would have been granted through the credit notice.

(9) **May the department apply my refund against other taxes I owe?** The department may apply overpayments against existing deficiencies and/or future assessments for the same legal entity. However, if preliminary schedules have not been issued regarding existing deficiencies or future assessments and the taxpayer is not presently under audit, the refund of an overpayment may not be delayed when the department determines a refund is due. The following examples illustrate the application of overpayments against existing deficiencies:

(a) The taxpayer's records are audited for the period Year 1 through Year 4. The audit disclosed underpayments in Year

2 and overpayments in Year 4. The department will apply the overpayments in Year 4 to the deficiencies in Year 2. The resulting amount will indicate whether a refund or credit is owed the taxpayer or whether the taxpayer owes additional tax.

(b) The department has determined that the taxpayer has overpaid its real estate excise tax. The department believes that the taxpayer may owe additional B&O taxes, but this has yet to be established. The department will not delay the refund of the real estate excise tax while it schedules and performs an audit for the B&O taxes.

(c) The department simultaneously performed a timber tax audit and a B&O tax audit of a taxpayer. The audit disclosed underpayments of B&O tax and overpayments of timber tax. Separate assessments were issued on the same date, one showing additional taxes due and the other overpayments. The department may apply the overpayment against the tax deficiency assessment since both the underpayment and overpayment have been established.

(10) **How do I appeal the department's decision?** The taxpayer may appeal the denial of: A refund claim (or any part thereof, including tax, penalties, or interest overpayments), a request for an extension for providing substantiation, or a request to use a specific sampling technique. Taxpayer may appeal to either:

(a) The department as provided in WAC 458-20-100, Appeals, small claims and settlements; or

(b) Directly to Thurston County superior court.

(11) **Application.** This section applies to refund applications or amended returns showing overpayments, where the taxpayer has also specifically identified the basis for the refund or credit, that are received by the department on or after the effective date of this section.

[Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 08-14-038, § 458-20-229, filed 6/23/08, effective 7/24/08; WSR 07-17-065, § 458-20-229, filed 8/13/07, effective 9/13/07. Statutory Authority: RCW 82.32.300. WSR 93-04-077, § 458-20-229, filed 2/1/93, effective 3/4/93; WSR 83-08-026 (Order ET 83-1), § 458-20-229, filed 3/30/83; Order ET 70-3, § 458-20-229 (Rule 229), filed 5/29/70, effective 7/1/70.]

WAC 458-20-230 Statutory limitations on assessments. (1) **Introduction.** This section explains the time period during which the department of revenue may issue a tax assessment. It also explains the circumstances under which the department may request that a taxpayer complete a statute of limitations waiver.

(2) **Assessment period.** Tax assessments must be made within four years after the close of the tax (calendar) year in which the tax was incurred with the following exceptions:

(a) Against a taxpayer who was not registered as required by chapter 82.32 RCW.

(b) Upon a showing of fraud or of misrepresentation of a material fact by the taxpayer.

(c) Where the taxpayer has executed a written waiver of such limitation.

(d) Sales tax collected by a seller upon retail sales and not remitted to the department.

(3) **Unregistered taxpayer.** Except for evasion or misrepresentation, if the department of revenue discovers any unregistered taxpayer doing business in this state, the department will assess taxes, interest, and penalties for a period of seven years plus the current year. If a taxpayer voluntarily registers before being contacted by the department, assessments will not exceed four years plus the current year, provided the taxpayer has made a good faith attempt to report correctly and there is no evidence of intent to evade tax under RCW 82.32.050. It will be presumed that a taxpayer has registered with the department if the taxpayer voluntarily files for an identification number under the Unified Business Identifier (UBI) system prior to any contact from the department of revenue.

(4) **Evasion or misrepresentation.** There is no limitation for the period in which an assessment or correction of an assessment can be made upon a showing of evasion or of misrepresentation of a material fact. Evasion involves a situation where the taxpayer knows a tax liability is due and the taxpayer attempts to escape detection through deceit, fraud, or other intentional wrongdoing. The evasion must be shown by clear, cogent, and convincing evidence which is objective and creditable. However, in the case of evasion or misrepresentation, any assessment for taxes which extends beyond four years and the current year will be limited to taxes which were underpaid as a result of the evasion or misrepresentation. (See RCW 82.32.050 and 82.32.090.)

(5) **Statute of limitations waiver.** The department may request that a taxpayer complete a waiver of the statute of limitations in those cases where the delay in timely completing an audit or issuance of an assessment is the result of actions of the taxpayer. If the department requests that a statute of limitations waiver be completed, the waiver will also hold open the period during which the department may refund taxes discovered to have been overpaid. The department may also request that a taxpayer complete a waiver of the statute of limitations in connection with a request from a taxpayer for a refund or credit for overpaid taxes. If the refund or credit request relates to a year for which the statute of limitations will expire within a short period, the department may be able to more promptly issue a refund by delaying the verification process until it is more convenient to the taxpayer and/or the department if the taxpayer will execute a statute of limitations waiver. (Refer to WAC 458-20-229.)

(6) **Trust funds.** Retail sales tax which is collected by a seller must be remitted to the department of revenue. These amounts are deemed to be held in trust by the seller until paid to the department. The statute of limitations does not apply to retail sales tax which was collected and not remitted to the department.

(7) **Revised assessments.** The department may issue an assessment to correct errors found in examining tax returns or it may issue an assessment to correct errors based on a review of the taxpayer's records. Assessments which are based on a review of the tax returns are subject to further review and revision by future audit. Once issued, the department may revise an audit assessment subject to the following restrictions.

(a) The assessment generally may not be increased from the amount originally assessed for those years for which the statute of limitations would have expired if this were an original assessment. For these years an assessment can be reduced, but not increased.

(b) An assessment may be increased upon discovery of fraud/evasion or misrepresentation of a material fact.

(8) **Assessments following conditional refunds or credits.** Taxpayers may petition for a credit or refund of overpaid taxes by following the procedures in WAC 458-20-229. The department at its option may grant such credits or refunds without further immediate verification. If it is later determined that a refund was granted in error and that there was no fraud/evasion or misrepresentation of a material fact, the department may issue an assessment to recover the taxes and interest which were refunded in error, provided the assessment is issued within four years from the close of the tax year in which the tax was incurred or within a period covered by a statute of limitations waiver.

(9) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(a) ABC Manufacturing has manufacturing plants in Oregon and Washington. This taxpayer properly registered with the department of revenue when first engaging in business in Washington a number of years ago and has remained registered. In 1987 the taxpayer transferred equipment from its Oregon plant and used the equipment in its Washington plant. (See RCW 82.12.010 for a definition of use.) This transfer was recorded in the accounting records in 1987, but the taxpayer inadvertently failed to report the use tax. The taxpayer's records were audited in 1992 at which time this transfer and the failure to report the use tax came to the department's attention. Since the department discovered the use tax had not been paid more than four years after the close of 1987 and none of the exceptions as stated in subsection (2) of this section apply, the department is barred by the statute of limitations from now assessing the use tax. The department can expand the statute of limitations to seven years plus the current year if the taxpayer was required to be registered and failed to do so.

(b) The department issued its assessment on December 20, 1992, for use taxes owed by ABC Manufacturing covering the period January 1, 1988, through September 30, 1992. The taxpayer contacted the department in April 1994 and provided documentation to support that retail sales tax had been paid on some items assessed for use tax in the tax years 1989 and 1990. In the process of reviewing the documentation, the department discovered that the auditor inadvertently had failed to assess use tax on some assets purchased in the year 1988 which would have resulted in a larger tax assessment for that year than originally assessed. The department issued a revised assessment on June 15, 1994, covering the period January 1, 1988, through September 30, 1992 which reflected the deletion of the use tax assessed in error for 1989 and 1990. The revised assessment did not increase the tax assessment for taxes owed in 1988 because this would have resulted in the assessment being increased more than four years after the close of the 1988 tax year. Any petition for refund must be made within four years of the close of the tax year in which the tax was paid.

(c) The department contacted XYZ Distributing on September 1, 1992, to schedule a routine audit of its records. The taxpayer requested that the department delay the start of the audit until December 1, 1992, because its records are maintained on a fiscal year ending September 30 and the audit would be extremely disruptive to its year end closing if begun immediately. This delay would not allow the department sufficient time to complete the review of the records for 1988 and timely make an assessment for any taxes found to be due. The department may request the taxpayer to complete a statute of limitations waiver for the year 1988 in exchange for delaying the start of the audit. The completion of the waiver by the taxpayer will also hold open the year 1988 for refund or credit of any taxes found to have been overpaid in this period until such time as an assessment is issued or the waiver expires.

(d) ABC Manufacturing was being audited by the department for the period January 1, 1988, through September 30, 1992. During the process of examining the records, the department discovered that ABC had collected retail sales tax on sales in 1986 which had never been remitted to the department. There was no fraud or misrepresentation involved in the taxpayer's failure to remit the tax. The department appropriately expanded the period covered by the assessment to include the unremitted retail sales tax in the year 1986. Retail sales tax collected by a seller is deemed to be held in trust until paid to the department and the statute of limitations does not apply. (See RCW 82.08.050.)

(e) The department, through staff at its Seattle office, was unable to find a registration for ARC Company. The department contacted ARC by letter inquiring about its business activities in Washington and asking ARC for its registration number. ARC had not registered with the department of revenue, nor had it registered with any other state agencies through the UBI system. Shortly after being contacted by the department's Seattle staff, ARC contacted the Olympia office of the department and completed an application for registration without disclosing the earlier contact by the Seattle office. ARC subsequently argued that the assessment should be restricted to four years plus the current year. The department appropriately made its assessment for seven years plus the current year because the taxpayer was unregistered at the time of being first contacted by the department.

(f) John Smith lives in Washington part of the year, votes in Washington, has a Washington driver's license, and uses his Washington address in filing federal tax returns. He spends the winters in Arizona. In 1986, while in Arizona, he purchased a new motor home which he licensed in Arizona. He assumed that it was appropriate to license the vehicle in Arizona since he spends a considerable part of the year there and was not aware that he should pay use tax on the first use in Washington which occurred later that year. In 1992 he traded this motor home for a new motor home which he purchased from an Arizona dealer. Shortly thereafter, he returned to Washington and the department became aware of Mr. Smith's use of both of these motor homes in Washington. The department concluded that use tax was due. However, because the department could not show any evidence of evasion or misrepresentation and the taxpayer was not required to be registered with the department, the statute of limitations had expired on the 1986 purchase. Use tax was properly due and assessed on the 1992 purchase with the value based on the total purchase price after allowing a deduction for the trade-in value.

(g) In 1992 the department audited the records of XYZ Hauling for the years 1988 through 1991. The audit disclosed

that some income from hauling performed in 1988 had not been reported and issued an assessment in 1992 for additional taxes owed under the motor transportation public utility tax. The taxpayer paid the assessment in 1992. In 1994 the taxpayer contacted the department with additional records which disclosed that part of the hauling for which motor transportation tax was assessed for the year 1988 should have been assessed under the urban transportation classification, a lower tax rate. The taxpayer requested that all of the motor transportation tax be refunded and argued that the urban transportation tax could not be assessed since the statute of limitations had expired for the year 1988. The department issued a revised assessment in which it subtracted the tax that should have been paid under urban transportation from the motor transportation tax which was assessed. The department refunded the difference. The revised assessment did not result in additional taxes being assessed, but was a reduction of the original assessment.

[Statutory Authority: RCW 82.32.300. WSR 93-03-004, § 458-20-230, filed 1/8/93, effective 2/8/93; Order ET 70-3, § 458-20-230 (Rule 230), filed 5/29/70, effective 7/1/70.]

WAC 458-20-233 Tax liability of medical and hospital service bureaus and associations and similar health care organizations. All medical service bureaus, medical service corporations, hospital service associations and similar health care organizations engaging in business within this state are subject to the provisions of the business and occupation tax and are taxable under the service and other business activities classification upon their gross income. The term "gross income" as defined in RCW 82.04.080 is construed to include the total contributions, fees, premiums or other receipts paid in by the members or subscribers. Insofar as tax liability is concerned it is immaterial that such organizations may be incorporated as charitable or nonprofit corporations.

Certain of these organizations operate under contracts by the terms of which the bureau or association acts solely as the agent of a physician, hospital, or ambulance company in offering to its members or subscribers medical and surgical services, hospitalization, nursing, and ambulance services. In computing tax liability such bureaus and associations, therefore, will be entitled to deduct from their gross income the amounts paid to member physicians, hospitals and ambulance companies. No deduction will be allowed with respect to amounts retained as surplus or reserve accounts or to amounts expended for the purchase of supplies or for any other expense of the bureau or association other than as provided herein.

Under contracts wherein these organizations furnish to their members medical and surgical, hospitalization and ambulance services as a principal and not as an agent, no such deduction is allowed.

Revised July 1, 1956.

[Order ET 70-3, § 458-20-233 (Rule 233), filed 5/29/70, effective 7/1/70.]

WAC 458-20-235 Effect of rate changes on prior contracts and sales agreements. (1) **Introduction.** This section explains the principals that determine the applicability of changes in the rates of tax imposed under the Revenue Act, with respect to contracts, sales agreements, and installment sales made prior to the effective date of the change.

(2) **Unconditional sales contracts.**

• When an unconditional sales contract to sell tangible personal property is entered into prior to the effective date of a rate change, and the property is delivered after the rate change date, the new tax rate applies to the transaction.

• When an unconditional sales contract to sell tangible personal property is entered into prior to the effective date, and the property is delivered prior to the rate change date, the tax rate in effect for the prior period applies.

• When a contract to sell tangible personal property contains a specific provision to pass title at some time prior to delivery of the property, such a specific provision is controlling and the tax rate in effect at that time applies.

(3) **Conditional and installment sales.** The taxes due on conditional and installment sales must be wholly reported during the period in which the sale is made (see WAC 458-20-198 Installment sales, method of reporting), even when the seller receives payment in installments. Sellers who receive installment payments after the effective date of a rate change on conditional and installment sales made prior to that date do not need to adjust the installment payment amounts to reflect the rate change.

(4) **Leasing or rental of tangible personal property.** Lessors who lease tangible personal property are required to collect from their lessees the retail sales tax measured by the gross income from leases or rentals as of the time the lease or rental payments are due (WAC 458-20-211 Leases or rentals of tangible personal property, bailments). Lessors must collect and remit taxes to the department of revenue (department) at the new rates on all lease or rental payments due on and after the effective date of a rate change, including lease or rental payments on contracts entered into prior to that date.

(5) **Repairing or improving tangible personal or real property.** When persons install, repair, clean, alter, imprint, or improve tangible person property for others, or improve buildings or other structures upon real property of others:

• Sales and use tax rate increases apply to the first billing period starting on or after the effective date of the increase; and

• Sales and use tax rate decreases apply when bills are rendered on or after the effective date of the decrease. (RCW 82.08.064)

The new tax rate applies to the full contract amount if the contract was executed prior to the effective date of the rate change, unless the contract work is completed and accepted prior to the effective date.

If under the terms of the contract, the seller is entitled to periodic payments, which amounts are calculated to compensate the seller for the work completed to the date of payment, the applicable tax rates upon such payments (including, in the case of public works contracts, the percentage retained by the public agency pursuant to the provisions of RCW 60.28.010) will be those in effect at the time the seller is entitled to receive the payments.

(6) **Do you have questions on rate changes?** If you have questions on how a rate change may affect you, please contact the Telephone Information Center at 1-800-647-7706, or write the department at:

Taxpayer Information and Education
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and 82.08.064. WSR 10-07-135, § 458-20-235, filed 3/23/10, effective 4/23/10. Statutory Authority: RCW 82.32.300. WSR 83-07-032 (Order ET 83-15), § 458-20-235, filed 3/15/83; Order ET 70-3, § 458-20-235 (Rule 235), filed 5/29/70, effective 7/1/70.]

WAC 458-20-236 Baseball clubs and other sport organizations.

Business and Occupation Tax

Baseball clubs and other sport organizations are taxable under the classification of service and other business activities upon the total income derived from games for which such clubs are the sponsors or hosts, even though a fixed amount or a certain percentage of such income is paid to another team or club.

Conversely, amounts received by baseball clubs or other sport organizations as their share of the proceeds from games for which they are not the sponsor or host may be excluded from the measure of tax.

Issued July 1, 1956.

[Order ET 70-3, § 458-20-236 (Rule 236), filed 5/29/70, effective 7/1/70.]

WAC 458-20-238 Sales of watercraft to nonresidents—Use of watercraft in Washington by nonresidents. (1) **Introduction.** This section explains the retail sales tax exemption provided by RCW 82.08.0266 for sales to nonresidents of watercraft requiring United States Coast Guard documentation or state registration; the retail sales tax exemption provided by RCW 82.08.02665 for sales of watercraft to residents of foreign countries; and the retail sales and use tax exemptions contained in Substitute House Bill No. 1002 (SHB 1002), chapter 22, Laws of 2007 relating to sales or use of vessels thirty feet or longer to or by nonresident individuals. These statutes provide the exclusive authority for granting a retail sales tax exemption for sales of such watercraft when delivery is made within Washington. This section explains the requirements to be met, and the documents which must be preserved, to substantiate a claim of exemption. It also discusses use tax exemptions for nonresidents bringing watercraft into Washington for enjoyment and/or repair.

This section primarily deals with the retail sales and use taxes where delivery takes place or vessel is used in Washington. Sellers should refer to WAC 458-20-193 Inbound and outbound interstate sales of tangible personal property if they deliver the vessel to the purchaser at an out-of-state location. Purchasers also should be aware that there is a watercraft excise tax which may apply to the purchase or use of watercraft in Washington. (See chapter 82.49 RCW et seq.) In addition, purchasers of commercial vessels may have annual liability for personal property tax.

(2) **Business and occupation (B&O) tax.** Retailing B&O tax is due on all sales of watercraft to consumers if delivery is made within the state of Washington, even though the sale may qualify for an exemption from the retail sales tax. If the seller also manufactures the vessel in Washington, the seller must report under both the manufacturing and wholesaling or retailing classifications of the B&O tax, and claim a multiple activities tax credit (MATC). Manufacturers should also refer to WAC 458-20-136 (Manufacturing, processing for hire, fabricating) and WAC 458-20-19301 (Multiple activities tax credits).

(3) **Retail sales tax.** The retail sales tax generally applies to the sale of watercraft to consumers when delivery is made within the state of Washington. Under certain conditions, however, retail sales tax exemptions are available for sales of watercraft to nonresidents of Washington, even when delivery is made within Washington.

(a) **Exemptions for sales of watercraft, to nonresidents, requiring United States Coast Guard documentation and certain sales of vessels to residents of foreign countries.** RCW 82.08.0266 provides an exemption from the retail sales tax for sales of watercraft to residents of states other than Washington for use outside this state, even when delivery is made within Washington. The exemption provided by RCW 82.08.0266 is limited to sales of watercraft requiring United States Coast Guard documentation or registration with the state in which the vessel will be principally used, but only when that state has assumed the registration and numbering function under the Federal Boating Act of 1958.

RCW 82.08.02665 provides a retail sales tax exemption for sales of vessels to residents of foreign countries for use outside this state, even when delivery is made in Washington. This exemption is not limited to the types of watercraft qualifying for the exemption provided by RCW 82.08.0266. The term "vessel," for the purposes of RCW 82.08.02665, means every watercraft used or capable of being used as a means of transportation on the water, other than a seaplane.

(i) **Exemption requirements.** The following requirements must be met to perfect any claim for exemption under RCW 82.08.0266 and 82.08.02665:

(A) The watercraft must leave Washington waters within forty-five days of delivery;

(B) The seller must examine acceptable proof that the buyer is a resident of another state or a foreign country; and

(C) The seller, at the time of the sale, must retain as a part of its records a completed exemption certificate to document the exempt nature of the sale. This requirement may be satisfied by using the department's "buyer's retail sales tax exemption certificate," or another certificate with substantially the information as it relates to the exemption provided by RCW 82.08.0266 and 82.08.02665. The certificate must be completed in its entirety, and retained by the seller. A blank certificate can be obtained via the internet at http://dor.wa.gov, by facsimile by calling Fast Fax at (360) 786-6116 or (800) 647-7706 (using menu options), or by writing to: Taxpayer Services, Department of Revenue, P.O. Box 47478, Olympia, Washington 98504-7478. The seller should not accept an exemption certificate if the seller becomes aware of any information prior to the completion of the sale which is inconsistent with the purchaser's claim of residency, such as a Washington address on a credit application.

(ii) **Component parts and repairs.** The exemptions provided by RCW 82.08.0266 and 82.08.02665 apply only to sales of watercraft. For the purposes of these exemptions, the term "watercraft" includes component parts which are

installed in or on the watercraft prior to delivery to and acceptance by the buyer, but only when these parts are sold by the seller of the watercraft. "Component part" means tangible personal property which is attached to and used as an integral part of the operation of the watercraft, even if the item is not required mechanically for the operation of the watercraft. Component parts include, but are not necessarily limited to, motors, navigational equipment, radios, depthfinders, and winches, whether themselves permanently attached to the watercraft or held by brackets which are permanently attached. If held by brackets, the brackets must be permanently attached to the watercraft in a definite and secure manner.

These exemptions do not extend to the sale of boat trailers, repair parts, or repair labor. These exemptions also do not extend to a separate seller of unattached component parts, even though these parts may be manufactured specifically for the watercraft and/or permanently installed in or on the watercraft prior to the watercraft being delivered to and accepted by the buyer.

(b) **Exemption for vessels thirty feet or longer.** Effective July 1, 2007, SHB 1002, chapter 22, Laws of 2007, a retail sales tax exemption is available for sales of vessels thirty feet or longer to individuals who are nonresidents of Washington.

(i) **Exemption requirements.** The following requirements must be met in order for an individual to claim this exemption:

(A) The individual must provide valid proof of nonresidency at the time of purchase;

(B) The vessel purchased must measure at least thirty feet in length; and

(C) The individual must obtain a valid use permit from the vessel dealer authorized to sell use permits.

(ii) **Valid proof of nonresidency.** An individual may prove nonresidency with identification that:

(A) Includes a photograph of the individual;

(B) Is issued by the jurisdiction in which the individual claims residency;

(C) Includes the individual's residential address; and

(D) Is issued for the purpose of establishing an individual's residency in a jurisdiction outside Washington state.

Acceptable identification includes a valid out-of-state driver's license.

(iii) **Use permits.** A use permit is not renewable and costs five hundred dollars for vessels thirty to fifty feet and eight hundred dollars for vessels greater than fifty feet in length. The permit includes an affidavit (affidavit) from the buyer declaring that the purchased vessel will be used in a manner consistent with this exemption. The use permit also includes an adhesive sticker (sticker) that must be displayed on the purchased vessel and which is valid for twelve consecutive months from the date of purchase. The sticker serves as proof of a validly issued use permit. Vessel dealers are not obligated to issue use permits to any individual. Buyers must elect this exemption irrevocably and may not elect additional exemptions under RCW 82.08.0266 and 82.08.02665 for the same period. Individuals must wait twenty-four months from the expiration of a use permit before claiming the use tax exemption for their vessel pursuant to RCW 82.12.0251.

(iv) **What are the obligations of vessel dealers?** A vessel dealer who elects to issue a use permit under this section has the following obligations:

(A) Examine and determine, in good faith, whether the individual has valid proof of nonresidency.

(B) Use department of revenue's (department) approved use permits. Obtain department's use permits from: Taxpayer Account Administration Division, Department of Revenue, P.O. Box 47476, Olympia, Washington 98504-7476, Telephone 360-902-7065.

(C) Retain copies of issued use permits in his or her records for the statutory period. For information about the statutory period, please refer to WAC 458-20-254 Recordkeeping.

(D) Provide copies of issued use permits to the department on a quarterly basis. Copies of issued permits must be sent to: Taxpayer Account Administration Division, Department of Revenue, P.O. Box 47476, Olympia, Washington 98504-7476.

(E) Collect, remit and report use permit fees. Dealers report use permit fees on their excise tax returns and remit in accordance with RCW 82.32.045.

(F) Electronically file all returns, as described in RCW 82.32.050, with the department. Nonelectronically filed returns are not deemed filed unless approved by the department for good cause shown.

(v) **Liability for retail sales and use tax.**

(A) If an individual obtains a use permit for a vessel under this section and uses that vessel in Washington after the use permit expires, the individual will be liable for retail sales tax on the original selling price of that vessel (along with interest retroactive to the date of purchase at the rate provided in RCW 82.32.050).

(B) Vessel dealers will be personally liable for retail sales tax if the dealer either does not collect retail sales tax when making sales to individuals without valid identification establishing nonresidency, or fails to maintain records of sales as provided under (b)(iv) of this subsection.

(4) **Deferred retail sales or use tax.** If Washington retail sales tax has not been paid, persons using watercraft on Washington waters are required to report and remit to the department such sales tax (commonly referred to as deferred retail sales tax) or use tax, unless the use is specifically exempt by law. A credit against Washington's use tax is allowed for retail sales or use tax previously paid by the user or the user's bailor or donor with respect to the property to any other state of the United States, any political subdivision thereof, the District of Columbia, and any foreign country or political subdivision thereof, prior to the use of the property in Washington. RCW 82.12.035. See also WAC 458-20-178 Use tax.

(a) Tax is due on the use by any nonresident of watercraft purchased from a Washington vendor and first used within this state for more than forty-five days if retail sales or use tax has not been paid by the user. Tax is due notwithstanding the watercraft qualified for retail sales tax exemption at the time of purchase.

(b) Use tax does not apply to the temporary use or enjoyment of watercraft brought into this state by nonresidents while temporarily within this state.

(i) For watercraft owned by nonresident entities (i.e., corporations, limited liability companies, trusts, partnerships, etc.), it will be presumed that use within Washington exceeding sixty days in any twelve-month period is more than temporary use and use tax is due, except as otherwise provided in this section.

(ii) Nonresident individuals (whether residents of other states or foreign countries) may temporarily bring watercraft into this state for their use or enjoyment without incurring liability for the use tax if such use does not exceed a total of six months in any twelve-month period. To qualify for this six-month exemption period, the watercraft must be issued a valid number under federal law or by an approved authority of the state of principal operation, be documented under the laws of a foreign country, or have a valid United States customs service cruising license. The watercraft must also satisfy all identification requirements under RCW 88.02.030 for any period after the first sixty days. Failure to meet the applicable documentation and identification requirements will result in a loss of the exemption.

(c) Watercraft owned by nonresidents and in this state exclusively for repair, alteration, or reconstruction are exempt from the use tax if removed from this state within sixty days. If repair, alteration, or reconstruction cannot be completed within this period, the exemption may be extended by filing with the department's compliance division an affidavit as required by RCW 88.02.030 verifying the vessel is located upon the waters of this state exclusively for repair, alteration, reconstruction, or testing. This document, titled "Nonresident Out-of-State Vessel Repair Affidavit," is effective for sixty days. If additional extensions of the exemption period are needed, additional affidavits must be sent to the department. Failure to file this affidavit can result in requiring that the vessel be registered in Washington and subject to the use tax.

(d) **Use tax exemption for vessels thirty feet or longer.** Effective July 1, 2007, SHB 1002, chapter 22, Laws of 2007 exempts from use tax the purchase of vessels thirty feet or longer used in Washington by nonresident individuals. This exemption is available to nonresident individuals in any of the three following situations: The vessel is purchased from a vessel dealer and a use permit is obtained in accordance with subsection (3)(b) of this section; the vessel is purchased in Washington from someone other than a vessel dealer and within fourteen days of purchase the nonresident individual obtains a use permit under this subsection; the vessel is acquired outside Washington and the nonresident individual, within fourteen days of bringing the vessel into Washington, buys a use permit under this subsection. Any vessel dealer that issues permits under subsection (3)(b) of this section must also issue permits under this subsection.

(i) **What are the obligations of vessel dealers?** Vessel dealers that issue use permits have the same obligations as those described in subsection (3)(b)(iv) of this section. Vessel dealers may not issue use permits under this subsection where a nonresident individual has already obtained a use permit under subsection (3)(b) of this section.

(ii) **Valid proof of nonresidency.** Nonresident individuals must meet the same identification requirements described in subsection (3)(b)(ii) of this section.

(iii) **Use permits.** The use permit is not renewable and costs five hundred dollars for vessels thirty to fifty feet and eight hundred dollars for vessels greater than fifty feet in length. This use permit must be displayed on the vessel and is valid for twelve consecutive months from the date of issuance. Nonresident individuals must obtain a use permit from a vessel dealer; however, vessel dealers are not obligated to issue these use permits. Nonresident individuals must elect this exemption irrevocably and may not elect exemption under RCW 82.08.0266 and 82.08.02665 for the same period. The nonresident individual must wait twenty-four consecutive months from the expiration of a use permit before claiming exemption for a vessel under RCW 82.12.0251.

(iv) **Liability for use tax.**

(A) If a nonresident individual continues to use a vessel in Washington after his or her use permit expires, that individual shall be liable for use tax under RCW 82.12.020. Liability for use tax will be based upon the value of the vessel at the time it was either purchased or first brought into Washington. Interest will accrue retroactive to the date of purchase or first use in Washington at a rate set by RCW 82.32.050.

(B) Vessel dealers are personally liable for use tax where a dealer either issues a use permit to a nonresident individual who does not hold valid proof of nonresidency, or fails to maintain records for each use permit issued showing the type of identification accepted, the identification numbers, and expiration date.

(5) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances. In all examples, retailing B&O tax is due from the seller for all sales of watercraft and parts, and all charges for repair parts and labor.

(a) Mr. Kelley, a resident of California, pilots his cabin cruiser which is registered in that state into Puget Sound for his enjoyment. On the sixtieth day of his stay, Mr. Kelley obtains an identification document for the cabin cruiser under RCW 88.02.030 from the department of licensing. To further extend his stay in Washington waters, he applies for a second identification document within the prescribed period. In the middle of his fifth month on Puget Sound, Mr. Kelley departs and returns the craft to its home port in California. The stay would not subject Mr. Kelley to use tax. On the other hand, if Mr. Kelley were a resident of Vancouver, British Columbia, bringing a vessel registered in Canada, he would also have to timely obtain and display the appropriate identification document required by RCW 88.02.030 to allow his temporary use of the watercraft in Washington.

(b) Company A sells a yacht to John Doe, an Oregon resident, who takes delivery in Washington. The yacht is required to be registered by the state of Oregon. The vessel is removed from Washington waters within forty-five days of delivery. Company A examines a driver's license confirming John Doe to be an Oregon resident, and records this information in the sales file. Company A does not complete and retain the required exemption certificate.

The sale of the yacht is subject to the retail sales tax. The exclusive authority for granting a retail sales tax exemption for this sale is provided by RCW 82.08.0266. Completion of an exemption certificate is a statutorily imposed condition for

obtaining this exemption. Company A has not satisfied the conditions and requirements necessary to grant an exemption under this statute. The exemption provisions under RCW 82.08.0273 for sales to nonresidents of states having less than three percent retail sales tax can not be used for purchases of vessels which require United States Coast Guard documentation, or registration in the state of principal use. If the exemption certificate had been properly completed at the time of sale, this sale would have qualified for retail sales tax exemption.

(c) Mr. Jones, a California resident, contracts Company B to manufacture a pleasure yacht. Mr. Jones purchases a boat motor from Company Y with instructions that delivery be made to Company B for installation on the yacht. The yacht is required to be registered with the state of California, which has assumed the registration and numbering function under the Federal Boating Act of 1958. Company B examines Mr. Jones' driver's license to verify Mr. Jones is a nonresident of Washington, and retains the proper exemption certificate at the time of sale. Delivery is made in Washington, and Mr. Jones removes the vessel from Washington waters within forty-five days of delivery.

The sale of the yacht by Company B to Mr. Jones is not subject to the retail sales tax, as the requirements and conditions for exemption have been satisfied. Retail sales tax does, however, apply to the sale of the motor by Company Y to Mr. Jones. The exemption provided by RCW 82.08.0266 does not extend to a separate seller of unattached component parts, even though the parts are installed in the watercraft prior to delivery.

(d) Mr. Smith, a resident of British Columbia, Canada, brings his yacht into Washington with the intention of temporarily using the yacht for personal enjoyment. Mr. Smith obtains the required identification document issued by the department of licensing. After four months of personal use, the yacht experiences mechanical difficulty. The yacht is taken to a repair facility and due to the extensive nature of the damage the yacht remains at the repair facility for six months. As explained in subsection (4)(c) of this section, Mr. Smith makes a timely filing of each required "Nonresident Out-of-State Vessel Repair Affidavit." An employee of the repair facility is on board the yacht during all testing, and there is no personal use by Mr. Smith during this period. Upon completion of the repairs and testing, Mr. Smith takes delivery at the repair facility.

Mr. Smith may personally use the yacht in Washington waters for up to two months after taking delivery of the repaired yacht. He will not incur liability for use tax because the instate use of the yacht for personal enjoyment will not exceed six months in a twelve-month period. The time the yacht is at the repair facility exclusively for repair does not count against the period of time Mr. Smith is considered to be "temporarily" using the yacht in Washington for personal enjoyment. Retail sales tax is due, and must be paid, however, on all charges for repair parts and labor. The exemption from sales tax for purchases of vessels does not extend to repairs.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.08.0266, and 82.08.02665. WSR 08-14-022, § 458-20-238, filed 6/20/08, effective 7/21/08. Statutory Authority: RCW 82.32.300. WSR 00-23-003, § 458-20-238, filed 11/1/00, effective 12/2/00; WSR 95-24-103, § 458-20-238, filed 12/6/95, effective 1/6/96; WSR 83-21-061 (Order ET 83-7), § 458-20-238, filed 10/17/83; WSR 83-08-026 (Order ET 83-1), § 458-20-238, filed 3/30/83; Order ET 70-3, § 458-20-238 (Rule 238), filed 5/29/70, effective 7/1/70.]

WAC 458-20-239 Sales to nonresidents of farm machinery or implements, and related services. (1) **Introduction.** This section explains the retail sales tax exemption provided by RCW 82.08.0268 for sales to nonresidents of farming machinery and implements, parts for farming machinery and implements, and related labor and services. This section also explains the documents that must be preserved to substantiate a claim of exemption. Sellers should refer to WAC 458-20-193 (Inbound and outbound interstate sales of tangible personal property) if they deliver farm machinery or implements to the purchaser at an out-of-state location.

(2) **Tax-reporting requirements.** Retailing B&O and retail sales taxes generally apply to all sales of tangible personal property, parts, and repair labor in Washington.

(a) RCW 82.08.0268 provides an exemption from retail sales tax for sales to nonresidents of the following when used in conducting a farm activity outside the state of Washington:

(i) Machinery and implements;

(ii) Parts for machinery and implements; and

(iii) Labor and services for repair of machinery, implements, and parts.

(b) To qualify for the exemption, the machinery, implements, or parts must be transported outside the state immediately after sale or completion of the repair or service.

(c) This exemption is allowed even though the property sold or serviced is delivered to the purchaser in this state, but only when the seller receives from the buyer an exemption certificate, and examines acceptable proof such as a driver's license that the buyer is a resident of a state or country other than the state of Washington.

(d) The exempt nature of the transaction must be documented by using the department's "Farmers' Retail Sales Tax Exemption Certificate," or another certificate with substantially the same information as it relates to the exemption provided by RCW 82.08.0268. The certificate must be completed in its entirety, and retained by the seller.

The "Farmers' Retail Sales Tax Exemption Certificate" can be obtained via the internet at http://dor.wa.gov. The form may also be obtained by contacting the department's telephone information center at 1-800-647-7706, or by writing the department at:

Taxpayer Information and Education
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478

If, prior to completion of the sale, the seller becomes aware of any information inconsistent with the purchaser's claim of residency, such as a Washington address on a credit application, the seller should not accept an exemption certificate.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and 82.08.0268. WSR 09-15-057, § 458-20-239, filed 7/10/09, effective 8/10/09. Statutory Authority: RCW 82.32.300. WSR 00-09-092, § 458-20-239, filed 4/19/00, effective 5/20/00; WSR 83-08-026 (Order ET 83-1), § 458-20-239, filed 3/30/83; Order ET 70-3, § 458-20-239 (Rule 239), filed 5/29/70, effective 7/1/70.]

WAC 458-20-240 Manufacturer's new employee tax credits—Applications filed after June 30, 2010. (1) Introduction. Chapter 82.62 RCW provides business and occupation (B&O) tax credits to certain persons engaged in manufacturing and research and development activities. These credits are intended to stimulate the economy by creating employment opportunities in specific rural counties and community empowerment zones of this state. The credits are as much as $4,000 per qualified employment position. This rule explains the eligibility requirements and application procedures for this program. It is important to note that an application for the tax credits must be submitted to the department of revenue before the actual hiring of qualified employment positions. See subsection (6) of this rule for additional information regarding this application requirement. This tax credit program is a companion to the tax deferral program under chapter 82.60 RCW; however, the eligible geographic areas in the two programs are not identical.

The department of employment security and the department of commerce administer programs for rural counties and job training. These agencies should be contacted directly for information concerning those programs.

(2) **Who is eligible for these tax credits?** Subject to certain qualifications, an applicant (person applying for a tax credit under chapter 82.62 RCW) who is engaged in an eligible business project is entitled to the tax credits provided by chapter 82.62 RCW.

(a) **What is an eligible business project?** An "eligible business project" means manufacturing, commercial testing, or research and development activities conducted by an applicant in an eligible area at a specific facility, subject to the restriction noted in the following paragraph. An "eligible business project" does not include any portion of a business project undertaken by a light and power business or any portion of a business project creating employment positions outside an eligible area.

To be considered an "eligible business project," the applicant's number of average full-time qualified employment positions at the specific facility must be at least fifteen percent greater in the calendar year for which credit is being sought than the number of positions at the same facility in the immediately preceding calendar year. Subsection (4) of this rule explains how to determine whether this threshold is satisfied.

(b) **What is an eligible area?** As noted above, the facility must be located in an eligible area to be considered an eligible business project. An "eligible area" is:

(i) A rural county, which is a county with fewer than one hundred persons per square mile or, a county smaller than two hundred twenty-five square miles, as determined annually by the office of financial management and published by the department of revenue effective for the period of July 1st through June 30th (see RCW 82.14.370); or

(ii) A community empowerment zone (CEZ). CEZ means an area meeting the requirements of RCW 43.31C.020 and officially designated by the director of the department of commerce.

(iii) **How to determine whether an area is an eligible area.** Rural county designation information can be obtained from the office of financial management internet web site at www.ofm.wa.gov/popden/rural.htm. The department has instituted a geographic information system (GIS) to assist taxpayers in determining taxing jurisdiction boundaries, local tax rates, and a mapping and address lookup system to determine whether a specific address is within a CEZ. The system is available on the department's internet web site at www.dor.wa.gov.

(c) **What are manufacturing and research and development activities?** Manufacturing or research and development activities must be conducted at the facility to be considered an eligible business project.

(i) **Manufacturing.** "Manufacturing" has the meaning given in RCW 82.04.120. In addition, for the purposes of chapter 82.62 RCW "manufacturing" also includes the activities performed by research and development laboratories and commercial testing laboratories.

(ii) **Research and development.** "Research and development" means the development, refinement, testing, marketing, and commercialization of a product, service, or process before commercial sales have begun, but only when such activities are intended to ultimately result in the production of a new, different, or useful substance or article of tangible personal property for sale. "Commercial sales" does not include sales of prototypes or sales for market testing if the total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(3) **What are the hiring requirements?** The average full-time qualified employment positions at the specific facility during the calendar year for which credits are claimed must be at least fifteen percent greater than the average full-time qualified employment positions at the same facility for the preceding calendar year.

(a) **What is a qualified employment position?** A "qualified employment position" means a position filled by a permanent full-time employee employed at an eligible business project for twelve consecutive months**.** Once a full-time position is established and filled it will continue to qualify for twelve consecutive periods so long as any person fills the position. The position is considered "filled" even during periods of vacancy, provided these periods do not exceed thirty consecutive days and the employer is training or actively recruiting a replacement employee.

(b) **What is a "permanent full-time employee"?** A "permanent full-time employee" is a position that is filled by an employee who satisfies any one of the following minimum thresholds:

(i) Works thirty-five hours per week for fifty-two consecutive weeks;

(ii) Works four hundred fifty-five hours, excluding overtime, each quarter for four consecutive quarters; or

(iii) Works one thousand eight hundred twenty hours, excluding overtime, during a period of twelve consecutive months.

(c) **"Permanent full-time employee" - Seasonal operations.** For applicants that regularly operate on a seasonal basis only and that employ more than fifty percent of their employees for less than a full twelve month continuous period, a "permanent full-time employee" is a permanent full-time employee as described above or an equivalent in full time equivalent (FTE) work hours.

(4) **How to determine if the fifteen percent employment increase requirement is met.** Qualification for tax credits depends upon whether the applicant hires enough new positions to meet the fifteen percent average increase requirement.

(a) **Determining the fifteen percent increase.** To determine the projected number of permanent full-time qualified employment positions necessary to satisfy the fifteen percent employment increase requirement:

(i) Determine the average number of permanent full-time qualified employment positions that existed at the facility during the calendar year prior to the year in which tax credit is being claimed.

(ii) Multiply the average number of full-time positions from subsection (i) by .15 or fifteen percent. The resulting number equals the number of positions that must be filled to meet the fifteen percent increase. Numbers are rounded up to the nearest whole number at point five (.5).

(b) **When does hiring have to occur?** All hiring increases must occur during the calendar year for which credits are being sought for purposes of meeting the fifteen percent threshold test. Positions hired in a calendar year prior to making an application are not eligible for a credit but the positions are used to calculate whether the fifteen percent threshold has been met.

(c) **The department will assist applicants to determine their hiring requirements.** Accompanying the tax credit application is a worksheet to assist the applicant in determining if the fifteen percent qualified employment threshold is satisfied. Based upon the information provided in the application, the department will advise applicants of their minimum number of hiring needs for which credits are being sought.

(d) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(i) ABC Company anticipates increasing employment during the 2001 calendar year at a manufacturing facility by an average of 15 full-time qualified employment positions for a total of 113 positions. The average number of full-time qualified employment positions during the 2000 calendar year was 98. To qualify for the tax credit program the minimum average number of full-time qualified employment positions required for the 2001 calendar year is 98 x .15 = 14.7 (rounding up to 15 positions). Therefore, ABC Company's plan to hire 15 full-time qualified employment positions for 2001 meets the 15% employment increase requirement.

(ii) ABC anticipates increasing employment at this same manufacturing facility by an average of 15 additional full-time qualified employment positions during the 2002 calendar year to a total of 128 positions. To qualify for the tax credit program the minimum average number of full-time qualified employment positions required for the 2002 calendar year is 17 (113 x 15 = 16.95, rounding up to 17). Therefore, ABC Company's plan to hire 15 full-time qualified employment positions for 2002 does not meet the 15% employment increase requirement.

(5) **Restriction against displacing existing jobs within Washington.** The law provides that no recipient may use tax credits approved under this program to decertify a union or to displace existing jobs in any community of the state. Thus, the average expected increase of employment positions at the specific facility for which application is made must reflect a gross increase in the applicant's employment of persons at all locations in this state. Transfers of personnel from existing positions outside of an eligible area to new positions at the specific facility within an eligible area will not be allowed for purposes of approving tax credits. Also, layoffs or terminations of employment by the recipient at other locations in Washington but outside an eligible area for the purpose of hiring new positions within an eligible area will result in the withdrawal of any credits taken or approved.

(6) **Application procedures.** A taxpayer must file an application with and obtain approval from the department of revenue to receive tax credits under this program. A separate application must be submitted for each calendar year for which credits are claimed. RCW 82.62.020 requires that application for the tax credits be made prior to the actual hiring of qualified employment positions. Applications failing to satisfy this statutory requirement will be disapproved.

(a) **How to obtain and file applications.** Application forms will be provided by the department upon request either by calling 360-902-7175 or via the department's internet web site at www.dor.wa.gov under forms. The completed application may be sent by fax to 360-586-0527 or mailed to the following address:

State of Washington
Department of Revenue
Taxpayer Account Administration
P.O. Box 47476
Olympia, WA 98504-7476

The U.S. Post Office postmark or fax date will be used as the date of application.

(b) **Confidentiality.** Applications, reports, or any other information received by the department in connection with this tax credit program, except applications not approved by the department are not confidential and are subject to disclosure. All other taxpayer information is subject to the confidentiality provisions in RCW 82.32.330.

(c) **Department to act upon application within sixty days.** The department will determine if the applicant qualifies for tax credits on the basis of the information provided in the application and will approve or disapprove the application within sixty days. If approved, the department will issue a credit approval notice containing the dollar amount of tax credits available for use and the procedures for taking the credit. If disapproved, the department will notify the applicant in writing of the specific reasons for disapproval. The applicant may seek administrative review of the department's disapproval of an application by filing a petition for review with the department. The petition must be filed within thirty days from the date of notice of the disallowance pursuant to the provisions of WAC 458-20-100, Appeals, small claims and settlements.

(d) **No adjustment of credit after approval.** After an application is approved and tax credits are granted, no

upward adjustment or amendments of the application will be made for that calendar year.

(7) **How much is the tax credit?** The amount of tax credit is based on the number of and the wages and benefits paid to qualified employment positions created.

(a) **How much tax credit may I claim for each qualified employment position?** The amount of tax credit that may be claimed for each position created is as follows:

(i) Two thousand dollars for each qualified employment position that pays forty thousand dollars or less in wages and benefits annually and is employed in an eligible business project; and

(ii) Four thousand dollars for each qualified employment position that pays more than forty thousand dollars in wages and benefits annually and is employed in an eligible business project.

(b) **What qualifies as wages and benefits?** For the purposes of chapter 82.62 RCW, "wages" means compensation paid to an individual for personal services, whether denominated as wages, salary, commission, bonus, or otherwise. "Benefits" means compensation not paid as wages and includes Social Security, retirement, health care, life insurance, industrial insurance, unemployment compensation, vacation, holiday, sick leave, military leave, and jury duty. "Benefits" does not include any amount reported as wages.

(8) **How to claim approved credits.** The recipients must take the tax credits approved under this program on their regular combined excise tax return for their regular assigned tax reporting period. These tax credits may not exceed the B&O tax liability. The amount of credit taken should be entered into the "credit" section of the return form, with a copy of the credit approval notice issued to the recipient attached to the return.

(a) **When can credits be used?** The credits may be used as soon as hiring of the projected qualified employment positions begins or may accrue until they are most beneficial for the recipient's use. For example, if a recipient has been approved for $12,000 of tax credits based upon projections to hire five new positions, that recipient may use $2,000 or $4,000 of tax credit at the time it hires each new employee, depending on the wage/benefit level of the position filled.

(b) **No refunds for unused credits.** No tax refunds will be made for any tax credits which exceed tax liability during the life of this program. If tax credits derived from qualified hiring exceed the recipients' business and occupation tax liability in any one calendar year under this program, they may be carried forward to the next calendar year(s), until used.

(9) **Report to be filed by recipient.** A recipient of tax credits under this program must complete and submit a report of employment activities to substantiate that he or she has complied with the hiring and retention requirements for approved credits. RCW 82.62.050. This report must be filed with the department by the last day of the month immediately following the end of the four consecutive full calendar quarter period for which a credit is earned. Based upon this report the department will verify that the recipient is entitled to the tax credits approved by the department when the application was reviewed. The completed report may be sent by fax to 360-586-0527 or mailed to the following address:

State of Washington
Department of Revenue
Taxpayer Account Administration
P.O. Box 47476
Olympia, WA 98504-7476

The U.S. Post Office postmark or fax date will be used as the date of filing.

(a) **Verification of report.** The department will use the same report the recipient provides to the department of employment security, which is known as the quarterly employment security report, to verify the recipient's eligibility for tax credits. The recipient must maintain copies of the quarterly employment report for the year prior to the year for which credits are claimed, the year credits are claimed, and for the four quarters following the hiring of persons to fill the qualified employment positions. (The recipient does not have to forward copies of the quarterly employment report to the department each quarter.) The department may use other wage information provided to the department by the department of employment security. The taxpayer must provide additional information to the department, as the department finds necessary to calculate and verify wage eligibility.

(b) **Failure to file report.** The law provides that if any recipient fails to submit a report or submits an inadequate report, the department may declare the amount of taxes for which credit has been used to be immediately due and payable. An inadequate report is one which fails to provide information necessary to confirm that the requisite number of employment positions has been created and maintained for twelve consecutive months.

(10) **What if the required number of positions is not created?** The law provides that if the department finds that a recipient is not eligible for tax credits for any reason, other than failure to create the required number of qualified employment positions, the amount of taxes for which any credit has been used will be immediately due. No interest or penalty will be assessed in such cases. However, if the department finds that a recipient has failed to create the specified number of qualified employment positions, the department will assess interest, but not penalties, on the taxes against which the credit has been used. This interest on the assessment is mandatory and will be assessed at the statutory rate under RCW 82.32.050, retroactively to the date the tax credit was used. The interest will accrue until the taxes for which the credit was used are fully repaid. RCW 82.32.050. The interest rates under RCW 82.32.050 can be obtained from the department's internet web site at www.dor.wa.gov or by calling the department's information center at 1-800-647-7706.

(11) **Program thresholds.** The department cannot approve any credits that will cause the total credits approved to exceed seven million five hundred thousand dollars in any fiscal year. RCW 82.62.030. A "fiscal year" is the twelve-month period of July 1st through June 30th. If all or part of an application for credit is disallowed due to cap limitations, the disallowed portion will be carried over for approval the next fiscal year. However, the applicant's carryover into the next fiscal year is only permitted if the total credits approved for the next fiscal year does not exceed the cap for that fiscal year

as of the date on which the department has disallowed the application.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.08.0293, and 82.12.0293. WSR 10-23-035, § 458-20-240, filed 11/9/10, effective 12/10/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 05-01-079, § 458-20-240, filed 12/10/04, effective 1/10/05. Statutory Authority: RCW 82.32.300, 82.62.070 and chapter 82.62 RCW. WSR 01-17-069, § 458-20-240, filed 8/15/01, effective 9/15/01. Statutory Authority: RCW 82.32.300. WSR 88-17-047 (Order 88-5), § 458-20-240, filed 8/16/88; WSR 87-19-007 (Order ET 87-5), § 458-20-240, filed 9/8/87; WSR 86-14-019 (Order ET 86-13), § 458-20-240, filed 6/24/86; WSR 83-08-026 (Order ET 83-1), § 458-20-240, filed 3/30/83; Order ET 71-1, § 458-20-240, filed 7/22/71; Order ET 70-3, § 458-20-240 (Rule 240), filed 5/29/70, effective 7/1/70.]

WAC 458-20-24001 Sales and use tax deferral—Manufacturing and research/development activities in high unemployment counties—Applications filed after June 30, 2010. (1) **Introduction.** Chapter 82.60 RCW establishes a sales and use tax deferral program. The purpose of the program is to promote economic stimulation, create employment opportunities, and reduce poverty in certain areas of the state. The legislature established this program to be effective solely in those areas and under circumstances where the deferral is for investments that result in the creation of a specified minimum number of jobs or investment for a qualifying project.

(a) This deferral program applies to taxes imposed on the construction of qualified buildings or acquisition of qualified machinery and equipment and requires the recipient of the deferral to maintain the manufacturing or research and development activity for an eight-year period. This section does not address RCW 82.08.02565 and 82.12.02565, which provide a statewide sales and use tax exemption for machinery and equipment used directly in a manufacturing operation. Refer to WAC 458-20-13601 for more information regarding the statewide exemption.

(b) This program was first enacted in 1985. The legislature made major revisions to program criteria in 1993, 1994, 1995, 1996, 1999, 2004, 2009, and 2010, specifically to the definitions of "eligible area," "eligible investment project," and "qualified building." Each revision created additional criteria for prospective applicants. For applications made prior to June 30, 2010, see WAC 458-20-24001A.

(c) The employment security department and the department of community, trade, and economic development administer programs for high unemployment counties and job training and should be contacted directly for information concerning these programs.

(2) **Who is eligible for the sales and use tax deferral program?** A person engaged in manufacturing or research and development activity is eligible for this deferral program for its eligible investment project.

(a) **What does the term "person" mean for purposes of this section?** "Person" has the meaning given in RCW 82.04.030. "Person" does not include the state of Washington or its institutions. "Person" can be either a lessee or a lessor, who can apply separately for individual investment projects at the same site, if they comply with the other requirements of chapter 82.60 RCW.

(i) The lessor or owner of the qualified building is not eligible for deferral unless:

(A) The underlying ownership of the buildings, machinery, and equipment vests exclusively in the same person; or

(B) The lessor has by written contract agreed to pass the economic benefit of the deferral to the lessee;

(C) The lessee that receives the economic benefit of the deferral agrees in writing with the department to complete the annual survey required under RCW 82.60.070;

(D) The economic benefit of the deferral passed to the lessee is no less than the amount of tax deferred by the lessor; and

(E) The economic benefit of the deferral being passed to the lessee is evidenced by written documentation of any type of payment, credit, or other financial arrangement between the lessor or owner of the qualified building and the lessee.

For example, economic benefit of the deferral is passed through to the lessee when evidenced by written documentation that the amounts paid to the lessor for construction of tenant improvements are reduced by the amount of the sales tax deferred, or that the lessee receives more tenant improvements through a credit for tenant improvements or other mechanism in the lease equal to the amount of the sales tax deferred.

(ii) The lessor of the qualified building who receives a letter of intent from a qualifying lessee may be eligible for deferral, assuming that all other requirements of chapter 82.60 RCW are met. At the time of application, the lessor, or another qualifying lessee must provide to the department a letter of intent by the lessee to lease the qualified building and any other information to prove that the lessee will engage in qualified research and development or pilot scale manufacturing once the building construction is complete. After the investment project is certified as operationally complete, the lessee must actually occupy the building as a lessee and engage in qualified research and development or pilot scale manufacturing. Otherwise, deferred taxes will be immediately due to the lessor, and interest will be assessed retroactively from the date of deferral.

(b) **What is "manufacturing" for purposes of this section?** "Manufacturing" has the meaning given in RCW 82.04.120. Manufacturing, in addition, includes the activities performed by research and development laboratories and commercial testing laboratories, and the conditioning of vegetable seeds.

For purposes of this section, both manufacturers and processors for hire may qualify for the deferral program as being engaged in manufacturing activities. Refer to WAC 458-20-136 (Manufacturing, processing for hire, fabricating) for more information on processors for hire.

For purposes of this section, "vegetable seeds" includes the seeds of those crops that are grown in gardens and on truck farms and are generally known and sold under the name of vegetable or herb seeds in this state. "Vegetable seeds" includes, but is not limited to, cabbage seeds, carrot seeds, onion seeds, tomato seeds, and spinach seeds. Vegetable seeds do not include grain seeds, cereal seeds, fruit seeds, flower seeds, tree seeds, and other similar properties.

(c) **What is "research and development" for purposes of this section?** "Research and development" means the development, refinement, testing, marketing, and commercialization of a product, service, or process before commercial sales have begun, but only when such activities are

intended to ultimately result in the production of a new, different, or useful substance or article of tangible personal property for sale. For purposes of this section, "commercial sales" excludes sales of prototypes or sales for market testing if the total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(3) **What is eligible for the sales and use tax deferral program?** This deferral program applies to an eligible investment project for sales and use taxes imposed on the construction, expansion, or renovation of qualified buildings and acquisition of qualified machinery and equipment.

(a) **What is an "eligible investment project" for purposes of this section?** "Eligible investment project" means an investment project in an eligible area. Refer to (g) of this subsection for more information on eligible area. "Eligible investment project" does not include an investment project undertaken by a light and power business as defined in RCW 82.16.010, other than that portion of a cogeneration project that is used to generate power for consumption within the manufacturing site of which the cogeneration project is an integral part. It also does not include an investment project that has already received a deferral under chapter 82.60 RCW.

(b) **What is an "investment project" for purposes of this section?** "Investment project" means an investment in qualified buildings or qualified machinery and equipment, including labor and services rendered in the planning, installation, and construction of the project.

(c) **What is "qualified buildings" for purposes of this section?** "Qualified buildings" means construction of new structures, and expansion or renovation of existing structures for the purpose of increasing floor space or production capacity, used for manufacturing or research and development activities.

(i) "Qualified buildings" is limited to structures used for manufacturing and research and development activities. "Qualified buildings" includes plant offices and warehouses if such facilities are essential to or an integral part of a factory, mill, plant, or laboratory used for manufacturing or research and development.

(A) "Office" means space used by professional, clerical, or administrative staff. For plant office space to be a qualified building its use must be essential or integral to the manufacturing or research and development operation. Office space that is used by supervisors and their staff, by technicians, by payroll staff, by the safety officer, and by the training staff are examples of qualifying office space. An office may be located in a separate building from the building used for manufacturing or research and development activities, but the office must be located at the same site as the qualified building in order to qualify. Each individual office may only qualify or disqualify in its entirety.

(B) "Warehouse" means buildings or facilities used for the storage of raw materials or finished goods. A warehouse may be located in a separate building from the building used for manufacturing or research and development activities, but the warehouse must be located at the same site as the qualified building in order to qualify. Warehouse space may be apportioned based upon its qualifying use.

(C) A site is one or more immediately adjacent parcels of real property. Adjacent parcels of real property separated only by a public road comprise a single site.

(ii) "Qualified buildings" does not include construction of landscaping or most other work outside the building itself, even though the landscaping or other work outside the building may be required by the city or county government in order for the city or county to issue a permit for the construction of a building.

However, "qualified buildings" includes construction of specialized sewerage pipes connected to a qualified building that are specifically designed and used exclusively for manufacturing or research and development.

Also, "qualified buildings" includes construction of parking lots connected to or adjacent to the building if the parking lots are for the use of workers performing manufacturing or research and development in the building. Parking lots may be apportioned based upon its qualifying use.

(d) **When is apportionment of qualified buildings appropriate?** The deferral is allowable only in respect to investment in the construction of a new building or the expansion or renovation of an existing building used in manufacturing or research and development. Where a building(s) is used partly for manufacturing or research and development and partly for purposes that do not qualify for deferral under this section, apportionment is necessary.

(e) **What are the apportionment methods?** The deferral is determined by one of the following two apportionment methods. The first method of apportionment is based on square footage and does not require tracking the costs of materials for the qualifying/nonqualifying areas of a building. The second method of apportionment tracks the costs of materials used in the qualifying/nonqualifying areas, and it is primarily used by those industries with specialized building requirements.

(i) **First method.** The applicable tax deferral can be determined by apportionment according to the ratio of the square footage of that portion of the building(s) directly used for manufacturing or research and development purposes bears to the square footage of the total building(s).

Apportionment formula:

$$\frac{\text{Eligible square feet of building(s)}}{\text{Total square feet of building(s)}} = \text{Percent Eligible}$$

Percent Eligible x Total Project Costs = Eligible Costs.

"Total Project Costs" means cost of multipurpose buildings and other improvement costs associated with the deferral project. Machinery and equipment are not included in this calculation. Common areas, such as hallways, bathrooms, and conference rooms, are not included in the square feet figure for either the numerator or the denominator. The cost of the common areas is multiplied by the percent eligible to determine the portion of the common area that is eligible for deferral.

Eligible Costs x Tax Rate = Eligible Tax Deferred.

(ii) **Second method.** If the applicable tax deferral is not determined by the first method, it will be determined by

tracking the cost of construction of qualifying/nonqualifying areas as follows:

(A) Tax on the cost of construction of areas devoted solely to manufacturing or research and development may be deferred.

(B) Tax on the cost of construction of areas not used at all for manufacturing or research and development may not be deferred.

(C) Tax on the cost of construction of areas used in common for manufacturing or research and development and for other purposes, such as hallways, bathrooms, and conference rooms, may be deferred by apportioning the costs of construction on a square footage basis. The apportioned costs of construction eligible for deferral are established by using the ratio, expressed as a percentage, of the square feet of the construction, expansion, or renovation devoted to manufacturing or research and development, excluding areas used in common, to the total square feet of the construction, expansion, or renovation, excluding areas used in common. That percentage is applied to the cost of construction of the common areas to determine the costs of construction eligible for tax deferral. Expressed as a formula, apportionment of the cost of the common areas is determined by:

$$\frac{\text{Square feet devoted to manufacturing or research and development, excluding square feet of common areas}}{\text{Total square feet, excluding square feet of common areas}} = \text{Percentage of total cost of construction of common areas eligible for deferral}$$

(f) **What is "qualified machinery and equipment" for purposes of this section?** "Qualified machinery and equipment" means all new industrial and research fixtures, equipment, and support facilities that are an integral and necessary part of a manufacturing or research and development operation. "Qualified machinery and equipment" includes computers, desks, filing cabinets, photocopiers, printers, software, data processing equipment, laboratory equipment; manufacturing components such as belts, pulleys, shafts and moving parts; molds, tools and dies; operating structures; and all equipment used to control or operate machinery. It also includes machinery and equipment acquired under the terms of a lease by the recipient. "New" as used in this subsection means either new to the taxing jurisdiction of the state or new to the certificate holder.

For purposes of this section, "industrial fixture" means an item attached to a building or to land. Examples of "industrial fixtures" are fuel oil lines, boilers, craneways, and improvements to land such as concrete slabs.

(i) **Are qualified machinery and equipment subject to apportionment?** Qualified machinery and equipment are not subject to apportionment.

(ii) **To what extent is leased equipment eligible for the deferral?** The amount of tax deferral allowable for leased equipment is the amount of the consideration paid by the recipient to the lessor over the initial term of the lease, excluding any period of extension or option to renew, up to the last date for repayment of the deferred taxes. After that date, the recipient must pay the appropriate sales taxes to the lessor for the remaining term of the lease.

(g) **What is an "eligible area" for purposes of this section?** "Eligible area" means:

(i) **Qualifying county.** A qualifying county is a county that has an unemployment rate, as determined by the employment security department, which is at least twenty percent above the state average for the three calendar years immediately preceding the year in which the list of qualifying counties is established or updated, as the case may be.

The department, with the assistance of the employment security department, must establish a list of qualifying counties effective July 1, 2010. The list of qualifying counties is effective for a twenty-four-month period and must be updated by July 1st of the year that is two calendar years after the list was established or last updated, as the case may be; or

(ii) **Community empowerment zone (CEZ).** A "community empowerment zone" means an area meeting the requirements of RCW 43.31C.020 and officially designated as a CEZ by the director of the department of community, trade, and economic development.

(h) **What if an investment project is located in an area that qualifies both as a high unemployment county and as a CEZ?** If an investment project is located in an area that qualifies under more than one type of eligible area, the department will automatically assign the project to the eligible area that imposes the least burden on the taxpayer and with the greatest benefit to the taxpayer. If the applicant elects to be bound by the requirements of the other potential eligible area, the applicant must make a written statement to that effect. For example, on October 1, 2010, a city in a high unemployment county qualifies as a CEZ, and the high unemployment county is on the list as a qualifying county. The CEZ requirements are more restrictive than qualifying counties. The department will assign the project to the qualifying county designation unless the applicant elects to be bound by the CEZ requirements. Refer to subsection (4) of this section for more information on the application process.

(i) **Are there any hiring requirements for an investment project?** There may or may not be a hiring requirement, depending on the location of the project.

(i) **High unemployment county.** There are no hiring requirements for qualifying projects located in high unemployment counties.

(ii) **Community empowerment zone (CEZ).** There are hiring requirements for qualifying projects located in CEZs or in counties containing CEZs. The applicant applies for a deferral of investment that correlates to the estimated number of persons to be hired based on the following formula:

Number of qualified employment positions to be hired x $750,000 = amount of investment eligible for deferral

Applicants must make good faith estimates of anticipated hiring. Refer to subsection (4) of this section for more information on the application process. The recipient must fill the positions by persons who at the time of hire are residents of the CEZ, as defined in (i)(ii) of this subsection. The department has instituted a geographic information system (GIS) to assist taxpayers in determining taxing jurisdiction boundaries, local tax rates, and a mapping and address lookup system to determine whether a specific address is within a CEZ. The system is available on the department's internet web site at http://www.dor.wa.gov. A recipient must fill the qualified employment positions by the end of the calendar year following the year in which the project is certified as operationally

complete and retain the position during the entire tax year. Refer to subsection (7) of this section for more information on certification of an investment project as operationally complete. If the recipient does not fill the qualified employment positions by the end of the second calendar year following the year in which the project is certified as operationally complete, all deferred taxes are immediately due.

(A) **What is a "qualified employment position" for purposes of this section?** "Qualified employment position" means a permanent full-time employee employed in the eligible investment project during the entire tax year. The "entire tax year" means the full-time position is filled for a period of twelve consecutive months. "Full-time" means at least thirty-five hours a week, four hundred fifty-five hours a quarter, or one thousand eight hundred twenty hours a year.

(B) **Who are residents of the CEZ?** "Resident" means the person who fills the qualified employment position makes his or her home in the CEZ or the county in which the zone is located. A mailing address alone is insufficient to establish that a person is a resident.

(4) **What are the application and review processes?** An application for sales and use tax deferral under this program must be made prior to the initiation of construction, prior to the acquisition of machinery and equipment, and prior to the filling of qualified employment positions. Persons who apply after construction is initiated or finished or after acquisition of machinery and equipment are not eligible for the program. When an application for sales and use tax deferral is timely submitted, costs incurred before the application date are allowable, if they otherwise qualify. Applications for persons subject to hiring requirements must include information regarding the estimated total project cost and the qualified employment positions.

(a) **What is "initiation of construction" for purposes of this section?** "Initiation of construction," in regards to the construction, expansion, or renovation of buildings, means the commencement of on-site construction work. Neither planning nor land clearing prior to excavation of the building site constitutes the commencement of on-site construction work.

(b) **What is "acquisition of machinery and equipment" for purposes of this section?** "Acquisition of machinery and equipment" means the machinery and equipment is under the dominion and control of the recipient or its agent.

(c) **How may a taxpayer obtain an application form?** Application forms may be obtained at department of revenue district offices, by downloading from the department's web site (dor.wa.gov), by telephoning the telephone information center (800-647-7706), or by contacting the department's special programs division at:

Department of Revenue
Special Programs Division
Post Office Box 47477
Olympia, WA 98504-7477
Fax 360-586-2163

Applicants must mail or fax applications to the special programs division at the address or fax number given above. Only those applications received by the department under chapter 82.60 RCW, which are approved, are not confidential and are subject to disclosure. RCW 82.60.100.

For purposes of this section, "applicant" means a person applying for a tax deferral under chapter 82.60 RCW, and "department" means the department of revenue.

(d) **Will the department approve the deferral application?** In considering whether to approve or deny an application for a deferral, the department will not approve an application for a project involving construction unless:

(i) The construction will begin within one year from the date of the application; or

(ii) The applicant shows proof that, if the construction will not begin within one year of construction, there is a specific and active program to begin construction of the project within two years from the date of application. Proof may include, but is not limited to:

(A) Affirmative action by the board of directors, governing body, or other responsible authority of the applicant toward an active program of construction;

(B) Itemized reasons for the proposed construction;

(C) Clearly established plans for financing the construction; or

(D) Building permits.

Similarly, after an application has been granted, a deferral certificate is no longer valid and should not be used if construction has not begun within one year from the date of application or there is not a specific and active program to begin construction within two years from the date of application. However, the department will grant requests to extend the period for which the certificate is valid if the holder of the certificate can demonstrate that the delay in starting construction is due to circumstances beyond the certificate holder's control such as the acquisition of building permit(s). Refer to subsection (6) of this section for more information on the use of tax deferral certificate.

(e) **What is the date of application?** "Date of application" means the date of the U.S. Post Office postmark, fax, or electronic transmittal, or when the application is hand delivered to the department. The statute in effect on the "date of application" will determine the program criteria the applicant must satisfy.

(f) **When will the department notify approval or disapproval of the deferral application?** The department will verify the information contained in the application and approve or disapprove the application within sixty days. If approved, the department will issue a tax deferral certificate. If disapproved, the department will notify the applicant as to the reason(s) for disapproval.

(g) **May an applicant request a review of department disapproval of the deferral application?** The applicant may seek administrative review of the department's disapproval of an application within thirty days from the date of notice of the disallowance pursuant to the provisions of WAC 458-20-100 (Appeals). The filing of a petition for review with the department starts a review of departmental action.

(5) **What happens after the department approves the deferral application?** The department will issue a sales and use tax deferral certificate for state and local sales and use taxes due under chapters 82.08, 82.12, and 82.14 RCW for an eligible investment project. The department will state on the certificate the amount of tax deferral for which the recipient

is eligible. Recipients must keep track of how much tax is deferred.

For purposes of this section, "recipient" means a person receiving a tax deferral under this program.

(6) **How should a tax deferral certificate be used?** A tax deferral certificate issued under this program is for the use of the recipient for deferral of sales and use taxes due on each eligible investment project. Deferral is limited only to investment in qualified buildings or qualified machinery and equipment as defined in this section. Thus, sales and use taxes cannot be deferred on items that do not become part of the qualified buildings, machinery, or equipment. In addition, the deferral is not to be used to defer the taxes of the persons with whom the recipient does business, persons the recipient hires, or employees of the recipient.

The certificate holder must provide a copy of the tax deferral certificate to the seller at the time goods or services are purchased. The seller will be relieved of the responsibility for collection of the sales or use tax upon presentation of the certificate. The seller must retain a copy of the certificate as part of its permanent records for a period of at least five years. A blanket certificate may be provided by the certificate holder and accepted by the seller covering all such purchases relative to the eligible project. The seller is liable for business and occupation tax on all tax deferral sales.

For purposes of this section, "certificate holder" means an applicant to whom a tax deferral certificate has been issued.

(7) **What are the processes of an investment project that is certified by the department as operationally complete?** An applicant must provide the department with the estimated cost of the investment project at the time the application is made. Following approval of the application and issuance of a tax deferral certificate, a certificate holder must notify the department, in writing, when the value of the investment project reaches the estimated cost as stated on the tax deferral certificate.

For purposes of this section, "operationally complete" means the project is capable of being used for its intended purpose as described in the application.

(a) **What should a certificate holder do if its investment project reaches the estimated costs but the project is not yet operationally complete?** If a certificate holder has an investment project that has reached its level of estimated costs and the project is not operationally complete, the certificate holder may request an amended certificate stating a revised amount upon which the deferral taxes are requested. Requests must be mailed or faxed to the department.

(b) **What should a certificate holder do when its investment project is operationally complete?** The certificate holder must notify the department in writing when the investment project is operationally complete. The department will certify the date on which the project is operationally complete. The certificate holder of the deferral must maintain the manufacturing or research and development activity for eight years from this date.

(8) **Is a recipient of tax deferral required to submit annual surveys?** Each recipient of a tax deferral granted must complete an annual survey. If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.60.020(4), the lessee must agree to complete the annual survey and the applicant is not required to complete the annual survey. Refer to WAC 458-20-268 (Annual surveys for certain tax adjustments) for more information on the requirements to file annual surveys.

(9) **Is a recipient of tax deferral required to repay deferred taxes?** Repayment of tax deferred under chapter 82.60 RCW is excused, except as otherwise provided in RCW 82.60.070 and this subsection and subsection (10) of this section.

(a) **Is repayment required for machinery and equipment exempt under RCW 82.08.02565 or 82.12.02565?** Repayment of tax deferred under chapter 82.60 RCW is not required, and interest and penalties under RCW 82.60.070 will not be imposed, on machinery and equipment that qualifies for exemption under RCW 82.08.02565 or 82.12.02565.

(b) **When is repayment required?** The following subsections describe the various circumstances under which repayment of the deferral may occur. Outstanding taxes are determined by reference to the following table.

Repayment Year		Percentage of Deferred Tax Waived
1	(Year operationally complete)	0%
2		0%
3		0%
4		10%
5		15%
6		20%
7		25%
8		30%

Any action taken by the department to disqualify a recipient for tax deferral or assess interest will be subject to administrative review pursuant to the provisions of WAC 458-20-100 (Appeals). The filing of a petition for review with the department starts a review of departmental action.

(i) **Failure of investment project to satisfy general conditions.** If, on the basis of the recipient's annual survey or other information, including that submitted by the employment security department, the department of revenue finds that an investment project is not eligible for tax deferral for reasons other than failure to create the required number of qualified employment positions, the department will declare the amount of deferred taxes outstanding to be immediately due. No penalties or interest will be assessed on the deferred sales/use tax; however, all other penalties and interest applicable to excise tax assessments may be assessed and imposed. See subsection (10) of this section.

(ii) **Failure of investment project to satisfy required employment positions conditions.** If, on the basis of the recipient's annual survey or other information, the department finds that an investment project has been operationally complete and has failed to create the required number of qualified employment positions under subsection (3)(i) of this section, the amount of taxes deferred will be immediately due. There is no proration of the amount owed under this subsection. No penalties or interest will be assessed on the deferred sales/use tax; however, all other penalties and inter-

est applicable to excise tax assessments may be assessed and imposed.

(10) **When manufacturing or research and development activities are temporarily ceased.** A person is not liable for the amount of deferred taxes outstanding for an investment project when the person temporarily ceases to use its qualified buildings and qualified machinery and equipment for manufacturing or research and development activities in a county with a population of less than twenty thousand persons for a period not to exceed twenty-four months from the date that the department sent its assessment for the amount of outstanding deferred taxes to the taxpayer.

(a) The relief from repayment of deferred taxes does not apply unless the number of qualified employment positions maintained at the investment project after manufacturing or research and development activities are temporarily ceased is at least ten percent of the number of qualified employment positions employed at the investment project at the time the deferral was approved by the department. If a person has been approved for more than one deferral under this chapter, relief from repayment of deferred taxes under this section does not apply unless the number of qualified employment positions maintained at the investment project after manufacturing or research and development activities are temporarily ceased is at least ten percent of the highest number of qualified employment positions at the investment project at the time any of the deferrals were approved by the department.

(b) If, at any time during the twenty-four-month period after the department has sent the taxpayer an assessment for outstanding deferred taxes resulting from the person temporarily ceasing to use its qualified buildings and qualified machinery and equipment for manufacturing or research and development activities, the number of qualified employment positions falls below the ten percent threshold in this subsection, the amount of deferred taxes outstanding for the project is immediately due.

(c) The lessor of an investment project for which a deferral has been granted who has passed the economic benefits of the deferral to the lessee is not eligible for relief from the payment of deferred taxes under this section.

(d) A person seeking relief from the payment of deferred taxes must apply to the department in a form and manner prescribed by the department. The application required must be received by the department within thirty days of the date that the department sent its assessment for outstanding deferred taxes resulting from the person temporarily ceasing to use its qualified buildings and qualified machinery and equipment for manufacturing or research and development activities. The department must approve applications that meet the requirements for relief from the payment of deferred taxes.

(e) A person is entitled to relief under this section only once.

(f) A person whose application for relief from the payment of deferred taxes has been approved must continue to file an annual survey as required under RCW 82.60.070(1) or any successor statute. In addition, the person must file, in a form and manner prescribed by the department, a report on the status of the business and the outlook for commencing manufacturing or research and development activities.

(11) **When will the tax deferral program expire?** No applications for deferral of taxes will be accepted after June 30, 2020.

(12) **Is debt extinguishable because of insolvency or sale?** Insolvency or other failure of the recipient does not extinguish the debt for deferred taxes nor will the sale, exchange, or other disposition of the recipient's business extinguish the debt for the deferred taxes.

(13) **Does transfer of ownership terminate tax deferral?** Transfer of ownership does not terminate the deferral. The deferral is transferred, subject to the successor meeting the eligibility requirements of chapter 82.60 RCW, for the remaining periods of the deferral. Any person who becomes a successor (see WAC 458-20-216) to such investment project is liable for the full amount of any unpaid, deferred taxes under the same terms and conditions as the original recipient of the deferral.

Any questions regarding the potential eligibility of deferrals to be transferred on the sale of a business, contact special programs as provided for in subsection (4)(c) of this section.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-21-052, § 458-20-24001, filed 10/14/10, effective 11/14/10. Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-070, § 458-20-24001, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 06-17-007, § 458-20-24001, filed 8/3/06, effective 9/3/06; WSR 04-01-127, § 458-20-24001, filed 12/18/03, effective 1/18/04. Statutory Authority: RCW 82.32.300. WSR 01-12-041, § 458-20-24001, filed 5/30/01, effective 6/30/01; WSR 88-17-047 (Order 88-5), § 458-20-24001, filed 8/16/88; WSR 87-19-139 (Order 87-6), § 458-20-24001, filed 9/22/87; WSR 86-14-019 (Order ET 86-13), § 458-20-24001, filed 6/24/86; WSR 85-21-013 (Order ET 85-5), § 458-20-24001, filed 10/7/85.]

WAC 458-20-24001A Sales and use tax deferral—Manufacturing and research/development activities in rural counties—Applications filed prior to July 1, 2010. (1) **Introduction.** Chapter 82.60 RCW establishes a sales and use tax deferral program. The purpose of the program is to promote economic stimulation, create employment opportunities, and reduce poverty in certain areas of the state. The legislature established this program to be effective solely in those areas and for those circumstances where the deferral is for investments that result in the creation of a specified minimum number of jobs or investment for a qualifying project.

The program applies to sales and use taxes on materials and labor and services rendered in the construction of qualified buildings or acquisition of qualified machinery and equipment and requires the recipient of the deferral to maintain the manufacturing or research and development activity for an eight-year period. This rule does not address RCW 82.08.02565 and 82.12.02565, which provide a statewide sales and use tax exemption for machinery and equipment used directly in a manufacturing operation. Refer to WAC 458-20-13601 for more information regarding the statewide exemption.

(2) **Program background.** This program was enacted in 1985. The legislature made major revisions to program criteria in 1993, 1994, 1995, 1996, 1999, 2004, 2009, and 2010, specifically to the definitions of "eligible area," "eligible investment project," "qualified building," and "qualifying county." Each revision created additional criteria for prospective applicants. This rule is written in five parts and covers

applications made prior to July 1, 2010. Each part sets forth the requirements on the basis of the period of time in which application is made. Refer to the year during which application was made for information on an individual application. For applications made after June 30, 2010, see WAC 458-20-24001.

The employment security department and the department of community, trade, and economic development administer additional programs for distressed areas and job training and should be contacted directly for information concerning these programs.

PART I
Applications from March 31, 2004, to June 30, 2010

(101) **Who is eligible for the sales and use tax deferral program?** A person engaged in manufacturing or research and development activity is eligible for this deferral program for its eligible investment project.

(a) **What does the term "person" mean for purposes of this section?** "Person" has the meaning given in RCW 82.04.030. "Person" does not include the state of Washington or its institutions. "Person" can be either a lessee or a lessor, who can apply separately for individual investment projects at the same site, if they comply with the other requirements of chapter 82.60 RCW.

(i) The lessor or owner of the qualified building is not eligible for deferral unless:

(A) The underlying ownership of the buildings, machinery, and equipment vests exclusively in the same person; or

(B) All of the following conditions are met:

(I) The lessor has by written contract agreed to pass the economic benefit of the deferral to the lessee;

(II) The lessee that receives the economic benefit of the deferral agrees in writing with the department to complete the annual survey required under RCW 82.60.070;

(III) The economic benefit of the deferral passed to the lessee is no less than the amount of tax deferred by the lessor; and

(IV) Upon request, the lessor must provide the department with written documentation to support the eligibility of the deferral, including any type of payment, credit, or other financial arrangement between the lessor or owner of the qualified building and the lessee.

For example, economic benefit of the deferral is passed through to the lessee when evidenced by written documentation that the amounts paid to the lessor for construction of tenant improvements are reduced by the amount of the sales tax deferred, or that the lessee receives more tenant improvements through a credit for tenant improvements or other mechanism in the lease equal to the amount of the sales tax deferred.

(ii) The lessor of the qualified building who receives a letter of intent from a qualifying lessee may be eligible for deferral, assuming that all other requirements of chapter 82.60 RCW are met. At the time of application, the lessor must provide to the department a letter of intent by the lessee to lease the qualified building and any other information to prove that the lessee will engage in qualified research and development or pilot scale manufacturing once the building construction is complete. After the investment project is certified as operationally complete, the lessee must actually occupy the building as a lessee and engage in qualified research and development or pilot scale manufacturing. Otherwise, deferred taxes will be immediately due to the lessor, and interest will be assessed retroactively from the date of deferral.

(b) **What is "manufacturing" for purposes of this section?** "Manufacturing" has the meaning given in RCW 82.04.120. Manufacturing, in addition, includes:

(i) Computer programming, the production of computer software, and other computer-related services, but only when the computer programming, production of computer software, or other computer-related services are performed by a manufacturer as defined in RCW 82.04.110 and contribute to the production of a new, different, or useful substance or article or tangible personal property for sale (chapter 16, Laws of 2010);

(ii) The activities performed by research and development laboratories and commercial testing laboratories; and

(iii) Effective July 1, 2006, manufacturing also includes the conditioning of vegetable seeds.

For purposes of this section, both manufacturers and processors for hire may qualify for the deferral program as being engaged in manufacturing activities. Refer to WAC 458-20-136 (Manufacturing, processing for hire, fabricating) for more information on processors for hire.

For purposes of this section, "computer-related services" means activities such as programming for the manufactured product. It includes creating operating systems, software, and other similar goods that will be copied and sold as canned software. "Computer-related services" does not include information services, such as data or information processing. The activities performed by the manufacturer to test, correct, revise, or upgrade software or hardware before they are approved for sale to the consumer are considered computer-related services.

For purposes of this section, "vegetable seeds" includes the seeds of those crops that are grown in gardens and on truck farms and are generally known and sold under the name of vegetable or herb seeds in this state. "Vegetable seeds" includes, but is not limited to, cabbage seeds, carrot seeds, onion seeds, tomato seeds, and spinach seeds. Vegetable seeds do not include grain seeds, cereal seeds, fruit seeds, flower seeds, tree seeds, and other similar properties.

(c) **What is "research and development" for purposes of this section?** "Research and development" means the development, refinement, testing, marketing, and commercialization of a product, service, or process before commercial sales have begun, but only when such activities are intended to ultimately result in the production of a new, different, or useful substance or article of tangible personal property. (Chapter 16, Laws of 2010.) For purposes of this section, "commercial sales" excludes sales of prototypes or sales for market testing if the total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(102) **What is eligible for the sales and use tax deferral program?** This deferral program applies to an eligible investment project for sales and use taxes imposed on the construction, expansion, or renovation of qualified buildings and acquisition of qualified machinery and equipment.

(a) **What is an "eligible investment project" for purposes of this section?** "Eligible investment project" means an investment project in an eligible area. Refer to (g) of this subsection for more information on eligible area. "Eligible investment project" does not include an investment project undertaken by a light and power business as defined in RCW 82.16.010, other than that portion of a cogeneration project that is used to generate power for consumption within the manufacturing site of which the cogeneration project is an integral part. It also does not include an investment project that has already received a deferral under chapter 82.60 RCW.

(b) **What is an "investment project" for purposes of this section?** "Investment project" means an investment in qualified buildings or qualified machinery and equipment, including labor and services rendered in the planning, installation, and construction of the project.

(c) **What is "qualified buildings" for purposes of this section?** "Qualified buildings" means construction of new structures, and expansion or renovation of existing structures for the purpose of increasing floor space or production capacity, used for manufacturing or research and development activities.

(i) "Qualified buildings" is limited to structures used for manufacturing and research and development activities. "Qualified buildings" includes plant offices and warehouses if such facilities are essential to or an integral part of a factory, mill, plant, or laboratory used for manufacturing or research and development.

(A) "Office" means space used by professional, clerical, or administrative staff. For plant office space to be a qualified building its use must be essential or integral to the manufacturing or research and development operation. Office space that is used by supervisors and their staff, by technicians, by payroll staff, by the safety officer, and by the training staff are examples of qualifying office space. An office may be located in a separate building from the building used for manufacturing or research and development activities, but the office must be located at the same site as the qualified building in order to qualify. Each individual office may only qualify or disqualify in its entirety.

(B) "Warehouse" means buildings or facilities used for the storage of raw materials or finished goods. A warehouse may be located in a separate building from the building used for manufacturing or research and development activities, but the warehouse must be located at the same site as the qualified building in order to qualify. Warehouse space may be apportioned based upon its qualifying use.

(C) A site is one or more immediately adjacent parcels of real property. Adjacent parcels of real property separated only by a public road comprise a single site.

(ii) "Qualified buildings" does not include construction of landscaping or most other work outside the building itself, even though the landscaping or other work outside the building may be required by the city or county government in order for the city or county to issue a permit for the construction of a building.

However, "qualified buildings" includes construction of specialized sewerage pipes connected to a qualified building that are specifically designed and used exclusively for manufacturing or research and development.

Also, "qualified buildings" includes construction of parking lots connected to or adjacent to the building if the parking lots are for the use of workers performing manufacturing or research and development in the building. Parking lots may be apportioned based upon its qualifying use.

(d) **When is apportionment of qualified buildings appropriate?** The deferral is allowable only in respect to investment in the construction of a new building or the expansion or renovation of an existing building used in manufacturing or research and development. Where a building(s) is used partly for manufacturing or research and development and partly for purposes that do not qualify for deferral under this section, apportionment is necessary.

(e) **What are the apportionment methods?** The deferral is determined by one of the following two apportionment methods. The first method of apportionment is based on square footage and does not require tracking the costs of materials for the qualifying/nonqualifying areas of a building. The second method of apportionment tracks the costs of materials used in the qualifying/nonqualifying areas, and it is primarily used by those industries with specialized building requirements.

(i) **First method.** The applicable tax deferral can be determined by apportionment according to the ratio of the square footage of that portion of the building(s) directly used for manufacturing or research and development purposes bears to the square footage of the total building(s).

Apportionment formula:

$$\frac{\text{Eligible square feet of building(s)}}{\text{Total square feet of building(s)}} = \text{Percent Eligible}$$

Percent Eligible x Total Project Costs = Eligible Costs.

"Total Project Costs" means cost of multipurpose buildings and other improvement costs associated with the deferral project. Machinery and equipment are not included in this calculation. Common areas, such as hallways, bathrooms, and conference rooms, are not included in the square feet figure for either the numerator or the denominator. The cost of the common areas is multiplied by the percent eligible to determine the portion of the common area that is eligible for deferral.

Eligible Costs x Tax Rate = Eligible Tax Deferred.

(ii) **Second method.** If the applicable tax deferral is not determined by the first method, it will be determined by tracking the cost of construction of qualifying/nonqualifying areas as follows:

(A) Tax on the cost of construction of areas devoted solely to manufacturing or research and development may be deferred.

(B) Tax on the cost of construction of areas not used at all for manufacturing or research and development may not be deferred.

(C) Tax on the cost of construction of areas used in common for manufacturing or research and development and for other purposes, such as hallways, bathrooms, and conference rooms, may be deferred by apportioning the costs of construction on a square footage basis. The apportioned costs of construction eligible for deferral are established by using the

ratio, expressed as a percentage, of the square feet of the construction, expansion, or renovation devoted to manufacturing or research and development, excluding areas used in common, to the total square feet of the construction, expansion, or renovation, excluding areas used in common. That percentage is applied to the cost of construction of the common areas to determine the costs of construction eligible for tax deferral. Expressed as a formula, apportionment of the cost of the common areas is determined by:

$$\frac{\text{Square feet devoted to manufacturing or research and development, excluding square feet of common areas}}{\text{Total square feet, excluding square feet of common areas}} = \text{Percentage of total cost of construction of common areas eligible for deferral}$$

(f) **What is "qualified machinery and equipment" for purposes of this section?** "Qualified machinery and equipment" means all new industrial and research fixtures, equipment, and support facilities that are an integral and necessary part of a manufacturing or research and development operation. "Qualified machinery and equipment" includes computers, desks, filing cabinets, photocopiers, printers, software, data processing equipment, laboratory equipment; manufacturing components such as belts, pulleys, shafts and moving parts; molds, tools and dies; operating structures; and all equipment used to control or operate machinery. It also includes machinery and equipment acquired under the terms of a lease by the recipient. "New" as used in this subsection means either new to the taxing jurisdiction of the state or new to the certificate holder.

For purposes of this section, "industrial fixture" means an item attached to a building or to land. Examples of "industrial fixtures" are fuel oil lines, boilers, craneways, and improvements to land such as concrete slabs.

(i) **Are qualified machinery and equipment subject to apportionment?** Qualified machinery and equipment are not subject to apportionment.

(ii) **To what extent is leased equipment eligible for the deferral?** The amount of tax deferral allowable for leased equipment is the amount of the consideration paid by the recipient to the lessor over the initial term of the lease, excluding any period of extension or option to renew, up to the last date for repayment of the deferred taxes. After that date, the recipient must pay the appropriate sales taxes to the lessor for the remaining term of the lease.

(g) **What is an "eligible area" for purposes of this section?** "Eligible area" means:

(i) **Rural county.** A rural county is a county with fewer than one hundred persons per square mile or a county smaller than two hundred twenty-five square miles as determined annually by the office of financial management and published by the department of revenue effective for the period July 1st through June 30th; or

(ii) **Community empowerment zone (CEZ).** A "community empowerment zone" means an area meeting the requirements of RCW 43.31C.020 and officially designated as a CEZ by the director of the department of commerce, or a county containing a CEZ.

(h) **What if an investment project is located in an area that qualifies both as a rural county and as a CEZ?** If an investment project is located in an area that qualifies under more than one type of eligible area, the department will automatically assign the project to the eligible area that imposes the least burden on the taxpayer and with the greatest benefit to the taxpayer. If the applicant elects to be bound by the requirements of the other potential eligible area, the applicant must make a written statement to that effect. For example, on October 1, 2004, the city of Yakima qualifies as a CEZ, and the entire county of Yakima has fewer than one hundred persons per square mile. The CEZ requirements are more restrictive than counties containing fewer than one hundred persons per square mile. The department will assign the project to the "fewer than one hundred persons per square mile designation" unless the applicant elects to be bound by the CEZ requirements. Refer to subsection (104) of this section for more information on the application process.

(i) **Are there any hiring requirements for an investment project?** There may or may not be a hiring requirement, depending on the location of the project.

(i) **Rural county.** There are no hiring requirements for qualifying projects located in rural counties.

(ii) **Community empowerment zone (CEZ).** There are hiring requirements for qualifying projects located in CEZs or in counties containing CEZs. The applicant applies for a deferral of investment that correlates to the estimated number of persons to be hired based on the following formula:

Number of qualified employment positions to be hired x $750,000 = amount of investment eligible for deferral

Applicants must make good faith estimates of anticipated hiring. Refer to subsection (104) of this section for more information on the application process. The recipient must fill the positions by persons who at the time of hire are residents of the CEZ. The department has instituted a geographic information system (GIS) to assist taxpayers in determining taxing jurisdiction boundaries, local tax rates, and a mapping and address lookup system to determine whether a specific address is within a CEZ. The system is available on the department's internet web site at http://www.dor.wa.gov. A recipient must fill the qualified employment positions by the end of the calendar year following the year in which the project is certified as operationally complete and retain the position during the entire tax year. Refer to subsection (107) of this section for more information on certification of an investment project as operationally complete. If the recipient does not fill the qualified employment positions by the end of the second calendar year following the year in which the project is certified as operationally complete, all deferred taxes are immediately due.

(A) **What is a "qualified employment position" for purposes of this section?** "Qualified employment position" means a permanent full-time employee employed in the eligible investment project during the entire tax year. The "entire tax year" means the full-time position is filled for a period of twelve consecutive months. "Full-time" means at least thirty-five hours a week, four hundred fifty-five hours a quarter, or one thousand eight hundred twenty hours a year.

(B) **Who are residents of the CEZ?** "Resident" means the person who fills the qualified employment position makes his or her home in the CEZ. A mailing address alone is insufficient to establish that a person is a resident.

(103) **What are the application and review processes?** An application for sales and use tax deferral under this program must be made prior to the initiation of construction, prior to the acquisition of machinery and equipment, and prior to the filling of qualified employment positions. Persons who apply after construction is initiated or finished or after acquisition of machinery and equipment are not eligible for the program. When an application for sales and use tax deferral is timely submitted, costs incurred before the application date are allowable, if they otherwise qualify. Applications for persons subject to hiring requirements must include information regarding the estimated total project cost and the qualified employment positions.

(a) **What is "initiation of construction" for purposes of this section?** "Initiation of construction," in regards to the construction, expansion, or renovation of buildings, means the commencement of on-site construction work. Neither planning nor land clearing prior to excavation of the building site constitutes the commencement of on-site construction work.

(b) **What is "acquisition of machinery and equipment" for purposes of this section?** "Acquisition of machinery and equipment" means the machinery and equipment is under the dominion and control of the recipient or its agent.

(c) **How may a taxpayer obtain an application form?** Application forms may be obtained at department of revenue district offices, by downloading from the department's web site (dor.wa.gov), by telephoning the telephone information center at 1-800-647-7706, or by contacting the department's special programs division at:

Department of Revenue
Special Programs Division
Post Office Box 47477
Olympia, WA 98504-7477
Fax 360-586-2163

Applicants must mail or fax applications to the special programs division at the address or fax number given above. Applications received by the department under chapter 82.60 RCW are not confidential and are subject to disclosure. RCW 82.60.100.

For purposes of this section, "applicant" means a person applying for a tax deferral under chapter 82.60 RCW, and "department" means the department of revenue.

(d) **Will the department approve the deferral application?** In considering whether to approve or deny an application for a deferral, the department will not approve an application for a project involving construction unless:

(i) The construction will begin within one year from the date of the application; or

(ii) The applicant shows proof that, if the construction will not begin within one year of construction, there is a specific and active program to begin construction of the project within two years from the date of application. Proof may include, but is not limited to:

(A) Affirmative action by the board of directors, governing body, or other responsible authority of the applicant toward an active program of construction;

(B) Itemized reasons for the proposed construction;

(C) Clearly established plans for financing the construction; or

(D) Building permits.

Similarly, after an application has been granted, a deferral certificate is no longer valid and should not be used if construction has not begun within one year from the date of application or there is not a specific and active program to begin construction within two years from the date of application. However, the department will grant requests to extend the period for which the certificate is valid if the holder of the certificate can demonstrate that the delay in starting construction is due to circumstances beyond the certificate holder's control such as the acquisition of building permit(s). Refer to subsection (106) of this section for more information on the use of tax deferral certificate.

(e) **What is the date of application?** "Date of application" means the date of the U.S. Post Office postmark, fax, or electronic transmittal, or when the application is hand delivered to the department. The statute in effect on the "date of application" will determine the program criteria the applicant must satisfy.

(f) **When will the department notify approval or disapproval of the deferral application?** The department will verify the information contained in the application and approve or disapprove the application within sixty days. If approved, the department will issue a tax deferral certificate. If disapproved, the department will notify the applicant as to the reason(s) for disapproval.

(g) **May an applicant request a review of department disapproval of the deferral application?** The applicant may seek administrative review of the department's disapproval of an application within thirty days from the date of notice of the disallowance pursuant to the provisions of WAC 458-20-10001 (Appeals). The filing of a petition for review with the department starts a review of departmental action.

(104) **What happens after the department approves the deferral application?** The department will issue a sales and use tax deferral certificate for state and local sales and use taxes due under chapters 82.08, 82.12, and 82.14 RCW for an eligible investment project. The department will state on the certificate the amount of tax deferral for which the recipient is eligible. Recipients must keep track of how much tax is deferred.

For purposes of this section, "recipient" means a person receiving a tax deferral under this program.

(105) **How should a tax deferral certificate be used?** A tax deferral certificate issued under this program is for the use of the recipient for deferral of sales and use taxes due on each eligible investment project. Deferral is limited only to investment in qualified buildings or qualified machinery and equipment as defined in this section. Thus, sales and use taxes cannot be deferred on items that do not become part of the qualified buildings, machinery, or equipment. In addition, the deferral is not to be used to defer the taxes of the persons with whom the recipient does business, persons the recipient hires, or employees of the recipient.

The certificate holder must provide a copy of the tax deferral certificate to the seller at the time goods or services are purchased. The seller will be relieved of the responsibility for collection of the sales or use tax upon presentation of the certificate. The seller must retain a copy of the certificate as

part of its permanent records for a period of at least five years. A blanket certificate may be provided by the certificate holder and accepted by the seller covering all such purchases relative to the eligible project. The seller is liable for business and occupation tax on all tax deferral sales.

For purposes of this section, "certificate holder" means an applicant to whom a tax deferral certificate has been issued.

(106) **What are the processes of an investment project that is certified by the department as operationally complete?** An applicant must provide the department with the estimated cost of the investment project at the time the application is made. Following approval of the application and issuance of a tax deferral certificate, a certificate holder must notify the department, in writing, when the value of the investment project reaches the estimated cost as stated on the tax deferral certificate.

For purposes of this section, "operationally complete" means the project is capable of being used for its intended purpose as described in the application.

(a) **What should a certificate holder do if its investment project reaches the estimated costs but the project is not yet operationally complete?** If a certificate holder has an investment project that has reached its level of estimated costs and the project is not operationally complete, the certificate holder may request an amended certificate stating a revised amount upon which the deferral taxes are requested. Requests must be mailed or faxed to the department.

(b) **What should a certificate holder do when its investment project is operationally complete?** The certificate holder must notify the department in writing when the construction project is operationally complete. The department will certify the date on which the project is operationally complete. The certificate holder of the deferral must maintain the manufacturing or research and development activity for eight years from this date.

(107) **Is a recipient of tax deferral required to submit annual surveys?** Each recipient of a tax deferral granted under chapter 82.60 RCW after June 30, 1994, must complete an annual survey. If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.60.020(4), the lessee must agree to complete the annual survey and the applicant is not required to complete the annual survey. Refer to WAC 458-20-268 (Annual surveys for certain tax adjustments) for more information on the requirements to file annual surveys.

(108) **Is a recipient of tax deferral required to repay deferred taxes?** Repayment of tax deferred under chapter 82.60 RCW is excused, except as otherwise provided in RCW 82.60.070 and this subsection.

(a) **Is repayment required for machinery and equipment exempt under RCW 82.08.02565 or 82.12.02565?** Repayment of tax deferred under chapter 82.60 RCW is not required, and interest and penalties under RCW 82.60.070 will not be imposed, on machinery and equipment that qualifies for exemption under RCW 82.08.02565 or 82.12.02565.

(b) **When is repayment required?** The following subsections describe the various circumstances under which repayment of the deferral may occur. Outstanding taxes are determined by reference to the following table. The table presumes the taxpayer maintained eligibility for the entire year.

Repayment Year		Percentage of Deferred Tax Waived
1	(Year operationally complete)	0%
2		0%
3		0%
4		10%
5		15%
6		20%
7		25%
8		30%

Any action taken by the department to disqualify a recipient for tax deferral or assess interest will be subject to administrative review pursuant to the provisions of WAC 458-20-10001 (Appeals). The filing of a petition for review with the department starts a review of departmental action.

(i) **Failure of investment project to satisfy general conditions.** If, on the basis of the recipient's annual survey or other information, including that submitted by the employment security department, the department of revenue finds that an investment project is not eligible for tax deferral for reasons other than failure to create the required number of qualified employment positions, the department will declare the amount of deferred taxes outstanding to be immediately due. An example of a disqualification under this section is a facility not being used for a manufacturing or research and development operation. No penalties or interest will be assessed on the deferred sales/use tax; however, all other penalties and interest applicable to excise tax assessments may be assessed and imposed.

(ii) **Failure of investment project to satisfy required employment positions conditions.** If, on the basis of the recipient's annual survey or other information, the department finds that an investment project has been operationally complete and has failed to create the required number of qualified employment positions under subsection (102)(i) of this section, the amount of taxes deferred will be immediately due. There is no proration of the amount owed under this subsection. No penalties or interest will be assessed on the deferred sales/use tax; however, all other penalties and interest applicable to excise tax assessments may be assessed and imposed.

(109) **When will the tax deferral program expire?** No applications for deferral of taxes will be accepted after June 30, 2010.

(110) **Is debt extinguishable because of insolvency or sale?** Insolvency or other failure of the recipient does not extinguish the debt for deferred taxes nor will the sale, exchange, or other disposition of the recipient's business extinguish the debt for the deferred taxes.

(111) **Does transfer of ownership terminate tax deferral?** Transfer of ownership does not terminate the deferral. The deferral is transferred, subject to the successor meeting the eligibility requirements of chapter 82.60 RCW, for the remaining periods of the deferral. Any person who becomes a successor (see WAC 458-20-216) to such investment project is liable for the full amount of any unpaid, deferred taxes

under the same terms and conditions as the original recipient of the deferral.

PART II
Applications from August 1, 1999, to March 31, 2004

(201) **Definitions.** The following definitions apply to applications made on and after August 1, 1999, and before April 1, 2004:

(a) "Acquisition of equipment or machinery" means the equipment and machinery is under the dominion and control of the recipient.

(b) "Applicant" means a person applying for a tax deferral under chapter 82.60 RCW.

(c) "Certificate holder" means an applicant to whom a tax deferral certificate has been issued.

(d) "Computer-related services" means activities such as programming for the manufactured product. It includes creating operating systems, software, and other similar goods that will be copied and sold as canned software. "Computer-related services" does not include information services, such as data or information processing. The activities performed by the manufacturer to test, correct, revise, or upgrade software or hardware before they are approved for sale to the consumer are considered computer-related services.

(e) "Date of application" means the date of the U.S. Post Office postmark, fax, or electronic transmittal, or when the application is hand delivered to the department. The statute in effect on the "date of application" will determine the program criteria the applicant must satisfy.

(f) "Department" means the department of revenue.

(g) "Eligible area" means:

(i) Rural county. A rural county is a county with fewer than one hundred persons per square mile as determined annually by the office of financial management and published by the department of revenue effective for the period July 1st through June 30th; or

(ii) Community empowerment zone (CEZ). A "community empowerment zone" means an area meeting the requirements of RCW 43.31C.020 and officially designated as a CEZ by the director of the department of community, trade, and economic development or a county containing a CEZ.

(h) "Eligible investment project" means an investment project in an eligible area. "Eligible investment project" does not include an investment project undertaken by a light and power business as defined in RCW 82.16.010, other than that portion of a cogeneration project that is used to generate power for consumption within the manufacturing site of which the cogeneration project is an integral part. It also does not include an investment project that has already received a deferral under chapter 82.60 RCW.

(i) "Industrial fixture" means an item attached to a building or to land. Examples of "industrial fixtures" are fuel oil lines, boilers, craneways, and improvements to land such as concrete slabs.

(j) "Initiation of construction," in regards to the construction, expansion, or renovation of buildings, means the commencement of on-site construction work. Neither planning nor land clearing prior to excavation of the building site constitutes the commencement of on-site construction work.

(k) "Investment project" means an investment in qualified buildings or qualified machinery and equipment, including labor and services rendered in the planning, installation, and construction of the project. When an application for sales and use tax deferral is timely submitted, costs incurred before the application date are allowable, if they otherwise qualify.

(l) "Manufacturing" has the meaning given in RCW 82.04.120. Manufacturing also includes computer programming, the production of computer software, and other computer-related services, but only when the computer programming, production of computer software, or other computer-related services are performed by a manufacturer as defined in RCW 82.04.110 and contribute to the production of a new, different, or useful substance or article of tangible personal property for sale; and the activities performed by research and development laboratories and commercial testing laboratories. (Chapter 16, Laws of 2010.)

(m) "Operationally complete" means the project is capable of being used for its intended purpose as described in the application.

(n) "Person" has the meaning given in RCW 82.04.030. "Person" does not include the state of Washington or its institutions. "Person" can be either a lessee or a lessor, who can apply separately for individual investment projects at the same site, if they comply with the other requirements of chapter 82.60 RCW. The lessor/owner of the structure is not eligible for deferral unless the underlying ownership of the buildings, machinery, or equipment vests in the lessor/owner, or unless the lessor has by written contract agreed to pass the economic benefit of the deferral to the lessee in the form of reduced rent payments.

(o) "Qualified buildings" means construction of new structures and expansion or renovation of existing structures for the purpose of increasing floor space or production capacity, used for manufacturing and research and development activities.

"Qualified buildings" are limited to structures used for manufacturing and research and development activities. "Qualified buildings" include plant offices and warehouses if such facilities are essential to or an integral part of a factory, mill, plant, or laboratory. "Office" means space used by professional, clerical, or administrative staff. For plant office space to be a qualified building its use must be essential or integral to the manufacturing or research and development operation. Office space that is used by supervisors and their staff, by technicians, by payroll staff, by the safety officer, and by the training staff are examples of qualifying office space. "Warehouse" means buildings or facilities used for the storage of raw materials or finished goods.

(p) "Qualified employment position" means a permanent full-time employee employed in the eligible investment project during the entire tax year. The "entire tax year" means the full-time position is filled for a period of twelve consecutive months. Full-time means at least thirty-five hours a week, four hundred fifty-five hours a quarter, or one thousand eight hundred twenty hours a year.

(q) "Qualified machinery and equipment" means all new industrial and research fixtures, equipment, and support facilities that are an integral and necessary part of a manufacturing or research and development operation. "Qualified machinery and equipment" includes computers, desks, filing cabinets, photocopiers, printers, software, data processing equipment, laboratory equipment; manufacturing compo-

nents such as belts, pulleys, shafts and moving parts; molds, tools and dies; operating structures; and all equipment used to control or operate machinery. It also includes machinery and equipment acquired under the terms of a lease by the recipient. "New" as used in this subsection means either new to the taxing jurisdiction of the state or new to the certificate holder.

(r) "Recipient" means a person receiving a tax deferral under this program.

(s) "Research and development" means the development, refinement, testing, marketing, and commercialization of a product, service, or process before commercial sales have begun. As used in this subsection, "commercial sales" excludes sales of prototypes or sales for market testing if the total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(t) "Resident" means the person who fills the qualified employment position makes his or her home in the CEZ. A mailing address alone is insufficient to establish that a person is a resident.

(202) **Issuance of deferral certificate.** The department will issue a sales and use tax deferral certificate for state and local sales and use taxes due under chapters 82.08, 82.12, and 82.14 RCW for an eligible investment project. The department will state on the certificate the amount of tax deferral for which the recipient is eligible. Recipients must keep track of how much tax is deferred.

(203) **Eligible investment amount.** There may or may not be a hiring requirement, depending on the location of the project.

(a) **No hiring requirements.** There are no hiring requirements for qualifying projects located in counties with fewer than one hundred persons per square mile. Monitoring and reporting procedures are explained in subsection (210) of this section. Buildings that will be used partly for manufacturing or research and development and partly for other purposes are eligible for a deferral on a proportionate basis. Subsection (204) of this section explains the procedure for apportionment.

(b) **Hiring requirements.** There are hiring requirements for qualifying projects located in CEZs or in counties containing CEZs. The applicant applies for a deferral of investment that correlates to the estimated number of persons to be hired based on the following formula:

Number of qualified employment positions to be hired x $750,000 = amount of investment eligible for deferral

Applicants must make good faith estimates of anticipated hiring. The recipient must fill the positions by persons who at the time of hire are residents of the CEZ. The department has instituted a geographic information system (GIS) to assist taxpayers in determining taxing jurisdiction boundaries, local tax rates, and a mapping and address lookup system to determine whether a specific address is within a CEZ. The system is available on the department's internet web site at http://www.dor.wa.gov. A recipient must fill the qualified employment positions by the end of the calendar year following the year in which the project is certified as operationally complete and retain the position during the entire tax year. If the recipient does not fill the qualified employment positions by the end of the second calendar year following the year in which the project is certified as operationally complete, all deferred taxes are immediately due.

(204) **Apportionment of costs between qualifying and nonqualifying investments.** The deferral is allowable only in respect to investment in the construction of a new building or the expansion or renovation of existing buildings used in manufacturing, research and development, or commercial testing laboratories.

(a) Where a building(s) is used partly for manufacturing or research and development and partly for purposes that do not qualify for deferral under this rule, the deferral will be determined by one of the following apportionment methods. The first method of apportionment is based on square footage and does not require tracking the costs of materials for the qualifying/nonqualifying areas of a building. The second method of apportionment tracks the costs of materials used in the qualifying/nonqualifying areas and is primarily used by those industries with specialized building requirements.

(i) The applicable tax deferral will be determined by apportionment according to the ratio of the square footage of that portion of the building(s) directly used for manufacturing or research and development purposes bears to the square footage of the total building(s).

Apportionment formula:

$$\frac{\text{Eligible square feet of building(s)}}{\text{Total square feet of building(s)}} = \text{Percent Eligible}$$

Percent Eligible x Total Project Costs = Eligible Costs.

"Total Project Costs" means cost of multipurpose buildings and other improvement costs associated with the deferral project. Machinery and equipment are not included in this calculation. Common areas, such as hallways and bathrooms, are not included in the square feet figure for either the numerator or the denominator. The cost of the common areas is multiplied by the percent eligible to determine the portion of the common area that is eligible for deferral.

Eligible Tax Deferred = Eligible Cost x Tax Rate.

(ii) If a building is used partly for manufacturing, research and development, or commercial testing and partly for other purposes, the applicable tax deferral shall be determined as follows:

(A) Tax on the cost of construction of areas devoted solely to manufacturing, research and development, or commercial testing may be deferred.

(B) Tax on the cost of construction of areas not used at all for manufacturing, research and development, or commercial testing may not be deferred.

(C) Tax on the cost of construction of areas used in common for manufacturing, research and development, or commercial testing and for other purposes, such as hallways, bathrooms, and conference rooms, may be deferred by apportioning the costs of construction on a square footage basis. The apportioned costs of construction eligible for deferral are established by using the ratio, expressed as a percentage, of the square feet of the construction, expansion, or renovation devoted to manufacturing, research and development, or commercial testing, excluding areas used in common to the total square feet of the construction, expansion, or renova-

tion, excluding areas used in common. That percentage is applied to the cost of construction of the common areas to determine the costs of construction eligible for tax deferral. Expressed as a formula, apportionment of the cost of the common areas is determined by:

$$\frac{\text{Square feet devoted to manufacturing, research and development, or commercial testing, excluding square feet of common areas}}{\text{Total square feet, excluding square feet of common areas}} = \text{Percentage of total cost of construction of common areas eligible for deferral}$$

(b) Qualified machinery and equipment is not subject to apportionment.

(205) **Leased equipment.** The amount of tax deferral allowable for leased equipment is the amount of the consideration paid by the recipient to the lessor over the initial term of the lease, excluding any period of extension or option to renew, up to the last date for repayment of the deferred taxes. After that date the recipient must pay the appropriate sales taxes to the lessor for the remaining term of the lease.

(206) **Application procedure and review process.** An application for sales and use tax deferral under this program must be made prior to the initiation of construction, prior to the acquisition of machinery and equipment, and prior to the filling of qualified employment positions. Persons who apply after construction is initiated or finished or after acquisition of machinery and equipment are not eligible for the program. Applications for persons subject to hiring requirements must include information regarding the estimated total project cost and the qualified employment positions.

(a) Application forms will be supplied to the applicant by the department upon request. The completed application may be sent by fax to 360-586-2163 or mailed to the following address:

State of Washington
Department of Revenue
Special Programs
P.O. Box 47477
Olympia, WA 98504-7477

Applications and reports received by the department under chapter 82.60 RCW are not confidential and are subject to disclosure. (RCW 82.60.100.)

(b) In considering whether to approve or deny an application for a deferral, the department will not approve an application for a project involving construction unless:

(i) The construction will begin within one year from the date of the application; or

(ii) If the construction will not begin within one year of application, the applicant shows proof that there is a specific and active program to begin construction of the project within two years from the date of application. Proof may include, but is not limited to:

(A) Affirmative action by the board of directors, governing body, or other responsible authority of the applicant toward an active program of construction;

(B) Itemized reasons for the proposed construction;

(C) Clearly established plans for financing the construction; or

(D) Building permits.

Similarly, after an application has been granted, a deferral certificate is no longer valid and should not be used if construction has not begun within one year from the date of application or there is not a specific and active program to begin construction within two years from the date of application. However, the department will grant requests to extend the period for which the certificate is valid if the holder of the certificate can demonstrate that the delay in starting construction is due to circumstances beyond the certificate holder's control such as the acquisition of building permit(s).

(c) The department will verify the information contained in the application and approve or disapprove the application within sixty days. If approved, the department will issue a tax deferral certificate. If disapproved, the department will notify the applicant as to the reason(s) for disapproval.

(d) The applicant may seek administrative review of the department's disapproval of an application within thirty days from the date of notice of the disallowance pursuant to the provisions of WAC 458-20-100, appeals, small claims and settlements. The filing of a petition for review with the department starts a review of departmental action.

(207) **Eligible area criteria.** The office of financial management will determine annually the counties with fewer than one hundred persons per square mile. The department will update and distribute the list each year. The list will be effective on July 1 of each year.

If an investment project is located in an area that qualifies under more than one type of eligible area, the department will automatically assign the project to the eligible area that imposes the least burden on the taxpayer and with the greatest benefit to the taxpayer. If the applicant elects to be bound by the requirements of the other potential eligible area, the applicant must make a written statement to that effect. For example, on October 1, 1999, the city of Yakima qualifies as a CEZ, and the entire county of Yakima has fewer than one hundred persons per square mile. The CEZ requirements are more restrictive than counties containing fewer than one hundred persons per square mile. The department will assign the project to the "fewer than one hundred persons per square mile designation" unless the applicant elects to be bound by the CEZ requirements.

(208) **Use of the certificate.** A tax deferral certificate issued under this program is for the use of the recipient for deferral of sales and use taxes due on each eligible investment project. Deferral is limited only to investment in qualified building or qualified machinery and equipment as defined in Part I. Thus, sales and use taxes cannot be deferred on items that do not become part of the qualified buildings, machinery, or equipment. In addition, the deferral is not to be used to defer the taxes of the persons with whom the recipient does business, persons the recipient hires, or employees of the recipient.

The tax deferral certificate is to be used in a manner similar to that of a resale certificate as set forth in WAC 458-20-102, Resale certificates. The certificate holder must provide a copy of the tax deferral certificate to the seller at the time goods or services are purchased. The seller will be relieved of the responsibility for collection of the sales or use tax upon presentation of the certificate. The seller must retain a copy of the certificate as part of its permanent records for a period of at least five years. A blanket certificate may be provided

by the certificate holder and accepted by the seller covering all such purchases relative to the eligible project. The seller is liable for business and occupation tax on all tax deferral sales.

(209) **Project operationally complete.** An applicant must provide the department with the estimated cost of the investment project at the time the application is made. Following approval of the application and issuance of a tax deferral certificate, a certificate holder must notify the department, in writing, when the value of the investment project reaches the estimated cost as stated on the tax deferral certificate.

(a) If a certificate holder has reached its level of estimated costs and the project is not operationally complete, the certificate holder may request an amended certificate stating a revised amount upon which the deferral taxes are requested. Requests must be mailed or faxed to the department.

(b) The certificate holder must notify the department in writing when the construction project is operationally complete. The department will certify the date on which the project is operationally complete. The recipient of the deferral must maintain the manufacturing or research and development activity for eight years from this date.

(210) **Reporting and monitoring procedure.**

(a) **Requirement to submit annual reports.** Each recipient of a tax deferral under chapter 82.60 RCW must submit a report on December 31st of the year in which the investment project is certified by the department as having been operationally completed and on December 31st of each of the seven succeeding calendar years. The report must be made to the department in a form and manner prescribed by the department. If the recipient fails to submit a report or submits an inadequate or falsified report, the department may declare the amount of deferred taxes outstanding to be immediately due and payable. An inadequate or falsified report is one that contains material omissions or contains knowingly false statements and information.

(b) **Requirement to submit annual surveys.** Effective April 1, 2004, each recipient of a tax deferral granted under chapter 82.60 RCW after June 30, 1994, must complete an annual survey **instead of an annual report.** If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.60.020(4), the lessee must agree to complete the annual survey and the applicant is not required to complete the annual survey. Refer to WAC 458-20-268 (Annual surveys for certain tax adjustments) for more information on the requirements to file annual surveys.

(211) **Repayment of deferred taxes.** Repayment of tax deferred under chapter 82.60 RCW is excused, except as otherwise provided in RCW 82.60.070 and this subsection.

(a) Repayment of tax deferred under chapter 82.60 RCW is not required, and interest and penalties under RCW 82.60.-070 will not be imposed, on machinery and equipment that qualifies for exemption under RCW 82.08.02565 or 82.12.-02565.

(b) The following subsections describe the various circumstances under which repayment of the deferral may occur. Outstanding taxes are determined by reference to the following table. The table presumes the taxpayer maintained eligibility for the entire year.

Repayment Year		Percentage of Deferred Tax Waived
1	(Year operationally complete)	0%
2		0%
3		0%
4		10%
5		15%
6		20%
7		25%
8		30%

Any action taken by the department to disqualify a recipient for tax deferral or assess interest will be subject to administrative review pursuant to the provisions of WAC 458-20-100, appeals, small claims and settlements. The filing of a petition for review with the department starts a review of departmental action.

(c) **Failure of investment project to satisfy general conditions.** If, on the basis of the recipient's annual report or other information, including that submitted by the employment security department, the department of revenue finds that an investment project is not eligible for tax deferral for reasons other than failure to create the required number of qualified employment positions, the department will declare the amount of deferred taxes outstanding to be immediately due. An example of a disqualification under this section is a facility not being used for a manufacturing or research and development operation.

(d) **Failure of investment project to satisfy required employment positions conditions.** If, on the basis of the recipient's annual report or other information, the department finds that an investment project has been operationally complete and has failed to create the required number of qualified employment positions, the amount of taxes deferred will be immediately due. There is no proration of the amount owed under this subsection. No penalties or interest will be assessed on the deferred sales/use tax; however, all other penalties and interest applicable to excise tax assessments may be assessed and imposed.

(212) **Debt not extinguished because of insolvency or sale.** Insolvency or other failure of the recipient does not extinguish the debt for deferred taxes nor will the sale, exchange, or other disposition of the recipient's business extinguish the debt for the deferred taxes. Transfer of ownership does not terminate the deferral. The deferral is transferred, subject to the successor meeting the eligibility requirements of chapter 82.60 RCW, for the remaining periods of the deferral. Any person who becomes a successor (see WAC 458-20-216) to such investment project is liable for the full amount of any unpaid, deferred taxes under the same terms and conditions as the original recipient of the deferral.

(213) **Disclosure of information.** Applications and reports received by the department under chapter 82.60 RCW are not confidential and are subject to disclosure. (RCW 82.60.100.) Effective April 1, 2004, all information collected in annual surveys, except the amount of tax deferral taken, is confidential and not subject to disclosure. Information on the

amount of tax deferral taken in annual surveys is not confidential and may be disclosed to the public upon request.

PART III
Applications from July 1, 1995, to July 31, 1999

(301) **Definitions.** For the purposes of this part, the following definitions apply for applications made on and after July 1, 1995, and before August 1, 1999:

(a) "Acquisition of equipment or machinery" means the equipment and machinery is under the dominion and control of the recipient.

(b) "Applicant" means a person applying for a tax deferral under chapter 82.60 RCW.

(c) "Certificate holder" means an applicant to whom a tax deferral certificate has been issued.

(d) "Computer-related services" means services that are connected or interact directly in the manufacture of computer hardware or software or the programming of the manufactured hardware. This includes the manufacture of hardware such as chips, keyboards, monitors, any other hardware, and the components of these items. It includes creating operating systems and software that will be copied and sold as canned software. "Computer-related services" does not include information services. The activities performed by the manufacturer to test, correct, revise, or upgrade software or hardware before they are approved for sale to the consumer are considered computer-related services.

(e) "Department" means the department of revenue.

(f) "Eligible area" means one of the areas designated according to the following classifications:

(i) Unemployment county. A county in which the average level of unemployment for the three calendar years preceding the year in which an application is filed exceeds the average state unemployment for those years by twenty percent. In making this calculation, the department will compare the county's average unemployment rate in the prior three years to one hundred twenty percent of the state's average unemployment rate based on official unemployment figures published by the department of employment security;

(ii) Median income county. On and after June 6, 1996, a county that has a median household income that is less than seventy-five percent of the state median income for the previous three years;

(iii) MSA. A metropolitan statistical area, as defined by the Office of Federal Statistical Policy and Standards, United States Department of Commerce, in which the average level of unemployment for the calendar year immediately preceding the year in which an application is filed under chapter 82.60 RCW exceeds the average state unemployment for such calendar year by twenty percent;

(iv) CEZ and county containing a CEZ. A designated community empowerment zone (CEZ) approved under RCW 43.63A.700 or a county containing such a community empowerment zone;

(v) Timber impact area towns. A town with a population of less than twelve hundred persons that is located in a county that is a timber impact area, as defined in RCW 43.31.601, but that is not an unemployment county as defined in Part I;

(vi) Governor's designation county. A county designated by the governor as an eligible area under RCW 82.60.047; or

(vii) Contiguous county. A county that is contiguous to an unemployment county or a governor's designation county.

(g)(i) "Eligible investment project" means:

(A) An investment project in an unemployment county, a median income county, an MSA, a timber impact area town, or a governor's designation county; or

(B) That portion of an investment project in a CEZ, a county containing a CEZ, or a contiguous county, that is directly utilized to create at least one new full-time qualified employment position for each seven hundred fifty thousand dollars of investment.

(ii) "Eligible investment project" does not include an investment project undertaken by a light and power business as defined in RCW 82.16.010, other than that portion of a cogeneration project that is used to generate power for consumption within the manufacturing site of which the cogeneration project is an integral part. It also does not include an investment project that has already received a deferral under chapter 82.60 RCW.

(h) "Industrial fixture" means an item attached to a building or to land. Fixtures become part of the real estate to which they are attached and upon attachment are classified as real property, not personal property. Examples of "industrial fixtures" are fuel oil lines, boilers, craneways, and certain concrete slabs.

(i) "Initiation of construction," in regards to the construction, expansion, or renovation of buildings, means the commencement of on-site construction work. Land clearing prior to excavation of the building site does not commence construction nor does planning commence construction.

(j) "Investment project" means an investment in qualified buildings or qualified machinery and equipment, including labor and services rendered in the planning, installation, and construction of the project. When an application for sales and use tax deferral is timely submitted, costs incurred before the application date are allowable, if they otherwise qualify.

(k) "Manufacturing" has the meaning given in RCW 82.04.120. Manufacturing, for purposes of the distressed area deferral program**,** also includes computer programming, the production of computer software, and other computer-related services, but only when the computer programming, production of computer software, or other computer-related services are performed by a manufacturer as defined under RCW 82.04.110 and contribute to the production of a new, different, or useful substance or article of tangible personal property for sale; and the activities performed by research and development laboratories and commercial testing laboratories. (Chapter 16, Laws of 2010.)

(l) "Operationally complete" means the project is capable of being used for its intended purpose as described in the application.

(m) "Person" has the meaning given in RCW 82.04.030. "Person" does not include the state of Washington or its institutions. "Person" can be either a lessee or a lessor, who can apply separately for individual investment projects at the same site, if they comply with the other requirements of chapter 82.60 RCW. The lessor/owner of the structure is not eligible for deferral unless the underlying ownership of the buildings, machinery, or equipment vests exclusively in the lessor/owner, or unless the lessor has by written contract

agreed to pass the economic benefit of the deferral to the lessee in the form of reduced rent payments.

(n) "Qualified buildings" means construction of new structures, and expansion or renovation of existing structures for the purpose of increasing floor space or production capacity, used for manufacturing and research and development activities.

"Qualified buildings" are limited to structures used for manufacturing and research and development activities. "Qualified buildings" include plant offices and warehouses if such facilities are essential or an integral part of a factory, mill, plant, or laboratory. "Office" means space used by professional, clerical, or administrative staff. For plant office space to be a qualified building its use must be essential or integral to the manufacturing or research and development operation. Office space that is used by supervisors and their staff, by technicians, by payroll staff, by the safety officer, and by the training staff are examples of qualifying office space. "Warehouse" means facilities used for the storage of raw materials or finished goods.

(o) "Qualified employment position" means a permanent full-time employee employed in the eligible investment project during the entire tax year. The "entire tax year" means the full-time position is filled for a period of twelve consecutive months. "Full time" means at least 35 hours a week, 455 hours a quarter, or 1,820 hours a year.

(p) "Qualified machinery and equipment" means all new industrial and research fixtures, equipment, and support facilities that are an integral and necessary part of a manufacturing or research and development operation. "Qualified machinery and equipment" includes computers, desks, filing cabinets, photocopiers, printers, software, data processing equipment, laboratory equipment; manufacturing components such as belts, pulleys, shafts and moving parts; molds, tools and dies; operating structures; and all equipment used to control or operate machinery. It also includes machinery and equipment acquired under the terms of a lease by the recipient. "New" as used in this subsection means either new to the taxing jurisdiction of the state or new to the certificate holder.

(q) "Recipient" means a person receiving a tax deferral under this program.

(r) "Research and development" means the development, refinement, testing, marketing, and commercialization of a product, service, or process before commercial sales have begun. As used in this subsection, "commercial sales" excludes sales of prototypes or sales for market testing if the total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(302) **Issuance of deferral certificate.** The department will issue a sales and use tax deferral certificate for state and local sales and use taxes due under chapters 82.08, 82.12, and 82.14 RCW for an eligible investment project. The department will state on the certificate the amount of tax deferral for which the recipient is eligible. Recipients must keep track of how much tax is deferred.

(303) **Eligible investment amount.** There may or may not be a hiring requirement, depending on the location of the project.

(a) **No hiring requirements.** There are no hiring requirements for qualifying projects located in distressed counties, MSAs, median income counties, governor-designated counties, or timber impact towns. Monitoring and reporting procedures are explained in subsection (310) of this section. Buildings that will be used partly for manufacturing or research and development and partly for other purposes are eligible for a deferral on a proportionate basis. Subsection (304) of this section explains the procedure for apportionment.

(b) **Hiring requirements.** There are hiring requirements for qualifying projects located in CEZs, in counties containing CEZs, or in contiguous counties. Total qualifying project costs, including any part of the project that would qualify under RCW 82.08.02565 and 82.12.02565, must be examined to determine the number of positions associated with the project. An applicant who knows at the time of application that he or she will not fill the required qualified employment positions is not eligible for the deferral. Applicants must make good faith estimates of anticipated hiring. The applicant applies for a deferral of investment that correlates to the estimated number of persons to be hired. The investment must include the sales price of machinery and equipment eligible for the sales and use tax exemption under RCW 82.08.-02565 and 82.12.02565. An applicant can amend the number of persons hired until completion of the project. The qualified employment positions filled by December 31 of the year of completion are the benchmark to be used during the next seven years in determining hiring compliance.

(i) Total qualifying project costs are divided by seven hundred fifty thousand, the result being the qualified employment positions.

(ii) In addition, the number of qualified employment positions created by an investment project will be reduced by the number of full-time employment positions maintained by the recipient in any other community in this state that are displaced as a result of the investment project. This reduction requires a reexamination of whether the seventy-five percent hiring requirement (as explained below) is met.

(iii) This number, which is the result of (i) and (ii) of this subsection, is the number of positions used as the benchmark over the life of the deferral. For recipients locating in a CEZ or a county containing a CEZ, seventy-five percent of the new positions must be filled by residents of a CEZ located in the county where the project is located. The department has instituted a geographic information system (GIS) to assist taxpayers in determining taxing jurisdiction boundaries, local tax rates, and a mapping and address lookup system to determine whether a specific address is within a CEZ. The system is available on the department's internet web site at http://www.dor.wa.gov. For recipients located in a contiguous county, residents of an adjacent unemployment or governor-designated county must fill seventy-five percent of the new positions.

(iv) The qualified employment positions are reviewed each year, beginning December 31st of the year the project is operationally complete and each year for seven years. If the recipient has failed to create the requisite number of positions, the department will issue an assessment as explained under subsection (311) of this section.

(v) In addition to the hiring requirements for new positions under (b) of this subsection, the recipient of a deferral for an expansion or diversification of an existing facility must ensure that he or she maintains the same percentage of

employment positions filled by residents of the contiguous county or the CEZ that existed prior to the application being made. This percentage must be maintained for seven years.

(vi) Qualified employment positions do not include those positions filled by persons hired in excess of the ratio of one employee per required dollar of investment for which a deferral is granted. In the event an employee is either voluntarily or involuntarily separated from employment, the employment position will be considered filled if the employer is either training or actively recruiting a replacement employee, so long as the position is not actually vacant for any period in excess of thirty consecutive days.

(304) **Apportionment of costs between qualifying and nonqualifying investments.** The deferral is allowable only in respect to investment in the construction of a new building or the expansion or renovation of existing buildings used in manufacturing, research and development, or commercial testing.

(a) Where a building(s) is used partly for manufacturing, research and development, or commercial testing and partly for purposes that do not qualify for deferral under this rule, the deferral will be determined by apportionment of the total project costs. The applicable tax deferral will be determined by apportionment according to the ratio of the square footage of that portion of the building(s) directly used for manufacturing, research and development, or commercial testing purposes bears to the square footage of the total building(s).

Apportionment formula:

$$\frac{\text{Eligible square feet of building(s)}}{\text{Total square feet of building(s)}} = \text{Percent Eligible}$$

Percent Eligible x Total Project Costs = Eligible Costs.

"Total Project Costs" means cost of multipurpose buildings and other improvement costs associated with the deferral project. Machinery and equipment are not included in this calculation. Common areas, such as hallways and bathrooms, are not included in the square feet figure for either the numerator or the denominator. The cost of the common areas is multiplied by the percent eligible to determine the portion of the common area that is eligible for deferral.

Eligible Tax Deferred = Eligible Cost x Tax Rate.

(b) Qualified machinery and equipment is not subject to apportionment.

(305) **Leased equipment.** The amount of tax deferral allowable for leased equipment is the amount of the consideration paid by the recipient to the lessor over the initial term of the lease, excluding any period of extension or option to renew, up to the last date for repayment of the deferred taxes. After that date the recipient must pay the appropriate sales taxes to the lessor for the remaining term of the lease.

(306) **Application procedure and review process.** An application for sales and use tax deferral under this program must be made prior to the initiation of construction and the acquisition of machinery and equipment. Persons who apply after construction is initiated or after acquisition of machinery and equipment are not eligible for the program. Applications for persons subject to hiring requirements must include information regarding the estimated total project cost and the qualified employment positions.

(a) Application forms will be supplied to the applicant by the department upon request. The completed application may be sent by fax to 360-586-2163 or mailed to the following address:

State of Washington
Department of Revenue
Special Programs
P.O. Box 47477
Olympia, WA 98504-7477

(b) The department will verify the information contained in the application and approve or disapprove the application within sixty days. If approved, the department will issue a tax deferral certificate. If disapproved, the department will notify the applicant as to the reason(s) for disapproval. The U.S. Post Office postmark or fax date will be used as the date of application.

(c) The applicant may seek administrative review of the department's disapproval of an application within thirty days from the date of notice of disallowance pursuant to the provisions of WAC 458-20-100, appeals, small claims and settlements. The filing of a petition for review with the department starts a review of departmental action.

(307) **Eligible area criteria.** The statewide and county unemployment statistics last published by the department will be used to determine eligible areas based on unemployment. Median income county designation is based on data produced by the office of financial management and made available to the department on November 1 of each year. The timber impact town designation is based on information provided by the department of employment security.

If an investment project is located in an area that qualifies under more than one type of eligible area, the department will automatically assign the project to the eligible area that imposes the least burden on the taxpayer and with the greatest benefit to the taxpayer. If the applicant elects to be bound by the requirements of the other potential eligible area, the applicant must make a written statement to that effect. For example, on May 1, 1998, the city of Yakima qualifies as a CEZ, and the entire county of Yakima qualifies as an unemployment county. The CEZ requirements are more restrictive than the unemployment county requirements. The department will assign the project to the distressed area eligible area unless the applicant elected to be bound by the CEZ requirements.

(308) **Use of the certificate.** A tax deferral certificate issued under this program is for the use of the recipient for deferral of sales and use taxes due on each eligible investment project. Deferral is limited only to investment in qualified building or qualified machinery and equipment as defined in subsection (301) of this section. Thus, sales and use taxes cannot be deferred on items that do not become part of the qualified buildings, machinery, or equipment. In addition, the deferral is not to be used to defer the taxes of the persons with whom the recipient does business, persons the recipient hires, or employees of the recipient.

The tax deferral certificate is used in a manner similar to that of a resale certificate as set forth in WAC 458-20-102, Resale certificates. The certificate holder must provide a copy of the tax deferral certificate to the seller at the time

goods or services are purchased. The seller is relieved of the responsibility for collection of the sales or use tax upon presentation of the certificate. The seller must retain a copy of the certificate as part of its permanent records for a period of at least five years. A blanket certificate may be provided by the certificate holder and accepted by the seller covering all such purchases relative to the eligible project. The seller is liable for business and occupation tax on all tax deferral sales.

(309) **Project operationally complete.** An applicant must provide the department with the estimated cost of the investment project at the time the application is made. Following approval of the application and issuance of a deferral certificate, a certificate holder must notify the department, in writing, when the value of the investment project reaches the estimated cost as stated on the tax deferral certificate.

(a) If a certificate holder has reached its level of estimated costs and the project is not operationally complete, the certificate holder may request an amended certificate stating a revised amount upon which the deferral is requested. Requests must be mailed or faxed to the department.

(b) The certificate holder must notify the department in writing when the construction project is operationally complete. The department will certify the date on which the project was operationally complete. The recipient of the deferral must maintain the manufacturing or research and development activity for eight years from this date.

(310) **Reporting and monitoring procedure.**

(a) Requirement to submit annual reports. Each recipient of a deferral granted after July 1, 1995, must submit a report to the department on December 31st of the year in which the investment project is certified by the department as having been operationally completed, and on December 31st of each of the seven succeeding calendar years. The report must be made to the department in a form and manner prescribed by the department. The report must contain information regarding the actual employment related to the project and any other information required by the department. If the recipient fails to submit a report or submits an inadequate or falsified report, the department may declare the amount of deferred taxes outstanding to be immediately due and payable. An inadequate or falsified report is one that contains material omissions or contains knowingly false statements and information.

(b) **Requirement to submit annual surveys.** Effective April 1, 2004, each recipient of a tax deferral granted under chapter 82.60 RCW after June 30, 1994, must complete an annual survey **instead of an annual report.** If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.60.020(4), the lessee must agree to complete the annual survey and the applicant is not required to complete the annual survey. Refer to WAC 458-20-268 (Annual surveys for certain tax adjustments) for more information on the requirements to file annual surveys.

(311) **Repayment of deferred taxes.** Repayment of tax deferred under chapter 82.60 RCW is excused, except as otherwise provided in RCW 82.60.070 and this subsection, on an investment project for which a deferral has been granted under chapter 82.60 RCW after June 30, 1994.

(a) Taxes deferred under this chapter need not be repaid on machinery and equipment for lumber and wood product industries, and sales of or charges made for labor and services, of the type which qualified for exemption under RCW 82.08.02565 or 82.12.02565.

(b) The following describes the various circumstances under which repayment of the deferral may be required. Outstanding taxes are determined by reference to the following table. The table presumes the taxpayer maintained eligibility for the entire year.

Repayment Year		Percentage of Deferred Tax Waived
1	(Year operationally complete)	0%
2		0%
3		0%
4		10%
5		15%
6		20%
7		25%
8		30%

Any action taken by the department to disqualify a recipient for tax deferral or require payment of all or part of deferred taxes is subject to administrative review pursuant to the provisions of WAC 458-20-100, appeals, small claims and settlements. The filing of a petition for review with the department starts a review of departmental action. See subsection (24)(d) of this section for repayment and waiver for deferrals with hiring requirements.

(c) **Failure of investment project to satisfy general conditions.** If, on the basis of the recipient's annual report or other information, including that submitted by the department of employment security, the department finds that an investment project is not eligible for tax deferral for reasons other than failure to create the required number of qualified employment positions, the department will declare the amount of deferred taxes outstanding to be immediately due. For example, a reason for disqualification would be that the facilities are not used for a manufacturing or research and development operation.

(d) **Failure of investment project to satisfy required employment positions conditions.** If, on the basis of the recipient's annual report or other information, the department finds that an investment project has been operationally complete for three years and has failed to create the required number of qualified employment positions, the amount of taxes deferred will be immediately due. The department will assess interest at the rate and as provided for delinquent excise taxes under RCW 82.32.050 (retroactively to the date the application was filed). There is no proration of the amount owed under this subsection. No penalties will be assessed.

(e) **Failure of investment project to satisfy employee residency requirements.** If, on the basis of the recipient's annual report or other information, the department finds that an investment project under RCW 82.60.040 (1)(b) or (c) has failed to comply with any requirement of RCW 82.60.045 for any calendar year for which reports are required under this subsection, twelve and one-half percent of the amount of deferred taxes will be immediately due. For each year a deferral's requirements are met twelve and one-half percent of the amount of deferred taxes will be waived. The depart-

ment will assess interest at the rate provided for delinquent excise taxes under RCW 82.32.050, retroactively to the date the application was filed. Each year the employment requirement is met, twelve and one-half percent of the deferred tax will be waived, if all other program requirements are met. No penalties will be assessed.

(f) The department of employment security makes and certifies to the department all determinations of employment and wages required under this subsection.

(312) **Debt not extinguished because of insolvency or sale.** Insolvency or other failure of the recipient does not extinguish the debt for deferred taxes nor will the sale, exchange, or other disposition of the recipient's business extinguish the debt for the deferred taxes. Transfer of ownership does not terminate the deferral. The deferral is transferred, subject to the successor meeting the eligibility requirements of this chapter, for the remaining periods of the deferral. Any person who becomes a successor (see WAC 458-20-216) to such investment project is liable for the full amount of any unpaid, deferred taxes under the same terms and conditions as the original recipient.

(313) **Disclosure of information.** Applications and reports received by the department under chapter 82.60 RCW are not confidential and are subject to disclosure. (RCW 82.60.100.) Effective April 1, 2004, all information collected in annual surveys, except the amount of tax deferral taken, is confidential and not subject to disclosure. Information on the amount of tax deferral taken in annual surveys is not confidential and may be disclosed to the public upon request.

PART IV
Applications from July 1, 1994, to June 30, 1995

(401) **Definitions.** For the purposes of this part, the following definitions apply for applications made on and after July 1, 1994, and before July 1, 1995.

(a) "Acquisition of equipment or machinery" means the date the equipment and machinery is under the dominion and control of the recipient.

(b) "Applicant" means a person applying for a tax deferral under chapter 82.60 RCW.

(c) "Certificate holder" means an applicant to whom a tax deferral certificate has been issued.

(d) "Computer-related services" means services that are connected or interact directly in the manufacture of computer hardware or software or the programming of the manufactured hardware. This includes the manufacture of hardware such as chips, keyboards, monitors, any other hardware, and the components of these items. It includes creating operating systems and software that will be copied and sold as canned software. "Computer-related services" does not include information services. The activities performed by the manufacturer to test, correct, revise, and upgrade software or hardware before they are approved for sale to the consumer are considered computer-related services in this instance.

(e) "Department" means the department of revenue.

(f) "Eligible area" means:

(i) Unemployment county. A county in which the average level of unemployment for the three calendar years preceding the year in which an application is filed exceeds the average state unemployment for those years by twenty percent. The department may compare the county's average unemployment rate in the prior three years to one hundred twenty percent of the state's average unemployment rate based on official unemployment figures published by the department of employment security;

(ii) MSA. A metropolitan statistical area, as defined by the Office of Federal Statistical Policy and Standards, United States Department of Commerce, in which the average level of unemployment for the calendar year immediately preceding the year in which an application is filed under chapter 82.60 RCW exceeds the average state unemployment for such calendar year by twenty percent;

(iii) CEZ. A designated community empowerment zone approved under RCW 43.63A.700;

(iv) Timber impact area towns. A town with a population of less than twelve hundred persons that is located in a county that is a timber impact area, as defined in RCW 43.31.601, but that is not an unemployment county as defined in this subsection;

(v) Contiguous county. A county that is contiguous to an unemployment county or a governor's designation county; or

(vi) Governor's designation county. A county designated by the governor as an eligible area under RCW 82.60.047.

(g)(i) "Eligible investment project" means that portion of an investment project which:

(A) Is directly utilized to create at least one new full-time qualified employment position for each seven hundred fifty thousand dollars of investment on which a deferral is requested; and

(B) Either initiates a new operation, or expands or diversifies a current operation by expanding, equipping, or renovating an existing facility with costs in excess of twenty-five percent of the true and fair value of the facility prior to improvement. "Improvement" means the physical alteration by significant expansion, modernization, or renovation of an existing facility, excluding land, where the cost of such expansion, etc., exceeds twenty-five percent of the true and fair value of the existing facility prior to the initiation of the expansion or renovation. The term "improvement" is further defined to include those portions of an existing facility which do not increase the usable floor space, but is limited to the renovation, modernization, or any other form of alteration or addition and the equipment and machinery installed therein during the course of construction. The twenty-five percent test may be satisfied by considering the value of both the building and machinery and equipment; however, at least forty percent of the total renovation costs must be attributable to the physical renovation of the building structure alone. "True and fair value" means the value listed on the assessment roles as determined by the county assessor for the buildings or equipment for ad valorem property tax purposes at the time of application.

(ii) "Eligible investment project" does not include either an investment project undertaken by a light and power business as defined in RCW 82.16.010, other than cogeneration projects that are both an integral part of a manufacturing facility and owned at least fifty percent by the manufacturer, or investment projects that have already received deferrals under chapter 82.60 RCW.

(h) "Industrial fixture" means an item attached to a building or to land. Fixtures become part of the real estate to which they are attached and upon attachment are classified as real

property, not personal property. Examples of "industrial fixtures" are fuel oil lines, boilers, craneways, and certain concrete slabs.

(i) "Initiation of construction," in regards to the construction of new buildings, means the commencement of on-site construction work.

(j) "Initiation of construction," in regards to the construction of expanding or renovating existing structures for the purpose of increasing floor space or production capacity used for manufacturing and research and development, means the commencement of the new construction by renovation, modernization, or expansion, by physical alteration.

(k) "Investment project" means an investment in qualified buildings or qualified machinery and equipment, including labor and services rendered in the planning, installation, and construction of the project. A person who does not build or remodel his or her own building, but leases from a third party, is eligible for sales and use tax deferral on the machinery and equipment provided that an investment in qualified machinery and equipment is made by such person and a new structure used to house the manufacturing activities is constructed.

(l) "Manufacturing" has the meaning given in RCW 82.04.120. Manufacturing, for purposes of the distressed area deferral program, also includes computer programming, the production of computer software, and other computer-related services, but only when the computer programming, production of computer software, or other computer-related services are performed by a manufacturer as defined in RCW 82.04.-110 and contribute to the production of a new, different, or useful substance or article of tangible personal property for sale; and the activities performed by research and development laboratories and commercial testing laboratories. (Chapter 16, Laws of 2010.)

(m) "Operationally complete" means the project is capable of being used for its intended purpose as described in the application.

(n) "Person" has the meaning given in RCW 82.04.030. "Person" does not include the state of Washington or its institutions. "Person" can be either a lessee or a lessor, who can apply separately for individual investment projects at the same site, if they comply with the other requirements of chapter 82.60 RCW. The lessor/owner of the structure is not eligible for deferral unless the underlying ownership of the buildings, machinery, or equipment vests exclusively in the lessor/owner, or unless the lessor has by written contract agreed to pass the economic benefit of the deferral to the lessee in the form of reduced rent payments.

(o) "Qualified buildings" are limited to structures used for manufacturing and research and development activities. "Qualified buildings" include plant offices and warehouses if such facilities are essential or an integral part of a factory, mill, plant, or laboratory. "Office" means space used by professional, clerical, or administrative staff. For plant office space to be a qualified building its use must be essential or integral to the manufacturing or research and development operation. Office space that is used by supervisors and their staff, by technicians, by payroll staff, by the safety officer, and by the training staff are examples of qualifying office space. "Warehouse" means facilities used for the storage of raw materials or finished goods.

(p) "Qualified employment position" means a permanent full-time employee employed in the eligible investment project during the entire tax year. The "entire tax year" means the full-time position is filled for a period of twelve consecutive months. "Full time" means at least 35 hours per week, 455 hours a quarter, or 1,820 hours a year.

(q) "Qualified machinery and equipment" means all new industrial and research fixtures, equipment, and support facilities that are an integral and necessary part of a manufacturing operation or research and development operation. "Qualified machinery and equipment" includes: Computers, software, data processing equipment, laboratory equipment; manufacturing components such as belts, pulleys, shafts and moving parts; molds, tools and dies; operating structures; and all equipment used to control or operate machinery. It also includes machinery and equipment acquired under the terms of a lease by the recipient. "New" as used in this subsection means either new to the taxing jurisdiction of the state or new to the certificate holder.

(r) "Research and development" means the development, refinement, testing, marketing, and commercialization of a product, service, or process before commercial sales have begun. As used in this subsection, "commercial sales" excludes sales of prototypes or sales for market testing if the total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(s) "Recipient" means a person receiving a tax deferral under this program.

(402) **Issuance of deferral certificate.** The department will issue a sales and use tax deferral certificate for state and local sales and use taxes due under chapters 82.08, 82.12, and 82.14 RCW for an eligible investment project. The department will state on the certificate the amount of tax deferral for which the recipient is eligible. Recipients must keep track of how much tax is deferred.

(403) **Eligible investment amount.**

(a) Projects located in unemployment counties, MSAs, governor-designated counties, or timber impact towns are eligible for a deferral on the portion of the investment project that represents one new qualified employment position for each seven hundred fifty thousand dollars of investment. The eligible amount is computed by dividing the total qualifying project costs by seven hundred fifty thousand, the result being the qualified employment positions. In addition, the number of qualified employment positions created by an investment project will be reduced by the number of full-time employment positions maintained by the recipient in any other community in this state that are displaced as a result of the investment project. This is the number of positions used as the hiring benchmark. The qualified employment positions must be filled by the end of year three. Monitoring and reporting procedures are set forth in subsection (410) of this section. In addition, buildings that will be used partly for manufacturing or research and development and partly for other purposes are eligible for a deferral on a proportionate basis. Subsection (404) of this section explains the procedure for apportionment.

(b) Projects located in CEZs, counties containing CEZs, or counties contiguous to an eligible county, are eligible for a deferral if the project meets specific hiring requirements. The recipient is eligible for a deferral on the portion of the invest-

ment project that represents one new qualified employment position for each seven hundred fifty thousand dollars of investment. The eligible amount is computed by dividing the total qualifying project costs by seven hundred fifty thousand, the result being the qualified employment positions. This is the number of positions used as the hiring benchmark over the life of the deferral. The qualified employment positions are reviewed each year, beginning December 31st of the year the project is operationally complete and each year for seven years. Monitoring and reporting procedures are set forth in subsection (410) of this section. In addition, buildings that will be used partly for manufacturing or research and development and partly for other purposes are eligible for a deferral on a proportionate basis. Subsection (404) of this section explains the procedure for apportionment.

(c) In addition to the hiring requirements for new positions under (b) of this subsection, the recipient of a deferral for an expansion or diversification of an existing facility must ensure that he or she maintains the same percentage of employment positions filled by residents of the contiguous county or the CEZ that existed prior to the application being made. This percentage must be maintained for seven years. The department has instituted a geographic information system (GIS) to assist taxpayers in determining taxing jurisdiction boundaries, local tax rates, and a mapping and address lookup system to determine whether a specific address is within a CEZ. The system is available on the department's internet web site at http://www.dor.wa.gov.

(d) Qualified employment positions does not include those persons hired in excess of the ratio of one employee per required dollar of investment for which a deferral is granted. In the event an employee is either voluntarily or involuntarily separated from employment, the employment position will be considered filled if the employer is either training or actively recruiting a replacement employee so long as the position is not actually vacant for any period in excess of thirty consecutive days.

(404) **Apportionment of costs between qualifying and nonqualifying investments.** The deferral is allowable only in respect to investment in the construction of a new building or the expansion or renovation of existing buildings used in manufacturing, research and development.

(a) Where a building(s) is used partly for manufacturing or research and development and partly for purposes which do not qualify for deferral under this rule, the deferral will be determined by apportionment of the total project costs. The applicable tax deferral will be determined by apportionment according to the ratio of the square footage of that portion of the building(s) directly used for manufacturing or research and development purposes bears to the square footage of the total building(s).

Apportionment formula:

$$\frac{\text{Eligible square feet of building(s)}}{\text{Total square feet of building(s)}} = \text{Percent Eligible}$$

Percent Eligible x Total Project Costs = Eligible Costs.

"Total Project Costs" means cost of multipurpose buildings and other improvement costs associated with the deferral project. Machinery and equipment are not included in this calculation. Common areas, such as hallways and bathrooms, are not included in the square feet figure for either the numerator or the denominator. The cost of the common areas is multiplied by the percent eligible to determine the portion of the common area that is eligible for deferral.

Eligible Tax Deferred = Eligible Cost x Tax Rate.

(b) Qualified machinery and equipment is not subject to apportionment.

(405) **Leased equipment.** The amount of tax deferral allowable for leased equipment is the amount of the consideration paid by the recipient to the lessor over the initial term of the lease, excluding any period of extension or option to renew, up to the last date for repayment of the deferred taxes. After that date the recipient must pay the appropriate sales taxes to the lessor for the remaining term of the lease.

(406) **Application procedure and review process.** An application for sales and use tax deferral under this program must be made prior to the initiation of construction and the acquisition of machinery and equipment. Persons who apply after construction is initiated or after acquisition of machinery and equipment are not eligible for the program.

(a) Application forms will be supplied to the applicant by the department upon request. The completed application may be sent by fax to 360-586-2163 or mailed to the following address:

State of Washington
Department of Revenue
Special Programs
P.O. Box 47477
Olympia, WA 98504-7477

(b) The department will verify the information contained in the application and approve or disapprove the application within sixty days. If approved, the department will issue a tax deferral certificate. If disapproved, the department will notify the applicant as to the reason(s) for disapproval. The U.S. Post Office postmark or fax date will be used as the date of application.

(c) The applicant may seek administrative review of the department's disapproval of an application within thirty days from the date of notice of disallowance pursuant to the provisions of WAC 458-20-100, appeals, small claims and settlements. The filing of a petition for review with the department starts a review of departmental action.

(407) **Eligible area criteria.** The department will use the statewide and county unemployment statistics as last published by the department. Timber impact town designation is based on information provided by the department of employment security. The department will update the list of eligible areas by county, annually.

(408) **Use of the certificate.** A tax deferral certificate issued under this program will be for the use of the recipient for deferral of sales and use taxes due on each eligible investment project. Deferral is limited only to investment in qualified buildings or qualified machinery and equipment as defined in subsection (401) of this section. Thus, sales and use taxes cannot be deferred on items that do not become part of the qualified buildings, machinery, or equipment. In addition, the deferral is not to be used to defer the taxes of the persons with whom the recipient does business, persons the

recipient hires, or employees of the recipient. The tax deferral certificate is be used in a manner similar to that of a resale certificate as set forth in WAC 458-20-102, Resale certificates. The certificate holder must provide a copy of the tax deferral certificate to the seller at the time goods or services are purchased. The seller will be relieved of the responsibility for collection of the sales or use tax upon presentation of the certificate. The seller must retain a copy of the certificate as part of its permanent records for a period of at least five years. A blanket certificate may be provided by the certificate holder and accepted by the seller covering all such purchases relative to the eligible project. The seller is liable for business and occupation tax on all tax deferral sales.

(409) **Project operationally complete.** An applicant must provide the department with the estimated cost of the investment project at the time the application is made. Following approval of the application and issuance of a tax deferral certificate, a certificate holder must notify the department, in writing, when the value of the investment project reaches the estimated cost as stated on the tax deferral certificate.

(a) If a certificate holder has reached its level of estimated costs and the project is not operationally complete, the certificate holder may request an amended certificate stating a revised amount upon which the deferral of sales and use taxes is requested. Requests must be mailed or faxed to the department.

(b) The certificate holder must notify the department in writing when the construction project is operationally complete. The department will certify the date on which the project was operationally complete. The recipient of the deferral must maintain the manufacturing or research and development activity for eight years from this date.

(c) The recipient will be notified in writing of the total amount of deferred taxes, the date(s) upon which the deferred taxes must be paid, and any reports required to be submitted in the subsequent years. If the department disallows any portion of the amount of sales and use taxes requested for deferral, the recipient may seek administrative review of the department's action within thirty days from the date of the notice of disallowance pursuant to the provisions of WAC 458-20-100, appeals, small claims and settlements. The filing of a petition for review with the department starts a review of departmental action.

(410) **Reporting and monitoring procedure.**

(a) Requirement to submit annual reports. Each recipient of a sales and use tax deferral must submit a report to the department on December 31st of the year in which the investment project is certified by the department as having been operationally completed, and on December 31st of each of the seven succeeding calendar years. The report must be made to the department in a form and manner prescribed by the department. The report must contain information regarding the actual employment related to the project and any other information required by the department. If the recipient fails to submit a report or submits an inadequate or falsified report, the department may declare the amount of deferred taxes outstanding to be immediately due and payable. An inadequate or falsified report is one that contains material omissions or contains knowingly false statements and information.

(b) Requirement to submit annual surveys. Effective April 1, 2004, each recipient of a tax deferral granted under chapter 82.60 RCW after June 30, 1994, must complete an annual survey **instead of an annual report.** If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.60.020(4), the lessee must agree to complete the annual survey and the applicant is not required to complete the annual survey. Refer to WAC 458-20-268 (Annual surveys for certain tax adjustments) for more information on the requirements to file annual surveys.

(411) **Repayment of deferred taxes.** Repayment of tax deferred under chapter 82.60 RCW is excused, except as otherwise provided in RCW 82.60.070 and this subsection on an investment project for which a deferral has been granted under chapter 82.60 RCW after June 30, 1994.

(a) The following describes the various circumstances under which repayment of the deferral may be required. Outstanding taxes are determined by reference to the following table. The table presumes the taxpayer maintained eligibility for the entire year. See subsection (c) for repayment and waiver for deferrals with hiring requirements.

Repayment Year		Percentage of Deferred Tax Waived
1	(Year operationally complete)	0%
2		0%
3		0%
4		10%
5		15%
6		20%
7		25%
8		30%

Any action taken by the department to disqualify a recipient for tax deferral or require payment of all or part of deferred taxes is subject to administrative review pursuant to the provisions of WAC 458-20-100, appeals, small claims and settlements. The filing of a petition for review with the department starts a review of departmental action.

(b) **Failure of investment project to satisfy general conditions.** If, on the basis of the recipient's annual report or other information, including that submitted by the department of employment security, the department finds that an investment project is not eligible for tax deferral, other than failure to create the required number of positions, the department will declare the amount of deferred taxes outstanding to be immediately due. For example, a reason for disqualification would be that the facility is not used for manufacturing or research and development operations.

(c) **Failure of investment project to satisfy employment positions conditions.** If, on the basis of the recipient's annual report or other information, the department finds that an investment project has been operationally complete for three years and has failed to create the required number of qualified employment positions, the amount of taxes deferred will be immediately due. The department will assess interest at the rate and as provided for delinquent excise taxes under RCW 82.32.050 (retroactively to the date of deferral). No penalties will be assessed.

(d) **Failure of investment project to satisfy employee residency requirements.** If, on the basis of the recipient's annual report or other information, the department finds that an investment project under RCW 82.60.040 (1)(b) or (c) has failed to comply with the special hiring requirements of RCW 82.60.045 for any calendar year for which reports are required under this subsection, twelve and one-half percent of the amount of deferred taxes will be immediately due. For each year a deferral's requirements are met twelve and one-half percent of the amount of deferred taxes will be waived. The department will assess interest at the rate provided for delinquent excise taxes under RCW 82.32.050, retroactively to the date of deferral. No penalties will be assessed.

(e) The department of employment security makes and certifies to the department all determinations of employment and wages required under this subsection, per request.

(412) **Debt not extinguished because of insolvency or sale.** Insolvency or other failure of the recipient does not extinguish the debt for deferred taxes nor will the sale, exchange, or other disposition of the recipient's business extinguish the debt for the deferred taxes. Transfer of ownership does not terminate the deferral. The deferral is transferred, subject to the successor meeting the eligibility requirements of this chapter, for the remaining periods of the deferral. Any person who becomes a successor (see WAC 458-20-216) to such investment project is liable for the full amount of any unpaid, deferred taxes under the same terms and conditions as the original recipient.

(413) **Disclosure of information.** Applications and reports received by the department under chapter 82.60 RCW are not confidential and are subject to disclosure. (RCW 82.60.100.) Effective April 1, 2004, all information collected in annual surveys, except the amount of tax deferral taken, is confidential and not subject to disclosure. Information on the amount of tax deferral taken in annual surveys is not confidential and may be disclosed to the public upon request.

PART V
Applications from July 1, 1992, to June 30, 1994

(501) **Definitions.** For the purposes of this part, the following definitions apply for applications made after July 1, 1992, but before July 1, 1994:

(a) "Acquisition of equipment or machinery" means the equipment and machinery is under the dominion and control of the recipient.

(b) "Applicant" means a person applying for a tax deferral under chapter 82.60 RCW.

(c) "Certificate holder" means an applicant to whom a tax deferral certificate has been issued.

(d) "Computer-related services" means services that are connected or interact directly in the manufacture of computer hardware or software or the programming of the manufactured hardware. This includes the manufacture of hardware such as chips, keyboards, monitors, any other hardware, and the components of these items. It includes creating operating systems and software that will be copied and sold as canned software. "Computer-related services" does not include information services. The activities performed by the manufacturer to test, correct, revise, and upgrade software or hardware before they are approved for sale to the consumer are considered computer-related services in this instance.

(e) "Department" means the department of revenue.

(f) "Eligible area" means:

(i) Unemployment county. A county in which the average level of unemployment for the three calendar years preceding the year in which an application is filed exceeds the average state unemployment for those years by twenty percent. The department may compare the county's average unemployment rate in the prior three years to one hundred twenty percent of the state's average unemployment rate based on official unemployment figures published by the department of employment security;

(ii) MSA. A metropolitan statistical area, as defined by the Office of Federal Statistical Policy and Standards, United States Department of Commerce, in which the average level of unemployment for the calendar year immediately preceding the year in which an application is filed under chapter 82.60 RCW exceeds the average state unemployment for such calendar year by twenty percent; or

(iii) CEZ. Beginning July 1, 1993, a designated community empowerment zone approved under RCW 43.63A.700.

(g)(i) "Eligible investment project" means that portion of an investment project which:

(A) Is directly utilized to create at least one new full-time qualified employment position for each three hundred thousand dollars of investment on which a deferral is requested; and

(B) Either initiates a new operation, or expands or diversifies a current operation by expanding, or renovating an existing building with costs in excess of twenty-five percent of the true and fair value of the plant complex prior to improvement. "Improvement" means the physical alteration by significant expansion, modernization, or renovation of an existing plant complex, excluding land, where the cost of such expansion, etc., exceeds twenty-five percent of the true and fair value of the existing plant complex prior to the initiation of the expansion or renovation. The term "improvement" is further defined to include those portions of an existing building which do not increase the usable floor space, but is limited to the renovation, modernization, or any other form of alteration or addition and the equipment and machinery installed therein during the course of construction. The twenty-five percent test may be satisfied by considering the value of both the building and machinery and equipment; however, at least forty percent of the total renovation costs must be attributable to the physical renovation of the building structure alone. "True and fair value" means the value listed on the assessment rolls as determined by the county assessor for the land, buildings, or equipment for ad valorem property tax purposes at the time of application; or

(C) Acquires machinery and equipment to be used for either manufacturing or research and development. The lessor/owner of the structure is not eligible for a deferral unless the underlying ownership of the buildings, machinery, and equipment vests exclusively in the same person.

(ii) "Eligible investment project" does not include any portion of an investment project undertaken by a light and power business as defined in RCW 82.16.010 or investment projects that have already received deferrals under chapter 82.60 RCW.

(h) "Industrial fixture" means an item attached to a building or to land. Fixtures become part of the real estate to which

they are attached and upon attachment are classified as real property, not personal property. Examples of "industrial fixtures" are fuel oil lines, boilers, craneways, and certain concrete slabs.

(i) "Initiation of construction," in regards to the construction of new buildings, means the commencement of on-site construction work.

(j) "Initiation of construction," in regards to the construction of expanding or renovating existing structures for the purpose of increasing floor space or production capacity used for manufacturing and research and development, means the commencement of new construction by renovation, modernization, or expansion, by physical alteration.

(k) "Investment project" means an investment in qualified buildings and qualified machinery and equipment, including labor and services rendered in the planning, installation, and construction of the project.

(l) "Manufacturing" has the meaning given in RCW 82.04.120. Manufacturing, for purposes of the distressed area deferral program**,** also includes computer programming, the production of computer software, and other computer-related services, but only when the computer programming, production of computer software, or other computer-related services are performed by a manufacturer as defined in RCW 82.04.-110 and contribute to the production of a new, different, or useful substance or article of tangible personal property for sale; and the activities performed by research and development laboratories and commercial testing laboratories. (Chapter 16, Laws of 2010.)

(m) "Operationally complete" means the project is capable of being used for its intended purpose as described in the application.

(n) "Person" has the meaning given in RCW 82.04.030. "Person" does not include the state of Washington or its institutions. "Person" can be either a lessee or a lessor, who can apply separately for individual investment projects at the same site, if they comply with the other requirements of this chapter. The lessor/owner of the structure is not eligible for deferral unless the underlying ownership of the buildings, machinery, or equipment vests in the lessor/owner.

(o) "Qualified buildings" are limited to structures used for manufacturing and research and development activities. "Qualified buildings" include plant offices and warehouses if such facilities are essential or an integral part of a factory, mill, plant, or laboratory. "Office" means space used by professional, clerical, or administrative staff. For plant office space to be a qualified building, its use must be essential or integral to the manufacturing or research and development operation. Office space that is used by supervisors and their staff, by technicians, by payroll staff, by the safety officer, and by the training staff are examples of qualifying office space. "Warehouse" means facilities used for the storage of raw materials or finished goods.

(p) "Qualified employment position" means a permanent full-time employee employed in the eligible investment project during the entire tax year. The "entire tax year" means the full-time position is filled for a period of twelve consecutive months. "Full time" means at least 35 hours a week, 455 hours a quarter, or 1,820 hours a year.

(q) "Qualified machinery and equipment" means all new industrial and research fixtures, equipment, and support facilities that are an integral and necessary part of a manufacturing operation or research and development operation. "Qualified machinery and equipment" includes: Computers, software, data processing equipment, laboratory equipment; manufacturing components such as belts, pulleys, shafts and moving parts; molds, tools and dies; operating structures; and all equipment used to control or operate machinery. It also includes machinery and equipment acquired under the terms of a long- or short-term lease by the recipient. "New" as used in this subsection means either new to the taxing jurisdiction of the state or new to the certificate holder.

(r) "Recipient" means a person receiving a tax deferral under this program.

(s) "Research and development" means the development, refinement, testing, marketing, and commercialization of a product, service, or process before commercial sales have begun. As used in this subsection, "commercial sales" excludes sales of prototypes or sales for market testing if the total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(502) **Issuance of deferral certificate.** The department will issue a sales and use tax deferral certificate for state and local sales and use taxes due under chapters 82.08, 82.12, and 82.14 RCW for an eligible investment project. The department will state on the certificate the amount of tax deferral for which the recipient is eligible. Recipients must keep track of how much deferral is taken.

(503) **Eligible investment amount.** Recipients are eligible for a deferral on investment used to create employment positions.

(a) Total qualifying project costs must be examined to determine the number of positions associated with the project. Total qualifying project costs are divided by three hundred thousand, the result being the qualified employment positions. This is the number of positions used as the hiring benchmark at the end of year three. The qualified employment positions are reviewed in the third year, following December 31st of the year the project is operationally complete. If the recipient has failed to create the requisite number of positions, the department will issue an assessment under subsection (511) of this section. Buildings that will be used partly for manufacturing or research and development and partly for other purposes are eligible for a deferral on a proportionate basis. Subsection (504) of this section explains the procedure for apportionment.

(b) Qualified employment positions does not include those persons hired in excess of the ratio of one employee per required dollar of investment for which a deferral is granted. In the event an employee is either voluntarily or involuntarily separated from employment, the employment position will be considered filled if the employer is either training or actively recruiting a replacement employee so long as the position is not actually vacant for any period in excess of thirty consecutive days.

(504) **Apportionment of costs between qualifying and nonqualifying investments.** The deferral is allowable only in respect to investment in the construction of a new building or the expansion or renovation of existing buildings directly used in manufacturing, research and development, or commercial testing laboratories.

(a) Where a building(s) is used partly for manufacturing or research and development, or commercial testing and partly for purposes, which do not qualify for deferral under this rule, the deferral will be determined by apportionment of the total project costs. The applicable tax deferral will be determined by apportionment according to the ratio of the square footage of that portion of the building(s) directly used for manufacturing or research and development purposes bears to the square footage of the total building(s).

Apportionment formula:

$$\frac{\text{Eligible square feet of building(s)}}{\text{Total square feet of building(s)}} = \text{Percent Eligible}$$

Percent Eligible x Total Project Costs = Eligible Costs.

"Total Project Costs" means cost of multipurpose buildings and other improvement costs associated with the deferral project. Machinery and equipment are not included in this calculation. Common areas, such as hallways and bathrooms, are not included in the square feet figure for either the numerator or the denominator. The cost of the common areas is multiplied by the percent eligible to determine the portion of the common area that is eligible for deferral.

Eligible Tax Deferred = Eligible Cost x Tax Rate.

(b) Qualified machinery and equipment is not subject to apportionment.

(505) **Leased equipment.** The amount of tax deferral allowable for leased equipment is the amount of the consideration paid by the recipient to the lessor over the initial term of the lease, excluding any period of extension or option to renew, up to the last date for repayment of the deferred taxes. After that date the recipient must pay the appropriate sales taxes to the lessor for the remaining term of the lease.

(506) **Application procedure and review process.** An application for sales and use tax deferral under this program must be made prior to the initiation of construction and the acquisition of equipment or machinery. Persons who apply after construction is initiated or finished or after acquisition of machinery and equipment are not eligible for the program.

(a) Application forms will be supplied to the applicant by the department upon request. The completed application may be sent by fax to 360-586-2163 or mailed to the following address:

State of Washington
Department of Revenue
Special Programs
P.O. Box 47477
Olympia, WA 98504-7477

(b) The department will verify the information contained in the application and either approve or disapprove the application within sixty days. If approved, the department will issue a tax deferral certificate. If disapproved, the department will notify the applicant as to the reason(s) for disapproval. The U.S. Post Office postmark or fax date will be used as the date of application.

(c) The applicant may seek administrative review of the department's refusal to issue a certificate pursuant to the provisions of WAC 458-20-100, appeals, small claims and settlements, within thirty days from the date of notice of the department's refusal, or within any extension of such time granted by the department. The filing of a petition for review with the department starts a review of departmental action.

(507) **Unemployment criteria.** For purposes of making application for tax deferral and of approving such applications, the statewide and county unemployment statistics last published by the department will be used to determine eligible areas. The department will update the list of eligible areas by county, on an annual basis.

(508) **Use of the certificate.** A tax deferral certificate issued under this program is for the use of the recipient for deferral of sales and use taxes due on each eligible investment project. Deferral is limited only to investment in qualified buildings or qualified machinery and equipment as defined in subsection (501) of this section. Thus, sales and use taxes cannot be deferred on items that do not become part of the qualified buildings, machinery, or equipment.

The tax deferral certificate is to be used in a manner similar to that of a resale certificate as set forth in WAC 458-20-102, Resale certificates. The certificate holder must provide a copy of the tax deferral certificate to the seller at the time goods or services are purchased. The seller will be relieved of the responsibility for collection of the sales or use tax upon presentation of the certificate. The seller must retain a copy of the certificate as part of its permanent records for a period of at least five years. A blanket certificate may be provided by the certificate holder and accepted by the seller covering all such purchases relative to the eligible project. The seller is liable for business and occupation tax on all tax deferral sales. The deferral certificate is to defer the taxes of the recipient. For example, the deferral is not to be used to defer the taxes of the persons with whom the recipient does business, persons the recipient hires, or employees of the recipient.

(509) **Project operationally complete.** An applicant must provide the department with the estimated cost of the investment project at the time the application is made. Following approval of the application and issuance of a tax deferral certificate, a certificate holder must notify the department, in writing, when the value of the investment project reaches the estimated cost as stated on the tax deferral certificate.

(a) If a certificate holder has reached its level of estimated costs and the project is not operationally complete, the certificate holder may request an amended certificate stating a revised amount upon which the deferral of sales and use taxes is requested. Requests must be mailed or faxed to the department.

(b) The certificate holder must notify the department in writing when the construction project is operationally complete. The department will certify the date on which the project was operationally complete. The recipient of the deferral must maintain the manufacturing or research and development activity for eight years from this date.

(c) The recipient will be notified in writing of the total amount of deferred taxes, the date(s) upon which the deferred taxes must be paid, and any reports required to be submitted in the subsequent years. If the department disallows all or any portion of the amount of sales and use taxes requested for deferral, the recipient may seek administrative review of the department's action pursuant to the provisions of WAC 458-

20-100, within thirty days from the date of the notice of disallowance.

(510) **Reporting and monitoring procedure.** Requirement to submit annual reports. Each recipient of a sales and use tax deferral must submit a report to the department on December 31st of each year during the repayment period until the tax deferral is repaid. The report must be made to the department in a form and manner prescribed by the department. The report must contain information regarding the actual employment related to the project and any other information required by the department. If the recipient fails to submit a report or submits an inadequate or falsified report, the department may declare the amount of deferred taxes outstanding to be immediately assessed and payable. An inadequate or falsified report is one that contains material omissions or contains knowingly false statements and information.

(511) **Repayment of deferred taxes.** The recipient must begin paying the deferred taxes in the third year after the date certified by the department as the date on which the construction project has been operationally completed.

(a) The first payment will be due on December 31st of the third calendar year after such certified date, with subsequent annual payments due on December 31st of the following four years, with amounts of payment scheduled as follows:

Repayment Year		Percentage of Deferred Tax Repaid
1	(Year certified operationally complete)	0%
2		0%
3		0%
4		10%
5		15%
6		20%
7		25%
8		30%

(b) The department may authorize an accelerated repayment schedule upon request of the recipient. Interest will not be charged on any taxes deferred under this part during the period of deferral, although other penalties and interest applicable to delinquent excise taxes may be assessed and imposed for any delinquent payments during the repayment period pursuant to chapter 82.32 RCW.

(c) Taxes deferred on the sale or use of labor directly applied in the construction of an investment project for which deferral has been granted need not be repaid, provided eligibility for the granted tax deferral has been perfected by meeting all of the eligibility requirements, based upon the recipient's annual December 31 reports and any other information available to the department. The recipient must establish, by clear and convincing evidence, the value of all construction and installation labor for which repayment of sales tax is sought to be excused. Such evidence must include, but is not limited to: A written, signed, and dated itemized billing from construction/installation contractors or independent third party labor providers which states the value of labor charged separately from the value of materials. This information must be maintained in the recipient's permanent records for the department's review and verification. In the absence of such itemized billings in its permanent records, no recipient may be excused from repayment of sales tax on the value of labor in an amount exceeding thirty percent of its gross construction or installation contract charges. The value of labor for which an excuse from repayment of sales or use tax may be received will not exceed the value which is subject to such taxes under the general provisions of chapters 82.08 and 82.12 RCW.

(d) **Failure of investment project to satisfy general conditions.** If, on the basis of the recipient's annual report or other information, including that submitted by the department of employment security, the department finds that an investment project is not eligible for tax deferral for reasons other than failure to create the required number of qualified employment positions, the department will declare the amount of deferred taxes outstanding to be immediately due. For example, a reason for disqualification would be the facility is not used for a manufacturing or research and development operation.

(e) **Failure of investment project to satisfy required employment positions.** If, on the basis of the recipient's annual report or other information, the department finds that an investment project has been operationally complete for three years and has failed to create the required number of qualified employment positions, the department will assess interest but not penalties, on the deferred taxes for the project. The department will assess interest at the rate provided for delinquent excise taxes under RCW 82.32.050, retroactively to the date of the date of deferral. No penalties will be assessed.

(f) The department of employment security makes and certifies to the department all determinations of employment and wages required under this subsection, per request.

(g) Any action taken by the department to assess interest or disqualify a recipient for tax deferral will be subject to administrative review pursuant to the provisions of WAC 458-20-100, appeals, small claims and settlements. The filing of a petition for review with the department starts a review of departmental action.

(512) **Debt not extinguished because of insolvency or sale.** Insolvency or other failure of the recipient does not extinguish the debt for deferred taxes nor will the sale, exchange, or other disposition of the recipient's business extinguish the debt for the deferred taxes. Transfer of ownership does not terminate the deferral. The deferral is transferred, subject to the successor meeting the eligibility requirements of this chapter, for the remaining periods of the deferral. Any person who becomes a successor (see WAC 458-20-216) to such investment project will be liable for the full amount of any unpaid, deferred taxes under the same terms and conditions as the original recipient.

(513) **Disclosure of information.** Applications and reports received by the department under chapter 82.60 RCW are not confidential and are subject to disclosure. (RCW 82.60.100.)

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-21-052, § 458-20-24001A, filed 10/14/10, effective 11/14/10; WSR 06-17-007, § 458-20-24001A, filed 8/3/06, effective 9/3/06; WSR 04-01-127, § 458-20-24001A, filed 12/18/03, effective 1/18/04. Statutory Authority: RCW

82.32.300. WSR 01-12-041, § 458-20-24001A, filed 5/30/01, effective 6/30/01.]

WAC 458-20-24003 Tax incentives for high technology businesses. (1) **Introduction.** This section explains the tax incentives, contained in chapter 82.63 RCW and RCW 82.04.4452, which apply to businesses engaged in research and development or pilot scale manufacturing in Washington in five high technology areas: Advanced computing, advanced materials, biotechnology, electronic device technology, and environmental technology. Eligibility for high technology or research and development tax incentives offered by the federal government or any other jurisdiction does not establish eligibility for Washington's programs.

This section contains examples that identify a number of facts and then state a conclusion. The examples should be used only as a general guide. The tax results in all situations must be determined after a review of all facts and circumstances. Assume all the examples below occur on or after June 10, 2004, unless otherwise indicated.

(2) **Organization of the section.** The information provided in this section is divided into three parts.

(a) Part I provides information on the sales and use tax deferral program under chapter 82.63 RCW.

(b) Part II provides information on the sales and use tax exemption available for persons engaged in certain construction activities for the federal government under RCW 82.04.190(6).

(c) Part III provides information on the business and occupation tax credit on research and developing spending under RCW 82.04.4452.

PART I
SALES AND USE TAX DEFERRAL PROGRAM

(3) **Who is eligible for the sales and use tax deferral program?** A person engaged in qualified research and development or pilot scale manufacturing in Washington in the five high technologies areas is eligible for this deferral program for its eligible investment project.

(a) **What does the term "person" mean for purposes of this deferral program?** "Person" has the meaning given in RCW 82.04.030. Effective June 10, 2004, "person" also includes state universities as defined in RCW 28B.10.016. "Person" can be either a lessee or a lessor, who can apply separately for individual investment projects at the same site, if they comply with the other requirements of chapter 82.63 RCW.

(i) Effective June 10, 2004, the lessor or owner of the qualified building is not eligible for a deferral unless:

(A) The underlying ownership of the buildings, machinery, and equipment vests exclusively in the same person; or

(B) All of the following conditions are met:

(I) The lessor by written contract agrees to pass the economic benefit of the deferral to the lessee;

(II) The lessee that receives the economic benefit of the deferral agrees in writing with the department to complete the annual survey required under RCW 82.63.020(2);

(III) The lessee must receive an economic benefit from the lessor no less than the amount of tax deferred by the lessor; and

(IV) Upon request, the lessor must provide the department with written documentation to support the eligibility of the deferral, including any type of payment, credit, or other financial arrangement between the lessor or owner of the qualified building and the lessee.

For example, economic benefit of the deferral is passed through to the lessee when evidenced by written documentation that the amounts paid to the lessor for construction of tenant improvements are reduced by the amount of the sales tax deferred, or that the lessee receives more tenant improvements through a credit for tenant improvements or other mechanism in the lease equal to the amount of the sales tax deferred.

(ii) Prior to June 10, 2004, the lessor or owner of the qualified building is not eligible for a deferral unless the underlying ownership of the buildings, machinery, and equipment vests exclusively in the same person, or unless the lessor by written contract agrees to pass the economic benefit of the deferral to the lessee in the form of reduced rent payments.

(iii) The lessor of the qualified building who receives a letter of intent from a qualifying lessee may be eligible for deferral, assuming that all other requirements of chapter 82.63 RCW are met. At the time of application, the lessor must provide to the department a letter of intent by the lessee to lease the qualified building and any other information to prove that the lessee will engage in qualified research and development or pilot scale manufacturing once the building construction is complete. After the investment project is certified as operationally complete, the lessee must actually occupy the building as a lessee and engage in qualified research and development or pilot scale manufacturing. Otherwise, deferred taxes will be immediately due to the lessor, and interest will be assessed retroactively from the date of deferral.

(b) **What is "qualified research and development" for purposes of this section?** "Qualified research and development" means research and development performed within this state in the fields of advanced computing, advanced materials, biotechnology, electronic device technology, and environmental technology.

(c) **What is "research and development" for purposes of this section?** "Research and development" means activities performed to discover technological information, and technical and nonroutine activities concerned with translating technological information into new or improved products, processes, techniques, formulas, inventions, or software.

The term includes exploration of a new use for an existing drug, device, or biological product if the new use requires separate licensing by the Federal Food and Drug Administration under chapter 21 C.F.R., as amended.

The term does not include adaptation or duplication of existing products where the products are not substantially improved by application of the technology, nor does the term include surveys and studies, social science and humanities research, market research or testing, quality control, sale promotion and service, computer software developed for internal use, and research in areas such as improved style, taste, and seasonal design.

(i) A person need not both discover technological information and translate technological information into new or

improved products, processes, techniques, formulas, inventions, or software in order to engage in research and development. A person may perform either activity alone and be engaged in research and development.

(ii) To discover technological information means to gain knowledge of technological information through purposeful investigation. The knowledge sought must be of something not previously known or, if known, only known by persons who have not made the knowledge available to the public.

(iii) Technological information is information related to the application of science, especially with respect to industrial and commercial objectives. Industrial and commercial objectives include both sale and internal use (other than internal use software). The translation of technological information into new or improved products, processes, techniques, formulas, inventions, or software does not require the use of newly discovered technological information to qualify as research and development.

(iv) The translation of technological information requires both technical and nonroutine activities.

(A) An activity is technical if it involves the application of scientific, engineering, or computer science methods or principles.

(B) An activity is nonroutine if it:

(I) Is undertaken to achieve a new or improved function, performance, reliability, or quality; and

(II) Is performed by engineers, scientists, or other similarly qualified professionals or technicians; and

(III) Involves a process of experimentation designed to evaluate alternatives where the capability or the method of achieving the new or improved function, performance, reliability, or quality, or the appropriate design of the desired improvement, is uncertain at the beginning of the taxpayer's research activities. A process of experimentation must seek to resolve specific uncertainties that are essential to attaining the desired improvement.

(v) A product is substantially improved when it functions fundamentally differently because of the application of technological information. This fundamental difference must be objectively measured. Examples of objective measures include increased value, faster operation, greater reliability, and more efficient performance. It is not necessary for the improvement to be successful for the research to qualify.

(vi) Computer software development may qualify as research and development involving both technical and nonroutine activities concerned with translating technological information into new or improved software, when it includes the following processes: Software concept, software design, software design implementation, conceptual freeze, alpha testing, beta testing, international product localization process, and other processes designed to eliminate uncertainties prior to the release of the software to the market for sale. Research and development ceases when the software is released to the market for sale.

Postrelease software development may meet the definition of research and development under RCW 82.63.010(16), but only if it involves both technical and nonroutine activities concerned with translating technological information into improved software. All facts and circumstances are considered in determining whether postrelease software development meets the definition of research and development.

(vii) Computer software is developed for internal use if it is to be used only by the person by whom it is developed. If it is to be available for sale, lease, or license, it is not developed for internal use, even though it may have some internal applications. If it is to be available for use by persons, other than the person by whom it is developed, who access or download it remotely, such as through the internet, it is not usually deemed to be developed for internal use. However, remotely accessed software is deemed to be developed for internal use if its purpose is to assist users in obtaining goods, services, or information provided by or through the person by whom the software is developed. For example, software is developed for internal use if it enables or makes easier the ordering of goods from or through the person by whom the software is developed. On the other hand, a search engine used to search the world wide web is an example of software that is not developed for internal use because the search engine itself is the service sought.

(viii) Research and development is complete when the product, process, technique, formula, invention, or software can be reliably reproduced for sale or commercial use. However, the improvement of an existing product, process, technique, formula, invention, or software may qualify as research and development.

(d) **What is "pilot scale manufacturing" for purposes of this section?** "Pilot scale manufacturing" means design, construction, and testing of preproduction prototypes and models in the fields of biotechnology, advanced computing, electronic device technology, advanced materials, and environmental technology other than for commercial sale. "Commercial sale" excludes sales of prototypes or sales for market testing if the total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(e) **What are the five high technology areas?** The five high technology areas are as follows:

(i) **Advanced computing.** "Advanced computing" means technologies used in the designing and developing of computing hardware and software, including innovations in designing the full spectrum of hardware from hand-held calculators to super computers, and peripheral equipment.

(ii) **Advanced materials.** "Advanced materials" means materials with engineered properties created through the development of specialized processing and synthesis technology, including ceramics, high value-added metals, electronic materials, composites, polymers, and biomaterials.

(iii) **Biotechnology.** "Biotechnology" means the application of technologies, such as recombinant DNA techniques, biochemistry, molecular and cellular biology, genetics, including genomics, gene expression and genetic engineering, cell fusion techniques, and new bioprocesses, using living organisms, or parts of organisms, to produce or modify products, to improve plants or animals, to develop microorganisms for specific uses, to identify targets for small molecule pharmaceutical development, or to transform biological systems into useful processes and products or to develop microorganisms for specific uses.

(iv) **Electronic device technology.** "Electronic device technology" means technologies involving microelectronics; semiconductors; electronic equipment and instrumentation; radio frequency, microwave, and millimeter electronics; opti-

cal and optic-electrical devices; and data and digital communications and imaging devices.

(v) **Environmental technology.** "Environmental technology" means assessment and prevention of threats or damage to human health or the environment, environmental cleanup, and the development of alternative energy sources.

(A) The assessment and prevention of threats or damage to human health or the environment concerns assessing and preventing potential or actual releases of pollutants into the environment that are damaging to human health or the environment. It also concerns assessing and preventing other physical alterations of the environment that are damaging to human health or the environment.

For example, a research project related to salmon habitat restoration involving assessment and prevention of threats or damages to the environment may qualify as environmental technology, if such project is concerned with assessing and preventing potential or actual releases of water pollutants and reducing human-made degradation of the environment.

(I) Pollutants include waste materials or by-products from manufacturing or other activities.

(II) Environmental technology includes technology to reduce emissions of harmful pollutants. Reducing emissions of harmful pollutants can be demonstrated by showing the technology is developed to meet governmental emission standards. Environmental technology also includes technology to increase fuel economy, only if the taxpayer can demonstrate that a significant purpose of the project is to increase fuel economy and that such increased fuel economy does in fact significantly reduce harmful emissions. If the project is intended to increase fuel economy only minimally or reduce emissions only minimally, the project does not qualify as environmental technology. A qualifying research project must focus on the individual components that increase fuel economy of the product, not the testing of the entire product when everything is combined, unless the taxpayer can separate out and identify the specific costs associated with such testing.

(III) Environmental technology does not include technology for preventive health measures for, or medical treatment of, human beings.

(IV) Environmental technology does not include technology aimed to reduce impact of natural disasters such as floods and earthquakes.

(V) Environmental technology does not include technology for improving safety of a product.

(B) Environmental cleanup is corrective or remedial action to protect human health or the environment from releases of pollutants into the environment.

(C) Alternative energy sources are those other than traditional energy sources such as fossil fuels, nuclear power, and hydroelectricity. However, when traditional energy sources are used in conjunction with the development of alternative energy sources, all the development will be considered the development of alternative energy sources.

(4) **What is eligible for the sales and use tax deferral program?** This deferral program applies to an eligible investment project for sales and use taxes imposed on the construction, expansion, or renovation of qualified buildings and acquisition of qualified machinery and equipment.

(a) **What is an "eligible investment project" for purposes of this section?** "Eligible investment project" means an investment project which either initiates a new operation, or expands or diversifies a current operation by expanding, renovating, or equipping an existing facility.

(b) **What is an "investment project" for purposes of this section?** "Investment project" means an investment in qualified buildings or qualified machinery and equipment, including labor and services rendered in the planning, installation, and construction or improvement of the project. When an application for sales and use tax deferral is timely submitted, costs incurred before the application date are allowable, if they otherwise qualify.

(c) **What is "qualified buildings" for purposes of this section?** "Qualified buildings" means construction of new structures, and expansion or renovation of existing structures for the purpose of increasing floor space or production capacity, used for pilot scale manufacturing or qualified research and development.

(i) "Qualified buildings" is limited to structures used for pilot scale manufacturing or qualified research and development. "Qualified buildings" includes plant offices and other facilities that are an essential or an integral part of a structure used for pilot scale manufacturing or qualified research and development.

(A) "Office" means space used by professional, clerical, or administrative staff. For plant office space to be a qualified building, its use must be essential or integral to pilot scale manufacturing or qualified research and development. An office may be located in a separate building from the building used for pilot scale manufacturing or qualified research and development, but the office must be located at the same site as the qualified building in order to qualify. Each individual office may only qualify or disqualify in its entirety.

(B) A site is one or more immediately adjacent parcels of real property. Adjacent parcels of real property separated only by a public road comprise a single site.

(ii) "Qualified buildings" does not include construction of landscaping or most other work outside the building itself, even though the landscaping or other work outside the building may be required by the city or county government in order for the city or county to issue a permit for the construction of a building.

However, "qualified buildings" includes construction of specialized sewerage pipes connected to a qualified building that are specifically designed and used exclusively for pilot scale manufacturing or qualified research and development.

Also, "qualified buildings" includes construction of parking lots connected to or adjacent to the building if the parking lots are for the use of workers performing pilot scale manufacturing or qualified research and development in the building. Parking lots may be apportioned based upon its qualifying use.

(d) **What is "multiple qualified buildings" for purposes of this section?** "Multiple qualified buildings" means "qualified buildings" leased to the same person when such structures:

(i) Are located within a five-mile radius; and

(ii) The initiation of construction of each building begins within a sixty-month period.

(e) **When is apportionment of qualified buildings appropriate?** The deferral is allowable only in respect to investment in the construction of a new building or the expansion or renovation of an existing building used in pilot scale manufacturing or qualified research and development. Where a building(s) is used partly for pilot scale manufacturing or qualified research and development and partly for purposes that do not qualify for deferral under this section, apportionment is necessary.

(f) **What is the apportionment method?** The applicable tax deferral will be determined as follows:

(i) Tax on the cost of construction of areas devoted solely to pilot scale manufacturing or qualified research and development may be deferred.

(ii) Tax on the cost of construction of areas not used at all for pilot scale manufacturing or qualified research and development may not be deferred.

(iii) Tax on the cost of construction of areas used in common for pilot scale manufacturing or qualified research and development and for other purposes, such as hallways, bathrooms, and conference rooms, may be deferred by apportioning the costs of construction on a square footage basis. The apportioned costs of construction eligible for deferral are established by using the ratio, expressed as a percentage, of the square feet of the construction, expansion, or renovation devoted to pilot scale manufacturing or qualified research and development, excluding areas used in common to the total square feet of the construction, expansion, or renovation, excluding areas used in common. That percentage is applied to the cost of construction of the common areas to determine the costs of construction eligible for tax deferral. Expressed as a formula, apportionment of the cost of the common areas is determined by:

$$\frac{\text{Square feet devoted to research and development or pilot scale manufacturing, excluding square feet of common areas}}{\text{Total square feet, excluding square feet of common areas}} = \text{Percentage of total cost of construction of common areas eligible for deferral}$$

(iv) The apportionment method described in (f)(i), (ii), and (iii) of this subsection must be used unless the applicant or recipient can demonstrate that another method better represents a reasonable apportionment of costs, considering all the facts and circumstances. An example is to use the number of employees in a qualified building that is engaged in pilot scale manufacturing or qualified research and development as the basis for apportionment, if this method is not easily manipulated to reflect a desired outcome, and it otherwise represents a reasonable apportionment of costs under all the facts and circumstances. This method may take into account qualified research and development or pilot scale manufacturing activities that are shifted within a building or from one building to another building. If assistance is needed to a tax-related question specific to your business under this subsection, you may request a tax ruling. To make a request contact the department's taxpayer information and education division at:

Department of Revenue
Taxpayer Information and Education
P.O. Box 47478
Olympia, WA 98504-7478
fax 360-586-2463

(v) Example. A building to be constructed will be partially devoted to research and development and partially devoted to marketing, a nonqualifying purpose. The total area of the building is 100,000 square feet. Sixty thousand square feet are used only for research and development, 20,000 square feet are used only for marketing, and the remaining 20,000 square feet are used in common by research and development employees and marketing employees. Tax on the cost of constructing the 60,000 square feet used only for research and development may be deferred. Tax on the cost of constructing the 20,000 square feet used only for marketing may not be deferred. Tax on 75% of the cost of constructing the common areas may be deferred. (Sixty thousand square feet devoted solely to research and development divided by 80,000 square feet devoted solely to research and development and marketing results in a ratio expressed as 75%.)

(g) **What is "qualified machinery and equipment" for purposes of this section?** "Qualified machinery and equipment" means fixtures, equipment, and support facilities that are an integral and necessary part of a pilot scale manufacturing or qualified research and development operation. "Qualified machinery and equipment" includes: Computers; software; data processing equipment; laboratory equipment, instrumentation, and other devices used in a process of experimentation to develop a new or improved pilot model, plant process, product, formula, invention, or similar property; manufacturing components such as belts, pulleys, shafts, and moving parts; molds, tools, and dies; vats, tanks, and fermenters; operating structures; and all other equipment used to control, monitor, or operate the machinery. For purposes of this section, qualified machinery and equipment must be either new to the taxing jurisdiction of the state or new to the certificate holder, except that used machinery and equipment may be treated as qualified machinery and equipment if the certificate holder either brings the machinery and equipment into Washington or makes a retail purchase of the machinery and equipment in Washington or elsewhere.

(i) **What are "integral" and "necessary"?** Machinery and equipment is an integral and necessary part of pilot scale manufacturing or qualified research and development if the pilot scale manufacturing or qualified research and development cannot be accomplished without it. For example, a laboratory table is integral and necessary to qualified research and development. Likewise, telephones, computer hardware (e.g., cables, scanners, printers, etc.), and computer software (e.g., Word, Excel, Windows, Adobe, etc.) used in a typical workstation for an R&D personnel are integral and necessary to qualified research and development. Decorative artwork, on the other hand, is not integral and necessary to qualified research and development.

(ii) **Must qualified machinery and equipment be used exclusively for qualifying purposes in order to qualify?** Qualified machinery and equipment must be used exclusively for pilot scale manufacturing or qualified research and devel-

opment to qualify for the deferral. Operating system software shared by accounting personnel, for example, is not used exclusively for qualified research and development. However, *de minimis* nonqualifying use will not cause the loss of the deferral. An example of *de minimis* use is the occasional use of a computer for personal e-mail.

(iii) **Is qualified machinery and equipment subject to apportionment?** Unlike buildings, if machinery and equipment is used for both qualifying and nonqualifying purposes, the costs cannot be apportioned. Sales or use tax cannot be deferred on the purchase or use of machinery and equipment used for both qualifying and nonqualifying purposes.

(iv) **To what extent is leased equipment eligible for the deferral?** In cases of leases of qualifying machinery and equipment, deferral of tax is allowed on payments made during the initial term of the lease, but not for extensions or renewals of the lease. Deferral of tax is not allowed for lease payments for any period after the seventh calendar year following the calendar year for which the project is certified as operationally complete.

(5) **What are the application and review processes?** Applicants must apply for deferral to the department of revenue before the initiation of construction of, or acquisition of equipment or machinery for the investment project. When an application for sales and use tax deferral is timely submitted, costs incurred before the application date are allowable, if they otherwise qualify. In the case of an investment project consisting of "multiple qualified buildings," applications must be made for, and before the initiation of construction of, each qualified building.

(a) **What is "initiation of construction" for purposes of this section?**

(i) **On or after June 10, 2004.**

(A) Initiation of construction means the date that a building permit is issued under the building code adopted under RCW 19.27.031 for:

(I) Construction of the qualified building, if the underlying ownership of the building vests exclusively with the person receiving the economic benefit of the deferral;

(II) Construction of the qualified building, if a lessor passes the economic benefits of the deferral to a lessee as provided in RCW 82.63.010(7); or

(III) Tenant improvements for a qualified building, if a lessor passes the economic benefits of the deferral to a lessee as provided in RCW 82.63.010(7).

(B) Initiation of construction does not include soil testing, site clearing and grading, site preparation, or any other related activities that are initiated before the issuance of a building permit for the construction of the foundation of the building.

(C) If the investment project is a phased project, initiation of construction must apply separately to each building. For purposes of this section, a "phased project" means construction of multiple buildings in different phases over the life of a project. A taxpayer may file a separate application for each qualified building, or the taxpayer may file one application for all qualified buildings. If a taxpayer files one application for all qualified buildings, initiation of construction must apply separately to each building.

(ii) **Prior to June 10, 2004.** Construction is initiated when workers start on-site building tasks. The initiation of construction does not include land clearing or site preparation prior to excavation of the building site. Also, the initiation of construction does not include design or planning activities.

(b) **What is "acquisition of machinery and equipment" for purposes of this section?** "Acquisition of machinery and equipment" means the machinery and equipment is under the dominion and control of the recipient or its agent.

(c) **Lessor and lessee examples.**

(i) Prior to the initiation of construction, Owner/Lessor A enters into an agreement with Lessee B, a company engaged in qualified research and development. Under the agreement, A will build a building to house B's research and development activities, will apply for a tax deferral on construction of the building, will lease the building to B, and will pass on the entire value of the deferral to B. B agrees in writing with the department to complete annual surveys. A applies for the deferral before the date the building permit is issued. A is entitled to a deferral on building construction costs.

(ii) After construction has begun, Lessee C asks that certain tenant improvements be added to the building. Lessor D and Lessee C each agree to pay a portion of the cost of the improvements. D agrees with C in a written agreement that D will pass on the entire value of D's portion of the tax deferral to C, and C agrees in writing with the department to complete annual surveys. C and D each apply for a deferral on the costs of the tenant improvements they are legally responsible for before the date the building permit is issued for such tenant improvements. Both applications will be approved. While construction of the building was initiated before the applications were submitted, tenant improvements on a building under construction are deemed to be the expansion or renovation of an existing structure. Also, lessees are entitled to the deferral only if they are legally responsible and actually pay contractors for the improvements, rather than merely reimbursing lessors for the costs.

(iii) After construction has begun but before machinery or equipment has been acquired, Lessee E applies for a deferral on machinery and equipment. The application will be approved, and E is required to complete annual surveys. Even though it is too late to apply for a deferral of tax on building costs, it is not too late to apply for a deferral for the machinery and equipment.

(d) **How may a taxpayer obtain an application form?** Application forms may be obtained at department of revenue district offices, by downloading from the department's web site (dor.wa.gov), by telephoning the telephone information center (800-647-7706), or by contacting the department's special programs division at:

Department of Revenue
Special Programs Division
Post Office Box 47477
Olympia, WA 98504-7477
fax 360-586-2163

Applicants must mail or fax applications to the special programs division at the address or fax number given above. Only those applications which are approved by the department in connection with the deferral program are not confidential and are subject to public disclosure.

For purposes of this section, "applicant" means a person applying for a tax deferral under chapter 82.63 RCW, and "department" means the department of revenue.

(e) **What should an application form include?** The application form should include information regarding the location of the investment project, the applicant's average employment in Washington for the prior year, estimated or actual new employment related to the project, estimated or actual wages of employees related to the project, estimated or actual costs, and time schedules for completion and operation. The application form may also include other information relevant to the project and the applicant's eligibility for deferral.

(f) **What is the date of application?** The date of application is the earlier of the postmark date or the date of receipt by the department.

(g) **When will the department notify approval or disapproval of the deferral application?** The department must rule on an application within sixty days. If an application is denied, the department must explain in writing the basis for the denial. An applicant may appeal a denial within thirty days under WAC 458-20-100 (Appeals).

(6) **Can a lessee leasing "multiple qualified buildings" elect to treat the "multiple qualified buildings" as a single investment project?** Yes. If a lessee will conduct qualified research and development or pilot scale manufacturing within the "multiple qualified buildings" and desires to treat the "multiple qualified buildings" as a single investment project, the lessee may do so by making both a preliminary election and a final election therefore.

(a) **When must the lessee make the preliminary election to treat the "multiple qualified buildings" as a single investment project?** The lessee must make the preliminary election before a temporary certificate of occupancy, or its equivalent, is issued for any of the buildings within the "multiple qualified buildings."

(b) **When must the lessee make the final election to treat the "multiple qualified buildings" as a single investment project?** All buildings included in the final election must have been issued a temporary certificate of occupancy or its equivalent. The lessee must then make the final election for such buildings by the date that is the earlier of:

(i) Sixty months following the date that the lessee made the preliminary election; or

(ii) Thirty days after the issuance of the temporary certificate of occupancy, or its equivalent, for the last "qualified building" to be completed that will be included in the final election.

(c) **What occurs if the final election is not made by the deadline?** When a final election is not made by the deadline in (b)(i) or (ii) of this subsection, the qualified buildings will each be treated as individual investment projects under the original applications for those buildings.

(d) **How are preliminary and final elections made?** The preliminary and final elections must be made in the form and manner prescribed by the department. For information concerning the form and manner for making these elections contact the department's special programs division at:

Department of Revenue
Special Programs Division
Post Office Box 47477
Olympia, WA 98504-7477
fax 360-586-2163

(e) **Before the final election is made, can the lessee choose to exclude one or more of the buildings included in its preliminary election?** Yes. Before the final election is made, the lessee may remove one or more of the qualified buildings included in the preliminary election from the investment project. When a qualified building under the preliminary election is, for any reason, not included in the final election, the qualified building will be treated as an individual investment project under the original application for that building.

(f) **Application.** This subsection (6) applies to deferral applications received by the department after June 30, 2007.

(7) **What happens after the department approves the deferral application?** If an application is approved, the department must issue the applicant a sales and use tax deferral certificate.

The certificate provides for deferral of state and local sales and use taxes on the eligible investment project. The certificate will state the amount of tax deferral for which the recipient is eligible. It will also state the date by which the project will be operationally complete. The deferral is limited to investment in qualified buildings or qualified machinery and equipment. The deferral does not apply to the taxes of persons with whom the recipient does business, persons the recipient hires, or employees of the recipient.

For purposes of this section, "recipient" means a person receiving a tax deferral under chapter 82.63 RCW.

(8) **How should a tax deferral certificate be used?** A successful applicant, hereafter referred to as a recipient, must present a copy of the certificate to sellers of goods or retail services provided in connection with the eligible investment project in order to avoid paying sales or use tax. Sellers who accept these certificates in good faith are relieved of the responsibility to collect sales or use tax on transactions covered by the certificates. Sellers must retain copies of certificates as documentation for why sales or use tax was not collected on a transaction.

The certificate cannot be used to defer tax on repairs to, or replacement parts for, qualified machinery and equipment.

(9) **May an applicant apply for new deferral at the site of an existing deferral project?**

(a) The department must not issue a certificate for an investment project that has already received a deferral under chapter 82.60, 82.61, or 82.63 RCW. For example, replacement machinery and equipment that replaces qualified machinery and equipment is not eligible for the deferral. Also, if renovation is made from an existing building that has already received a deferral under chapter 82.60, 82.61, or 82.63 RCW for the construction of the building, the renovation is not eligible for the deferral.

(b) If expansion is made from an existing building that has already received a deferral under chapter 82.60, 82.61, or 82.63 RCW for the construction of the building, the expanded portion of the building may be eligible for the deferral. Acquisition of machinery and equipment to be used

for the expanded portion of the qualified building may also be eligible.

(c) An investment project for qualified research and development that has already received a deferral may also receive an additional deferral certificate for adapting the investment project for use in pilot scale manufacturing.

(d) A certificate may be amended or a certificate issued for a new investment project at an existing facility.

(10) **May an applicant or recipient amend an application or certificate?** Applicants and recipients may make written requests to the special programs division to amend an application or certificate.

(a) Grounds for requesting amendment include, but are not limited to:

(i) The project will exceed the costs originally stated;

(ii) The project will take more time to complete than originally stated;

(iii) The original application is no longer accurate because of changes in the project; and

(iv) Transfer of ownership of the project.

(b) The department must rule on the request within sixty days. If the request is denied, the department must explain in writing the basis for the denial. An applicant or recipient may appeal a denial within thirty days under WAC 458-20-100 (Appeals).

(11) **What should a recipient of a tax deferral do when its investment project is operationally complete?**

(a) When the building, machinery, or equipment is ready for use, or when a final election is made to treat "multiple qualified buildings" as single investment project, the recipient must notify the special programs division in writing that the eligible investment project is operationally complete. The department must, after appropriate investigation: Certify that the project is operationally complete; not certify the project; or certify only a portion of the project. The certification will include the year in which the project is operationally complete. If the department certifies as an operationally complete investment project consisting of "multiple qualifying buildings," the certification is deemed to have occurred in the calendar year in which the final election is made.

(b) If all or any portion of the project is not certified, the recipient must repay all or a proportional part of the deferred taxes. The department will notify the recipient of the amount due, including interest, and the due date.

(c) The department must explain in writing the basis for not certifying all or any portion of a project. The decision of the department to not certify all or a portion of a project may be appealed under WAC 458-20-100 (Appeals) within thirty days.

(d) An investment project consisting of "multiple qualifying buildings" may not be certified as operationally complete unless the lessee furnishes the department with a bond, letter of credit, or other security acceptable to the department in an amount equal to the repayment obligation as determined by the department. The department may decrease the secured amount each year as the repayment obligation decreases under the provisions of RCW 82.63.045. If the lessee does not furnish the department with a bond, letter of credit, or other acceptable security equal to the amount of deferred tax, the qualified buildings will each be treated as individual investment projects under the original applications for those buildings.

(12) **Is a recipient of a tax deferral required to submit annual surveys?** Each recipient of a tax deferral granted under chapter 82.63 RCW must complete an annual survey. If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.63.010(7), the lessee must agree to complete the annual survey and the applicant is not required to complete the annual survey. See WAC 458-20-268 (Annual surveys for certain tax adjustments) for more information on the requirements to file annual surveys.

(13) **Is a recipient of tax deferral required to repay deferred taxes?**

(a) **When is repayment required?** Deferred taxes must be repaid if an investment project is used for purposes other than qualified research and development or pilot scale manufacturing during the calendar year for which the department certifies the investment project as operationally complete or at any time during any of the succeeding seven calendar years. Taxes are immediately due according to the following schedule:

Year in which nonqualifying use occurs	% of deferred taxes due
1	100%
2	87.5%
3	75%
4	62.5%
5	50%
6	37.5%
7	25%
8	12.5%

Interest on the taxes, but not penalties, must be paid retroactively to the date of deferral. For purposes of this section, the date of deferral is the date tax-deferred items are purchased.

The lessee of an investment project consisting of "multiple qualified buildings" is solely liable for payment of any deferred tax determined to be due and payable beginning on the date the department certifies the product as operationally complete. This does not relieve any lessor of its obligation under RCW 82.63.010(7) and subsection (3)(a) of this section to pass the economic benefit of the deferral to the lessee.

(b) **When is repayment not required?**

(i) Deferred taxes need not be repaid if the investment project is used only for qualified research and development or pilot scale manufacturing during the calendar year for which the department certifies the investment project as operationally complete and during the succeeding seven calendar years.

(ii) Deferred taxes need not be repaid on particular items if the purchase or use of the item would have qualified for the machinery and equipment sales and use tax exemptions provided by RCW 82.08.02565 and 82.12.02565 (discussed in WAC 458-20-13601) at the time of purchase or first use.

(iii) Deferred taxes need not be repaid if qualified machinery and equipment on which the taxes were deferred is destroyed, becomes inoperable and cannot be reasonably

repaired, wears out, or becomes obsolete and is no longer practical for use in the project. The use of machinery and equipment which becomes obsolete for purposes of the project and is used outside the project is subject to use tax at the time of such use.

(14) **When will the tax deferral program expire?** The authority of the department to issue deferral certificates expires January 1, 2015.

(15) **Is debt extinguishable because of insolvency or sale?** The debt for deferred taxes will not be extinguished by the insolvency or other failure of the recipient.

(16) **Does transfer of ownership terminate tax deferral?** Transfer of ownership does not terminate the deferral. The deferral may be transferred to the new owner if the new owner meets all eligibility requirements for the remaining periods of the deferral. The new owner must apply for an amendment to the deferral certificate. If the deferral is transferred, the new owner is liable for repayment of deferred taxes under the same terms as the original owner. If the new owner is a successor to the previous owner under the terms of WAC 458-20-216 (Successors, quitting business) and the deferral is not transferred, the new owner's liability for deferred taxes is limited to those that are due for payment at the time ownership is transferred.

PART II
SALES AND USE TAX EXEMPTION FOR PERSONS ENGAGED IN CERTAIN CONSTRUCTION ACTIVITIES FOR THE FEDERAL GOVERNMENT

(17) **Persons engaged in construction activities for the federal government.** Effective June 10, 2004, persons engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, or any instrumentality thereof, are not liable for sales and use tax on tangible personal property incorporated into, installed in, or attached to such building or other structure, if the investment project would qualify for sales and use tax deferral under chapter 82.63 RCW if undertaken by a private entity. RCW 82.04.190(6).

PART III
BUSINESS AND OCCUPATION TAX CREDIT FOR RESEARCH AND DEVELOPMENT SPENDING

(18) **Who is eligible for the business and occupation tax credit?** RCW 82.04.4452 provides for a business and occupation tax credit for persons engaging in research and development in Washington in five areas of high technology: Advanced computing, advanced materials, biotechnology, electronic device technology, and environmental technology.

A person is eligible for the credit if its research and development spending in the calendar year for which credit is claimed exceeds 0.92 percent of the person's taxable amount for the same calendar year.

(a) **What does the term "person" mean for purposes of this credit?** "Person" has the meaning given in RCW 82.04.030.

(b) **What is "research and development spending" for purposes of this section?** "Research and development spending" means qualified research and development expenditures plus eighty percent of amounts paid to a person other than a public educational or research institution to conduct qualified research and development.

(c) **What is "taxable amount" for purposes of this section?** "Taxable amount" means the taxable amount subject to business and occupation tax required to be reported on the person's combined excise tax returns for the year for which the credit is claimed, less any taxable amount for which a multiple activities tax credit is allowed under RCW 82.04.440. See WAC 458-20-19301 (Multiple activities tax credits) for information on the multiple activities tax credit.

(d) **What are "qualified research and development expenditures" for purposes of this section?** "Qualified research and development expenditures" means operating expenses, including wages, compensation of a proprietor or a partner in a partnership, benefits, supplies, and computer expenses, directly incurred in qualified research and development by a person claiming the business and occupation tax credit provided by RCW 82.04.4452. The term does not include amounts paid to a person other than a public educational or research institution to conduct qualified research and development. Nor does the term include capital costs and overhead, such as expenses for land, structures, or depreciable property.

(i) In order for an operating expense to be a qualified research and development expenditure, it must be directly incurred in qualified research and development. If an employee performs qualified research and development activities and also performs other activities, only the wages and benefits proportionate to the time spent on qualified research and development activities are qualified research and development expenditures under this section. The wages of employees who supervise or are supervised by persons performing qualified research and development are qualified research and development expenditures to the extent the work of those supervising or being supervised involves qualified research and development.

(ii) The compensation of a proprietor or a partner is determined in one of two ways:

(A) If there is net income for federal income tax purposes, the amount reported subject to self-employment tax is the compensation.

(B) If there is no net income for federal income tax purposes, reasonable cash withdrawals or cash advances are the compensation.

(iii) Depreciable property is any property with a useful life of at least a year. Expenses for depreciable property will not constitute qualified research and development expenditures even if such property may be fully deductible for federal income tax purposes in the year of acquisition.

(iv) Computer expenses do not include the purchase, lease, rental, maintenance, repair or upgrade of computer hardware or software. They do include internet subscriber fees, run time on a mainframe computer, and outside processing.

(v) Training expenses for employees are qualified research and development expenditures if the training is directly related to the research and development being performed. Training expenses include registration fees, materials, and travel expenses. Although the research and development must occur in Washington, training may take place outside of Washington.

(vi) Qualified research and development expenditures include the cost of clinical trials for drugs and certification by Underwriters Laboratories.

(vii) Qualified research and development expenditures do not include legal expenses, patent fees, or any other expense not incurred directly for qualified research and development.

(viii) Stock options granted as compensation to employees performing qualified research and development are qualified research and development expenditures to the extent they are reported on the W-2 forms of the employees and are taken as a deduction for federal income tax purposes by the employer.

(ix) Preemployment expenses related to employees who perform qualified research and development are qualified research and development expenditures. These expenses include recruiting and relocation expenses and employee placement fees.

(e) **What does it mean to "conduct" qualified research and development for purposes of this section?** A person is conducting qualified research and development when:

(i) The person is in charge of a project or a phase of the project; and

(ii) The activities performed by that person in the project or the phase of the project constitute qualified research and development.

(iii) Examples.

(A) Company C is conducting qualified research and development. It enters into a contract with Company D requiring D to provide workers to perform activities under the direction of C. D is not entitled to the credit because D is not conducting qualified research and development. Its employees work under the direction of C. C is entitled to the credit if all other requirements of the credit are met.

(B) Company F enters into a contract with Company G requiring G to perform qualified research and development on a phase of its project. The phase of the project constitutes qualified research and development. F is not entitled to the credit because F is not conducting qualified research and development on that phase of the project. G, however, is entitled to the credit if all other requirements of the credit are met.

(f) **What is "qualified research and development" for purposes of this section?** "Qualified research and development" means research and development performed within this state in the fields of advanced computing, advanced materials, biotechnology, electronic device technology, and environmental technology.

(g) **What is "research and development" for purposes of this section?** See subsection (3)(c) of this section for more information on the definition of research and development.

(i) Example. A company that engages in environmental cleanup contracted to clean up a site. It had never faced exactly the same situation before, but guaranteed at the outset that it could do the job. It used a variety of existing technologies to accomplish the task in a combination it had never used before. The company was not engaged in qualified research and development in performing this contract. While the company applied existing technologies in a unique manner, there was no uncertainty to attain the desired or necessary specifications, and therefore the outcome of the project was certain.

(ii) Example. Same facts as (g)(i) of this subsection, except that the company performed research on a technology that had been applied in other contexts but never in the context where the company was attempting to use it, and it was uncertain at the outset whether the technology could achieve the desired outcome in the new context. If the company failed, it would have to apply an existing technology that is much more costly in its cleanup effort. The company was engaged in qualified research and development with respect to the research performed in developing the technology.

(iii) Example. Company A is engaged in research and development in biotechnology and needs to perform standard blood tests as part of its development of a drug. It contracts with a lab, B, to perform the tests. The costs of the tests are qualified research and development expenditures for A, the company engaged in the research and development. Although the tests themselves are routine, they are only a part of what A is doing in the course of developing the drug. B, the lab contracted to perform the testing, is not engaged in research and development with respect to the drug being developed. B is neither discovering technological information nor translating technological information into new or improved products, processes, techniques, formulas, inventions, or software. B is not entitled to a credit on account of the compensation it receives for conducting the tests.

(h) **What are the five high technology areas?** See subsection (3)(e) of this section for more information.

(19) **How is the business and occupation tax credit calculated?**

(a) **On or after July 1, 2004.** The amount of the credit is calculated as follows:

(i) A person must first determine the greater of:

The person's qualified research and development expenditures;

or

Eighty percent of amounts received by a person other than a public educational or research institution as compensation for conducting qualified research and development.

(ii) Then the person subtracts, from the amount determined under (a)(i) of this subsection, 0.92 percent of its taxable amount. If 0.92 percent of the taxable amount exceeds the amount determined under (a)(i) of this subsection, the person is not eligible for the credit.

(iii) The credit is calculated by multiplying the amount determined under (a)(ii) of this subsection by the following:

(A) For the periods of July 1, 2004, to December 31, 2006, the person's average tax rate for the calendar year for which the credit is claimed;

(B) For the periods of January 1, 2007, to December 31, 2007, the greater of the person's average tax rate for the calendar year or 0.75 percent;

(C) For the periods of January 1, 2008, to December 31, 2008, the greater of the person's average tax rate for the calendar year or 1.0 percent;

(D) For the periods of January 1, 2009, to December 31, 2009, the greater of the person's average tax rate for the calendar year or 1.25 percent; and

(E) For the periods after December 31, 2009, 1.50 percent.

(iv) For the purposes of this section, "average tax rate" means a person's total business and occupation tax liability for the calendar year for which the credit is claimed, divided by the person's total taxable amount for the calendar year for which the credit is claimed.

(v) For purposes of calculating the credit, if a person's reporting period is less than annual, the person may use an estimated average tax rate for the calendar year for which the credit is claimed, by using the person's average tax rate for each reporting period. When the person files its last return for the calendar year, the person must make an adjustment to the total credit claimed for the calendar year using the person's actual average tax rate for the calendar year.

(vi) Examples.

(A) A business engaging in qualified research and development has a taxable amount of $10,000,000 in a year. It pays $80,000 in that year in wages and benefits to employees directly engaged in qualified research and development. The business has no other qualified research and development expenditures. Its qualified research and development expenditures of $80,000 are less than $92,000 (0.92 percent of its taxable amount of $10,000,000). If a business's qualified research and development expenditures (or eighty percent of amounts received for the conduct of qualified research and development) are less than 0.92 percent of its taxable amount, it is not eligible for the credit.

(B) A business engaging in qualified research and development has a taxable amount of $10,000,000 in 2005. Seven million dollars of this amount is taxable at the rate of 0.015 under the B&O tax classification for services and $3,000,000 is taxable at the rate of 0.00484 under the B&O tax classification for royalties. The business pays $119,520 in B&O tax for this reporting period. It pays $200,000 in that year to employees directly engaged in qualified research and development. The business has no other qualified research and development expenditures.

In order to determine the amount of its credit, the business subtracts $92,000 (0.92 percent of its taxable amount of $10,000,000) from $200,000, its qualified research and development expenditures. The resulting amount of $108,000 multiplied by the business's average tax rate equals the amount of the credit.

The business's average tax rate in 2005 is determined by dividing its B&O tax of $119,520 by its taxable amount of $10,000,000. The result, 0.01195, is multiplied by $108,000 to determine the amount of the credit. The credit is $1,291 ($1,290.60 rounded to the nearest whole dollar).

(b) **From July 1, 1998 to June 30, 2004.** The amount of the credit is equal to the greater of:

The person's qualified research and development expenditures;

or

Eighty percent of amounts received by a person other than a public educational or research institution as compensation for conducting qualified research and development

multiplied by 0.00484 in the case of a nonprofit corporation or association; and

multiplied by 0.015 in the case of all other persons.

(c) **Prior to July 1, 1998.** The amount of the credit is equal to the greater of:

The person's qualified research and development expenditures;

or

Eighty percent of amounts received by a person other than a public educational or research institution as compensation for conducting qualified research and development

multiplied by 0.00515 in the case of a nonprofit corporation or association; and

multiplied by 0.025 in the case of all other persons.

(d) The credit for any calendar year may not exceed the lesser of two million dollars or the amount of business and occupation tax otherwise due for the calendar year.

(e) Credits may not be carried forward or carried back to other calendar years.

(20) **Is the person claiming the business and occupation tax credit required to submit annual surveys?** Each person claiming the credit granted under RCW 82.04.4452 must complete an annual survey. See WAC 458-20-268 (Annual surveys for certain tax adjustments) for more information on the requirements to file annual surveys.

(21) **Is the business and occupation tax credit assignable?** A person entitled to the credit because of qualified research and development conducted under contract for another person may assign all or a portion of the credit to the person who contracted for the performance of the qualified research and development.

(a) Both the assignor and the assignee must be eligible for the credit for the assignment to be valid.

(b) The total of the credit claimed and the credit assigned by a person assigning credit may not exceed the lesser of two million dollars or the amount of business and occupation tax otherwise due from the assignor in any calendar year.

(c) The total of the credit claimed, including credit received by assignment, may not exceed the lesser of two million dollars or the amount of business and occupation tax otherwise due from the assignee in any calendar year.

(22) **What happens if a person has claimed the business and occupation tax credit earlier but is later found ineligible?** If a person has claimed the credit earlier but is later found ineligible for the credit, then the department will declare the taxes against which the credit was claimed to be immediately due and payable. Interest on the taxes, but not penalties, must be paid retroactively to the date the credit was claimed.

(23) **When will the business and occupation tax credit program expire?** The business and occupation tax credit program for high technology businesses expires January 1, 2015.

(24) **Do staffing companies qualify for the business and occupation tax credit program?** A staffing company may be eligible for the credit if its research and development spending in the calendar year for which credit is claimed exceeds 0.92 percent of the person's taxable amount for the same calendar year.

(a) **Qualifications of the credit.** In order to qualify for the credit, a staffing company must meet the following criteria:

(i) It must conduct qualified research and development through its employees;

(ii) Its employees must perform qualified research and development activities in a project or a phase of the project, without considering any activity performed:

(A) By the person contracting with the staffing company for such performance; or

(B) By any other person;

(iii) It must complete an annual survey by March 31st following any year in which the credit was taken; and

(iv) It must document any claim of the B&O tax credit.

(b) Examples.

(i) Company M, a staffing company, furnishes three employees to Company N for assisting a research project in electronic device technology. N has a manager and five employees working on the same project. The work of M's employees and N's employees combined as a whole constitutes qualified research and development. M's employees do not perform sufficient activities themselves to be considered performing qualified research and development. M does not qualify for the credit.

(ii) Company V, a staffing company, furnishes three employees to Company W for performing a phase of a research project in advanced materials. W has a manager and five employees working on other phases of the same project. V's employees are in charge of a phase of the project that results in discovery of technological information. The work of V's employees alone constitutes qualified research and development. V qualifies for the credit if all other requirements of the credit are met.

(iii) Same as (b)(ii) of this subsection, except that the phase of the research project involves development of computer software for W's internal use. The work of V's employees alone constitutes qualified research and development. V qualifies for the credit if all other requirements of the credit are met.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-21-044, § 458-20-24003, filed 10/13/10, effective 11/13/10; WSR 10-07-136, § 458-20-24003, filed 3/23/10, effective 4/23/10; WSR 06-18-059, § 458-20-24003, filed 8/31/06, effective 10/1/06. Statutory Authority: RCW 82.32.-300, 82.01.060(2), and 82.63.010. WSR 03-12-053, § 458-20-24003, filed 5/30/03, effective 6/30/03.]

WAC 458-20-240A Manufacturer's new employee tax credits—Applications filed prior to July 1, 2010. (1) Introduction. Chapter 82.62 RCW provides business and occupation (B&O) tax credits to certain persons engaged in manufacturing and research and development activities. These credits are intended to stimulate the economy by creating employment opportunities in specific rural counties and community empowerment zones of this state. The credits are as much as $4,000 per qualified employment position. This rule explains the eligibility requirements and application procedures for this program. It is important to note that an application for the tax credits must be submitted to the department of revenue before the actual hiring of qualified employment positions. See subsection (6) of this rule for additional information regarding this application requirement. This tax credit program is a companion to the tax deferral program under chapter 82.60 RCW; however, the eligible geographic areas in the two programs are not identical.

The department of employment security and the department of commerce administer programs for rural counties and job training. These agencies should be contacted directly for information concerning those programs.

(2) **Who is eligible for these tax credits?** Subject to certain qualifications, an applicant (person applying for a tax credit under chapter 82.62 RCW) who is engaged in an eligible business project is entitled to the tax credits provided by chapter 82.62 RCW.

(a) **What is an eligible business project?** An "eligible business project" means manufacturing, commercial testing, or research and development activities conducted by an applicant in an eligible area at a specific facility, subject to the restriction noted in the following paragraph. An "eligible business project" does not include any portion of a business project undertaken by a light and power business or any portion of a business project creating employment positions outside an eligible area.

To be considered an "eligible business project," the applicant's number of average full-time qualified employment positions at the specific facility must be at least fifteen percent greater in the calendar year for which credit is being sought than the number of positions at the same facility in the immediately preceding calendar year. Subsection (4) of this rule explains how to determine whether this threshold is satisfied.

(b) **What is an eligible area?** As noted above, the facility must be located in an eligible area to be considered an eligible business project. An "eligible area" is:

(i) A rural county, which is a county with fewer than one hundred persons per square mile or, on and after April 1, 2004, a county smaller than two hundred twenty-five square miles, as determined annually by the office of financial management and published by the department of revenue effective for the period of July 1st through June 30th (see RCW 82.62.010(3)); or

(ii) A community empowerment zone (CEZ). CEZ means an area meeting the requirements of RCW 43.31C.020 and officially designated by the director of the department of commerce.

(iii) **How to determine whether an area is an eligible area.** Rural county designation information can be obtained from the office of financial management internet web site at www.ofm.wa.gov/popden/rural.htm. The department has instituted a geographic information system (GIS) to assist taxpayers in determining taxing jurisdiction boundaries, local tax rates, and a mapping and address lookup system to determine whether a specific address is within a CEZ. The system is available on the department's internet web site at www.dor.wa.gov.

(c) **What are manufacturing and research and development activities?** Manufacturing or research and development activities must be conducted at the facility to be considered an eligible business project.

(i) **Manufacturing.** "Manufacturing" has the meaning given in RCW 82.04.120. In addition, for the purposes of chapter 82.62 RCW "manufacturing" also includes computer programming, the production of computer software, other computer-related services, but only when the computer-related services are performed by a manufacturer as defined under RCW 82.04.110 and contribute to the production of a

new, different, or useful substance or article of tangible personal property for sale; and the activities performed by research and development laboratories and commercial testing laboratories. (Chapter 16, Laws of 2010.)

(ii) **Research and development.** "Research and development" means the development, refinement, testing, marketing, and commercialization of a product, service, or process before commercial sales have begun. "Commercial sales" does not include sales of prototypes or sales for market testing if the total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(iii) **Computer-related services.** "Computer-related services" for the purposes of chapter 82.62 RCW, the definition of "manufacturing" means services that are connected with or interact directly in the manufacture of computer hardware or software or the programming of the manufactured hardware. "Computer-related services" includes the manufacture of hardware such as chips, keyboards, monitors, and any other hardware, and the components of these items. "Computer-related services" also includes creating operating systems and software that will be copied and sold as canned software. The activities performed by the manufacturer to test, correct, revise, or upgrade software or hardware before they are approved for sale to the consumer are considered computer-related services. "Computer-related services" does not include services such as information services.

(3) **What are the hiring requirements?** The average full-time qualified employment positions at the specific facility during the calendar year for which credits are claimed must be at least fifteen percent greater than the average full-time qualified employment positions at the same facility for the preceding calendar year.

(a) **What is a qualified employment position?** A "qualified employment position" means a position filled by a permanent full-time employee employed at an eligible business project for twelve consecutive months. Once a full-time position is established and filled it will continue to qualify for twelve consecutive periods so long as any person fills the position. The position is considered "filled" even during periods of vacancy, provided these periods do not exceed thirty consecutive days and the employer is training or actively recruiting a replacement employee.

(b) **What is a "permanent full-time employee"?** A "permanent full-time employee" is a position that is filled by an employee who satisfies any one of the following minimum thresholds:

(i) Works thirty-five hours per week for fifty-two consecutive weeks;

(ii) Works four hundred fifty-five hours, excluding overtime, each quarter for four consecutive quarters; or

(iii) Works one thousand eight hundred twenty hours, excluding overtime, during a period of twelve consecutive months.

(c) **"Permanent full-time employee" - Seasonal operations.** For applicants that regularly operate on a seasonal basis only and that employ more than fifty percent of their employees for less than a full twelve month continuous period, a "permanent full-time employee" is a permanent full-time employee as described above or an equivalent in full-time equivalent (FTE) work hours.

(4) **How to determine if the fifteen percent employment increase requirement is met.** Qualification for tax credits depends upon whether the applicant hires enough new positions to meet the fifteen percent average increase requirement.

(a) **Determining the fifteen percent increase.** To determine the projected number of permanent full-time qualified employment positions necessary to satisfy the fifteen percent employment increase requirement:

(i) Determine the average number of permanent full-time qualified employment positions that existed at the facility during the calendar year prior to the year in which tax credit is being claimed.

(ii) Multiply the average number of full-time positions from subsection (i) by .15 or fifteen percent. The resulting number equals the number of positions that must be filled to meet the fifteen percent increase. Numbers are rounded up to the nearest whole number at point five (.5).

(b) **When does hiring have to occur?** All hiring increases must occur during the calendar year for which credits are being sought for purposes of meeting the fifteen percent threshold test. Positions hired in a calendar year prior to making an application are not eligible for a credit but the positions are used to calculate whether the fifteen percent threshold has been met.

(c) **The department will assist applicants to determine their hiring requirements.** Accompanying the tax credit application is a worksheet to assist the applicant in determining if the fifteen percent qualified employment threshold is satisfied. Based upon the information provided in the application, the department will advise applicants of their minimum number of hiring needs for which credits are being sought.

(d) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(i) ABC Company anticipates increasing employment during the 2001 calendar year at a manufacturing facility by an average of 15 full-time qualified employment positions for a total of 113 positions. The average number of full-time qualified employment positions during the 2000 calendar year was 98. To qualify for the tax credit program the minimum average number of full-time qualified employment positions required for the 2001 calendar year is 98 x .15 = 14.7 (rounding up to 15 positions). Therefore, ABC Company's plan to hire 15 full-time qualified employment positions for 2001 meets the 15% employment increase requirement.

(ii) ABC anticipates increasing employment at this same manufacturing facility by an average of 15 additional full-time qualified employment positions during the 2002 calendar year to a total of 128 positions. To qualify for the tax credit program the minimum average number of full-time qualified employment positions required for the 2002 calendar year is 17 (113 x .15 = 16.95, rounding up to 17). Therefore, ABC Company's plan to hire 15 full-time qualified employment positions for 2002 does not meet the 15% employment increase requirement.

(5) **Restriction against displacing existing jobs within Washington.** The law provides that no recipient may use tax credits approved under this program to decertify a union or to displace existing jobs in any community of the state. Thus, the average expected increase of employment positions at the specific facility for which application is made must reflect a gross increase in the applicant's employment of persons at all locations in this state. Transfers of personnel from existing positions outside of an eligible area to new positions at the specific facility within an eligible area will not be allowed for purposes of approving tax credits. Also, layoffs or terminations of employment by the recipient at other locations in Washington but outside an eligible area for the purpose of hiring new positions within an eligible area will result in the withdrawal of any credits taken or approved.

(6) **Application procedures.** A taxpayer must file an application with and obtain approval from the department of revenue to receive tax credits under this program. A separate application must be submitted for each calendar year for which credits are claimed. RCW 82.62.020 requires that application for the tax credits be made prior to the actual hiring of qualified employment positions. Applications failing to satisfy this statutory requirement will be disapproved.

(a) **How to obtain and file applications.** Application forms will be provided by the department upon request either by calling 360-902-7175 or via the department's internet web site at www.dor.wa.gov under forms. The completed application may be sent by fax to 360-586-0527 or mailed to the following address:

State of Washington
Department of Revenue
Taxpayer Account Administration
P.O. Box 47476
Olympia, WA 98504-7476

The U.S. Post Office postmark or fax date will be used as the date of application.

(b) **Confidentiality.** Applications, reports, or any other information received by the department in connection with this tax credit program, except applications not approved by the department, are not confidential and are subject to disclosure. All other taxpayer information is subject to the confidentiality provisions in RCW 82.32.330.

(c) **Department to act upon application within sixty days.** The department will determine if the applicant qualifies for tax credits on the basis of the information provided in the application and will approve or disapprove the application within sixty days. If approved, the department will issue a credit approval notice containing the dollar amount of tax credits available for use and the procedures for taking the credit. If disapproved, the department will notify the applicant in writing of the specific reasons for disapproval. The applicant may seek administrative review of the department's disapproval of an application by filing a petition for review with the department. The petition must be filed within thirty days from the date of notice of the disallowance pursuant to the provisions of WAC 458-20-100, Appeals, small claims and settlements.

(d) **No adjustment of credit after approval.** After an application is approved and tax credits are granted, no upward adjustment or amendments of the application will be made for that calendar year.

(7) **How much is the tax credit?** The amount of tax credit is based on the number of and the wages and benefits paid to qualified employment positions created.

(a) **How much tax credit may I claim for each qualified employment position?** The amount of tax credit that may be claimed for each position created is as follows:

(i) Two thousand dollars for each qualified employment position that pays forty thousand dollars or less in wages and benefits annually and is employed in an eligible business project; and

(ii) Four thousand dollars for each qualified employment position that pays more than forty thousand dollars in wages and benefits annually and is employed in an eligible business project.

(b) **What qualifies as wages and benefits?** For the purposes of chapter 82.62 RCW, "wages" means compensation paid to an individual for personal services, whether denominated as wages, salary, commission, bonus, or otherwise. "Benefits" means compensation not paid as wages and includes Social Security, retirement, health care, life insurance, industrial insurance, unemployment compensation, vacation, holiday, sick leave, military leave, and jury duty. "Benefits" does not include any amount reported as wages.

(8) **How to claim approved credits.** The recipients must take the tax credits approved under this program on their regular combined excise tax return for their regular assigned tax reporting period. These tax credits may not exceed the B&O tax liability. The amount of credit taken should be entered into the "credit" section of the return form, with a copy of the credit approval notice issued to the recipient attached to the return.

(a) **When can credits be used?** The credits may be used as soon as hiring of the projected qualified employment positions begins or may accrue until they are most beneficial for the recipient's use. For example, if a recipient has been approved for $12,000 of tax credits based upon projections to hire five new positions, that recipient may use $2,000 or $4,000 of tax credit at the time it hires each new employee, depending on the wage/benefit level of the position filled.

(b) **No refunds for unused credits.** No tax refunds will be made for any tax credits which exceed tax liability during the life of this program. If tax credits derived from qualified hiring exceed the recipients' business and occupation tax liability in any one calendar year under this program, they may be carried forward to the next calendar year(s), until used.

(9) **Annual report to be filed by recipient.** A recipient of tax credits under this program must complete and submit an annual report of employment activities to substantiate that he or she has complied with the hiring and retention requirements for approved credits. RCW 82.62.050. This report must be filed with the department by January 31st of the year following the calendar year for which credit was approved by the department. Based upon this report the department will verify that the recipient is entitled to the tax credits approved by the department when the application was reviewed. The completed annual report may be sent by fax to 360-586-0527 or mailed to the following address:

State of Washington
Department of Revenue
Taxpayer Account Administration
P.O. Box 47476
Olympia, WA 98504-7476

The U.S. Post Office postmark or fax date will be used as the date of filing.

(a) **Verification of annual report.** The department will use the same report the recipient provides to the department of employment security, which is known as the quarterly employment security report, to verify the recipient's eligibility for tax credits. The recipient must maintain copies of the quarterly employment report for the year prior to the year for which credits are claimed, the year credits are claimed, and for the four quarters following the hiring of persons to fill the qualified employment positions. (The recipient does not have to forward copies of the quarterly employment report to the department each quarter.) The department may use other wage information provided to the department by the department of employment security. The taxpayer must provide additional information to the department, as the department finds necessary to calculate and verify wage eligibility.

(b) **Failure to file report.** The law provides that if any recipient fails to submit a report or submits an inadequate report, the department may declare the amount of taxes for which credit has been used to be immediately due and payable. An inadequate report is one which fails to provide information necessary to confirm that the requisite number of employment positions has been created and maintained for twelve consecutive months.

(10) **What if the required number of positions is not created?** The law provides that if the department finds that a recipient is not eligible for tax credits for any reason, other than failure to create the required number of qualified employment positions, the amount of taxes for which any credit has been used will be immediately due. No interest or penalty will be assessed in such cases. However, if the department finds that a recipient has failed to create the specified number of qualified employment positions, the department will assess interest, but not penalties, on the taxes against which the credit has been used. This interest on the assessment is mandatory and will be assessed at the statutory rate under RCW 82.32.050, retroactively to the date the tax credit was used. The interest will accrue until the taxes for which the credit was used are fully repaid. RCW 82.32.050. The interest rates under RCW 82.32.050 can be obtained from the department's internet web site at www.dor.wa.gov or by calling the department's information center at 1-800-647-7706.

(11) **Program thresholds.** The department cannot approve any credits that will cause the total credits approved to exceed seven million five hundred thousand dollars in any fiscal year. RCW 82.62.030. A "fiscal year" is the twelve-month period of July 1st through June 30th. If all or part of an application for credit is disallowed due to cap limitations, the disallowed portion will be carried over for approval the next fiscal year. However, the applicant's carryover into the next fiscal year is only permitted if the total credits approved for the next fiscal year does not exceed the cap for that fiscal year as of the date on which the department has disallowed the application.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.08.0293, and 82.12.0293. WSR 10-23-035, § 458-20-240A, filed 11/9/10, effective 12/10/10.]

WAC 458-20-241 Radio and television broadcasting. For the purpose of this rule:

"Broadcast" or "broadcasting" includes both radio and television commercial broadcasting stations unless it clearly appears from the context to refer only to radio or television.

"Local advertising" means all broadcast advertising other than national, network, or regional advertising as herein defined.

"National advertising" means broadcast advertising paid for by sponsors which supply goods or services on a national or international basis.

"Network advertising" means broadcast advertising originated by national or regional broadcast networks from outside the state of Washington, the broadcast advertising being supplied by national or regional network broadcasting companies.

"Regional advertising" means broadcast advertising paid for by sponsors which supply goods or services on a regional basis over two or more states.

Business and Occupation Tax

Radio and television broadcasting. Taxable on gross income from the sale of radio or television advertising, and any other gross income from broadcasting, excluding sales to other broadcasters of the right to broadcast material on processed film, sound recorded magnetic tape, and other transcriptions (see service and other activities).

Deductions from gross income from advertising:

(1) **Agency fees.** It is a general trade practice in the broadcasting industry to make allowances to advertising agencies in the form of the deduction or exclusion of a certain percentage of the gross charge made for advertising ordered by the agency for the advertiser. This allowance will be deductible as a discount in the computation of the broadcaster's tax liability in the event that the allowance is shown as a discount or price reduction in the billing or that the billing is on a net basis, i.e., less the discount.

(2) **Gross receipts from national, network, and regional advertising.** The taxpayer may deduct either actual gross receipts from national, network, and regional advertising as herein defined, as included in the gross amount reported under radio and television broadcasting, or may take a "standard deduction" as provided by RCW 82.04.280, as amended by chapter 149, Laws of 1967 ex. sess., which will be a percentage arrived at annually for all broadcast stations in the state of Washington which use the standard deduction method. This percentage will be determined by dividing the total broadcast advertising receipts in the nation from network, national, and regional advertising by the total broadcast advertising receipts in the nation.

This standard deduction will be based on the most current figures published at the beginning of the calendar year and shall be used throughout that calendar year notwithstanding the publishing of the following year's figures within that calendar year. Previously the Federal Communications Com-

mission published the figures used to compute the standard deduction. The Federal Communications Commission no longer publishes these figures and henceforth it will be the responsibility of the industry to annually provide these figures to the department of revenue. The figures used will be subject to verification by the department.

Example of computation:

The standard deduction for persons engaged in radio and television broadcasting was 64% for the calendar year 1970. The deduction was computed as follows:

1.	Total radio advertising receipts 1968	$1,076,300,000
2.	Total television advertising receipts 1968	2,087,600,000
3.	Total broadcast advertising receipts	3,163,900,000
4.	Total national, network, regional advertising receipts, radio, 1968	379,200,000
5.	Total national, network, regional advertising receipts, television, 1968	1,635,100,000
6.	Total broadcast advertising receipts from national, network, and regional advertising	2,014,300,000
7.	Standard deduction for 1970 will be the quotient of line 6 divided by line 3 or	64%

(3) **Interstate business, allocation.** It is recognized that radio and television broadcasting is an interstate business and that under the Constitution of the United States a tax is prohibited upon so much of the revenue of a radio or television broadcasting station as is derived from the service of broadcasting to persons in other states or foreign countries. Accordingly, revenues from local advertising shall be allocated to remove from the tax base the gross income from advertising which is intended to reach potential customers of the advertiser who are located outside the state of Washington.

It will be presumed that the entire gross income of radio and television stations located within the state of Washington from local advertising as herein defined is subject to tax unless and until the taxpayer submits proof to the department of revenue that some portion of such income is exempt according to the principles set forth herein and until a specific allocation formula has been approved by the department.

Method of allocation. When the total daytime listening area of a radio or television station extends beyond the boundaries of the state of Washington, the allowable deduction is that portion of revenue represented by the out-of-state audience computed as a ratio to the station's total audience as measured by the 100 microvolt signal strength and delivery by wire, if any. The out-of-state audience may therefore be determined by delivery "over the air" and by community antenna television systems. However, community antenna television audiences may not be claimed by a station in the same area in which it claims an audience served over the air, thus eliminating a claim for double exemption.

The most current United States and Canadian census figures will be used to determine the in-state and out-of-state audience.

An engineer holding at least a first class operator's license from the Federal Communications Commission must compute the 100 microvolt contour for the station claiming the exemption. The 100 microvolt contour will be applicable to all broadcasting stations, whether standard (AM), frequency modulation (FM), or television (TV), and the applicable contour will be the daytime ground-wave contour. The computation must be submitted to the department of revenue in map form, showing the scale used in miles, with the contour drawn on the map and the counties or cities within the contour indicated. The map must be certified as being correct by the personal signature of the engineer making the computation. The type of license held by the engineer should be indicated. The map must have attached to it the population covered both within and without the state according to the applicable United States and Canadian census.

In the event that cable antenna television subscribers are claimed as part of the out-of-state audience, the name of the systems, the location, and the number of subscribers must also be attached to the map. The number of subscribers will be multiplied by a factor of 3, representing the average size household family.

The foregoing exhibits must be forwarded to the Department of Revenue, Olympia, Washington 98504, and must be approved by the department before any deduction is allowable.

Service and other activities. Taxable on gross income from personal or professional services, including gross income from producing and making custom commercials or special programs, fees for providing writers, directors, artists and technicians, charges for the granting of a license to use facilities (as distinct from the leasing or renting of tangible personal property, see WAC 458-20-211), and charges to other broadcasters for the mere right to broadcast material on processed film, sound recorded magnetic tape, and other transcriptions when the material is returned to the original broadcaster.

Retailing or wholesaling. Taxable on gross proceeds of sales of tangible personal property, including gross proceeds from sales of films and tape produced for general distribution and from sales of copies of commercials, programs, films, etc., even though the original was not subjected to sales tax. The sale of custom-made programs, commercials, films, etc., is not taxable under this classification. (See subheading **Service and other activities** above.)

Manufacturing. Taxable on the cost to produce special programs, such as public affairs, religious, travelogues, and other general programming, which are vended to other broadcasters under a lease or contract granting a mere license to use. This tax does not apply to a recording made for the broadcaster's own use, including news, delayed programs, commercials and promotions, special and syndicated programming, and "entire day" programming.

Retail sales tax. Sales to broadcasters of equipment, supplies and materials for use and not for resale are subject to the retail sales tax. This includes sales of raw or unprocessed

film or magnetic tape and other transcription material as well as processed film, recorded magnetic tape or other transcriptions unless vended under a lease or contract granting a mere license to use.

If the tapes, films, etc., upon which the sales tax has been paid are later sold by the broadcaster in the regular course of business, the provisions of WAC 458-20-102 concerning purchases for dual purposes will apply.

Sales to broadcasters of the right to broadcast the material on processed film, sound recorded magnetic tape, and other transcriptions under a right or license granted by lease or contract are not retail sales and the retail sales tax is not applicable.

The broadcaster must collect retail sales tax on sales of packaged films, programs, etc., produced for general distribution, including training and industrial films, and also on sales of copies of films, commercials, programs, etc., even though the original was not subjected to sales tax.

Use tax. Acquisition or exercise of the right to broadcast processed film, recorded magnetic tape or other transcriptions under a right or license granted by lease or contract is not the use of tangible personable property by the broadcaster and the use tax is not applicable.

Broadcasters of radio and television programs are subject to use tax on the value of articles manufactured or produced by them for their own use (excluding custom produced commercials or special programs which includes, but is not necessarily limited to, recordings of news, delayed programs, commercials and promotions, special and syndicated programming, and "entire day" programming) and on the use of tangible personal property purchased or acquired under conditions whereby the retail sales tax has not been paid. The broadcaster is liable for use tax on the value (cost of production) of processed film, sound recorded magnetic tape, and other transcriptions when the broadcaster vends merely the right to broadcast such material under a right or license granted by lease or contract.

Effective September 1, 1982.

[Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order ET 83-1), § 458-20-241, filed 3/30/83; Order ET 70-3, § 458-20-241 (Rule 241), filed 5/29/70, effective 7/1/70.]

WAC 458-20-242A Pollution control exemption and/or credits for single purpose facilities added to existing production plants to meet pollution control requirements and which are separately identifiable equipment principally for pollution control. Rule 242 deals with pollution control facilities and is published in two parts:

Part A. Single purpose facilities added to existing production plants as separately identifiable equipment principally for pollution control and which are not designed for production of products other than recovered products which but for the facility would be released as pollutants.

Part B. Dual purpose facilities which consist of new plant equipment which achieves pollution control in the process of production of the plant's products rather than through the add on of a pollution device to existing plant equipment at some point in processing or upon completion of processing.

Definition of Terms

For purposes of this rule:

(1) "Facility" shall mean an "air pollution control facility" or a "water pollution control facility" as herein defined:

(a) "Air pollution control facility" includes any treatment works, control devices and disposal systems, machinery, equipment, structures, property or any part or accessories thereof, installed or acquired for the primary purpose of reducing, controlling or disposing of industrial waste which if released to the outdoor atmosphere could cause air pollution. "Air pollution control facility" shall not mean any motor vehicle air pollution control devices used to control the emission of air contaminants from any motor vehicle.

(b) "Water pollution control facility" includes any treatment works, control device or disposal system, machinery, equipment, structures, property or any accessories thereof installed or acquired for the primary purpose of reducing, controlling or disposing of sewage and industrial waste, which if released to a water course could cause water pollution; provided, that the word "facility" shall not be construed to include any control device, machinery, equipment, structure, disposal system or other property installed or constructed for a municipal corporation or for the primary purpose of connecting any commercial establishment with the waste collecting facilities of public or privately owned utilities.

(c) For purposes of this exemption or credit, the terms "commercial establishment" and "other commercial establishment" do not include contractors or their suppliers who install pollution control equipment in facilities of and for another person.

(2) For the purpose of tax credit or exemption, "cost" shall be limited to capital expenditures directly related to the acquisition and installation of the control facility as described in the application. For the purposes of this definition, capital expenditures may include engineering, architecture, legal fees, overhead and other costs which may be directly attributed to the control facility.

(3) "Net commercial value of recovered products" shall mean the value of recovered products less the costs incurred in processing, including overhead costs, and costs attributable to their sale, or other disposition for value. The term shall not include a deduction for the cost or the depreciation of the facility.

(4) "Certificate" shall mean a pollution control tax exemption and credit certificate for which application has been timely made.

(5) "Appropriate control agency" shall mean the state department of ecology; or the operating local or regional air pollution control agency within whose jurisdiction a facility is or will be located.

(6) For the purposes of this rule "depreciation" shall be determined by the straight line method. That is, the cost of the facility, less the salvage or residual value, divided by months of useful life yields the amount by which the facility is depreciated monthly. In computing depreciation for purposes of obtaining a certificate, depreciation shall be computed through the last full month prior to the month in which the application for certificate is filed.

(7) "Department" shall mean the Washington state department of revenue.

Filing Application and Issuance of Certificates

An application for a certificate will be made available by the department to cover the following conditions:

(1) Existing facilities, to provide the basis for a tax credit and for sales tax paid.

(2) Proposed facilities

(a) To provide the basis for a tax exemption on the purchase of material and equipment;

(b) To provide the basis for a tax credit.

The application must show the cost of the facility, specifically stating costs of materials and equipment incorporated into it. When the certificate is for the purposes referred to in "2" above, estimated costs must be shown. The certificate issued on an application based on estimated costs will not permit the holder to claim the credit referred to in "2b" above until an application showing actual costs has been filed and a supplement to the certificate issued.

Applications showing actual costs must also show the total depreciation which is applicable to the facility to the date of the application, the net commercial value of all materials recovered or captured by the facility during the entire period of operation prior to the date of application, and the amount of federal tax credit taken on federal tax returns filed prior to the date of application.

If, subsequent to the issuance of a certificate for a facility, a determination is made to modify or replace such facility, the certificate holder may file an application for a new or a supplemental certificate covering the modification or replacement following the same procedures provided for making application for original certificate. After the issuance by the department of any new certificate or supplement, all subsequent tax exemption and credits for the modified replacement facility shall be based thereon.

The application will be submitted to the department which will forward it to the appropriate control agency within ten days of its receipt from the applicant. The determination that a facility is designed and operated or is intended to be operated primarily for the control, capture and removal of pollutants from the air, or for the control and reduction of water pollution, and that the facility is suitable and reasonably adequate, and meets the intent and purposes of chapter 70.94 RCW (air pollution) or chapter 90.48 RCW (water pollution) will be made by the appropriate control agency. The control agency will notify the department of its findings within thirty days of the date the application was received for approval. The department will make the final determination of cost.

In making a determination, the appropriate control agency will afford to the applicant an opportunity for a hearing. If the local or regional air pollution control agency fails to act or if the applicant feels aggrieved by the action of the local board, the applicant may appeal to the department of ecology pursuant to rules and regulations established by that department.

Upon notification of the action taken by the control agency the department will issue a certificate or notice of denial within thirty days of the receipt of the application from the control agency. The department will send a certificate or supplement, when issued, by certified mail. Notice of refusal to issue a certificate will likewise be sent by certified mail.

Time limitations. Application must be made no later than December 31, 1969, except that with respect solely to a facility required to be installed in an industrial, manufacturing, waste disposal, utility, or other commercial establishment which is in operation or under construction as of July 30, 1967, such application will be deemed timely if made within one year after the effective date of specific requirements for such facility promulgated by the appropriate control agency; whether or not the determination is made before or after the limitation date of December 31, 1969. The "effective date of specific requirements" refers to the compliance order's date for completion of engineering.

Revocation of certificate. The department may revoke an issued certificate upon subsequent discovery that it was improperly issued for reason of illegality, fraud, mistake, or the ineligibility of the applicant.

Utilization of Exemption and Credit

Sales tax exemption. The original acquisition of a facility, or the modification (meaning a substantial improvement resulting from added capacity in the removal of pollutants from the air or water) of an existing facility by the holder of a certificate shall be exempt from sales tax imposed by chapter 82.08 RCW and use tax subsequent to the effective date of the certificate. For applications filed subsequent to January 1, 1975 certificate holders shall receive credit for sales and use tax paid on acquisition of the facility prior to receiving certification. This exemption does not extend to servicing, maintenance, repairs or replacement parts after a facility is complete and placed in service.

Subsequent to July 30, 1967, a certificate holder may elect to pay sales or use tax on the acquisition and installation of a control facility and, subsequently, take a credit against future liability under business and occupation, use, or public utility tax to the extent of the foregoing exemption, except that a person so electing may not take any further manufacturing tax credit as provided in RCW 82.04.435 on the same facility.

Business and Occupation, Use, or Public Utility Tax Credit. With respect to a facility which has been placed in operation and for which a certificate has been issued, a tax credit not exceeding 2 percent of the cost of a new facility or of the depreciated cost of an existing facility may be taken for each year the certificate is in force. Such credit may be claimed against business and occupation, use, or public utility tax liability; however, it shall not exceed 50 percent of the tax liability for any reporting period for which it is claimed nor shall the cumulative amount of credit allowed for any facility exceed 50 percent of the cost of the facility.

Credits to be reduced. Credits claimed will be reduced by the net commercial value of materials captured or recov-

ered by the pollution control facility. The value of such material shall first reduce the credit available in the current reporting period and then be applied against the cumulative credit balance which has been established but which may not be currently available to the certificate holder. Applicants and certificate holders shall provide the department with information required to establish the net commercial value of recovered or captured material and will be required to make books and records available to the department to verify the correctness of information furnished. The cumulative credit will also be reduced by the amount of federal investment tax credit or other federal tax credits allowed to the certificate holder which are applicable to the facility. The federal tax credits shall be taken as an offset against a pollution control tax credit claimed in the first reporting period following the date of filing the tax return on which the federal tax credit was taken, and thereafter as an offset against a credit hereunder as it becomes available to the certificate holder. The applicant shall advise the department of adjustments to the federal tax credits, either increase or decrease, resulting from either an audit by the internal revenue service, or otherwise. Adjustments to the credit allowable under this rule will be made by the department accordingly.

The department will issue instructions and forms to the certificate holder covering the accounting for the credit for which the certificate holder is eligible. Where a certificate holder is also eligible for manufacturing tax credit, the department may issue special instructions covering the separate accounting for the tax credits.

Credit will be allowable only in any period in which a certificate is in force.

[Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order ET 83-1), § 458-20-242A, filed 3/30/83; Order ET 77-1, § 458-20-242A, filed 12/8/77 (formerly codified WAC 458-20-242); Order ET 70-3, § 458-20-242 (Rule 242), filed 5/29/70, effective 7/1/70.]

WAC 458-20-242B Pollution control exemption and/or credits for dual purpose facilities which are constructed to meet pollution control requirements and which achieve pollution control in the process of production of the plant's products. Rule 242 deals with pollution control facilities and is published in two parts:

Part A. Single purpose facilities added to existing production plants as separately identifiable equipment principally for pollution control and which are not designed for production of products other than recovered products which but for the facility would be released as pollutants.

Part B. Dual purpose facilities which consist of new plant equipment which achieves pollution control in the process of production of the plant's products rather than through the add on of a pollution device to existing plant equipment at some point in processing or upon completion of processing.

This rule sets out instructions for determining pollution control tax exemption and/or credit for a dual purpose pollution control facility.

A dual purpose pollution control facility is defined as a single, integrated facility which is installed to meet standards for air or water pollution, or both, and which is also necessary to the manufacture of products. It refers to a facility in which the portion of the total facility to be identified as for the purpose of pollution control is so integrated into the total facility that physical separation into identifiable component parts—that is, that which is for manufacturing and that which is for pollution control—is not possible. If these criteria are met, the following net cost approach shall be used to determine tax exemption and/or credit.

The application for certification shall be filed with the department of revenue in accordance with chapter 82.34 RCW and WAC 458-20-242A. Upon approval by the appropriate control agency, subject to the qualification that the facility described in the application is a dual purpose facility and that all requirements outlined in chapter 82.34 RCW are met, an exemption/credit certificate shall be issued. To determine the net cost attributable to the pollution control element of the dual function facility, the computations described in the following steps are required.

(1) Obtain cost estimates (for facilities under construction) and final cost figures (for completed facilities) directly related to the new dual function facility. (Actual allowable credits will be based on final costs of completed facilities.) Add to this final cost the amount of unrecovered depreciation on existing equipment replaced, if any. Subtract from this the salvage value of the replaced equipment, if and. Sales and use tax paid shall not be included as part of the facility cost.

(2) Determine the percentage that actual production capacity per unit of time of the existing plant equipment (before installation of the control facility) is of the actual capacity per unit of time of the new dual purpose facility. If the percentage so obtained is equal to or greater than 100 percent, use the figure obtained in step (1) for calculations commencing at step (3).

If the percentage so obtained is less than 100 percent, multiply that percentage times the figure derived in step (1) above. This figure represents the gross cost of constructing the new facility which meets pollution control requirements and obtains productive capacity of the existing plant. Productive capacity shall include all production of commercial or industrial value other than recovered or captured materials deductible from credits under provisions of RCW 82.34.060.

(3) All computations used to adjust the gross cost (as determined in step (2) above) shall be expressed in terms of current dollars at the start up date as defined in this step (3). To this end, a discount rate suitable for determining the present value of future income or expenditures is required. The basis of the discount rate will be the average cost of borrowed capital based on Aa Industrial Bonds as reported in Moody's Bond Record and the cost of equity capital as established by the price earnings ratio for the particular industry class as reported in the value line. This will be the average of amounts so reported for the 12 months preceding and 12 months succeeding the start up date. This date is the first date the new dual purpose facility is both in operation and in compliance with the requirements of the appropriate pollution control agency.

The discount rate to be applied will be a combination of these rates. The two rates shall be weighted 50/50. The same discount rate shall be used for all adjustments to the gross cost.

(4) The next step in the procedure is to calculate the present value of future capital that will not be spent at some specific future date due to the expenditure now of the amount determined in (2) above. This "specific future date" is the date determined by the department as the date of projected replacement of the existing plant absent the need to meet pollution control requirements. This will be the amount of expenditure calculated in (2) above multiplied by the discount factor (as determined by use of the discount rate as calculated in (3) above) which will equal the present worth of that amount of money received or expended on the date representing the end of the useful life of the existing plant by the new installation (the date of "projected replacement"). This calculated amount shall be reduced by the present value, if any, of the undepreciated balance that would remain after the end of the depreciation period for the new facility if construction had been delayed to the date used as the end of the useful life of the facility replaced. This net calculation is then subtracted from the amount computed as the "gross cost" in (2).

(5) From the amount determined in (4) deduct the present value, after deduction of a percentage equal to the maximum corporate federal income tax rate as of the start up date, of operating savings expected to accrue to the date of projected replacement used in (4) applying the discount factor for annual savings based on the discount rate calculated in (3). Operating savings shall not include the net commercial value of materials captured or recovered by virtue of the new installation deductible under RCW 82.34.060 (2)(b).

(6) The next step is to deduct from the balance as computed in (5) the present net value of federal income tax savings to be derived from depreciation of the gross cost of the dual purpose facility due to its construction sooner than at the date of projected replacement using straight line depreciation over the useful life of the facility. The determination of net present value of federal income tax reductions due to depreciation allowances will consist of three steps.

(a) Calculate the present value of depreciation allowances from date of completion of the new facility using straight line depreciation to the projected replacement date.

(b) Deduct from (a) the present value of depreciation that would have been allowable after the date of full depreciation of the new dual purpose facility if construction of the new facility had been delayed until the projected replacement date of the existing facility.

(c) Multiply the result of (a) minus (b) by the maximum corporate federal income tax rate as of the start up date.

The net amount of federal tax benefits arrived at in (c) shall then be deducted from the balance determined in step (5).

(7) The remaining amount from that calculated in (2) after adjustments provided for in steps (3) through (6) is the "net cost" of pollution control equipment to be used as the base for calculation of credits.

Calculation of credits

(A) Determine 2 percent of the amount computed in step 7. this is the gross annual credit.

(B) Multiply the amount shown in step (7) by 50 percent to determine maximum total credit allowable.

(C) The gross credit allowable per year must first be reduced by the net commercial value of captured or recovered materials. Captured or recovered materials means materials which, but for compliance with pollution control requirements, would be discharged into the air or water and which discharge is required to be reduced or eliminated by requirements of the appropriate pollution control agency. The result is the *net* credit allowable per year.

The formula for "C" is the value of materials captured or recovered from the new plant less the value of materials which would have been captured or recovered over a comparable period of time from the existing plant, but for compliance with pollution control requirements, multiplied by the percentage derived by dividing net cost (step 7) by total cost (step 1).

If the net commercial value of recovered materials exceeds the gross credit allowable per year, the excess must be carried forward for purposes of reducing credits for future years. The amount of the net commercial value of recovered materials reduces both the annual and total credit allowable.

(D) Determine the total amount of Federal Investment Tax Credit or other federal tax credit actually received. Then multiply this tax credit by the percentage which the net cost portion (step 7) is to the total cost of the facility (step 1) to arrive at the portion of the tax credit applicable to the pollution control element of the dual purpose facility.

(E) Deduct the amount determined in step (D) from the amount determined in step (C) until total federal tax credits are totally offset. This is to be an annual calculation.

(F) If the annual amount of net credit to be taken after computation through step (E) exceeds 50 percent of the firm's tax liability under chapters 82.04, 82.12, and 82.16 RCW, it must be reduced to 50 percent of such tax liability.

Adopted December 8, 1977.

[Order ET 77-1, § 458-20-242B (Rule 242 Part B), filed 12/8/77.]

WAC 458-20-243 Litter tax. (1) **Introduction.** Chapter 82.19 RCW imposes a litter tax on manufacturers, wholesalers, and retailers of certain products. Litter tax is imposed independently of the business and occupation (B&O) tax and retail sales and use taxes. RCW 82.19.010. This section provides detailed information about litter tax, including the measure of the tax, the products to which the tax applies, and specific exemptions from the tax.

(2) **Tax measure.** For manufacturers, the measure of the tax is the value of products listed in subsection (4) of this section, including by-products manufactured in this state. For wholesalers and retailers, the measure of the tax is the gross proceeds of sales within this state of the products listed in subsection (4) of this section. In the case of publishers of newspapers and magazines, the measure of the tax is the gross proceeds of sales, and does not include advertising income.

Litter tax is imposed on subsequent sales of the same goods from the manufacturer to the wholesaler, from the wholesaler to the retailer, and from the retailer to the consumer, if the goods are listed in subsection (4) of this section, and the sales are not specifically exempt by law.

(a) **Value of products and gross proceeds of sales.** For purposes of the litter tax, "value of products" and "gross proceeds of sales" have the same meanings as defined in RCW

82.04.450 and 82.04.070, respectively. See also WAC 458-20-112 for more information regarding "value of products."

(b) **Grocery stores and drugstores.** Where it is impractical to separate products that are and are not subject to litter tax, an alternative method is allowed. Persons operating drugstores may report and pay litter tax measured by fifty percent of total sales in lieu of separately accounting for sales of nondrug drugstore sundry products. (See subsection (4)(n) of this section for information about what constitutes nondrug drugstore sundry products.) Persons operating grocery stores may report and pay the litter tax measured by ninety-five percent of total sales in lieu of separately accounting for grocery and nongrocery products sold. (See subsection (4)(b) of this section for information about what constitutes grocery products.)

(3) **When do I report and pay litter tax?** The frequency of reporting and paying litter tax coincides with the reporting periods of taxpayers for their B&O tax. For example, a wholesaler who reports B&O tax monthly would also report any litter tax liability on the monthly return. For more information on tax reporting frequency, see WAC 458-20-22801 Tax reporting frequency—Forms.

(4) **What products are subject to litter tax?** Litter tax applies to the manufacture or sale of products in the product categories in this subsection, unless a specific exemption applies. Litter tax applies whether these products are sold packaged, unpackaged, or in recyclable containers. See subsection (5) of this section for the litter tax exemptions available for the manufacture or sale of products in these categories.

(a) **Food for human or pet consumption.** Food for human or pet consumption is any substance, except drugs, where the chief general use is for human or pet nourishment, regardless of whether the substance is sold in a consumable form. Food for human or pet consumption includes candy, chewing gum, condiments, packaged or unpackaged meat, bulk foods, shellfish, and ingredients used in processing food for human or pet consumption such as industrial chocolate, grain, barley, or hops. This category includes sales of meals, snacks, lunches, or other food and beverages at restaurants, drive-ins, snack bars, taverns, or by concessionaires.

(b) **Groceries.** Groceries are all products sold by persons in a place of business selling food for off-premises consumption, but excluding drugs, building materials, clothing, furniture, and appliances.

(c) **Cigarettes and tobacco products.** Cigarettes and tobacco products include all of the products subject to the excise taxes imposed by chapters 82.24 and 82.26 RCW.

(d) **Soft drinks and carbonated waters.** Soft drinks are nonalcoholic beverages that contain natural or artificial sweeteners. Soft drinks do not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of vegetable or fruit juice by volume. Carbonated waters are nonalcoholic beverages, containing carbon dioxide, that do not contain natural or artificial sweeteners.

(e) **Beer and other malt beverages.** Beer and other malt beverages are all beverages defined as beer or malt liquor by Title 66 RCW or rules of the Washington state liquor control board.

(f) **Wine.** Wine includes all alcoholic beverages defined as wine in Title 66 RCW or rules of the Washington state liquor control board.

(g) **Newspapers and magazines.** Newspapers and magazines are all daily and periodical publications, including real estate guides, vehicle trader publications, free community newspapers, and the like.

(h) **Household paper and paper products.** Household paper and paper products are materials or substances made into sheets or leaves from natural organic or synthetic fibrous material for home or other personal use. Household paper and paper products include products or articles made from such sheets or leaves for home or other personal use, such as toilet tissue, paper cups, plates, napkins, cards, wrapping paper, stationery, personal banking checks or deposit slips, computer printer or copier paper, and the like.

(i) **Glass containers.** Glass containers are articles made wholly or in substantial part of processed silicates that can be, or are, used to hold other things within themselves. Glass containers include only those containers that are sold with, and that contain, another product or products otherwise subject to litter tax, or containers that are produced so that they can later contain and be sold with another product or products otherwise subject to litter tax. Glass containers do not include containers that are produced to be sold at retail as empty reusable containers, such as drinking glasses, vases, and the like.

(j) **Metal containers.** Metal containers are articles made wholly or in substantial part of materials such as iron, steel, tin, aluminum, copper, zinc, lead, silver and any alloys thereof and that can be, or are, used to hold other things within themselves. Metal containers include only those containers that are sold with, and that contain, another product or products otherwise subject to litter tax, or containers that are produced so that they can later contain and be sold with another product or products otherwise subject to litter tax. Metal containers do not include containers that are produced to be sold at retail as empty reusable containers, such as pots and pans, or metal containers made for transporting other products.

(k) **Plastic or fiber containers made of synthetic material.** Plastic or fiber containers made of synthetic material will be referred to as plastic or fiber containers for purposes of this subsection (4)(k). Plastic or fiber containers are articles that can be, or are, used to hold other things within themselves and that are made of synthetically produced ethylene derivatives, resins, waxes, adhesives, or polymers or by synthesis of fiber materials with adhesives, polymers, waxes, resins, or other materials. Plastic or fiber containers include containers made of paper, pasteboard, or cardboard in which the container materials consist of fibrous substances synthesized with other materials. Synthetic material is material that is produced by synthesis, which is the process of making or building up by a composition or union of simpler parts or elements as distinguished from the process of extraction or refinement. Plastic or fiber containers include only those containers that are sold with, and that contain, another product or products otherwise subject to litter tax, or containers that are produced so that they can later contain and be sold with another product or products otherwise subject to litter tax. Plastic or fiber containers do not include containers that are produced to be sold at retail as empty reusable containers.

(l) **Cleaning agents.** Cleaning agents are all soaps, detergents, solvents, or other cleansing substances used for cleaning buildings, places, persons, animals, or other things. Cleaning agents include packaged products and products sold in bulk form, as well as products sold in recyclable containers.

(m) **Toiletries.** Toiletries are all substances such as soap, powder, shampoo, cologne, perfume, cosmetics, toothpaste, and the like, used in connection with personal dressing or grooming.

(n) **Nondrug drugstore sundry products.** Nondrug drugstore sundry products are all products sold by persons in the business of selling drugs, except: Drugs, building materials, clothing, furniture, and appliances. For purposes of this section, "drug" has the same meaning as defined in RCW 82.08.0281.

(5) **Exemptions.** This subsection provides information about products listed under subsection (4) of this section that are exempt from litter tax as provided by RCW 82.19.050:

(a) **Products for use and consumption out-of-state.** The manufacture or sale of products for use and consumption outside the state;

(b) **Agricultural products exempt from B&O tax.** The value of products or gross proceeds of the sales by farmers exempt from tax under RCW 82.04.330;

(c) **Certain wholesale sales by qualified grocery distribution cooperatives.** The sale of products for resale by a qualified grocery distribution cooperative to customer-owners of the grocery distribution cooperative. For the purposes of this section, "qualified grocery distribution cooperative" and "customer-owner" have the meanings given in RCW 82.04.298;

(d) **Food or beverages sold for indoor consumption.** The sale of food or beverages by retailers that are sold solely for immediate consumption indoors at the seller's place of business or at a deck or patio at the seller's place of business, or indoors at an eating area that is contiguous to the seller's place of business; or

(e) **Certain retail sales by caterers.** Effective July 24, 2005, the sale of prepared food or beverages by caterers where the food or beverages are to be served for immediate consumption in or on individual nonsingle use containers at premises occupied or controlled by the customer. For the purposes of this section, "prepared food" has the same meaning as provided in RCW 82.08.0293. "Nonsingle use container" and "caterer" have the meanings given in RCW 82.19.050.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and chapter 82.19 RCW. WSR 06-17-187, § 458-20-243, filed 8/23/06, effective 9/23/06. Statutory Authority: RCW 82.32.300. WSR 83-08-026 (Order ET 83-1), § 458-20-243, filed 3/30/83; Order ET 71-2, § 458-20-243, filed 10/27/71.]

WAC 458-20-244 Food and food ingredients. (1) **Introduction.**

(a) **What is the purpose of this section?** This section, WAC 458-20-244, provides guidelines for determining if food or food ingredients qualify for the retail sales tax and use tax exemptions under RCW 82.08.0293 and 82.12.0293 (collectively referred to in this section as the "exemptions").

There is no corresponding business and occupation (B&O) tax exemption. Even if a sale of food or food ingredients is exempt from retail sales tax or use tax under the exemptions, gross proceeds from sales of food or food ingredients remain subject to the retailing B&O tax.

(b) **What other sections might apply?** The following sections may contain additional relevant information:

- WAC 458-20-119, Sales of meals;
- WAC 458-20-124, Restaurants, cocktail bars, taverns and similar businesses;
- WAC 458-20-12401, Special stadium sales and use tax;
- WAC 458-20-166, Hotels, motels, boarding houses, rooming houses, resorts, summer camps, trailer camps, etc.;
- WAC 458-20-167, Education institutions, school districts, student organizations, and private schools;
- WAC 458-20-168, Hospitals, medical care facilities, and adult family homes;
- WAC 458-20-169, Nonprofit organizations; and
- WAC 458-20-229, Refunds.

(2) **What qualifies for the exemptions?**

(a) **In general.** The exemptions apply to food and food ingredients. "Food and food ingredients" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.

(b) **Items not used solely for ingestion or chewing.** Items that are commonly ingested or chewed by humans for their taste or nutritional value but which may also be used for other purposes are generally treated as food or food ingredients. For example, pumpkins are presumed to be a food or food ingredient unless the pumpkin is sold painted or is otherwise clearly for decorative purposes rather than consumption. This is true even though the purchaser may use an undecorated pumpkin for carving and display rather than for eating.

(3) **What does not qualify for the exemptions?** The exemptions do not apply to the following items, which are not considered "food or food ingredients" or which are otherwise specifically excluded from the exemptions:

(a) **Items sold for medical or hygiene purposes.** Items commonly used for medical or hygiene purposes, such as cough drops, breath sprays, toothpaste, etc., are not ingested for taste or nutrition and are not considered a food or food ingredient. In contrast, breath mints are commonly ingested for taste and are considered a food or food ingredient.

(b) **Bulk sales of ice.** Ice sold in bags, containers, or units of greater than ten pounds and blocks of ice of any weight are not considered a food or food ingredient. Ice sold in cubed, shaved, or crushed form in packages or quantities of ten pounds or less is considered a food or food ingredient. Refer to WAC 458-20-120, Sales of ice, for additional guidance on the sale of ice.

(c) **Alcoholic beverages.** Alcoholic beverages are excluded from the definition of food and food ingredients. "Alcoholic beverages" means beverages that are suitable for human consumption and contain one-half of one percent or more of alcohol by volume.

(d) **Tobacco.** Tobacco is excluded from the definition of food and food ingredients. "Tobacco" includes cigarettes, cigars, chewing or pipe tobacco, or any other items that contain tobacco.

(e) **Candy.** Effective June 1, 2010, candy was excluded from the exemptions and retail sales tax was imposed on sales of candy. See chapter 23, Laws of 2010, sp. sess. Sales of

candy again became exempt effective December 2, 2010. See chapter 2, Laws of 2011.

(i) "Candy" means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces.

(ii) "Candy" does not include any preparation containing flour and does not require refrigeration.

(iii) For a list of products and whether they meet the definition of candy, refer to the department's internet site at http://dor.wa.gov/. If the product in question is not listed on the internet site write the department, including a label or copy of label for the product, for a ruling at:

Taxpayer Services
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478

(f) **Bottled water.** Effective June 1, 2010, bottled water was excluded from the exemptions and retail sales tax was due on sales of bottled water. See chapter 23, Laws of 2010, sp. sess. Sales of bottled water again became exempt effective December 2, 2010. See chapter 2, Laws of 2011.

(i) "Bottled water" means water that is placed in a sealed container or package for human consumption.

(ii) Bottled water is calorie free and does not contain sweeteners or other additives except that it may contain:

(A) Antimicrobial agents;

(B) Fluoride;

(C) Carbonation;

(D) Vitamins, minerals, and electrolytes;

(E) Oxygen;

(F) Preservatives; and

(G) Only those flavors, extracts, or essences derived from a spice or fruit.

(iii) "Bottled water" includes water that is delivered to the buyer in a reusable container that is not sold with the water.

(iv) See subsection (8) of this section for limited exceptions to the tax on bottled water.

(g) **Soft drinks.** Soft drinks are excluded from the exemptions. "Soft drinks" means any nonalcoholic beverage that contains natural or artificial sweeteners, except beverages that contain:

• Milk or milk products;

• Soy, rice, or similar milk substitutes; or

• More than fifty percent by volume of vegetable or fruit juice.

For example, sweetened sports beverages are considered "soft drinks," but a sweetened soy beverage is a food or food ingredient.

Beverage mixes that are not sold in liquid form are not soft drinks even though they are intended to be made into a beverage by the customer. Examples include powdered fruit drinks, powdered tea or coffee drinks, and frozen concentrates. These items are a food or food ingredient and are not subject to retail sales tax.

(h) **Dietary supplements.** Dietary supplements are excluded from the exemptions. "Dietary supplement" means any product intended to supplement the diet, other than tobacco, which meets all of the following requirements:

• Contains a vitamin; mineral; herb or other botanical; amino acid; a substance for use by humans to increase total dietary intake; or a concentrate, metabolite, constituent, extract; or combination of any of them;

• Is intended for ingestion in tablet, capsule, powder, soft gel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and

• Is required to be labeled with a Food and Drug Administration "supplement facts" box. If a product is otherwise considered a food or food ingredient and labeled with both a "supplement facts" box and "nutrition facts" box, the product is treated as a food or food ingredient.

Nutrition products formulated to provide balanced nutrition as a sole source of a meal or of the diet are considered a food or food ingredient and not a dietary supplement. Refer to RCW 82.08.925 for information on the sales tax exemption applicable to dietary supplements dispensed under a prescription.

(i) **Prepared food.** Prepared food is excluded from the exemptions. Prepared food generally means heated foods, combined foods, or foods sold with utensils provided by the seller, as described in more detail in subsection (4) of this section. "Prepared food" does not include food sold by a seller whose proper primary North American industry classification system (NAICS) classification is manufacturing in sector 311, except subsector 3118 (bakeries), unless the food is sold with utensils provided by the seller (see subsection (4)(c) of this section).

(4) **What is "prepared food"?** Food or food ingredients are "prepared foods" if any one of the following is true:

(a) **Heated foods.** Food or food ingredients are "prepared foods" if sold in a heated state or are heated by the seller, except bakery items. "Bakery items" include bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas. Food is sold in a heated state or is heated by the seller when the seller provides the food to the customer at a temperature that is higher than the air temperature of the seller's establishment. Food is not sold in a heated state or heated by the seller if the customer, rather than the seller, heats the food in a microwave provided by the seller.

(b) **Combined foods.** Food or food ingredients are "prepared foods" if the item sold consists of two or more foods or food ingredients mixed or combined by the seller for sale as a single item, unless the food or food ingredients are any of the following:

• Bakery items (defined in (a) of this subsection);

• Items that the seller only cuts, repackages, or pasteurizes;

• Items that contain eggs, fish, meat, or poultry, in a raw or undercooked state requiring cooking as recommended by the federal Food and Drug Administration in chapter 3, part 401.11 of *The Food Code*, published by the Food and Drug Administration, as amended or renumbered as of January 1, 2003, so as to prevent foodborne illness; or

• Items sold in an unheated state as a single item at a price that varies based on weight or volume.

(c) **Food sold with utensils provided by the seller.** Food or food ingredients are "prepared foods" if sold with

utensils provided by the seller. Utensils include plates, knives, forks, spoons, glasses, cups, napkins, and straws. A plate does not include a container or packaging used to transport the food.

(i) **Utensils are customarily provided by the seller.** A food or food ingredient is "sold with utensils provided by the seller" if the seller's customary practice for that item is to physically deliver or hand a utensil to the customer with the food or food ingredient as part of the sales transaction. If the food or food ingredient is prepackaged with a utensil, the seller is considered to have physically delivered a utensil to the customer unless the food and utensil are prepackaged together by a food manufacturer classified under sector 311 of the NAICS. Examples of utensils provided by such manufacturers include juice boxes that are packaged with drinking straws, and yogurt or ice cream cups that are packaged with wooden or plastic spoons.

(ii) **Utensils are necessary to receive the food.** Individual food or food ingredient items are "sold with utensils provided by the seller" if a plate, glass, cup, or bowl is necessary to receive the food or food ingredient and the seller makes those utensils available to its customers. For example, items obtained from a self-serve salad bar are sold with utensils provided by the seller, because the customer must use a bowl or plate provided by the seller in order to receive the items.

(iii) **More than seventy-five percent prepared food sales with utensils available.** All food and food ingredients sold at an establishment, including foods prepackaged with a utensil by a manufacturer classified under sector 311 of the NAICS, are "sold with utensils provided by the seller" if the seller makes utensils available to its customers and the seller's gross sales of prepared food under (a), (b), and (c)(ii) of this subsection equal more than seventy-five percent of the seller's gross sales of all food and food ingredients, including prepared food, soft drinks, and dietary supplements.

(A) **Exception for four or more servings.** Even if a seller has more than seventy-five percent prepared food sales, four servings or more of food or food ingredients packaged for sale as a single item and sold for a single price are not "sold with utensils provided by the seller" unless the seller's customary practice for the package is to physically hand or otherwise deliver a utensil to the customer as part of the sales transaction. Whenever available, the number of servings included in a package of food or food ingredients is to be determined based on the manufacturer's product label. If no label is available, the seller must reasonably determine the number of servings.

(B) **Determining total sales of prepared foods.** The seller must determine a single prepared food sales percentage annually for all the seller's establishments in the state based on the prior year of sales. The seller may elect to determine its prepared food sales percentage based either on the prior calendar year or on the prior fiscal year. A seller may not change its elected method for determining its prepared food percentage without the written consent of the department of revenue. The seller must determine its annual prepared food sales percentage as soon as possible after accounting records are available, but in no event later than ninety days after the beginning of the seller's calendar or fiscal year. A seller may make a good faith estimate of its first annual prepared food sales percentage if the seller's records for the prior year are not sufficient to allow the seller to calculate the prepared food sales percentage. The seller must adjust its good faith estimate prospectively if its relative sales of prepared foods in the first ninety days of operation materially depart from the seller's estimate.

(d) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(i) **Example 1.** Fast Cafe sells hot and cold coffee and mixed coffee and mixed milk beverages, cold soft drinks, milk and juice in single-serving containers, sandwiches, whole fruits, cold pasta salad, cookies and other pastries. Fast Cafe prepares the pasta salad on-site. It orders the pastries from a local bakery, including specialty cakes which it sells both as whole cakes and by the slice. It purchases its sandwiches from a local caterer. The sandwiches are delivered by the caterer prewrapped in plastic with condiments and a plastic knife. Fast Cafe makes straws, napkins and cup lids available for all customers by placing them on a self-service stand. In its first full year of operation, Fast Cafe's annual gross sales of all food and food ingredients, including prepared food, soft drinks, and dietary supplements is $100,000. Of this gross sales total, $80,000 is from the sale of hot coffee and hot and cold mixed coffee and milk beverages, all sold in disposable paper or plastic cups with the Fast Cafe logo.

Because more than seventy-five percent of Fast Cafe's total sales of food and food ingredients, including prepared food, soft drinks, and dietary supplements are sales of food or food ingredients that are heated or combined by the seller or sold with a utensil (cups) necessary to receive the food, Fast Cafe has more than seventy-five percent prepared food sales. Because Fast Cafe makes utensils available for its customers, all food and food ingredients sold by Fast Cafe are considered "prepared food," including the cold milk beverages, cookies and pastries, pasta salad, sandwiches and whole fruits. The only exception is the sale of whole specialty cakes. Because a whole cake contains four or more servings, it is not subject to retail sales tax unless Fast Cafe customarily hands a utensil to the customer as part of the sale transaction.

(ii) **Example 2.** Assume the same facts as in Example 1, but that only $60,000 of Fast Cafe's Year 1 gross sales were sales of hot coffee and hot and cold mixed coffee and milk beverages. The remainder of its sales were sales of sandwiches, whole fruits, cookies and other pastries. Under these facts, Fast Cafe does not have more than seventy-five percent prepared food sales. Thus, the items sold by Fast Cafe are taxed as follows:

• Hot coffee and milk beverages are heated by the seller and are also sold by Fast Cafe with a utensil (a paper cup) necessary to receive the food. The hot coffee and milk beverages are "prepared food" for either reason and are subject to retail sales tax.

• Cold mixed milk beverages are a combination of two or more foods or food ingredients and are also sold by Fast Cafe with a utensil (a paper or plastic cup) necessary to receive the food. The cold milk beverages are "prepared food" for either reason and are subject to retail sales tax.

• Cold soft drinks are not exempt and are subject to retail sales tax.

• Sandwiches prepared by the caterer are subject to retail sales tax. Even though the caterer, rather than the seller, combines the ingredients and includes a utensil, Fast Cafe is considered to have provided the utensil because the caterer is not a food manufacturer classified under sector 311 of the NAICS.

• Pasta salad is combined by the seller and is subject to retail sales tax. Note that if the pasta salad was sold by the pound, rather than by servings, it would not be subject to retail sales tax.

• Milk and juice in single serving containers, whole fruit, cookies, pastries, slices of cake, and whole cakes are not subject to retail sales tax unless the seller's customary practice is to hand a utensil to the customer as part of the sales transaction. None of these items are heated by the seller, combined by the seller, or require a plate, glass, cup, or bowl in order to receive the item. Even if Fast Cafe heats the pastries for its customers, the pastries are not subject to retail sales tax.

(iii) **Example 3.** A pizza restaurant sells whole hot pizzas, hot pizza by the slice, and unheated ready-to-bake pizzas. The whole hot pizzas and hot pizza sold by the slice, including delivered pizzas, are "prepared food" because these items are sold in a heated state. If the unheated ready-to-bake pizzas are prepared by the seller, they are "prepared food" because the seller has mixed or combined two or more food ingredients. This is true even though some ingredients in the unheated pizzas are raw or uncooked, because those ingredients do not require cooking to prevent foodborne illness. If the unheated ready-to-bake pizzas are prepared by a manufacturer other than the seller, they will be taxable as "prepared food" only if sold with utensils provided by the seller.

(5) **How are combined sales of taxable and exempt items taxed?**

(a) **Combined sales.** Where two or more distinct and identifiable items of tangible personal property, at least one of which is a food or food ingredient, are sold for one nonitemized price that does not vary based on the selection by the purchaser of items included in the transaction:

• The entire transaction is taxable if the seller's purchase price or sales price of the taxable items is greater than fifty percent of the combined purchase price or sales price; and

• The entire transaction is exempt from retail sales tax if the seller's purchase price or sales price of the taxable items is fifty percent or less of the combined purchase price or sales price.

The seller may make the determination based on either purchase price or sales price, but may not use a combination of the purchase price and sales price.

(b) **Example.**

A combination wine and cheese picnic basket contains four items packaged together: A bottle of wine, a wine opener, single-serving cheeses, and the picnic basket holding these items. The seller's purchase price for the wine, wine-opener, and picnic basket totals ten dollars. The seller's purchase price for the cheeses is two dollars. The seller must collect retail sales taxes on the entire package, because the seller's purchase price for the taxable items (ten dollars) is greater than fifty percent of the combined purchase price (twelve dollars).

(c) **Incidental packaging.** "Distinct and identifiable items" does not include packaging which is immaterial or incidental to the sale of another item or items. For example, a decorative bag sold filled with candy is not the sale of "distinct and identifiable" items where the bag is merely ornamental packaging immaterial in the sale of the candy.

(d) **Free items.** "Distinct and identifiable items" does not include items provided free of charge. An item is only provided free of charge if the seller's sales price does not vary depending on whether the item is included in the sale.

(6) **What are the seller's accounting requirements?** All sales of food and food ingredients at an establishment will be treated as taxable unless the seller separately accounts for sales of exempt and nonexempt food and food ingredients. It is sufficient separation for accounting purposes if cash registers or the like are programmed to identify items that are not tax exempt and to calculate and assess the proper sales tax accordingly.

(7) **Are there any other retail sales tax exemptions that apply?**

(a) **Meals served.** The exemptions apply to food and food ingredients furnished, prepared, or served as meals:

(i) Under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040;

(ii) That are provided to senior citizens, individuals with disabilities, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW; or

(iii) Effective August 1, 2009, RCW 82.08.0293 provides to residents, sixty-two years of age or older, of a qualified low-income senior housing facility by the lessor or operator of the facility. The sale of a meal that is billed to both spouses of a marital community or both domestic partners of a domestic partnership meets the age requirement in this subsection (a)(iii) if at least one of the spouses or domestic partners is at least sixty-two years of age. For purposes of this subsection, "qualified low-income senior housing facility" means a facility:

(A) That meets the definition of a qualified low-income housing project under Title 26 U.S.C. Sec. 42 of the federal Internal Revenue Code, as existing on August 1, 2009;

(B) That has been partially funded under Title 42 U.S.C. Sec. 1485 of the federal Internal Revenue Code; and

(C) For which the lessor or operator has at any time been entitled to claim a federal income tax credit under Title 26 U.S.C. Sec. 42 of the federal Internal Revenue Code.

(b) **Foods exempt under the Supplemental Nutrition Assistance Program (SNAP).** Under RCW 82.08.0297, eligible foods purchased with food benefits under the SNAP or a successor program are exempt from the retail sales tax. This is a separate and broader exemption than the retail sales tax exemption for food and food ingredients under RCW 82.08.-0293. For example, soft drinks, garden seeds, and plants which produce food for the household to eat are "eligible foods" but are not "food or food ingredients." If such items are purchased with food benefits under SNAP or a successor program, they are exempt from the retail sales tax under RCW 82.08.0297, even though the items do not qualify for the exemption under RCW 82.08.0293.

(i) **Use of food benefits combined with other means of payment.** When both food benefits and other means of payment are used in the same sales transaction, for purposes of collecting retail sales taxes, the other means of payment shall

be applied first to items which are food and food ingredients exempt under RCW 82.08.0293. The intent is to apply the benefits and other means of payment in such a way as to provide the greatest possible exemption from retail sales tax.

(ii) **Example.** A customer purchases the following at a grocery store: Meat for three dollars, cereal for three dollars, canned soft drinks for five dollars, and soap for two dollars for a total of thirteen dollars. The customer pays with seven dollars in benefits and six dollars in cash. The cash is applied first to the soap because the soap is neither exempt under RCW 82.08.0293 nor an eligible food under SNAP. The remaining cash (four dollars) is applied first to the meat and the cereal. The food benefits are applied to the balance of the meat and cereal (two dollars) and to the soft drinks (five dollars). Retail sales tax is due only on the soap.

(8) **Exceptions to tax on bottled water.** Effective June 1, 2010, two exemptions to the retail sales and use taxes on bottled water were as described in (a) and (b) of this subsection. Effective December 2, 2010, the retail sales and use taxes on bottled water were repealed. The exemptions are no longer applicable effective December 2, 2010.

(a) **Prescription issued bottled water.** Bottled water prescribed to patients for use in the cure, mitigation, treatment, or prevention of disease or other medical condition and delivered to the buyer in a reusable container that is not sold with the water is exempt provided the buyer provides the seller with a completed buyer's retail sales tax exemption certificate or a streamlined sales tax exemption certificate. A seller must retain a copy of the certificate for their files. Tax will be collected on all other sales of prescribed bottled water. Any buyer that has paid at least twenty-five dollars in state and local sales taxes on purchases of bottled water subject to this exemption may apply for a refund of the collected taxes directly from the department. No refund may be made for tax paid more than four years after the end of the calendar year in which the tax was paid to a seller.

(b) **Potable water not readily available.** Bottled water for human use to persons who do not otherwise have a readily available source of potable water and delivered to the buyer in a reusable container that is not sold with the water is exempt provided the buyer provides the seller with a completed buyer's retail sales tax exemption certificate or a streamlined sales tax exemption certificate. A seller must retain a copy of the certificate for their files. Tax will be collected on all other sales of bottled water. Any buyer that has paid at least twenty-five dollars in state and local sales taxes on purchases of bottled water subject to this exemption may apply for a refund of the collected taxes directly from the department. No refund may be made for tax paid more than four years after the end of the calendar year in which the tax was paid to a seller.

(c) **Forms and additional information are available.** Forms and additional information can be obtained from the department's internet site at http://dor.wa.gov/ or by contacting the department at:

Taxpayer Services
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478
1-800-647-7706

(9) **Vending machine sales.** The exemptions do not apply to sales of food and food ingredients dispensed from vending machines. There are special requirements for reporting sales tax collected on vending machine sales, discussed in (a) of this subsection. "Honor box" sales (sales of snacks or other items from open display trays) are not considered vending machine sales.

(a) **Calculating and reporting retail sales tax collected on vending machine sales.** Vending machine owners do not need to state the retail sales tax amount separately from the selling price. See RCW 82.08.050(5) and 82.08.0293. Instead, vending machine owners must determine the amount of retail sales tax collected on the sale of food or food ingredients by using one of the following methods:

(i) **Food or food ingredients dispensed in a heated state and soft drinks.** For food or food ingredients dispensed from vending machines in a heated state (e.g., hot coffee, soups, tea, and hot chocolate) and vending machine sales of soft drinks, a vending machine owner must calculate the amount of retail sales tax that has been collected ("tax in gross") based on the gross vending machine proceeds. The "tax in gross" is a deduction against the gross amount of both retailing B&O and retail sales. The formula is:

$$\text{gross machine proceeds} - \left(\frac{\text{gross machine proceeds}}{1 + \text{sales tax rate}}\right) = \text{tax in gross}$$

(ii) **All other food or food ingredients.** For all other food and food ingredients dispensed from vending machines, a vending machine owner must calculate the amount of retail sales tax that has been collected ("tax in gross") based on fifty-seven percent of the gross vending machine proceeds. The "tax in gross" is a deduction against the gross amount of both retailing B&O and retail sales. The formula is:

$$(\text{gross machine proceeds} \times .57) \times \text{sales tax rate} = \text{tax in gross}$$

The remaining 43% of the gross vending machine proceeds, less the "tax in gross" amount, is reported as an exempt food sales deduction against retail sales proceeds only calculated as follows:

$$(\text{gross machine proceeds} \times .43) - \text{tax in gross} = \text{exempt food deduction}$$

(b) **Example.** Jane owns a vending machine business with machines in Spokane and Seattle. In each location, she has a vending machine selling candy and water and a second vending machine selling hot cocoa and coffee drinks. Her annual sales for the vending machines and the combined retail sales tax rates for Seattle and Spokane are as follows:

	Coffee Machine (cocoa & coffee)	Candy Machine (candy & water)	Combined Retail Sales Tax Rate
Seattle	$2,500	$10,000	.088
Spokane	$3,000	$6,000	.086

To determine the amount of retail sales tax she collected on the sale of cocoa and coffee (food dispensed in a heated state), Jane calculates the "tax in gross" amount as follows:

$$\text{gross machine proceeds} - \frac{\text{gross machine proceeds}}{(1 + \text{sales tax rate})} = \text{tax in gross}$$

$2,500	-	($2,500/1.088)	=	$202.21	(Seattle coffee machine)
$3,000	-	($3,000/1.086)	=	$237.57	(Spokane coffee machine)
				$439.78	

Thus, for both retailing B&O and retail sales, Jane must report her total gross coffee machine proceeds of $5,500 with a "tax in gross" deduction of $439.78.

To determine the amount of retail sales tax she collected on the sale of candy and water, Jane calculates the "tax in gross" amount as follows:

(gross machine proceeds x .57) x sales tax rate = tax in gross

$10,000 x .57 x .088	=	$501.60	(Seattle candy machine)
$6,000 x .57 x .086	=	$294.12	(Spokane candy machine)
		$795.72	

Thus, for both retailing B&O and retail sales, Jane must report her total gross candy machine proceeds of $16,000 with a "tax in gross" deduction of $795.72.

Jane must also report an exempt food sales deduction representing the remaining 43% of the gross candy machine proceeds.

(43% x gross machine proceeds) - tax in gross = exempt food deduction
(.43 x $16,000) - $795.72 = $6,084.28

Jane reports the exempt food sales deduction only against the gross amount of her retail sales. The deduction does not apply to retailing B&O.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.08.0293 and 82.12.0293. WSR 12-01-027, § 458-20-244, filed 12/12/11, effective 1/12/12; WSR 10-21-010, § 458-20-244, filed 10/7/10, effective 11/7/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 07-24-038, § 458-20-244, filed 11/30/07, effective 12/31/07; WSR 07-11-066, § 458-20-244, filed 5/14/07, effective 6/14/07; WSR 03-24-031, § 458-20-244, filed 11/25/03, effective 1/1/04. Statutory Authority: RCW 82.32.300. WSR 88-15-066 (Order 88-4), § 458-20-244, filed 7/19/88; WSR 87-19-139 (Order 87-6), § 458-20-244, filed 9/22/87; WSR 86-21-085 (Order ET 86-18), § 458-20-244, filed 10/17/86; WSR 86-02-039 (Order ET 85-8), § 458-20-244, filed 12/31/85; WSR 83-17-099 (Order ET 83-6), § 458-20-244, filed 8/23/83; WSR 82-16-061 (Order ET 82-7), § 458-20-244, filed 7/30/82. Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 78-05-041 (Order ET 78-1), § 458-20-244 (Rule 244), filed 4/21/78, effective 7/1/78.]

WAC 458-20-245 Telephone business, telephone service. Under the provisions of various sections of chapter 3, Laws of 1983 2nd ex. sess., the retail sales tax is extended to "telephone service." The effective date is July 1, 1983 and the tax applies to all sales of "telephone service" billed on or after that date, whether or not such service was rendered before that date.

Persons engaged in the "telephone business" or rendering "telephone service" are taxable under the retailing of wholesaling classification of the business and occupation tax, whichever is applicable, on total gross revenues, as described herein. Such persons who are taxable under retailing must also collect retail sales tax from consumers, subject to certain exemptions explained more fully herein.

Definitions

As used herein: The term "telephone service" includes competitive telephone service and network telephone service.

The term "telephone business" means the business of providing network telephone service and includes cooperative or farmers line telephone companies or associations operating an exchange.

The term "competitive telephone service" means the providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as installation, repair, or maintenance services, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW.

The term "network telephone service" means the providing by any person of access to a local telephone network, switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, over a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes interstate service, including toll service, originating from or received on telecommunications equipment or apparatus in this state if the charge for the service is billed to a person in this state. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, nor the providing of broadcast services by radio or television stations.

The term "residential customer" means an individual subscribing to a residential class of telephone service.

The term "toll service" means the charge for services outside the local telephone network except customer access line charges for access to a toll calling network.

The term "telephone company" means a person engaged in the telephone business or rendering telephone service.

Business and Occupation Tax

Retailing and wholesaling. Persons making retail sales of telephone service to consumers are taxable upon the gross proceeds of sales under the retailing classification. Persons making sales of telephone services for resale in the regular course of business are taxable upon the gross proceeds of sales under the wholesaling classification. The tax shall apply to the gross income from all sales of competitive telephone service and network telephone service, as described more fully below.

For purposes of applying the business and occupation tax to telephone service, a sale takes place in Washington when a call originates from or is received on any telephone or other telecommunications equipment, instrument, or apparatus in Washington and the cost for the telephone service is charged to that equipment, instrument, or apparatus, regardless of where the actual billing invoice is sent.

The business and occupation tax shall apply to the gross proceeds of sales of competitive telephone service to customers. The tax shall be measured by total gross billings to such customers. The business and occupation tax shall also apply to the gross proceeds of sales of network telephone service, other than interstate and intrastate toll service, measured by total gross billings to customers. The tax as applied to interstate and intrastate service, including toll service, shall be determined under the apportionment guidelines set forth in the following paragraph.

With respect to interstate and intrastate toll service, the business and occupation tax shall apply to the income received from the interstate or intrastate division of revenue pool. The income subject to tax shall include amounts received for expenses incurred in furnishing the interstate or intrastate services plus any amounts received as return. Persons who are not members of the interstate or intrastate division of revenue pool but who receive shared interstate or intrastate revenues through a member of the division of revenue pool, are liable for business and occupation tax on the income received.

Persons engaged in the telephone business or rendering telephone service shall report on the combined excise tax return their total gross income received from billings to customers under column 2 of the appropriate classification line on the return (wholesaling or retailing). An adjustment may be made under column 3 of the excise tax return for revenues received from providing interstate and intrastate toll service, as described in the previous paragraph. On the reverse side of the return it should be explained that such adjustment was the result of income received from the interstate or intrastate division of revenue pool. The reported gross income under column 2 shall be the same under the retailing business and occupation tax and retail sales tax classifications, with appropriate adjustments and deductions noted under column 3.

Service. Persons engaged in the telephone business or rendering telephone service are taxable under the service and other activities classification on their income from services which are not included within the definition of the terms "sale at retail" in RCW 82.04.050 or "competitive telephone service" and "network telephone service," as defined herein. Included under this classification are, among others, gross income from the sale of advertising in telephone directories, gross income from charges made for processing NSF checks, and any other miscellaneous income.

Retail Sales Tax

The retail sales tax applies to all sales of competitive telephone service provided to both residential and business (nonresidential) customers. The retail sales tax also applies to all sales of network telephone service provided to business (nonresidential) customers.

The retail sales tax applies upon sales to a telephone company of all tangible personal property used as a consumer in providing telephone service. A consumer is liable for retail sales tax on all telephone service, as described herein, in situations where the tax was not paid to a telephone company as a result of a billing or other invoice rendered by that company.

The retail sales tax must be collected and accounted for in every case where retailing business and occupation tax is due as outlined herein, except for the following. The retail sales tax shall not apply to sales of network telephone service, other than toll service, provided to residential customers nor to sales of network telephone service paid for by inserting coins in coin-operated telephones.

The retail sales tax does not apply to sales of network telephone service, other than toll service, provided to residential customers.

The retail sales tax does not apply to sales of network telephone service which is paid for by inserting coins in coin-operated telephones. However, the retail sales tax does apply if the network telephone service is provided through a coin-operated telephone, the service originates from or is received on equipment in this state, and the charge for the service is billed to a telephone or other telecommunications equipment, instrument, or apparatus which is located in Washington.

The sales tax does not apply to network telephone service which is merely billed to a telephone or other telecommunications equipment, instrument, or apparatus whose situs is in Washington if the service neither originated from nor was received on equipment in this state.

Use Tax

The use tax applies to telephone or other telecommunications equipment, instrument, or apparatus purchased at retail and upon which the sales tax has not been paid. (See WAC 458-20-178.) A telephone company is liable for use tax on all tangible personal property purchased at retail and upon which the sales tax has not been paid. A telephone company is not liable for use tax on its own use as a consumer of its own network telephone service.

Special Situations

Persons making sales of telephone service for resale in the regular course of business must follow the provisions of WAC 458-20-102 concerning resale certificates.

The local retail sales tax applies to sales of telephone services as described herein. (See WAC 458-20-145.)

Persons engaged in telephone business or rendering telephone service are not taxable under the public utility tax, except with respect to gross income from engaging in telegraph or any other public service business as defined in WAC 458-20-179.

All retail telephone services including sales of equipment are taxable at the same state retail sales tax rate of 6.5 percent, regardless that such sales may be made in a border county. (See WAC 458-20-237.)

[Statutory Authority: RCW 82.32.300. WSR 83-17-099 (Order ET 83-6), § 458-20-245, filed 8/23/83.]

WAC 458-20-246 Sales to or through a direct seller's representative. (1) **Introduction.** The legislature passed chapter 23, Laws of 2010, (2ESSB 6143), which reaffirms and clarifies the legislature's intent in establishing the direct seller's exemption. The legislation also repeals the exemption provided by RCW 82.04.423 effective May 1, 2010.

Through April 30, 2010, RCW 82.04.423 provides an exemption from the business and occupation (B&O) tax on wholesale and retail sales by a person who does not own or lease real property in the state, is not incorporated in the state, does not regularly maintain inventory in this state, and makes sales in this state exclusively to or through a "direct seller's representative." This section explains the statutory elements that must be satisfied in order to be eligible to take this exemption.

(2) **Federal law background.** The statutory language describing the direct seller's representative is substantially the same language as contained in the federal Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982, PL 97-248. See 26 U.S.C. 3508. The federal law designates types of statutory nonemployees for Social Security tax purposes. In the federal law, the "direct seller's representative," as used in this section and under RCW 82.04.423, is designated as the direct seller. The purpose of the direct seller provision in the federal tax law is to provide that a direct seller is not an employee of the direct selling company, thereby relieving the direct selling company of a tax duty. Under the federal law, the direct selling company is a business that sells consumer products using a direct seller who either purchases from the direct selling company and resells the consumer products or sells for or solicits sales of consumer products on behalf of the direct selling company. Retail sales are limited to those occurring in the home or in a temporary retail establishment, such as a vendor booth at a fair.

(3) **Washington's direct seller's exemption.** The 1983 Washington state legislature used the same criteria to delineate, for state tax purposes, the necessary relationship between a direct seller and a direct seller's representative. In this section "direct seller" refers to the selling company, and the "direct seller's representative" refers to the person who purchases consumer products from the direct seller and resells the products, or sells for or solicits sales on behalf of the direct seller.

The exemption provided by RCW 82.04.423 is limited to the B&O tax on wholesaling or retailing imposed in chapter 82.04 RCW (Business and occupation tax). A direct seller is subject to other Washington state tax obligations, including, but not limited to, the sales tax under chapter 82.08 RCW, the use tax under chapter 82.12 RCW, and the litter tax imposed by chapter 82.19 RCW.

(4) **Who may take the exemption.** The B&O tax exemption may be taken by a person (the direct seller) selling consumer products using the services of a representative who sells at retail or solicits the sales for retail of only consumer products as outlined in statute. There are ten elements in the statute that must be present in order for a person to qualify for the exemption for Washington sales. The person must satisfy each element to be eligible for the exemption. The taxpayer must retain sufficient records and documentation to substantiate that each of the ten required elements has been satisfied. RCW 82.32.070.

(a) The four statutory elements describing the direct seller. RCW 82.04.423 provides that a direct seller:

(i) Cannot own or lease real property within this state. For example, if the direct seller's representative is selling vitamins door to door for the direct seller, but the direct seller owns or leases a coffee roasting factory in the state, the direct seller is not eligible for this exemption; and

(ii) Cannot regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business. This provision does not, however, prohibit the direct seller from holding title to the consumer product in the state. For instance, the direct seller owns the consumer products sold by the direct seller's representative when the representative is making retail sales for the direct seller. However, the personal property must not be a stock of goods in the state that is for sale in the ordinary course of business. The phrase "sale in the ordinary course of business" means sales that are arm's length and that are routine and reasonably expected to occur from time to time; and

(iii) Is not a corporation incorporated under the laws of this state; and

(iv) Makes sales in this state exclusively to or through a direct seller's representative. This provision of the statute describes how sales by the direct seller may be made. To be eligible for the exemption, all sales by the direct seller in this state must be made to or through a direct seller's representative. The direct seller may not claim any B&O tax exemption under RCW 82.04.423 if it has made sales in this state using means other than a direct seller's representative. This requirement does not, however, limit the methods the direct seller's representative may use to sell these products. For example, the representative can use the mail or the internet, if all other conditions of the exemption are met. The direct seller's use of mail order or internet, separate from the representative's use, may or may not be found to be "sales in this state" depending on the facts of the situation. If the direct seller's use of methods other than to or through a direct seller's representative constitutes "sales in this state," the exemption is lost. Additionally, a direct seller does not become ineligible for the exemption due to action by the direct seller's representative that is in violation of the statute, such as selling a product to

a permanent retail establishment, if the department of revenue (department) finds by a review of the facts that the ineligible sales are irregular, prohibited by the direct seller, and rare.

If a seller uses a direct seller's representative to sell "consumer products" in Washington, and also has a branch office, local outlet, or other local place of business, or is represented by any other type of selling employee, selling agent, or selling representative, no portion of the sales are exempt from B&O tax under RCW 82.04.423. For example, a person who uses representatives to sell consumer products door to door and who also sells consumer products through retail outlets is not eligible for the exemption. The phrase "sales exclusively to … a direct seller's representative" describes wholesale sales made by the direct seller to a representative. The phrase "sales exclusively … through a direct seller's representative" describes retail sales made by the direct seller to the consumer. The B&O tax exemption provided by RCW 82.04.423 is limited to these types of wholesale and retail sales.

(b) The six statutory elements describing the direct seller's representative. RCW 82.04.423 provides the following elements that relate to the direct seller's representative:

(i) How the sale is made. A direct seller's representative is "a person who buys only consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells at retail, or solicits the sale at retail of, only consumer products in the home or otherwise than in a permanent retail establishment." The direct seller sells the consumer product using the services of a representative in one of two ways, which are described by two clauses in the statute. The first clause ("a person who buys … for resale" from the direct seller) describes a wholesale sale by the direct seller. The second clause (a person who "sells or solicits the sale" for the direct seller) describes a retail sale by the direct seller.

(A) A transaction is on a "buy-sell basis" if the direct seller's representative performing the selling or soliciting services is entitled to retain part or all of the difference between the price at which the direct seller's representative purchases the consumer product and the price at which the direct seller's representative sells the product. The part retained is remuneration from the direct seller for the selling or soliciting services performed by the representative. A transaction is on a "deposit-commission basis" if the direct seller's representative performing the selling or soliciting services is entitled to retain part or all of a purchase deposit paid in connection with the transaction. The part retained is remuneration from the direct seller for the selling or soliciting services performed by the representative.

(B) The location where the retail sale of the consumer product may take place is specifically delineated by the terms of the statute. The direct seller may take the exemption only if the retail sale of the consumer product takes place either in the home or otherwise than in a permanent retail establishment. The resale of the products sold by the direct seller at wholesale is restricted by the statute through the following language: "For resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment." This restrictive phrase requires the product be sold at retail either in the home or in a nonpermanent retail establishment. Regardless of to whom the representative sells, the retail sale of the consumer product must take place either in the buyer's home or in a location that is not a permanent retail establishment. Examples of permanent retail establishments are grocery stores, hardware stores, newsstands, restaurants, department stores, and drug stores. Also considered as permanent retail establishments are amusement parks and sports arenas, as well as vendor areas and vendor carts in these facilities if the vendors are operating under an agreement to do business on a regular basis. Persons selling at temporary venues, such as a county fair or a trade show, are not considered to be selling at a permanent retail establishment.

(ii) What product the direct seller must be selling. The direct seller must be selling only a consumer product, the sale of which meets the definition of "sale at retail," used for personal, family, household, or other nonbusiness purposes. "Consumer product" includes, but is not limited to, cosmetics, cleaners and soaps, nutritional supplements and vitamins, food products, clothing, and household goods, purchased for use or consumption. The term does not include commercial equipment, industrial use products, and the like, including component parts. However, if a consumer product also has a business use, it remains a "consumer product," notwithstanding that the same type of product might be distributed by other unrelated persons to be used for commercial, industrial, or manufacturing purposes. For example, desktop computers are used extensively in the home as well as in businesses, yet they are a consumer product when sold for nonbusiness purposes.

(iii) How the person is paid. The statute requires that "substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked." The remuneration must be for the performance of sales and solicitation services and it must be based on measurable output. Remuneration based on hours does not qualify. A fixed salary or fixed compensation, without regard to the amount of services rendered, does not qualify.

Remuneration need not be in cash, and it may be the consumer product itself or other property, such as a car.

(iv) How the contract is memorialized. The services by the person must be performed pursuant to a written contract between the representative and the direct seller. The requirement that the contract be in writing is a specific statutory condition of RCW 82.04.423.

(v) What the contract must contain. The sale and solicitation services must be the subject of the contract. The contract must provide that the representative will not be treated as an employee of the direct seller for federal tax purposes.

(vi) The status of the representative. A person satisfying the requirements of the statute should also be a statutory nonemployee under federal law, since the requirements of RCW 82.04.423 and 26 U.S.C. 3508 are the same. The direct seller must maintain proof the representative is a statutory nonemployee.

(5) **Tax liability of the direct seller's representative.** The statute provides no tax exemption with regard to the "direct seller's representative." The direct seller's representative is subject to the service and other activities B&O tax on

commission compensation earned for services described in RCW 82.04.423. Likewise, a direct seller's representative who buys consumer products for resale and does in fact resell the products is subject to either the wholesaling or retailing B&O tax upon the gross proceeds of these sales. Retail sales tax must be collected and remitted to the department on retail sales unless specifically exempt by law. For example, certain food products are statutorily exempt from retail sales tax (see WAC 458-20-244).

(a) Subject to the agreement of the representatives, the direct seller may elect to remit the B&O taxes of the representatives and collect and remit retail sales tax as agents of the representatives through an agreement with the department. The direct seller's representative should obtain a tax registration endorsement with the department unless otherwise exempt under RCW 82.32.045. (See also WAC 458-20-101 on tax registration.)

(b) Every person who engages in this state in the business of acting as a direct seller's representative for unregistered principals, and who receives compensation by reason of sales of consumer products of such principals for use in this state, is required to collect the use tax from purchasers, and remit the same to the department, in the manner and to the extent set forth in WAC 458-20-221, Collection of use tax by retailers and selling agents.

(6) **The retail sales and/or use tax reporting responsibilities of the direct seller.** A direct seller is required to collect and remit the tax imposed by chapter 82.08 RCW (Retail sales tax) or 82.12 RCW (Use tax) if the seller regularly solicits or makes retail sales of "consumer products" in this state through a "direct seller's representative" even though the sales are exempt from B&O tax pursuant to RCW 82.04.423.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and 82.04.423. WSR 10-21-011, § 458-20-246, filed 10/7/10, effective 11/7/10. Statutory Authority: RCW 82.32.300. WSR 99-24-007, § 458-20-246, filed 11/19/99, effective 12/31/99; WSR 84-24-028 (Order 84-3), § 458-20-246, filed 11/30/84.]

WAC 458-20-247 Trade-ins, selling price, sellers' tax measures. (1) **Introduction.** This section explains the measure of tax when a trade-in is included in the sale of tangible personal property. It explains how and when the retail sales or use tax exclusions apply and the recordkeeping requirements needed to document the transactions.

The value of "trade-in property of like kind" is excluded from the definitions of "selling price" in RCW 82.08.010 and the definition of "value of the article used" in RCW 82.12.010.

Unless otherwise stated, "tax," "taxable," and "nontaxable," as used in this section, refer to retail sales or use tax only. The terms "trade-in," "traded in," and "property traded in" have their ordinary and common meaning. The terms refer to property applied, in whole or in part, toward the selling price of property of like kind. Readers are advised that the fact that sales and purchase transactions might be characterized as a "like kind" under Section 1031 of the Internal Revenue Code does not control for the purpose of the trade-in exclusion in RCW 82.08.010 and 82.12.010.

(a) **Examples.** This section contains examples which identify a number of facts and then state a conclusion. The examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(b) **References to related sections.** The department of revenue (department) has adopted other sections that readers may want to refer to.

(i) WAC 458-20-106 Casual or isolated sales—Business reorganizations;

(ii) WAC 458-20-178 Use tax;

(iii) WAC 458-20-208 Exemptions for wholesale sales of new motor vehicles between new car dealers and for accommodation sales;

(iv) WAC 458-20-211 Leases or rentals of tangible personal property, bailments; and

(v) WAC 458-20-272 Tire fee—Core deposits or credits.

(2) **General nature of the trade-in exclusion.** RCW 82.08.010 and 82.12.010 define the terms "selling price" and "value of the article used," in pertinent part, to mean the total amount of consideration, except separately stated trade-in property of like kind, including cash, credit, or tangible personal property, expressed in terms of money paid or delivered by a buyer to a seller. As a result, the buyer of tangible personal property is entitled to reduce the measure of retail sales or use tax if:

- The buyer delivers the trade-in property to the seller;
- The trade-in property is delivered as consideration for the purchase; and
- The property traded in is "property of a like kind."

(a) The trade-in exclusion applies to all trade-in property of like kind delivered by a buyer to a seller as consideration for a purchase. Thus, if a buyer trades in two motor vehicles when purchasing one motor vehicle, the buyer is entitled to a reduction in the measure of retail sales tax based on the value of both trade-in vehicles.

(b) The trade-in exclusion is limited to retail sales and use taxes. There is no comparable exclusion for business and occupation (B&O) tax. (See definition of "gross proceeds of sales" in RCW 82.04.070 and of "value proceeding or accruing" in RCW 82.04.090.) Sales tax need not have been paid on the item being traded in to be eligible for the trade-in exclusion.

(3) **Buyer to deliver trade-in property to seller.** The buyer must deliver trade-in property to the "seller."

(a) RCW 82.08.010 defines "seller" as "every person …making sales at retail or retail sales to a buyer, purchaser, or consumer, whether as agent, broker, or principal." There is no requirement that the seller be the owner of the property being sold to the buyer. RCW 82.08.010 anticipates and includes situations where a "seller" is selling property that he or she does not actually own, such as in consignment sales transactions.

For example, Broker enters into a consignment sale contract with Susan Smith to sell her Boat A. John Doe contacts Broker expressing interest in purchasing Boat A, provided his Boat B is accepted as a trade-in on the purchase. John Doe executes a purchase agreement with Broker which specifically identifies both Boat A being purchased and the trade-in. Broker accepts delivery and ownership of Boat B and places Boat B into Broker's own inventory. In turn Broker arranges delivery of the craft purchased to John. The buyer (John) has delivered the trade-in property (Boat B) to the seller (Broker). There is no requirement that Broker purchase Boat A from

Susan (thereby becoming the owner) prior to selling Boat A to John and accepting Boat B as trade-in property because, as a broker, Broker is a seller under RCW 82.08.010.

(b) The trade-in exclusion does not apply to transactions where a seller transfers tangible personal property in or out of its own inventory in exchange for other property it also owns.

(4) **Trade-in as consideration.** Property traded in must be consideration delivered by the buyer to the seller. The sales documents must identify the tangible personal property being purchased and the trade-in property being delivered to the seller. This does not require simultaneous transfers of the property being traded in and the property being purchased, but it does require that the delivery of the trade-in and the purchase be components of a single transaction. Sales documents, executed not later than the date the trade-in property is delivered to the seller, must identify the property purchased and the trade-in property as more fully explained in subsection (8) of this section.

Examples:

(a) Jane Doe offers to purchase Sailboat A from Dealer, if Dealer accepts her Sailboat B as a trade-in on the purchase. Dealer declines to accept ownership of Jane's Sailboat B, but instead offers to sell Sailboat B on a consignment basis with the net proceeds to be applied toward the purchase if Sailboat B is sold within three months. Jane accepts and Sailboat B is sold within the three-month period, and the net proceeds are applied to Jane's purchase of Sailboat A.

Jane is not entitled to the trade-in exclusion. An agreement to sell property on consignment does not constitute consideration "paid or delivered by a buyer to a seller," even if the subsequent proceeds are applied to the purchase price.

(b) Sally Jones decides to upgrade from her existing motor home to a new, larger motor home. The salesperson at a local RV dealership explains that while the dealership does not currently have on hand a motor home meeting Sally's needs, it can order one for her from the manufacturer. The salesperson also explains that if Sally trades in her motor home at the time she enters into the purchase contract, the dealership will accept the motor home as a down payment toward the purchase of the new motor home. Sally signs the purchase contract, the dealership orders the new motor home, and Sally delivers her motor home to the RV dealership (who accepts ownership of the motor home). Sally's new motor home is delivered to her eight months later.

Sally is entitled to the trade-in exclusion because the motor home was delivered to the RV dealership as consideration paid toward her purchase of the new motor home.

(c) Mr. B and Coastal Brokers enter into a consignment sales agreement. Under the terms of this agreement, Coastal Brokers will sell Mr. B's sailboat on a consignment basis and at the time of sale place the proceeds due Mr. B into a trust account for use toward a possible purchase of a yacht by Mr. B. Mr. B's sailboat is sold and the proceeds due to Mr. B placed in the trust account. Mr. B subsequently purchases a yacht from Coastal Brokers, and the trust account proceeds are applied to the purchase price of the yacht.

Mr. B is not entitled to the trade-in exclusion. The delivery of Mr. B's sailboat to Coastal Brokers and Mr. B's purchase of the yacht are not components of a single transaction. In addition, Mr. B's delivery of his sailboat for consignment sale by Coastal Brokers does not constitute consideration "paid or delivered by a buyer to a seller," even if proceeds from the sale are applied to the purchase of the yacht.

(d) John Smith agrees to purchase Travel Trailer A from Dealer if Dealer accepts John's Travel Trailer B as a trade-in on the purchase. Dealer accepts ownership of Travel Trailer B at an agreed-upon value, on the condition that John pay Dealer a monthly fee to reimburse Dealer for financing costs associated with Travel Trailer B. This fee is to be paid for a period of four months or until Dealer sells Travel Trailer B, whichever is shorter. John has no further responsibility with respect to Travel Trailer B after this period.

John is entitled to the trade-in exclusion because he delivered Travel Trailer B to Dealer as consideration paid toward Travel Trailer A. The fees John paid to reimburse Dealer for financing costs associated with the trade-in property do not change the nature of the transaction, though for the purposes of the trade-in exclusion they do reduce the originally agreed-upon value of the trade-in property.

(5) **Property of like kind.** The term "property of like kind" means articles of tangible personal property of the same generic classification. It refers to the class and kind of property, not to its grade or quality. The term includes all property within a general classification rather than within a specific category in the classification. Thus, as examples, it means furniture for furniture, motor vehicles for motor vehicles, licensed recreational land vehicles for licensed recreational land vehicles, appliances for appliances, auto parts for auto parts, and audio/video equipment for audio/video equipment. These general classifications are determined by the nature of the property and its function or use. It may be that some kinds of property fit within more than one general classification. For example, a motor home is both a motor vehicle and a licensed recreational land vehicle. Thus, for purposes of the trade-in exclusion, a motor home may be taken as a trade-in on a travel trailer, truck, camper, or a truck with camper attached, and vice versa. Similarly, a travel trailer may be taken as trade-in on a motor home even though a travel trailer is not a motor vehicle; both are licensed recreational land vehicles. Conversely, a utility trailer may not be taken as trade-in on a travel trailer because a utility trailer is neither a motor vehicle nor a licensed recreational land vehicle. Likewise a car may not be taken as trade-in on a camper and vice versa.

It is not required that a car be traded in exclusively on another car in order to get the trade-in reduction of the tax measure. It could, as well, be traded in as part payment for a truck, motorcycle, motor home, or any other qualifying motor vehicle. Similarly, a sofa for a recliner chair, a pistol for a rifle, a sailboat for a motorboat, or a gold chain for a wrist watch are the kinds of generic trade-in transfers which would qualify. The exclusion of the value of property traded in, however, does not include such things as a motorcycle for a boat, a diamond ring for a television set, a battery for lumber, computer hardware for computer software, or farm machinery (including tractors and self-propelled combines) for a car.

(6) **Value of property traded in.** The seller and buyer establish the value of property traded in. The parties may not overstate the value of the trade-in property in order to artificially lower the amount of retail sales or use tax due. Absent proof of a higher value, the property traded in must be deter-

mined by the fair market value of similar property of like quality, quantity, and age, sold or traded under comparable conditions.

(7) **Trade-in value exceeds selling price.** If the trade-in value exceeds the selling price of the item sold, the selling price of the item being purchased should be used as the trade-in value. For example, a Washington resident purchases a car with a value of $15,000 and trades in a car with a fair market value of $17,000. The net due to the purchaser is $2,000. When the seller completes the excise tax return, he or she should report a trade-in value of $15,000 and not $17,000 because the trade-in value is capped at selling price of the item being purchased.

(8) **Recordkeeping.** RCW 82.32.070 requires every person liable for any tax to keep and preserve records from which tax liability can be determined. To substantiate a claim for the trade-in exclusion, the sales agreement and/or invoice must identify both the property being purchased and the trade-in property. Such identification includes the model number, serial number, year of manufacture, and other information as appropriate. The sales agreement and/or invoice must also specify the selling price and the value of the trade-in property.

A copy of the sales agreement or invoice must be retained as a part of the seller's sales records. The following is an example of an invoice providing the necessary information regarding a sales transaction with trade-in:

Sold: 2009 Mountain Home 8.5 ft. Camper	
Model MH-20DT, Serial No. 200010	$19,075
Less "trade-in" - 1983 Meadowlark 8 ft. Camper	
Model No. ML883, Serial No. 0001	$2,000
Subtotal	$17,075
Retail Sales Tax	
Total	

(9) **Encumbered property traded in.** A buyer is entitled to full value for trade-in property, which is otherwise encumbered by a security interest or the subject of a conditional sale, or retail installment sales contract.

(10) **Casual or isolated sales.** The retail sales tax applies to all casual or isolated retail sales made by any person who is required to be registered and reporting tax to the state. The trade-in exclusion applies in the case of a casual or isolated sale, provided the statutory requirements are satisfied. The recordkeeping requirements explained in subsection (8) of this section apply to casual or isolated sales.

Persons who are not engaged in business activity, e.g., private persons, are not required to be registered and are not required to collect sales tax on their casual or isolated sales. See RCW 82.08.0251 and WAC 458-20-106. The use of property acquired through casual sales is subject to use tax. See RCW 82.12.020 and WAC 458-20-178.

(11) **Trade-ins as sales.** RCW 82.04.040 defines the term "sale" in pertinent part to mean "any transfer of the ownership of, title to, or possession of property for a valuable consideration." When property is traded in, ownership in that property is transferred. As a result, under the law a buyer delivering trade-in property to a seller is making a sale of the trade-in property.

(a) If the buyer is not in the business of selling the type of property being traded in the buyer incurs no B&O tax liability. See WAC 458-20-106.

(b) On occasions where the buyer is in the business of selling the type of property being traded in, the buyer incurs a B&O tax liability.

For example, Don's Leasing purchases a new car from Tom the Dealer. This car will be part of Don's inventory of cars that it rents to customers. Don delivers a used car out of its inventory to Tom the Dealer as a part of the consideration paid for the new car. The trade-in of the used car by Don is considered a wholesale sale to Tom. This is not a casual or isolated sale because Don is in the business of selling cars in the form of rentals.

(c) In most cases, a buyer delivers trade-in property to a seller who is in the business of reselling trade-in property (e.g., a buyer trading in an automobile to a new car dealer). The buyer in these cases has no responsibility to collect retail sales tax.

(12) **Retail services.** The exclusion of the value of property traded in from the selling price tax measure applies only to sales involving tangible personal property traded in for tangible personal property sold. It does not apply to any transactions involving services that have been statutorily included as "sales at retail." See RCW 82.04.050. For example, a construction contractor may not accept part payment in tangible personal property to thereby reduce the sales tax measure of the construction contract selling price. Similarly, a seller of tangible personal property may not accept retail services as part payment to thereby reduce the selling price tax measure. Such transfers neither qualify as trade-in transfers of tangible property nor "in-kind" transfers.

(13) **Trade-in for rental property.** Under RCW 82.04.-050, rentals or leases of tangible personal property are "retail sales." The "selling price" is also the measure of tax for such rentals and leases. Where tangible personal property is traded in as part payment for the rental or lease of property of like kind (e.g., a used computer against the rental of a new one), the sales tax will apply to all payments after the value of the property traded in has been depleted or consumed and the lessor of the property actually begins making charges for the lease or rental of tangible personal property. Refer to WAC 458-20-211 for more information regarding the tax-reporting responsibilities with respect to lease or rental transactions.

A lessee must first purchase leased property before trading it in toward the purchase/lease of other property to be entitled to the trade-in exclusion. A buyer cannot satisfy the statutory requirement that the trade-in property be delivered to the seller as a part of the consideration for the purchased property if the buyer does not have ownership of and the right to sell the property being traded in. For example, Jane Doe leases Auto A from Leasing Company. Jane decides to lease a newer Auto B from Leasing Company. Jane exercises her option to purchase Auto A, and then delivers Auto A as a trade-in towards the lease of Auto B. Jane is entitled to the trade-in exclusion. By delivering her ownership of Auto A to Leasing Company, Jane has satisfied the statutory requirement that she as the buyer deliver trade-in property to the seller as a part of the consideration paid for Auto B.

(14) **Real property transfers.** Because the trade-in exclusion is limited to tangible personal property, the trade-in exclusion does not apply to sales of real property or transactions where real property is traded in for tangible personal property.

(15) **Use tax.** RCW 82.12.010 defines the measure of the use tax as the "value of the article used." As explained in subsection (2) of this section, the statutory definition excludes "trade-in property of like kind." Therefore, the measure of the use tax for tangible personal property upon which no retail sales tax has been paid (e.g., if it were purchased in another state) is the same as the measure of the retail sales tax. In such cases the value of the property traded in should be excluded from the use tax measure.

The consumer-user, or any seller who has a duty to collect this state's use tax, must retain the sales records reflecting property "traded in," as explained in subsection (8) of this section.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.08.020, and 82.12.010. WSR 10-02-009, § 458-20-247, filed 12/24/09, effective 1/24/10. Statutory Authority: RCW 82.32.300. WSR 01-08-003, § 458-20-247, filed 3/21/01, effective 4/21/01; WSR 86-04-024 (Order 86-2), § 458-20-247, filed 1/28/86; WSR 85-02-006 (Order ET 84-6), § 458-20-247, filed 12/21/84.]

WAC 458-20-248 Sales of precious metal bullion and monetized bullion. Effective July 1, 1985, amounts derived from sales of precious metal bullion and monetized bullion as defined herein, are not subject to business and occupation tax under either the wholesaling or retailing classification or to retail sales tax. Statutory law expressly excludes such sales from the definitions of the terms, "wholesale sale," "sale at wholesale," "retail sale," and "sale at retail."

The term, "precious metal bullion" is statutorily defined to mean any precious metal which has been put through a process of smelting or refining, including, but not limited to, gold, silver, platinum, rhodium, and palladium, and which is in such state or condition that its value depends upon its contents and not upon its form.

The term, "monetized bullion" means coin or other forms of money manufactured from gold, silver, or other metals and heretofore, now, or hereafter used as a medium of exchange under the laws of this state, the United States, or any foreign nation, but does not include coins or money sold to be manufactured into jewelry or works of art.

Thus, sales of processed or refined precious metal valued solely upon the content thereof, whatever its form, are not subject to tax in this state. This includes processed nuggets, bars, sticks, dust, and other processed forms of precious metal. For example, sales of gold or silver in raw, refined forms to dentists, laboratories, jewelers, and other persons, for their own consumption or for resale are not taxable. However, sales of precious metal which has been manufactured or further processed into any form which determines or adds to the value thereof are fully taxable. For example, sales of jewelry items, medallions, artworks, and other items, the value of which is dependent upon more than the mere content of precious metal therein, are subject to wholesaling or retailing business and occupation tax, whichever is applicable, and retail sales tax as appropriate.

Sales of metal money, in coined or other form, which is recognized as a medium of exchange in the financial marketplace, are not taxable. However, sales of coin or money, whether or not recognized as a medium of exchange, to jewelers or other persons for the purpose of manufacturing jewelry or artworks therefrom are fully taxable. For example, sales of coins for necklaces or to be used as buttons or in paintings or painting frames, etc., are taxable.

It is presumed that all sales of coin and metal money are entitled to tax exemption: Provided, That in order to be exempt of tax persons who knowingly sell such things to buyers who are regularly engaged in the business of manufacturing jewelry or works of art must take a written, signed, and dated statement from such buyers that the coins or metal money are not being purchased for use in manufacturing jewelry or works of art. Artistic or cultural organizations which purchase such things are exempt of retail sales tax as provided in WAC 458-20-249.

The tax exclusions explained herein apply equally to sales of precious metal bullion or monetized bullion transferred through documents of ownership, certificates, confirmation slips, or other indicia of ownership.

Taxable Commissions

Amounts received as commissions upon sales of precious metals by dealers, brokers, and other selling and/or buying agents who sell or buy precious metal bullion or monetized bullion for the accounts of customers are subject to the service and other activities classification of business and occupation tax. The amount of any shared commission or fee paid to other dealers or commissioned agents associated in such transactions are deductible from the measure of this tax. However, no deduction is allowed for any of the dealer's or commissioned agent's own costs of doing business, including salaries or commissions paid to their own salespersons or other employees. Similarly, persons who receive any part of shared commissions derived from having been associated in transactions for the purchase or sale of precious metal or monetized bullion for the account of others, are themselves subject to service business tax measured by such amounts received.

Use Tax

The use tax does not apply upon the use of precious metal bullion or monetized bullion in this state under such circumstances that the sale of such bullion to the user would not be taxable if made in this state as explained earlier herein. In all other cases the use tax applies upon the first use by a consumer of precious metals in this state if retail sales tax has not been paid. See WAC 458-20-178.

[Statutory Authority: RCW 82.32.300. WSR 86-09-016 (Order ET 86-6), § 458-20-248, filed 4/9/86.]

WAC 458-20-249 Artistic or cultural organizations. For purposes of business and occupation tax deduction and certain retail sales tax and use tax exemptions, RCW 82.04.4328 expressly defines the term "artistic or cultural organizations" in pertinent part as follows:

". . . the term "artistic or cultural organization" means an organization which is organized and operated exclusively for

the purpose of providing artistic or cultural exhibitions, presentations, or performances or cultural or art education programs, . . . for viewing or attendance by the general public. The organization must be a not-for-profit corporation under chapter 24.03 RCW and managed by a governing board of not less than eight individuals none of whom is a paid employee of the organization or by a corporation sole under chapter 24.12 RCW. In addition, to qualify for deduction or exemption from taxation . . . the corporation shall satisfy the following conditions:

(a) No part of its income may be paid directly or indirectly to its members, stockholders, officers, directors, or trustees except in the form of services rendered by the corporation in accordance with its purposes and bylaws;

(b) Salary or compensation paid to its officers and executives must be only for actual services rendered, and at levels comparable to the salary or compensation of like positions within the state;

(c) Assets of the corporation must be irrevocably dedicated to the activities for which the exemption is granted and, on the liquidation, dissolution, or abandonment by the corporation, may not inure directly or indirectly to the benefit of any member or individual except a nonprofit organization, association, or corporation which also would be entitled to the exemption;

(d) The corporation must be duly licensed or certified when licensing or certification is required by law or regulation;

(e) The amounts received that qualify for exemption must be used for the activities for which the exemption is granted;

(f) Services must be available regardless of race, color, national origin, or ancestry; and

(g) The director of revenue shall have access to its books in order to determine whether the corporation is exempt from taxes.

(2) The term "artistic or cultural exhibitions, presentations, or performances or cultural or art education programs" includes and is limited to:

(a) An exhibition or presentation of works of art or objects of cultural or historical significance, such as those commonly displayed in art or history museums;

(b) A musical or dramatic performance or series of performances; or

(c) An educational seminar or program, or series of such programs, offered by the organization to the general public on an artistic, cultural, or historical subject."

Effective July 1, 1985, artistic or cultural organizations, as defined herein, are not subject to business and occupation tax upon amounts derived from conducting any business activities whatever. Formerly, a business and occupation tax deduction was available only for amounts received by such organizations from the United States and its instrumentalities or the state and local government entities (RCW 82.04.4322); certain manufacturing activities (RCW 82.04.4324); and tuition fees for artistic or cultural education programs (RCW 82.04.4326). Under current law, however, the deduction is unrestricted and applies to all activities conducted by such qualifying organizations.

Retail Sales Tax

Artistic or cultural organizations which make any charges for goods or services which are included in the definition of "retail sale" under RCW 82.04.050, must collect and report the retail sales tax thereon. No sales tax exemption is available for sales by such organizations.

Such organizations are exempt of paying retail sales tax upon their purchases of certain "objects" for the purpose of exhibition or presentation to the general public if the objects are:

(1) Objects of art;

(2) Objects of cultural value;

(3) Objects to be used in the creation of a work of art, other than tools; or

(4) Objects to be used in displaying art objects or presenting artistic or cultural exhibitions or performances. (RCW 82.08.031)

The term "objects" is deemed to mean items of tangible personal property. It does not include professional or commercial services rendered by third parties. Where, however, certain services are performed which are merely incidental to sales of tangible personal property, e.g., designing playbills or altering stage curtains which are then sold to qualifying organizations, the total charge therefore will be exempt.

Charges for materials, equipment, and services related to repair, maintenance, or replacement of buildings or structures are not exempt. Thus, e.g., theater seats, aisle carpeting, air conditioning systems, painting of interior or exterior of buildings, and the like are not tax exempt "objects."

Under Washington law exempt sales include rentals of exempt objects.

Examples of objects which may be purchased by qualifying artistic or cultural organizations without payment of retail sales tax are:

a) Tickets, programs, signs, posters, fliers, and playbills printed for particular displays or performances; scenery, costumes, stage, props, scrims, and materials for their construction;

b) Stage lights, filters, control panels, color medium, stage drapes, sets, set paint, gallery exhibition materials, risers, display platforms, and materials for their construction;

c) Sheet music, recordings, musical instruments and musical supplies for the staging of displays and performances;

d) Movie projectors, films, sound systems, video and sound equipment and supplies and computer hardware and standard, prewritten software directly used exclusively in the staging of performances or actual display of art objects.

Examples of objects which may be purchased by qualifying artistic or cultural organizations, upon which the retail sales tax must be paid are:

a) Supplies and equipment for clerical support, including bulk tickets for general use, stationery, typewriters, copy machines, and general office supplies;

b) Theater seats, lobby furniture, carpeting, vending machines, and general supplies for audience or patrons' convenience and use;

c) Shipping and packing materials, crates, boxes, dunnage, labels, tags, and container-related items for transfer or storage of exempt objects;

d) Sewing machines and other durable equipment used to prepare, repair, and maintain exempt objects (such items are deemed to be "tools," rather than exempt objects);

e) Theater or building lighting and utility fixtures and systems, and computer hardware and software not directly and exclusively used in staging performances or actually displaying art objects.

Qualified artistic and cultural organizations may obtain the tax exemptions by providing their suppliers with a written statement in essentially the following form:

I, _(buyer's name)_, hereby confirm that the items purchased on _(date of purchase)_, without payment of retail sales tax, from _(seller's name)_ are all objects of art or cultural value or to be used in the creation of such objects or in displaying art objects or presenting artistic or cultural exhibitions or performances.

(signature of authorized purchaser)

for: _(name of organization)_

(registration no. of organization)

Vendors who accept such certifications in good faith will be excused from the responsibility of collecting and remitting sales tax on such sales.

Use Tax

Under RCW 82.12.031, the use tax does not apply to the use of any objects for the purposes explained earlier in this rule, and upon which the retail sales tax would be exempt if the objects were purchased in this state. The use tax applies upon all other items of tangible personal property used by artistic or cultural organizations upon which retail sales tax has not been paid.

[Statutory Authority: RCW 82.32.300. WSR 86-07-006 (Order ET 86-4), § 458-20-249, filed 3/6/86.]

WAC 458-20-250 Solid waste collection tax. (1) **Introduction.** This section explains how the solid waste collection tax imposed under chapter 82.18 RCW applies; who is required to collect the tax; and the B&O, sales, and use tax obligations of persons providing solid waste collection services. The tax imposed under chapter 82.18 RCW was previously known as the "refuse collection tax." For the purposes of this section, the tax is referred to by its statutory name, the "solid waste collection tax."

(2)(a) **What is "solid waste"?** "Solid waste" or "waste" means garbage, trash, rubbish, or other material discarded as worthless or not economically viable for further use. The term does not include hazardous or toxic waste nor does it include material collected primarily for recycling or salvage.

(b) **Who is the taxpayer for purposes of the solid waste collection tax?** "Taxpayer" means that person upon whom the solid waste collection tax is imposed, that is, the private or commercial consumer.

(c) **Who is required to collect the solid waste collection tax?** Every person who receives waste for transfer, storage, or disposal including, but not limited to, all collection services, public or private dumps, transfer stations, and similar operations, must collect the solid waste collection tax from the private or commercial consumer.

(d) **What is the measure of the tax?** The solid waste collection tax applies to the consideration charged for solid waste collection services.

"Consideration charged for the services" is the total amount billed as compensation for solid waste collection services, without any deduction for any costs of doing business or any other expense whatsoever, paid or accrued. The term does not include:

(i) Any amount included in the charges for materials collected primarily for recycling;

(ii) The solid waste collection tax itself, whether separately itemized or not:

(iii) Any utility taxes or consumer taxes, imposed by the state or any political subdivision thereof or any municipal corporation, directly upon the consumer and separately itemized on the taxpayer's billing; or

(iv) Late charges or penalties which may be imposed for nontimely payment.

(3) **Reporting and collection obligations.** The person who collects the charges for solid waste collection services from the taxpayer is responsible for collecting the solid waste collection tax and remitting it to the state.

(a) **Failure to collect tax.** If any person charged with collecting the tax fails to bill the taxpayer for it, or to notify the taxpayer in writing that the tax is due, then that person shall be personally liable for the tax. Thus, unlike the retail sales tax, the solid waste collection tax may be included within the gross fee or charge billed to taxpayers and need not be separately itemized on such billings, but only if such taxpayers are notified in writing that the tax has been imposed and is being collected. Nothing prevents any solid waste collection business from separately itemizing the tax on customer billings, at its option.

(b) **Failure to remit collected tax.** If any person collects the tax and fails to pay it to the department in the manner provided in this section, for any reason whatsoever, the person shall be personally liable for the tax.

(4) **Due date.** The solid waste collection tax is due from the taxpayer within twenty-five days from the date the taxpayer is billed for the solid waste collection services. The solid waste collection tax must be separately reported upon lines provided on the excise tax return.

The tax is due to be remitted to the department by the person collecting it at the end of the tax reporting period in which the tax is received by that person.

(5) **Partial payments.** If a taxpayer makes only a partial payment of the amount billed for the services and tax, the amount paid must first be used to remit the solid waste collection tax to the department. The tax has first priority over all other claims against the amount paid by the taxpayer.

(6) **Sales to the federal government, Indians and Indian tribes.** The federal government, its agencies and instrumentalities, and all solid waste collection service contracts with such federal entities are not subject to the solid waste collection tax. Similarly, Indians and Indian tribes may be exempt from the tax. Refer to WAC 458-20-190 and 458-20-192 for more information about tax reporting and recordkeeping obligations relating to sales to the federal government and Indians or Indian tribes.

(7) **Transactions with multiple collection businesses.** To prevent pyramiding or multiple taxation of single transac-

tions, the solid waste collection tax does not apply to any person other than the ultimate consumer of the solid waste service.

(a) **Exemption certificate.** Persons engaged in the solid waste collection business by operating facilities for the transfer, storage, or disposal of waste, including public and private dumps, and who provide such services directly to taxpayers for a charge, are liable for the collection of the solid waste collection tax on such charges. However, persons who collect the solid waste collection tax and who, themselves, utilize the further services of others for the transfer, storage, or disposal of the waste collected are not required to again pay the tax to such other service providers. In order to be exempt from such tax payment a solid waste collection business must provide other solid waste service providers with a solid waste collector's exemption certificate in the following form:

We hereby certify that we are engaged in the solid waste collection business and are registered with the state department of revenue to collect and report the solid waste collection tax imposed under chapter 82.18 RCW. We certify further that the solid waste collection tax due with respect to the solid waste collection business being performed under this certificate has been or will be collected and paid and that we are exempt from further payment of such tax on charges for any solid waste collection services being procured by us.

Business Name . . . . . Authorized Signature . . . . .

Business Address . . . . . Date . . . . . .

Revenue Registration No. . . . . .

U.T.C. Certificate of Public Necessity No. . . . . .

If not regulated by U.T.C., please check here . . . . . .

(b) **Blanket exemption certificates.** Blanket certificates may be provided in advance by solid waste collectors or other persons who collect the customer charges for solid waste collection and who are liable for collecting and remitting the solid waste collection tax. Blanket certificates are valid for as long as the buyer and seller have a recurring business relationship. A "recurring business relationship" means at least one sale transaction within a period of twelve consecutive months. RCW 82.08.050 (7)(c).

(c) **Examples.** Examples of taxable and tax exempt transactions are:

(i) A private person or commercial customer hauls its own waste to a dump site for disposal and pays a fee - the fee is subject to the solid waste collection tax.

(ii) A solid waste collection company picks up and hauls residential or commercial waste to a dump for disposal - this company bills the customer for the tax and need not pay the tax upon any further charge made by the dump site operator, by providing an exemption certificate.

(iii) A city provides solid waste collection services to its residents through an independent hauler under a negotiated contract, and uses a county operated land fill. The city bills the residents on their utility bills. The tax applies to the solid waste portion of the utility bill adjusted as provided in this section. These taxes do not apply to any charge paid by the city to the hauling company, nor to any charge made by the county to the city for dumping services. The city must provide the hauler and the county with an exemption certificate.

(8) **Business and occupation tax.** A solid waste collection business is subject to service and other activities B&O tax on the gross income from solid waste collection activities. There is no deduction for any cost of doing business or any amounts paid over to other solid waste collection businesses. Late charges or penalties are subject to the service and other activities B&O tax.

Solid waste collection is an "enterprise activity," when funded over fifty percent by user fees. Amounts derived from this activity by a local governmental entity are subject to service and other activities B&O tax. See RCW 82.04.419, 82.04.4291, and WAC 458-20-189.

(9) **Sales of containers.** Solid waste collection businesses which provide waste receptacles, containers, dumpsters, and the like to their customers for a charge, separate from any charge for collection of the waste, are engaged in the business of renting tangible personal property taxable separate and apart from the solid waste collection business. Charges for such rentals, however designated, are subject to retailing B&O and retail sales taxes when they are billed separately or are line itemized on customer billings.

(10) **Sales and use tax obligations for the use of property.** Solid waste collection businesses are themselves the consumers of all tangible personal property purchased for their own use in conducting such business, other than items for resale or renting to customers, e.g., rented receptacles. Retail sales tax must be paid to materials suppliers and providers of such tangible consumables. (See RCW 82.04.050.) If the seller does not collect retail sales tax, the solid waste collection business must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law. Deferred sales or use tax should be reported on the buyer's excise tax return. However, the excise tax return does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's excise tax return. For detailed information regarding the use tax, refer to WAC 458-20-178 (Use tax).

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and chapter 82.18 RCW. WSR 08-14-025, § 458-20-250, filed 6/20/08, effective 7/21/08. Statutory Authority: RCW 82.32.330, 82.01.060(2), and 34.05.230. WSR 06-12-017, § 458-20-250, filed 5/26/06, effective 6/26/06. Statutory Authority: RCW 82.32.300. WSR 89-16-090 (Order 89-11), § 458-20-250, filed 8/2/89, effective 9/2/89; WSR 86-15-064 (Order ET 86-14), § 458-20-250, filed 7/22/86.]

WAC 458-20-251 Sewerage collection and other related activities. (1) **Introduction.** RCW 82.16.020 levies a public utility tax upon persons engaging in the business of sewerage collection. This rule provides guidance on the assessment of the public utility tax upon sewerage collection businesses, including the distinction between sewerage collection and other related business activities. It also describes how to determine the taxable gross receipts of a sewerage collection business that also engages in other related business activities. Additionally, the rule addresses a sewerage collection business's business and occupation (B&O), retail sales, and use tax reporting responsibilities. Municipalities and other governmental entities engaging in sewerage collection business activities should also refer to WAC 458-20-189 for guidance on the taxation of public service businesses and enterprise activities.

(2) **What is a sewerage collection business?** A sewerage collection business is the activity of accepting sewage to be deposited into and carried off by a system of lateral sewers, drains, and pipes to a common point, or points, for transfer to treatment or disposal, but does not include the actual transfer, treatment, or disposal of sewage. A sewerage collection business includes only that portion of a sewer system where "collection" occurs. Sewerage collection ends when the sewage exits the lateral sewers in a sewer system. Collection does not include the further transfer of sewage through a system of intercepting sewers or the final treatment or disposal of sewage.

(a) **What is the difference between sewage and sewerage?** Sewage is the waste matter carried off by sewer drains and pipes. Sewerage refers to the physical facilities (e.g., pipes, lift stations, and treatment and disposal facilities) through which sewage flows.

(b) **What is the difference between lateral and intercepting sewers?**

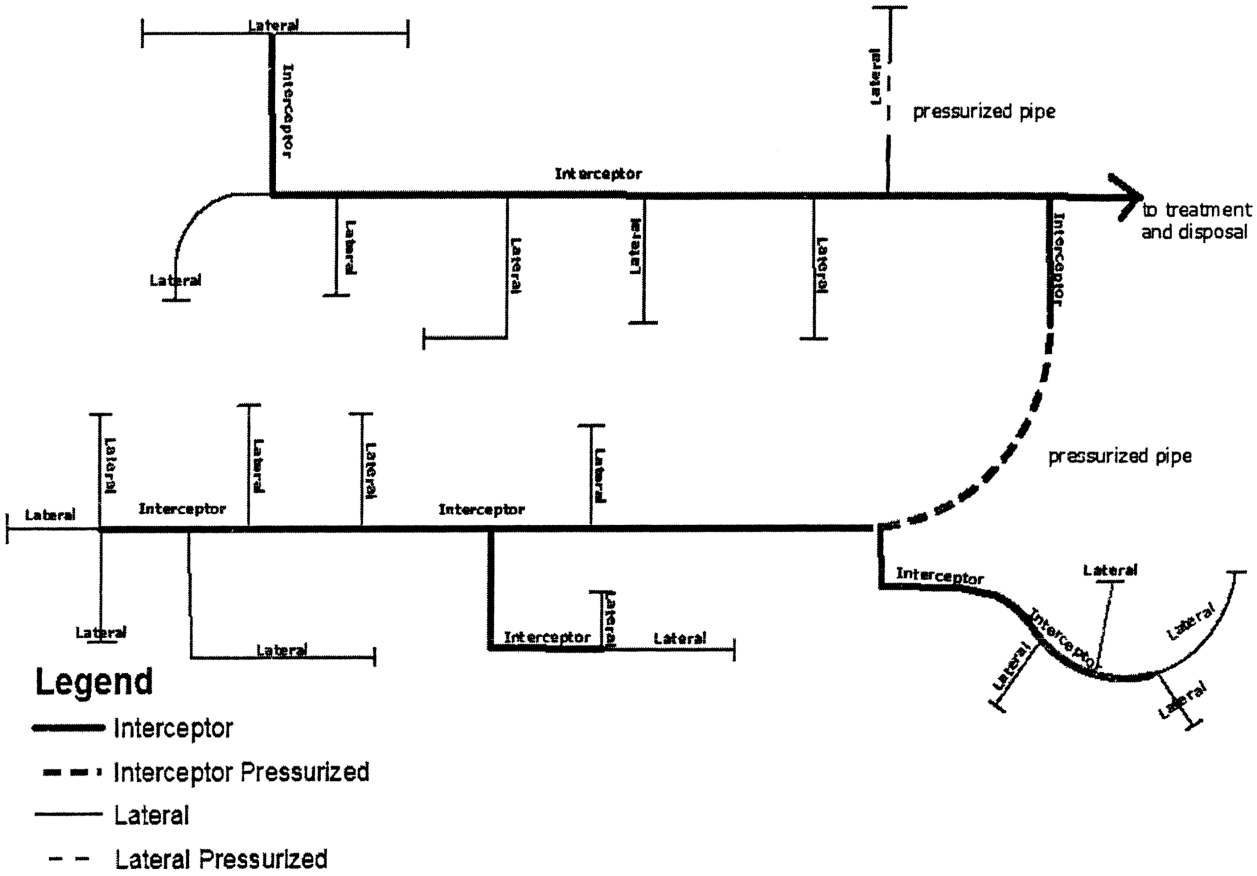
(i) A lateral sewer is a branch sewer running laterally down a street, alley, or easement that collects sewage directly from abutting properties and delivers it into an intercepting sewer.

(A) The sewage from abutting properties is collected through sewer pipes running from the abutting properties to the lateral sewer in the street, alley, or easement. If a sewerage collection business is responsible for maintaining any portion of such a sewer pipe, that portion is considered to be part of the lateral sewer.

(B) A lateral sewer may include force mains or lift stations if such equipment is installed as part of a lateral sewer line.

(ii) An intercepting sewer is a main sewer that receives flow from laterals and delivers the sewage to another main sewer or to a point for treatment or disposal.

The following diagram illustrates how sewer pipes in a sewerage system are categorized as lateral or intercepting sewers. The diagram does not attempt to represent any publicly maintained portions of sewer pipes that run from abutting properties to the lateral sewer in the street, alley, or easement.



(c) **How are drainage utility charges accounted for?** Certain real estate development projects (due to paving and other factors) may adversely affect rainwater runoff within areas served by a stormwater sewer system. Often, the stormwater system is administered by the same entity that operates a sewerage collection business. In this circumstance, some sewerage utilities impose a drainage utility charge on the development to reflect the impact on the utility's stormwater sewer system caused by the increased runoff. Other sewerage utilities charge all sewerage customers an additional drainage utility charge to reflect stormwater runoff. Although the same entity may be providing both stormwater and sanitary sewer collection services to the customer and many of the same facilities may be used, a drainage utility charge is not related to the collection of sewage for treatment and disposal. Therefore, a sewerage collection business does not include this

activity. Utility drainage charges are, however, subject to B&O taxation under the service and other activities classification, as discussed in subsection (4) below.

(3) **How is the public utility tax determined?** Persons engaged in the sewerage collection business are subject to the public utility tax under the sewer collection classification measured by the gross receipts of the collection business. (See RCW 82.16.020.) Gross receipts of the sewerage collection business include only that portion of income from customer billings that is allocable to the collection of sewage by a sewerage collection business. Gross receipts do not include any charges of any kind attributable to sewerage services other than collection.

There are two methods to determine the gross receipts of the collection business.

(a) **Itemization of customer billings.** If customer billings are itemized to show the actual charge for sewage collection, income realized from those billings is the gross receipts tax measure. If the itemized charges for sewage collection are less than the actual cost of providing the collection service, however, the sewerage collection business must use the cost-of-doing-business formula in subsection (3)(b) below.

(b) **Cost-of-doing-business formula.** If collection services are provided jointly with other related sewer services provided by the sewerage collection business or any other person, and the actual charge for sewerage collection is not itemized separately on customer billings or is less than the actual cost of providing the collection service, a simple cost-of-doing-business formula is used to derive the gross receipts public utility tax measure.

(i) **Formula.** The costs of providing sewerage collection services are divided by all business costs incurred in rendering all sewer services, including sewerage collection. The resulting percentage is multiplied by gross income from customer billings (all sewerage related charges). The result is the gross receipts public utility tax measure from engaging in the sewerage collection business. The standard cost accounting records of the sewerage collection business must be used for this purpose.

The formula is:

$$\frac{\text{Sewerage collection costs (Annualized)}}{\text{Total sewer service costs (Annualized)}} = \underline{\qquad}\ \%\ \text{x gross billing income} = \text{Public Utility Tax Measure}$$

In determining sewage collection costs for a sewerage collection business that also engages in related business activities involving the interception, transfer, storage, treatment, and/or disposal of sewage, only lateral sewers are considered collection sewers. Intercepting sewers are not collection sewers and may not be allocated to collection activities. All costs of operation of the sewer services business must be included in the denominator, including, but not limited to, direct operating costs and direct and indirect overhead costs. When circumstances warrant, the department may allow certain equipment—such as force mains or pump stations—to be converted into an equivalent length of pipe for purposes of allocating costs accurately.

(ii) **Annual year-end adjustment.** For the purpose of annualizing its costs, the sewerage collection business may use the previous calendar year costs or its budget allocations for the current tax year. In either case, however, it must make an end-of-year adjustment to its reporting based upon actual costs incurred during the current year.

(c) **Late charges/penalties excluded.** Revenue from late charges or other penalties for untimely payment by sewerage collection customers must be excluded when calculating gross receipts under subsection (3)(a) and (b) above. Receipts from these sources are subject to B&O taxation under the service and other activities classification as provided in subsection (4) below. (See WAC 458-20-179, Public utility tax, for further explanation of the taxation of late charge penalties.)

(d) **Preutility service activities excluded.** Services provided to a customer prior to receipt of sewerage collection services are subject to B&O taxation under the service and other activities classification as provided in subsection (4) below. For example, many sewerage collection businesses assess connection charges to a new customer before providing sewerage collection services to that customer. Such a connection charge may be variable (calculated as a charge per linear foot of road frontage for example) or a flat fee. A sewerage collection business may assess other charges for specific services provided to new customers, such as installing or inspecting the installation of service connections. In each case, the revenue from such fees is taxable under the service and other activities classification as long as the service for which the fee is assessed is performed before the sewerage collection business provides collection services to that customer. (See WAC 458-20-179, Public utility tax, for further explanation of the taxation of preutility service activities.)

(e) **Treatment or disposal costs deduction.** RCW 82.16.050(11) provides that in computing the public utility tax, a sewerage collection business may deduct from its reported gross income amounts paid by the business to a person taxable under chapter 82.04 RCW for the treatment or disposal of sewage. The deduction provided by RCW 82.16.-050(11) may be taken on the combined excise tax return only when the receipts related to treatment or disposal are included in the gross amounts reported under the sewer collection classification.

(4) **How are related business activities taxed?** Persons engaged in the sewerage collection business may also be engaged in related business activities involving the interception, transfer, storage, treatment, and/or disposal of sewage. These activities are generally subject to the service and other activities B&O tax. The measure of tax is the gross income or gross proceeds derived from those other services. The measure of tax does not include any amount subject to the sewerage collection public utility tax classification. The amount of gross income or gross proceeds subject to the service and other activities B&O tax must be determined consistent with the method used to determine the gross receipts subject to the sewage collection public utility tax (see subsection (3) above).

(5) **What if a governmental sewerage collection business pays a separate governmental entity for sewage interception, treatment or disposal?** RCW 82.04.432 provides a deduction from the B&O tax measure for amounts paid by municipal sewerage utilities and other public corporations to any other municipal corporation or governmental agency for sewage interception, treatment, or disposal. Thus, in such cases the service and other activities B&O tax on

sewer services does not have a pyramiding effect. In addition, RCW 82.04.4291 provides a B&O tax deduction for amounts derived by a political subdivision of the state of Washington from another political subdivision of the state of Washington as compensation for services subject to the service and other activities B&O tax. Income received from the state of Washington or its agencies and departments, however, is not deductible under RCW 82.04.4291. Thus, the local government entity that receives compensation from another local government entity for providing sewage interception, treatment, or disposal for that other government entity may also deduct the income from its own measure of service and other activities B&O tax, provided this amount has been included in the gross amount reported on the combined excise tax return. In such a case, neither entity pays tax on the amounts represented by the payments made for sewage interception, treatment, or disposal.

For example, Washington Municipality A operates a sewerage collection business. Rather than invest in its own treatment facilities, it contracts with Washington Municipality B to provide sewage transfer, treatment, and disposal services to Municipality A. When determining its tax liability, Municipality A must break down its sewage service charges (as provided in subsection (3) above) into a sewerage collection portion and that portion representing other sewage services (interception, transfer, treatment, and disposal). Municipality A pays public utility tax on its gross receipts from the sewerage collection business. Municipality A also pays service and other activities B&O tax on income derived from that portion of sewage transfer that it undertakes to move the waste to Municipality B for further transfer, treatment, and disposal by Municipality B. However, Municipality A may deduct from its gross income subject to service and other activities B&O tax the amount of any payments made to Municipality B for sewage transfer, treatment, or disposal services provided by Municipality B. In addition, pursuant to RCW 82.04.4291, Municipality B may deduct from its gross income subject to service and other activities B&O tax the amount of the payments received from Municipality A.

(6) **Local improvement district assessments.** Local improvement district (LID) and utility local improvement district (ULID) assessments, including interest and penalties on assessments, are not considered part of taxable income for either public utility tax or B&O tax purposes because they are exercises of the jurisdiction's taxing authority. These assessments may be composed of a share of the costs of capital facilities, installation labor, connection fees, and other expenses. A deduction may be taken for these amounts if they are included in the LID or ULID assessments.

(7) **Property purchased and used by a sewerage collection business.** Persons engaged in the sewerage collection business and/or engaged in providing other related sewer services are themselves the consumers of all tangible personal property purchased for their own use in conducting those activities. Retail sales tax (commonly referred to as "deferred sales tax") or use tax must be remitted directly to the department upon all tangible personal property used by a sewerage collection business or sewer service provider as a consumer, if the retail sales tax has not been collected by the seller. (See RCW 82.12.020.)

(8) **Sale of sludge.** With proper treatment, it is possible for the sludge remaining after the initial treatment of raw sewage to be used as fertilizer. If a sewerage collection business sells sludge, manufacturing B&O tax is due on the value of the products and retailing or wholesaling B&O tax is due on the gross proceeds of the sale. A multiple activities tax credit (MATC) applies as provided in RCW 82.04.440 and WAC 458-20-19301. If the sludge is sold to a consumer, retail sales tax is due on the proceeds of that sale, unless otherwise exempt by law.

If the necessary requirements are met, the business may claim a manufacturing machinery and equipment (M&E) exemption for machinery and equipment used directly in manufacturing the sludge (rendering it suitable for use as a fertilizer). This exemption is not available for machinery or equipment used merely to treat sewage for disposal.

For more information on the M&E exemption, see RCW 82.08.02565, 82.12.02565, and WAC 458-20-13601.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 03-19-059, § 458-20-251, filed 9/11/03, effective 10/12/03. Statutory Authority: RCW 82.32.300. WSR 86-18-069 (Order 86-16), § 458-20-251, filed 9/3/86.]

WAC 458-20-252 Hazardous substance tax and petroleum product tax.

PART 1 - HAZARDOUS SUBSTANCE TAX

(1) Introduction. Under the provisions of chapter 82.22 RCW a hazardous substance tax was imposed, effective January 1, 1988, upon the wholesale value of certain substances and products, with specific credits and exemptions provided. This law is significantly changed, effective on March 1, 1989, because of Initiative 97 (I-97) which was passed by the voters in the November 8, 1988 general election. The tax, which is reimposed by I-97, is an excise tax upon the privilege of possessing hazardous substances or products in this state. It is imposed in addition to all other taxes of an excise or property tax nature and is not in lieu of any other such taxes.

(a) I-97, which will be referred to as chapter 2, Laws of 1989, defines certain specific substances as being hazardous and includes other substances by reference to federal legislation governing such things. It also provides authority to the director of the state department of ecology to designate any substances or products as hazardous which could present a threat to human health or the environment. The department of ecology, by duly published rule, defines and enumerates hazardous substances and products and otherwise administers the provisions of the law relating to hazardous and toxic or dangerous materials, waste, disposal, cleanup, remedial actions, and monitoring. (See chapter 173-__ of the WAC.)

(b) Sections 8 through 12 of I-97 consist of the tax provisions relating to hazardous substances and products which are administered exclusively under this section. The tax provisions relate exclusively to the possession of hazardous substances and products. The tax provisions do not relate to waste, releases or spills of any materials, cleanup, compensation, or liability for such things, nor does tax liability under the law depend upon such factors. The incidence or privilege which incurs tax liability is simply the possession of the hazardous substance or product, whether or not such possession actually causes any hazardous or dangerous circumstance.

(c) The hazardous substance tax is imposed upon any possession of a hazardous substance or product in this state by any person who is not expressly exempt of the tax. However, it is the intent of the law that the economic burden of the tax should fall upon the first such possession in this state. Therefore, the law provides that if the tax has not been paid upon any hazardous substance or product the department may collect the tax from any person who has had possession. The amount of tax paid then constitutes a debt owed by the first person having had taxable possession to the person who pays the tax.

(2) Definitions. For purposes of this part the following terms will apply.

(a) "Tax" means the hazardous substance tax imposed under section 10 of I-97.

(b) "Hazardous substance" means anything designated as such by the provisions of chapter 173 WAC, administered by the state department of ecology, as adopted and thereafter amended. In addition, the law defines this term to include:

(i) Any substance that, on March 1, 1989, is a hazardous substance under section 101(14) of the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended by Public Law 99-499. These substances consist of chemicals and elements in their purest form. A CERCLA substance which contains water is still considered pure. Combinations of CERCLA substances as ingredients together with nonhazardous substances will not be taxable unless the end product is specifically designated as a hazardous substance by the department of ecology.

(ii) Petroleum products (further defined below);

(iii) Pesticide products required to be registered under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); and

(iv) Anything else enumerated as a hazardous substance in chapter 173-__ WAC by the department of ecology.

(c) "Product(s)" means any item(s) containing a combination of ingredients, some of which are hazardous substances and some of which are not hazardous substances.

(d) "Petroleum product" means any plant condensate, lubricating oil, crankcase motor oil, gasoline, aviation fuel, kerosene, diesel motor fuel, benzol, fuel oil, residual fuel, asphalt base, liquefied or liquefiable gases, such as butane, ethane and propane, and every other product derived from the refining of crude oil, but the term does not include crude oil.

(i) The term "derived from the refining of crude oil" as used herein, means produced because of and during petroleum processing. "Petroleum processing" includes all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to crude oil or any byproduct of crude oil so that as a result thereof a fuel or lubricant is produced for sale or commercial or industrial use. "Fuel" includes all combustible gases and liquids suitable for the generation of energy. The term "derived from the refining of crude oil" does not mean petroleum products which are manufactured from refined oil derivatives, such as petroleum jellies, cleaning solvents, asphalt paving, etc. Such further manufactured products become hazardous substances only when expressly so designated by the director of ecology.

(e) "Possession" means control of a hazardous substance located within this state and includes both actual and constructive possession.

(i) "Control" means the power to sell or use a hazardous substance or to authorize the sale or use by another.

(ii) "Actual possession" occurs when the person with control has physical possession.

(iii) "Constructive possession" occurs when the person with control does not have physical possession.

(f) "Previously taxed hazardous substance" means a hazardous substance upon which the tax has been paid and which has not been remanufactured or reprocessed in any manner.

(i) Remanufacturing or reprocessing does not include the mere repackaging or recycling for beneficial reuse. Rather, these terms embrace activities of a commercial or industrial nature involving the application of skill or labor by hand or machinery so that as a result, a new or different substance or product is produced.

(ii) "Recycling for beneficial reuse" means the recapturing of any used substance or product, for the sole purpose of extending the useful life of the original substance or product in its previously taxed form, without adding any new, different, or additional ingredient or component.

(iii) Example: Used motor oil drained from a crankcase, filtered, and containerized for reuse is not remanufactured or reprocessed. If the tax was paid on possession of the oil before use, the used oil is a previously taxed substance.

(iv) Possessions of used hazardous substances by persons who merely operate recycling centers or collection stations and who do not reprocess or remanufacture the used substances are not taxable possessions.

(g) "Wholesale value" is the tax measure or base. It means the fair market value determined by the wholesale selling price.

In cases where no sale has occurred, wholesale value means the fair market wholesale value, determined as nearly as possible according to the wholesale selling price at the place of use of similar substances of like quality and character. In such cases the wholesale value shall be the "value of the products" as determined under the alternate methods set forth in WAC 458-20-112.

(h) "Selling price" means consideration of any kind expressed in terms of money paid or delivered by a buyer to a seller, without any deductions for any costs whatsoever. Bona fide discounts actually granted to a buyer result in reductions in the selling price rather than deductions.

(i) "State," for purposes of the credit provisions of the hazardous substance tax, means:

(i) The state of Washington,

(ii) States of the United States or any political subdivisions of such other states,

(iii) The District of Columbia,

(iv) Territories and possessions of the United States,

(v) Any foreign country or political subdivision thereof.

(j) "Person" means any natural or artificial person, including a business organization of any kind, and has the further meaning defined in RCW 82.04.030.

(i) The term "natural person," for purposes of the tax exemption provided by section 11(2) of I-97 regarding substances used for personal or domestic purposes, means human beings in a private, as opposed to a business sense.

(k) Except as otherwise expressly defined in this section, the definitions of terms provided in chapters 82.04, 82.08, and 82.12 RCW apply equally for this section. Other terms

not expressly defined in these chapters or this section are to be given their common and ordinary meanings.

(3) Tax rate and measure. The tax is imposed upon the privilege of possessing hazardous substances in this state. The tax rate is seven tenths of one percent (.007). The tax measure or base is the wholesale value of the substance, as defined herein.

(4) Exemptions. The following are expressly exempt from the tax:

(a) Any successive possessions of any previously taxed hazardous substances are tax exempt.

(i) Any person who possesses a hazardous substance which has been acquired from any other person who is registered with the department of revenue and doing business in this state may take a written statement certifying that the tax has been previously paid. Such certifications must be taken in good faith and must be in the form provided in the last part of this section. Blanket certifications may be taken, as appropriate, which must be renewed at intervals not to exceed four years. These certifications may be used for any single hazardous substance or any broad classification of hazardous substances, e.g., "all chemicals."

(ii) In the absence of taking such certifications, the person who possesses any hazardous substance must retain proofs that it purchased or otherwise acquired the substance from a previous possessor in this state. It is not necessary for subsequent possessors to obtain certificates of previously taxed hazardous substances in order to perfect their tax exemption. Documentation which establishes any evidence of previous tax payment by another person will suffice. This includes invoices or billings from in state suppliers which reflect their payment of the tax or simple bills of lading or delivery documents revealing an in state source of the hazardous substances.

(iii) This exemption for taxes previously paid is available for any person in successive possession of a taxed hazardous substance even though the previous payment may have been satisfied by the use of credits or offsets available to the previous person in possession.

(iv) Example. Company A brings a substance into this state upon which it has paid a similar hazardous substance tax in another state. Company A takes a credit against its Washington tax liability in the amount of the other state's tax paid. It then sells the substance to Company B, and provides Company B with a certificate of previously taxed substance. Company B's possession is tax exempt even though Company A has not directly paid Washington's tax but has used a credit against its Washington liability.

(b) Any possession of a hazardous substance by a natural person for use of a personal or domestic nature rather than a business nature is tax exempt.

(i) This exemption extends to relatives, as well as other natural persons who reside with the person possessing the substance, and also to regular employees of that person who use the substance for the benefit of that person.

(ii) This exemption does not extend to possessions by any independent contractors hired by natural persons, which contractors themselves provide the hazardous substance.

(iii) Examples: Possessions of spray materials by an employee-gardener or soaps and cleaning solvents by an employee-domestic servant, when such substances are provided by the natural person for whose domestic benefit such things are used, are tax exempt. Also, possessions of fuel by private persons for use in privately owned vehicles are tax exempt.

(c) Any possession of any hazardous substance, other than pesticides or petroleum products, possessed by a retailer for making sales to consumers, in an amount which is determined to be "minimal" by the department of ecology. That department has determined that the term "minimal" means less than $1,000.00 worth of such hazardous substances measured by their wholesale value, possessed during any calendar month.

(d) Possessions of alumina or natural gas are tax exempt.

(e) Persons or activities which the state is prohibited from taxing under the United States Constitution are tax exempt.

(i) This exemption extends to the U.S. government, its agencies and instrumentalities, and to any possession the taxation of which has been expressly reserved or preempted under the laws of the United States.

(ii) The tax will not apply with respect to any possession of any hazardous substance purchased, extracted, produced or manufactured outside this state which is shipped or delivered into this state until the interstate transportation of such substance has finally ended in this state. Thus, out-of-state sellers or producers need not pay the tax on substances shipped directly to customers in this state. The customers must pay the tax upon their first possession unless otherwise expressly exempt.

(iii) Out-of-state sellers or producers will be subject to tax upon substances shipped or delivered to warehouses or other in state facilities owned, leased, or otherwise controlled by them.

(iv) However, the tax will not apply with respect to possessions of substances which are only temporarily stored or possessed in this state in connection with through, interstate movement of the substances from points of origin to points of destination both of which are outside of this state.

(f) The former exemption for petroleum products for export sale or use outside this state as fuel was effectively repealed by I-97. There are no exemptions under the law for any possessions of hazardous substances in this state simply because such substances may later be sold or used outside this state.

(g) Though I-97 contains an exemption for persons possessing any hazardous substance where such possession first occurred before March 1, 1989, this exemption applies only to the tax imposed under I-97. It does not apply retroactively to excuse the hazardous substance tax which was imposed under chapter 82.22 RCW in effect from January 1, 1988 until March 1, 1989. However:

(i) **Transitional rule:** Persons who possess stocks or inventories of petroleum products as of March 1, 1989, which are destined for sale or use outside this state as fuel are not subject to tax upon such possessions of preexisting inventories. For periods before March 1, 1989 the former exemption of RCW 82.22.040(3) for export petroleum products applies. For periods on and after March 1, 1989 the exemption for prepossessed hazardous substances explained in subsection (g) above will apply. Records appropriate to establish that such petroleum products were destined for out-of-state sale

or use as fuel must be retained by any possessor claiming exemption under this transitional rule.

(5) Credits. There are three distinct kinds of tax credits against liability which are available under the law.

(a) A credit may be taken by any manufacturer or processor of a hazardous substance produced from ingredients or components which are themselves hazardous substances, and upon which the hazardous substance tax has been paid by the same person or is due for payment by the same person.

(i) Example. A manufacturer possesses hazardous chemicals which it combines to produce an acid which is also designated as a hazardous substance or product. When it reports the tax upon the wholesale value of the acid it may use a credit to offset the tax by the amount of tax it has already paid or reported upon the hazardous chemical ingredients or components. In this manner the intent of the law to tax hazardous substances only once is fulfilled.

(ii) Under circumstances where the hazardous ingredient and the hazardous end product are both possessed by the same person during the same tax reporting period, the tax on the respective substances must be computed and the former must be offset against the latter so that the tax return reflects the tax liability after the credit adjustment.

(iii) This credit may be taken only by manufacturers who have the first possession in this state of both the hazardous ingredients and the hazardous end product.

(b) A credit may be taken in the amount of the hazardous substance tax upon the value of fuel which is carried from this state in the fuel tank of any airplane, ship, truck, or other vehicle.

(i) The credit may be claimed only for the amount of tax reported or actually due to be paid on the fuel, not the amount representing the value of the fuel.

(ii) The purpose of this credit is to exclude from taxation any possessions of fuel which remains in the fuel tanks of any carrier vehicles powered by such fuel when they leave this state, regardless of where or from whom such fuel-in-tanks was acquired.

(iii) The nature of this credit is such that it generally has application only for interstate and foreign private or common carriers who carry fuel into this state and/or purchase fuel in this state. The intent is that the tax will apply only to so much of such fuel as is actually consumed by such carriers within this state.

(iv) In order to equitably and efficiently administer this tax credit, any fuel which is brought into this state in carrier vehicle fuel tanks must be accounted for separately from fuel which is purchased in this state for use in such fuel tanks. Formulas approved by the department for reporting the amount of fuel consumed in this state for purposes of this tax or other excise tax purposes will satisfy the separate accounting required under this subsection.

(v) Fuel-in-tanks brought into this state must be fully reported for tax and then the credit must be taken in the amount of such fuel which is taken back out of this state. This is to be done on the same periodic excise tax return so that the net effect is that the tax is actually paid only upon the portion of fuel consumed here.

(vi) The credit for fuel-in-tanks purchased in this state must be accounted for by using a fuel-in-tanks credit certificate in substantially the following form:

Certificate of Credit for Fuel Carried from this State in Fuel Tanks

I hereby certify that the petroleum products specified herein, purchased by or transferred to the undersigned, from (name of seller or transferor), are entitled to the credit for fuel which is carried from this state in the fuel tank of any airplane, ship, truck, or other vehicle operated by a private or common carrier in interstate or foreign commerce. I will become liable for and pay the taxes due upon all or any part of such fuel which is not so carried from this state. This certification is given with full knowledge of, and subject to the legally prescribed penalties for fraud and tax evasion.

Registration No.	. . . . . (if applicable)
Type of Business	. . . . .
Firm Name	. . . . .
Business Address	. . . . .
Registered Name	. . . . . (if different)
Tax Reporting Agent	. . . . . (if applicable)
Authorized Signature	. . . . .
Title	. . . . .
Identity of Fuel	. . . . . (kind and amount by volume)

Date: . . . . . .

(vii) This certificate may be executed and provided to any possessor of fuel in this state, throughout the chain of distribution, with respect to fuel which ultimately will be sold and delivered into any carrier's fuel tanks in this state. Thus, refiners or manufacturers will take such certificates directly from carriers or from their wholesale purchasers who will sell to such carriers. Similarly, fuel dealers and distributors will take such certificates from carriers to whom they sell such fuel. These certificates must be retained as a permanent part of such seller's business records.

(viii) Persons who execute and provide these credit certificates to their fuel suppliers must retain suitable purchase and sales records as may be necessary to determine the amount of tax for which such persons may be liable.

(ix) Blanket certificates may be used to cover recurrent purchases of fuel by the same purchaser. Such blanket certificates must be renewed every two years.

(c) A credit may be taken against the tax owed in this state in the amount of any other state's hazardous substance tax which has been paid by the same person measured by the wholesale value of the same hazardous substance.

(i) In order for this credit to apply, the other state's tax must be significantly similar to Washington's tax in all its various respects. The taxable incident must be possessing the substance; the tax purpose must be that the substance is hazardous; and the tax measure must be stated in terms of the wholesale value of the substance, without deductions for costs of doing business, such that the other state's tax does not constitute an income tax or added value tax.

(ii) This credit may be taken for the amount of any other state's qualifying tax which has actually been paid before Washington state's tax is incurred because the substance was

previously possessed by the same person in another taxing jurisdiction.

(iii) The amount of credit is limited to the amount of tax paid in this state upon possession of the same hazardous substance in this state. Also, the credit may not be applied against any tax paid or owed in this state other than the hazardous substance tax imposed by section 10 of I-97.

(iv) Exchange agreements under which hazardous substances or products possessed in this state are exchanged through any accounts crediting system with like substances possessed in other states do not qualify for this credit. The substance taxed in another state, and for which this credit is sought, must be actually, physically possessed in this state.

(v) Persons claiming this credit must maintain records necessary to verify that the credit taking qualifications have been met. See WAC 458-20-19301, part (9) for record keeping requirements. The department of revenue will publish an excise tax bulletin listing other states' taxes which qualify for this credit.

(6) Newly defined hazardous substances. The director of ecology may identify and designate things as being hazardous substances after March 1, 1989. Also, things designated as hazardous substances may be deleted from this definition. Such actions are done by the adoption and subsequent periodic amendments to rules of the department of ecology under the Washington Administrative Code.

(a) The law allows the addition or deletion of substances as hazardous by rule amendments, no more often than twice in any calendar year.

(b) When such definitions are changed, they do not take effect for tax purposes until the first day of the following month which is at least thirty days after the effective date of rule action by the department of ecology.

(i) Example. The department of ecology adopts or amends the rule by adding a new substance and the effective date of the amendment is June 15. Possession of the substance does not become taxable until August 1.

(ii) The tax is owed by any person who has possession of the newly designated hazardous substance upon the tax effective date as explained herein. It is immaterial that the person in possession on that date was not the first person in possession of the substance in this state before it was designated as hazardous.

(7) Recurrent tax liability. It is the intent of the law that all hazardous substances possessed in this state should incur this tax liability only once unless they are expressly exempt. This is true of hazardous ingredients of products as well as the manufactured end product itself, if designated as a hazardous substance. The *exemption* for previously taxed hazardous substances does not apply to "products" which have been manufactured or remanufactured simply because an ingredient or ingredients of that product may have already been taxed when possessed by the manufacturer. Instead of an exemption, manufacturers in possession of both the hazardous ingredient(s) and end product(s) should use the *credit* provision explained at part (5)(a) of this section.

(a) However, the term "product" is defined to mean only an item or items which contain a combination of both hazardous substance(s) and nonhazardous substance(s). The term does not include combinations of only hazardous substances. Thus, possessions of substances produced by combining other hazardous substances upon all of which the tax has previously been paid will not again be taxable.

(b) When any hazardous substance(s) is first produced during and because of any physical combination or chemical reaction which occurs in a manufacturing or processing activity, the intermediate possession of such substance(s) within the manufacturing or processing plant is not considered a taxable possession if the substance(s) becomes a component or ingredient of the product being manufactured or processed or is otherwise consumed during the manufacturing or processing activity.

(i) However, when any intermediate hazardous substance is first produced during a manufacturing or processing activity and is withdrawn for sale or transfer outside of the manufacturing or processing plant, a taxable first possession occurs.

(c) Concentrations or dilutions for shipment or storage. The mere addition or withdrawal of water or other nonhazardous substances to or from hazardous substances designated under CERCLA or FIFRA for the sole purpose of transportation, storage, or the later manufacturing use of such substances does not result in any new hazardous product.

(8) How and when to pay tax. The tax must be reported on a special line of the combined excise tax return designated "hazardous substances." It is due for payment together with the timely filing of the return upon which it is reported, covering the tax reporting period during which the hazardous substance(s) is first possessed within this state. Any person who is not expressly exempt of the tax and who possesses any hazardous substance in this state, without having proof that the tax has previously been paid on that substance, must report and pay the tax.

(a) It may be that the person who purchases a hazardous substance will not have billing information from which to determine the wholesale value of the substance when the tax return for the period of possession is due. In such cases the tax is due for payment no later than the next regular reporting due date following the reporting period in which the substance(s) is first possessed.

(b) The taxable incident or event is the possession of the substance. Tax is due for payment by the purchaser of any hazardous substance whether or not the purchase price has been paid in part or in full.

(c) Special provision for manufacturers, refiners, and processors. Manufacturers, refiners, and processors who possess hazardous substances are required to report the tax and take any available exemptions and credits only at the time that such hazardous substances are withdrawn from storage for purposes of their sale, transfer, remanufacture, or consumption.

(9) How and when to claim credits. Credits should be claimed and offset against tax liability reported on the same excise tax return when possible. The tax return form provides a line for reporting tax on hazardous substances and a line for taking credits as an offset against the tax reported. It is not required that any documents or other evidences of entitlement to credits be submitted with the report. Such proofs must be retained in permanent records for the purpose of verification of credits taken.

(10) Special provision for consumer/first possessors. Under circumstances where the consumer is the first person

in possession of any nonexempt hazardous substance (e.g., substances imported by the consumer), or where the consumer is the person who must pay the tax upon substances previously possessed in this state (fuel purchased for export in fuel tanks) the consumer's tax measure will be eighty percent of its retail purchase price. This provision is intended to achieve a tax measure equivalent to the wholesale value.

(11) Hazardous substances or products on consignment. Consignees who possess hazardous substances or products in this state with the power to sell such things, in their own name or on behalf of a disclosed or undisclosed consignor are liable for payment of the tax. The exemption for previously taxed substances is available for such consignees only if the consignors have paid the tax and the consignee has retained the certification or other proof of previous tax payment referred to in part (4)(i) and (ii) of this section. Possession of consigned hazardous substances by a consignee does not constitute constructive possession by the consignor.

(12) Hazardous substances untraceable to source. Various circumstances may arise whereby a person will possess hazardous substances in this state, some of which have been previously taxed in this or other states and some of which may not. In such cases formulary tax reporting may be used, only upon a special ruling by the department of revenue.

(a) Example. Fungible petroleum products from sources both within and outside this state are commingled in common storage facilities. Formulary reporting is appropriate based upon volume percentages reflecting the ratio of in-state production to out-of-state production or other form of acquisition.

(13) Administrative provisions. The provisions of chapter 82.32 RCW regarding due dates, reporting periods, tax return requirements, interest and penalties, tax audits and limitations, disputes and appeals, and all such general administrative provisions apply equally to the hazardous substance tax. Special requested rulings covering unique circumstances generally will be issued within sixty days from the date upon which complete information is provided to the department of revenue.

(14) Certification of previously taxed hazardous substance. Certification that the hazardous substance tax has already been paid by a person previously in possession of the substance(s) may be taken in substantially the following form:

I hereby certify that this purchase - all purchases of (omit one) . . . . . .

. . . . . by . . . . . ,
(identify substance(s) purchased) (name of purchaser)

who possesses registration no. . . . . ,
(buyer's number, if registered)

consists of the purchase of hazardous substance(s) or product(s) upon which the hazardous substance tax has been paid in full by a person previously in possession of the substance(s) or product(s) in this state. This certificate is given with full knowledge of, and subject to the legally prescribed penalties for fraud and tax evasion, and with the full knowledge and agreement that the undersigned hereby assumes any liability for hazardous substance tax which has not been previously paid because of possession of the hazardous substance(s) or product(s) identified herein.

. . . . . The registered seller named below personally paid the tax upon possession of the hazardous substances.

. . . . . A person in possession of the hazardous substances prior to the possession of the registered seller named below paid the tax.

(Check the appropriate line.)

Name of registered seller . . . . . Registration No. . . . . .

Firm name . . . . . Address . . . . . .

Type of business . . . . . .

Authorized signature . . . . . Title . . . . . .

Date . . . . . .

PART II - PETROLEUM PRODUCTS TAX

(1) Under the provisions of chapter 383, Laws of 1989, (hereinafter referred to as the law), a petroleum product tax was imposed, effective July 1, 1989, upon the wholesale value of petroleum products in this state with specific credits and exemptions provided. The tax is an excise tax upon the privilege of first possessing petroleum products in this state. It is imposed in addition to all other taxes of an excise or property tax nature, including the hazardous substance tax explained earlier in this section, and is not in lieu of any other such taxes.

(a) Sections 14-18 of the law consist of the tax provisions relating to possession of petroleum products which are administered exclusively under this section. The application of the petroleum product tax with the exceptions noted below, is the same as the hazardous substance tax applications explained in subsection (1)(c) of part 1 of this section.

(b) The petroleum product tax is imposed upon any possession of petroleum products in this state by any person who is not expressly exempt of the tax. However, it is the intent of the law that the economic burden of the tax should fall only upon the first such possession in this state just like the hazardous substance tax.

(2) Definitions. For purposes of this part the following terms will apply.

(a) "Tax" means the petroleum product tax imposed under section 16 of the law.

(b) "Petroleum product" means any plant condensate, lubricating oil, gasoline, aviation fuel, kerosene, diesel motor fuel, benzol, fuel oil, residual fuel oil, asphalt base, liquefied or liquefiable gases, such as butane, ethane and propane, and every other product derived from the refining of crude oil, but the term does not include crude oil.

(c) "Possession" means control of a petroleum product located within this state and includes both actual and constructive possession.

(i) "Control" means the power to sell or use a petroleum product or to authorize the sale or use by another.

(ii) "Actual possession" occurs when the person with control has physical possession.

(iii) "Constructive possession" occurs when the person with control does not have physical possession.

(d) "Previously taxed petroleum products" means petroleum products upon which the petroleum product tax has been paid and which have not been remanufactured or repro-

cessed in any manner (other than mere repackaging or recycling for beneficial reuse) since the tax was paid.

(e) "Wholesale value" is the tax measure or base. It means the fair market value determined by the wholesale selling price at the place of use of similar products of like quality and character. "Wholesale value" shall be determined in precisely the manner for the petroleum product tax as it is for the hazardous substance tax in part 1, subsection (2)(g) of this section.

(f) "Selling price." See 2(h) of part 1 of this section.

(g) "State," for purposes of the credit provisions of the petroleum product tax, means:

(i) A state of the United States other than Washington, or any political subdivision of such other state,

(ii) The District of Columbia,

(iii) Any foreign country or political subdivision thereof, and

(iv) Territories and possessions of the United States.

(3) Tax rate and measure. The tax is imposed upon the privilege of possession of petroleum products in this state. The tax rate is fifty one-hundredths of one percent (.005). The tax measure or base is the wholesale value of the petroleum products, as defined herein. The tax will apply for first possessions of petroleum products in all periods after its effective date unless the department notifies taxpayers in writing of the department's determination that the pollution liability reinsurance program trust account contains a sufficient balance to cause a moratorium on the tax application. The department will again notify taxpayers in writing if and when the account balance requires reapplication of the tax.

(4) Exemptions. The following are expressly exempt from the tax:

(a) Any successive possessions of any previously taxed petroleum products are exempt in precisely the manner as the same exemption for the hazardous substance tax. (See part 1, subsection (4)(a) of this section.) If the tax is paid by any person other than the first person having taxable possession of a petroleum product, the amount of tax paid shall constitute a debt owed by the first person having taxable possession to the person who paid the tax.

(b) Any possession of a petroleum product by a natural person for use of a personal or domestic nature rather than a business nature is exempt in precisely the manner as the same exemption for the hazardous substance tax. (See part 1, subsection (4)(b) of this section.)

(c) Any possessions of the following substances are tax exempt:

(i) Natural gas, or petroleum coke;

(ii) Liquid fuel or fuel gas used in processing petroleum;

(iii) Petroleum products that are exported for use or sale outside this state as fuel.

(iv) The exemption for possessions of petroleum products for export sale or use as fuel may be taken by any person within the chain of distribution of such products in this state. To perfect its entitlement to this exemption the person possessing such product(s) must take from its buyer or transferee of the product(s) a written certification in substantially the following form:

Certificate of Tax Exempt Export Petroleum Products

I hereby certify that the petroleum products specified herein, purchased by or transferred to the undersigned, from (seller or transferor), are for export for use or sale outside Washington state as fuel. I will become liable for and pay any petroleum product tax due upon all or any part of such products which are not so exported outside Washington state. This certificate is given with full knowledge of, and subject to the legally prescribed penalties for fraud and tax evasion.

Registration No. . . . . .

Type of Business . . . . . .

(If applicable) Firm Name . . . . . .

Registered Name (If different) . . . . . .

Authorized Signature . . . . . .

Title . . . . . .

Identity of Petroleum Product . . . . . .
(Kind and amount by volume)

Date: . . . . . .

(v) Each successive possessor of such petroleum products must, in turn, take a certification in this form from any other person to whom such petroleum products are sold or transferred in this state. Failure to take and keep such certifications as part of its permanent records will incur petroleum product tax liability by such sellers or transferrers of petroleum products.

(vi) Persons in possession of such petroleum products who themselves export or cause the exportation of such products to persons outside this state for further sale or use as fuel must keep the proofs of actual exportation required by WAC 458-20-193, parts A or C. Carriers who will purchase fuel in this state to be taken out-of-state in the fuel tanks of any ship, airplane, truck, or other carrier vehicle will provide their fuel suppliers with this certification. Then such carriers will directly report and pay the tax only upon the portion of such fuel actually consumed by them in this state. (With respect to fuel brought into this state in fuel tanks and partially consumed here, see the credit provisions of part 1, subsection (5)(b) of this section.

(vii) Blanket export exemption certificates may never be accepted in connection with petroleum products exchanged under exchange agreements.

(d) Any possession of petroleum products packaged for sale to ultimate consumers. This exemption is limited to petroleum products which are prepared and packaged for sale at usual and ordinary retail outlets. Examples are containerized motor oil, lubricants, and aerosol solvents.

(5) Credits. There are two distinct kinds of tax credits against liability which are available under the law.

(a) A credit may be taken in the amount of the petroleum product tax upon the value of fuel which is carried from this state in the fuel tank of any airplane, ship, truck, or other vehicle. The credit is applied in precisely the same manner as the hazardous substance tax in part 1, subsection (5)(b) of this section.

The same form of certification as used for the fuel-in-tanks hazardous substance tax credit in subsection (5)(b)(vi) of part 1 of this section may be used.

(b) A credit may be taken against the tax owed in this state in the amount of any other state's petroleum product tax which has been paid by the same person measured by the wholesale value of the same petroleum product tax.

(i) In order for this credit to apply, the other state's tax must be significantly similar to Washington's tax in all its various respects. The taxable incident must be on the act or privilege of possessing petroleum products and the tax must be of a kind that is not generally imposed on other activities or privileges; the tax purpose must be to fund pollution liability insurance; and the tax measure must be stated in terms of the wholesale value of the petroleum products, without deductions for costs of doing business, such that the other state's tax does not constitute an income tax or added value tax.

(ii) The credit is applied in precisely the same manner as the state credit for hazardous substance tax in part 1, subsection (5)(c) of this section. The amount of the credit shall not exceed the petroleum product tax liability with respect to that petroleum product.

(6) The general administrative and tax reporting provisions for the hazardous substance tax contained in part 1 (8) through (14) of this section apply as well for the petroleum products tax of this part in precisely the same manner except the references to "hazardous substance(s)" or "substance(s)" should be replaced with the words, "petroleum products."

[Statutory Authority: RCW 82.32.300. WSR 89-16-091 (Order 89-12), § 458-20-252, filed 8/2/89, effective 9/2/89; WSR 89-10-051 (Order 89-1), § 458-20-252, filed 5/2/89; WSR 88-06-028 (Order 88-2), § 458-20-252, filed 2/26/88.]

WAC 458-20-254 Recordkeeping. (1) **Introduction.** This section defines the requirements for the maintenance and retention of books, records, and other sources of information. It also addresses these requirements where all or a part of the taxpayer's books and records are received, created, maintained, or generated through various computer, electronic, and/or imaging processes and systems.

The general requirements imposed on taxpayers are to retain and make available those records necessary to verify that the correct tax liability has been reported and paid by the taxpayer with respect to the taxes administered by the department of revenue ("department"). The records provided to the department are confidential and privileged. Such records may not be disclosed by the department, except as provided by RCW 82.32.330.

(2) **Definitions.** For purposes of this section, the following definitions will apply:

(a) "Data base management system" means a software system that controls, relates, retrieves, and provides accessibility to data stored in a data base.

(b) "Electronic data interchange" or "EDI technology" means the computer-to-computer exchange of business transactions in a standardized structured electronic format.

(c) "Hard copy" means any documents, records, reports or other data printed on paper.

(d) "Machine-sensible record" means a collection of related information in any electronic format (e.g., data base management systems, EDI technology, automated data process systems, etc.). Machine-sensible records do not include hard-copy records that are created or recorded on paper or stored in or by an imaging system such as microfilm, microfiche, or storage-only imaging systems.

(e) "Records" means all books, data, documents, reports, or other information, including those received, created, maintained, or generated through various computer, electronic, and/or imaging processes and systems.

(f) "Storage-only imaging system" means a system of computer hardware and software that provides for the storage, retention and retrieval of documents originally created on paper. It does not include any system, or part of a system, that manipulates or processes any information or data contained on the document in any manner other than to reproduce the document in hard copy or as an optical image.

(3) **Recordkeeping requirements—General.**

(a) Every taxpayer liable for a tax or fee imposed by the laws of the state of Washington for which the department of revenue has primary or secondary administrative responsibility, e.g., Title 82 RCW, chapter 67.28 RCW (hotel/motel tax), chapter 70.95 RCW (fee on tires), and chapter 84.33 RCW (forest excise tax), must keep complete and adequate records from which the department may determine any tax liability for such taxpayer.

(b) It is the duty of each taxpayer to prepare and preserve all records in a systematic manner conforming to accepted accounting methods and procedures. Such records are to be kept, preserved, and presented upon request of the department or its authorized representatives which will demonstrate:

(i) The amounts of gross receipts and sales from all sources, however derived, including barter or exchange transactions, whether or not such receipts or sales are taxable. These amounts must be supported by original source documents or records including but not limited to all purchase invoices, sales invoices, contracts, and such other records as may be necessary to substantiate gross receipts and sales.

(ii) The amounts of all deductions, exemptions, or credits claimed through supporting records or documentation required by statute or administrative rule, or other supporting records or documentation necessary to substantiate the deduction, exemption, or credit.

(iii) The payment of retail sales tax or use tax on capital assets, supplies, articles manufactured for your own use, and other items used by the taxpayer as a consumer.

(iv) The amounts of any refunds claimed. These amounts must be supported by records as may be necessary to substantiate the refunds claimed. Refer to WAC 458-20-229 for information on the refund process.

(c) The records kept, preserved, and presented must include the normal records maintained by an ordinary prudent business person. Such records may include general ledgers, sales journals, cash receipts journals, bank statements, check registers, and purchase journals, together with all bills, invoices, cash register tapes, and other records or documents of original entry supporting the books of account entries. The records must include all federal and state tax returns and reports and all schedules, work papers, instructions, and other data used in the preparation of the tax reports or returns.

(d) If a taxpayer retains records in both machine-sensible and hard-copy formats, the taxpayer must make the records available to the department in machine-sensible format upon request of the department. However, the taxpayer is not pro-

hibited from demonstrating tax compliance with traditional hard-copy documents or reproductions thereof, although this does not eliminate the requirement that they provide access to machine-sensible records, if requested.

(e) Machine-sensible records used to establish tax compliance must contain sufficient transaction-level detail information so that the details underlying the machine-sensible records can be identified and made available to the department upon request.

(f) At the time of an examination, the retained records must be capable of being retrieved and converted to a readable record format, as required in subsection (6) of this section.

(g) Taxpayers are not required to construct machine-sensible records other than those created in the ordinary course of business. A taxpayer who does not create the electronic equivalent of a traditional paper document in the ordinary course of business is not required to construct such a record for tax purposes.

(4) **Record retention period.** All records must be open for inspection and examination at any time by the department, upon reasonable notice, and must be kept and preserved for a period of five years. RCW 82.32.070

(5) **Failure to maintain or disclose records.** Any taxpayer who fails to comply with the requirements of RCW 82.32.070 or this section is forever barred from questioning, in any court action or proceedings, the correctness of any assessment of taxes made by the department based upon any period for which such books, records, and invoices have not been so kept, preserved, or disclosed. RCW 82.32.070

(6) **Electronic records.**

(a) **Electronic data interchange requirements.**

(i) Where a taxpayer uses electronic data interchange (EDI) processes and technology, the level of record detail, in combination with other records related to the transactions, must be equivalent to that contained in an acceptable paper record. For example, the retained records should contain such information as vendor name, invoice date, product description, quantity purchased, price, amount of tax, indication of tax status, shipping detail, etc. Codes may be used to identify some or all of the data elements, provided that the taxpayer provides a method which allows the department to interpret the coded information.

(ii) The taxpayer may capture the information at any level within the accounting system and need not retain the original EDI transaction records provided the audit trail, authenticity, and integrity of the retained records can be established. For example, a taxpayer using electronic data interchange technology receives electronic invoices from its suppliers. The taxpayer decides to retain the invoice data from completed and verified EDI transactions in its accounts payable system rather than to retain the EDI transactions themselves. Since neither the EDI transaction nor the accounts payable system captures information from the invoice pertaining to product description and vendor name (i.e., they contain only codes for that information), the taxpayer must also retain other records, such as its vendor master file and product code description lists and make them available to the department. In this example, the taxpayer need not retain its EDI transaction for tax purposes if the vendor master file contains the required information.

(b) **Electronic data processing systems requirements.** The requirements for an electronic data processing accounting system should be similar to that of a manual accounting system, in that an adequately designed accounting system should incorporate methods and records that will satisfy the requirements of this section.

(c) **Internal controls.**

(i) Upon the request of the department, the taxpayer must provide a description of the business process that created the retained records. Such description must include the relationship between the records and the tax documents prepared by the taxpayer and the measures employed to ensure the integrity of the records.

(ii) The taxpayer must be capable of demonstrating:

(A) The functions being performed as they relate to the flow of data through the system;

(B) The internal controls used to ensure accurate and reliable processing; and

(C) The internal controls used to prevent unauthorized addition, alteration, or deletion of retained records.

(iii) The following specific documentation is required for machine-sensible records retained pursuant to this section:

(A) Record formats or layouts;

(B) Field definitions (including the meaning of all codes used to represent information);

(C) File descriptions (e.g., data set name); and

(D) Detailed charts of accounts and account descriptions.

(7) **Access to machine-sensible records.**

(a) The manner in which the department is provided access to machine-sensible records may be satisfied through a variety of means that shall take into account a taxpayer's facts and circumstances through consultation with the taxpayer.

(b) Such access will be provided in one or more of the following manners:

(i) The taxpayer may arrange to provide the department with the hardware, software and personnel resources to access the machine-sensible records.

(ii) The taxpayer may arrange for a third party to provide the hardware, software and personnel resources necessary to access the machine-sensible records.

(iii) The taxpayer may convert the machine-sensible records to a standard record format specified by the department, including copies of files, on a magnetic medium that is agreed to by the department.

(iv) The taxpayer and the department may agree on other means of providing access to the machine-sensible records.

(8) **Storage-only imaging systems.**

(a) For purposes of storage and retention, taxpayers may convert hard-copy documents received or produced in the normal course of business and required to be retained under this section to microfilm, microfiche or other storage-only imaging systems and may discard the original hard-copy documents, provided the conditions of this section are met. Documents which may be stored on these media include, but are not limited to, general books of account, journals, voucher registers, general and subsidiary ledgers, and supporting records of details, such as sales invoices, purchase invoices, exemption certificates, and credit memoranda.

(b) Microfilm, microfiche and other storage-only imaging systems must meet the following requirements:

(i) Documentation establishing the procedures for converting the hard-copy documents to microfilm, microfiche or other storage-only imaging system must be maintained and made available upon request. Such documentation must, at a minimum, contain a sufficient description to allow an original document to be followed through the conversion system as well as internal procedures established for inspection and quality assurance.

(ii) Procedures must be established for the effective identification, processing, storage, and preservation of the stored documents and for making them available for a period of five years.

(iii) Upon request by the department, a taxpayer must provide facilities and equipment for reading, locating, and reproducing any documents maintained on microfilm, microfiche or other storage-only imaging system.

(iv) When displayed on such equipment or reproduced on paper, the documents must exhibit a high degree of legibility and readability. For this purpose, legibility is defined as the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters or numerals. Readability is defined as the quality of a group of letters or numerals being recognizable as words or complete numbers.

(v) All data stored on microfilm, microfiche or other storage-only imaging systems must be maintained and arranged in a manner that permits the location of any particular record.

(vi) There must be no substantial evidence that the microfilm, microfiche, or other storage-only imaging system lacks authenticity or integrity.

(9) **Effect on hard-copy recordkeeping requirements.**

(a) The provisions of this section do not relieve taxpayers of the responsibility to retain hard-copy records that are created or received in the ordinary course of business as required by existing law and regulations, except as otherwise provided in this section. Hard-copy records may be retained on a recordkeeping medium as provided in subsection (8) of this section.

(b) If hard-copy records are not produced or received in the ordinary course of transacting business (e.g., when the taxpayer uses electronic data interchange technology), such hard-copy records need not be created.

(c) Hard-copy records generated at the time of a transaction using a credit or debit card must be retained unless all the details necessary to determine correct tax liability relating to the transaction are subsequently received and retained by the taxpayer in accordance with this section.

(d) Computer printouts that are created for validation, control, or other temporary purposes need not be retained.

(e) Nothing in this section prevents the department from requesting hard-copy printouts in lieu of retained machine-sensible records at the time of examination.

(10) **Out-of-state businesses.** An out-of-state business which does not keep the necessary records within this state may either produce within this state such records as are required for examination by the department or permit the examination of the records by the department or its authorized representatives at the place where the records are kept. RCW 82.32.070.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 07-04-100, § 458-20-254, filed 2/6/07, effective 3/9/07. Statutory Authority: RCW 82.32.300. WSR 89-11-040 (Order 89-6), § 458-20-254, filed 5/16/89.]

WAC 458-20-255 Carbonated beverage syrup tax. (1) **Introduction.** This section explains the carbonated beverage syrup tax (syrup tax) as imposed by chapter 82.64 RCW. The syrup tax is an excise tax on the number of gallons of carbonated beverage syrup sold in this state, for use in producing carbonated beverages that are sold at wholesale or retail in this state. The syrup tax is in addition to all other taxes.

Except as otherwise provided in this rule, the provisions of chapters 82.04, 82.08, 82.12 and 82.32 RCW regarding definitions, due dates, reporting periods, tax return requirements, interest and penalties, tax audits and limitations, disputes and appeals, and all general administrative provisions apply to the syrup tax.

This rule provides examples that identify a number of facts and then state a conclusion regarding the applicability of the syrup tax. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(2) **What is carbonated beverage syrup?** Carbonated beverage syrup (syrup) is a concentrated liquid that is added to carbonated water to produce a carbonated beverage. "Syrup" includes concentrated liquid marketed by manufacturers to which purchasers add water, carbon dioxide, or carbonated water to produce a carbonated beverage. "Carbonated beverage" includes any nonalcoholic liquid intended for human consumption that contains any amount of carbon dioxide. Examples include soft drinks, mineral waters, seltzers, and fruit juices, if carbonated, and frozen carbonated beverages known as FCBs. "Carbonated beverage" does not include products such as bromides or carbonated liquids commonly sold as pharmaceuticals.

(3) **When is syrup tax imposed and how is it determined?** Syrup tax is imposed on the wholesale or retail sales of syrup within this state. The syrup tax is determined by the number of gallons of syrup sold. Fractional amounts are taxed proportionally.

(a) **When should syrup tax be reported and paid?** The frequency of reporting and paying the syrup tax coincides with the reporting periods of taxpayers for their business and occupation (B&O) tax. For example, a wholesaler who reports B&O tax monthly would also report any syrup tax liability on the monthly excise tax return.

(b) **What if I sell both previously taxed and nontaxed syrups?** Persons selling syrups in this state, some of which have been previously taxed in this or other states and some of which have not, may contact the department of revenue (department) for authorization to use formulary tax reporting. Prior to reporting in this manner, the person must receive a special ruling from the department that allows formulary reporting. A ruling may be obtained by writing the department at:

Taxpayer Information and Education
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478

Persons selling previously taxed syrups should refer to subsections (5)(a) and (6) of this section for information about an exemption or credit that may be applicable to such sales.

(4) **Who is responsible for paying the syrup tax?** This subsection explains who is responsible for payment of the syrup tax for both wholesale and retail sales of syrup in this state.

(a) **Wholesale sales.** A wholesaler making a wholesale sale of syrup in this state must collect the tax from the buyer and report and pay the tax to the department. If, however, the wholesaler is prohibited from collecting the tax under the Constitution of this state or the Constitution or laws of the United States, the wholesaler is liable for the tax. A wholesaler who fails or refuses to collect the syrup tax with intent to violate the provisions of chapter 82.64 RCW, or to gain some advantage directly or indirectly is guilty of a misdemeanor. The buyer is responsible for paying the syrup tax to the wholesaler. The syrup tax required to be collected by the wholesaler is a debt from the buyer to the wholesaler, until the tax is paid by the buyer to the wholesaler. Except as provided in subsection (5)(b)(ii) of this section, the buyer is not obligated to pay or report the syrup tax to the department.

(b) **Retail sales.** A retailer making a retail sale in this state of syrup purchased from a wholesaler who has not collected the tax must report and pay the tax to the department. Except as provided in subsection (5)(b)(ii) of this section, the buyer is not obligated to pay or report the syrup tax to the department.

(5) **Exemptions:** This subsection provides information on exemptions from the syrup tax.

(a) **Previously taxed syrup.** Any successive sale of previously taxed syrup is exempt. See RCW 82.64.030(1). "Previously taxed syrup" is syrup on which tax has been paid under chapter 82.64 RCW.

(i) All persons selling or otherwise transferring possession of taxed syrup, except retailers, must separately itemize the amount of the syrup tax on the invoice, bill of lading, or other instrument of sale. Beer and wine wholesalers selling syrup on which the syrup tax has been paid and who are prohibited under RCW 66.28.010 from having a direct or indirect financial interest in any retail business may, instead of a separate itemization of the amount of the syrup tax, provide a statement on the instrument of sale that the syrup tax has been paid. For purposes of the payment and the itemization of the syrup tax, the tax computed on standard units of a product (e.g., cases, liters, gallons) may be stated in an amount rounded to the nearest cent. In competitive bid documents, unless the syrup tax is separately itemized in the bid documents, the syrup tax will not be considered as included in the bid price. In either case, the syrup tax must be separately itemized on the instrument of sale except when the separate itemization is prohibited by law.

(ii) Any person prohibited by federal or state law, ruling, or requirement from itemizing the syrup tax on an invoice, bill of lading, or other document of delivery must retain the documentation necessary for verification of the payment of the syrup tax.

(iii) A subsequent sale of syrup sold or delivered upon an invoice, bill of lading, or other document of sale that contains a separate itemization of the syrup tax is exempt from the tax. However, a subsequent sale of syrup sold or delivered to the subsequent seller upon an invoice, bill of lading, or other document of sale that does not contain a separate itemization of the syrup tax is conclusively presumed to be previously untaxed syrup, and the seller must report and pay the syrup tax unless the sale is otherwise exempt.

(iv) The exemption for syrup tax previously paid is available for any person selling previously taxed syrup even though the previous payment may have been satisfied by the use of credits or offsets available to the prior seller.

(v) Example. Company A sells to Company B a syrup on which Company A paid a similar syrup tax in another state. Company A takes a credit against its Washington tax liability in the amount of the other state's tax paid (see subsection (6) of this section). It provides Company B with an invoice containing a separate itemization of the syrup tax. Company B's subsequent sale is tax exempt even though Company A has not directly paid Washington's tax but has used a credit against its Washington liability.

(b) **Syrup transferred out-of-state.** Any syrup that is transferred to a point outside the state for use outside the state is exempt. See RCW 82.64.030(2). The exemption for the sale of exported syrup may be taken by any seller within the chain of distribution.

(i) **Required documentation.** The prior approval of the department is not required to claim an exemption from the syrup tax for exported syrup. The seller, at the time of sale, must retain in its records an exemption certificate completed by the buyer to document the exempt nature of the sale. This requirement may be satisfied by using the department's "Certificate of Tax Exempt Export Carbonated Beverage Syrup," or another certificate with substantially the same information. A blank exemption certificate can be obtained through the following means:

(A) From the department's internet web site at http://dor.wa.gov;

(B) By facsimile by calling Fast Fax at 360-705-6705 or 800-647-7706 (using menu options); or

(C) By writing to: Taxpayer Services, Washington State Department of Revenue, P.O. Box 47478, Olympia, Washington 98504-7478.

(ii) The exemption certificate may be used so long as some portion of the syrup is exported. Sellers are under no obligation to verify the amount of syrup to be exported by their buyers providing such certificates. Buyers providing exemption certificates for exported syrup agree to become liable for tax and any associated penalties and interest on syrup that is not exported.

(iii) Example. Company A sells a previously untaxed syrup to Company C. Company C provides the seller with a completed exemption certificate as explained in (b)(i) of this subsection. Company C sells the syrup to Company D, who provides Company C with an exemption certificate. Company D decides to not export a portion of the purchased syrup. Companies A and C can both accept exemption certif-

icates. Company D is responsible for paying syrup tax on the syrup not exported.

(iv) Persons who make sales of syrup to persons outside this state must keep the proofs required by WAC 458-20-193 (Inbound and outbound interstate sales of tangible personal property) to substantiate the out-of-state sales.

(c) **Taxation prohibited under the United States Constitution.** Persons or activities that the state is prohibited from taxing under the United States Constitution are exempt. See RCW 82.64.050(1).

(d) **Wholesale sales of trademarked syrup to bottlers.** Any wholesale sale of a trademarked syrup by any person to a person commonly known as a bottler who is appointed by the owner of the trademark to manufacture, distribute, and sell the trademarked syrup within a specific geographic territory is exempt. See RCW 82.64.030(3).

(6) **Syrup tax credits.**

(a) **B&O tax credit for syrup tax paid.** Chapter 245, Laws of 2006 (SSB 6533) provided a B&O tax credit effective July 1, 2006. The credit is available to any buyer of syrup using the syrup in making carbonated beverages that are then sold, provided that the syrup tax, imposed by RCW 82.64.020, has been paid. The tax credit is a percentage of the syrup tax paid.

(i) **How much is the credit?** For syrup purchased July 1, 2006, through June 30, 2007, the B&O tax credit for the buyer is equivalent to twenty-five percent of the syrup tax paid. From July 1, 2007, through June 30, 2008, the allowable credit is fifty percent. From July 1, 2008, through June 30, 2009, the credit is seventy-five percent. As of July 1, 2009, the buyer is entitled to a B&O tax credit of one hundred percent of the syrup tax paid.

(ii) **When can the credit be taken?** The B&O tax credit can be claimed against taxes due for the tax reporting period in which the taxpayer purchased the syrup. The credit cannot exceed the amount of B&O tax due, nor can credit be refunded. Unused credit may be carried over and used for future reporting periods for a maximum of one year. The year starts at the end of the reporting period in which the syrup was purchased and credit was earned. See (b)(ii)(B)(iii) of this subsection for record documentation and retention.

(b) **Credit for syrup tax paid to another state.** Credit is allowed against the taxes imposed by chapter 82.64 RCW for any syrup tax paid to another state with respect to the same syrup. The amount of the credit cannot exceed the tax liability arising under chapter 82.64 RCW. The amount of credit is limited to the amount of tax paid in this state upon the wholesale sale of the same syrup in this state. In addition, the credit may not be applied against any tax paid or owed in this state other than the syrup tax imposed by chapter 82.64 RCW.

(i) **What is a state?** For purposes of the syrup tax credit, "state" is any state of the United States other than Washington, or any political subdivision of another state; the District of Columbia; and any foreign country or political subdivision of a foreign country.

(ii) **What is a syrup tax?** For purposes of the syrup tax credit, "syrup tax" means a tax that is:

(A) Imposed on the sale at wholesale of syrup and is not generally imposed on other activities or privileges; and

(B) Measured by the volume of the syrup.

(iii) **How and when to claim the credit.** Any tax credit available to the taxpayer should be claimed and offset against tax liability reported on the same excise tax return when possible. The excise tax return provides a line for reporting syrup tax, and the credit must be taken in the credit section under the credit classification "other credits." A statement showing the computation of the credit must be provided. It is not required that any other documents or other evidence of entitlement to credits be submitted with the return. Such proofs must be retained in permanent records for the purpose of verification of credits taken.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and chapter 82.64 RCW. WSR 08-14-019, § 458-20-255, filed 6/20/08, effective 7/21/08; WSR 06-23-067, § 458-20-255, filed 11/9/06, effective 12/10/06; WSR 05-02-009, § 458-20-255, filed 12/27/04, effective 1/27/05. Statutory Authority: RCW 82.32.300. WSR 98-20-085, § 458-20-255, filed 10/6/98, effective 11/6/98; WSR 91-20-058, § 458-20-255, filed 9/24/91, effective 10/25/91; WSR 89-17-001 (Order 89-13), § 458-20-255, filed 8/3/89, effective 9/3/89.]

WAC 458-20-256 Trade shows, conventions and seminars. (1) When a trade show, convention or educational seminar is sponsored and held by a nonprofit trade or nonprofit professional organization for a group other than the general public, the sponsoring organization may deduct from its business and occupation tax measure all "attendance" or "space" charges it collects for such an event, per RCW 82.04.4282. Nonqualifying organizations, and qualifying organizations sponsoring nonqualifying events, must include "attendance" and "space" charges in their tax measure for purposes of computing service and other activity business and occupation tax thereon.

(2) Nonprofit organizations are taxed in the same fashion as profit-making individuals or groups, with but few tax exemptions. This section implements one of those exemptions. See also WAC 458-20-114 and 458-20-169.

(3) For purposes of this section, the following definitions shall apply:

(a) The term "nonprofit" means exempt from tax under Section 501 of the Internal Revenue Code. The tax exempt status must be in effect when the trade show, convention, or seminar is conducted.

(b) A "trade organization" is an entity whose members are engaged "in trade", i.e., in one or more lawful commercial trades, businesses, crafts, industries, or distinct productive enterprises.

(c) A "professional organization" is an entity whose members are engaged in a particular lawful vocation, occupation or field of activity of a specialized nature.

(d) A "trade show" is a gathering of persons in trade for the purpose of exhibiting, demonstrating, and explaining services, products and/or equipment.

(e) A "convention" is a gathering of persons in trade or a profession for the purposes of providing, publishing and exchanging information, ideas and attitudes and conducting the business of the organization.

(f) A "seminar" is a gathering of persons in trade or a profession for the purpose of research, study, and/or exchange of specialized information, ideas and attitudes in regard to that trade or profession.

(g) "Not open to the general public" means that attendance is limited to members of the sponsoring organization and to specific invited guests of the sponsoring organization.

(4) As of July 23, 1989, for purposes of computing taxable receipts subject to business and occupation tax, a qualifying "nonprofit" organization may deduct all amounts the organization collects as charges for

(a) Admissions, and

(b) Licenses to occupy space in order to display exhibits, equipment and/or goods, at an organization-sponsored trade show, convention or seminar not open to the general public.

(5) No statutory deduction is available for the following:

(a) Outright sales of tangible personal property or services for which a specific charge separate from the charge for attending or occupying space is made. It is only those charges which are paid for the express privilege of attending or exhibiting at such an event which are deductible; and

(b) Admission or space charges for purely social, recreational, entertainment or other nontrade or nonprofessional gatherings regardless of the nonprofit tax status of the sponsoring organization.

(6) Examples:

(a) The local building trade council (council) organizes and sponsors a trade show held for specialty and general housing contractors. Council has on file a letter of tax exemption under Section 501 of the Internal Revenue Code. Council collects $100.00, prepaid, from each exhibitor for licenses to display and exhibit construction equipment, tools and related wares at preassigned booths, and $5.00, paid at the door, from each contractor who attends the event. Because the sponsoring organization qualifies as a nonprofit trade organization, the event qualifies as a trade show sponsored by the organization, and it is not open to the general public, all of the amounts collected constitute deductible receipts of admission and/or space charges.

(b) The metropolitan business group (metro), a recognized tax-exempt organization under IRC Section 501, organizes and sponsors a convention for all of its businesses members. Following completion of regular metro business matters (election of officers, etc.), there are speeches by accountants, attorneys, bankers, financial consultants, city planners, and other persons able to give legal and business advice and information to those attending. Metro charges a $25.00 per person entry fee. Included with the program is a hosted luncheon at which the mayor gives an explanation of local governmental regulations. The entry charges are fully deductible by Metro from its business and occupation tax measure. The sponsoring organization is "nonprofit" and a "trade organization" because its members are generically "in trade" even though not all are members of just one trade. The event constitutes a convention for persons "in trade" (generic, not specific) and the event is not open to the public. Finally, the moneys collected all constitute admission charges, no special charge for the meal having been made.

(c) The eastside whiffle ball association (association), a corporation recognized in writing to be tax exempt under Section 501 of the Internal Revenue Code, holds a "skills" clinic for all interested persons. The association charges $3.00 to all attending, which is just sufficient to cover the cost of materials and the use of a facility. Following the event, a special barbecue is held for $4.00 extra per participant. Souvenirs imprinted with the association name are also available for extra charge. The $3.00 admission charges, the $4.00 dinner charges, and the souvenir charges must all be included in the association's B&O tax measure for the following reasons, each one of which disallows the deduction:

(i) The association is not a trade or professional organization,

(ii) The event is not a trade show, convention or seminar, and

(iii) The event is open to the public. Separate dinner and souvenir charges are nondeductible in any event because they constitute itemized charges for goods and services.

(d) A local concerned citizen group (group), which has never applied for federal tax exempt status, organizes and sponsors a health care seminar held in the local school auditorium for district health care professionals, nurses, sport trainers, parents, and concerned students. To cover the cost of hiring competent medical experts to speak at the seminar, the group charges $5.00 per person. The event is sponsored by the group for a worthwhile public purpose and the entry fees are in fact admission charges. For the following reasons, each one of which disallows the deduction, the group will have to include all door charges in its tax measure: (i) The sponsoring organization is not properly recognized to be nonprofit (no federal tax recognition) or to be a trade or professional organization, and (ii) the event is open to the public at large.

[Statutory Authority: RCW 82.32.300. WSR 90-04-058, § 458-20-256, filed 2/2/90, effective 3/5/90.]

WAC 458-20-257 Warranties and maintenance agreements. (1) **Definitions.** For the purposes of this section, the following terms will apply:

(a) Warranties. Warranties, sometimes referred to as guarantees, are agreements which call for the replacement or repair of tangible personal property with no additional charge for parts or labor, or both, based upon the happening of some unforeseen occurrence, e.g., the property needs repair within the warranty period.

(b) Warrantor. The warrantor is the person obligated, as specified in the warranty agreement, to perform labor and/or provide materials to the owner of the personal property to which the warranty agreement relates.

(c) Maintenance agreements. Maintenance agreements sometimes referred to as service contracts, are agreements which require the specific performance of repairing, cleaning, altering, or improving of tangible personal property on a regular or irregular basis to ensure its continued satisfactory operation.

(2) **B&O tax.**

(a) Manufacturer's warranties included in the retail selling price of the article being sold.

(i) When a manufacturer's warranty is included in the retail selling price of the property sold and no additional charge is made, the value of the warranty is a part of the selling price. The value of the warranty is included in the "gross proceeds of sale" of the article sold and reported under the appropriate classification, e.g. retailing, wholesaling, etc.

(ii) When a repair is made by the manufacturer-warrantor under the warranty, the value of the labor and or parts provided are not subject to B&O tax.

(iii) When a person other than the manufacturer-warrantor makes a repair for the manufacturer-warrantor, the person making the repair is making a wholesale sale of the repair service to the manufacturer-warrantor. The person doing the

repair is B&O taxable under the wholesaling classification on the value of the parts and labor provided.

(b) Nonmanufacturer's warranties and manufacturer's warranties not included in the retail selling price of the article being sold.

(i) When a warranty is sold for a charge separate from the charge of the product, e.g., a warranty extending the manufacturer's warranty, the charge is reported in the service and other activities classification of the B&O tax.

(ii) When a repair is made by the warrantor under a separately stated warranty, the value of the labor and or parts provided are not subject to B&O tax.

(iii) When a person other than the warrantor makes a repair for the warrantor, the person making the repair is making a retail sale of the repair service to the warrantor. The person making the repair is B&O taxable under the retailing classification.

(c) Maintenance agreements.

(i) Maintenance agreements (service contracts) require the periodic specific performance of inspecting, cleaning, physical servicing, altering, and/or improving of tangible personal property. Charges for maintenance agreements are retail sales, subject to retailing B&O tax and retail sales tax under all circumstances.

(d) Amounts received as a commission or other consideration for selling a warranty or maintenance agreement of a third-party warrantor or provider are generally subject to B&O tax under the service and other activities classification. However, if the seller of the warranty is licensed under chapter 48.17 RCW with respect to this selling activity, the commission is subject to B&O tax under the insurance agent classification.

(e) In the event a warrantor purchases an insurance policy to cover the warranty, amounts received by the warrantor under the insurance policy are insurance claim reimbursements not subject to B&O tax.

(3) **Retail sales tax.**

(a) Manufacturer's warranties included in the retail selling price of the article being sold.

(i) When a manufacturer's warranty is included in the retail selling price of the property sold and no additional or separate charge is made, the value of the warranty is a part of the selling price and retail sales tax applies to the entire selling price of the article being sold.

(ii) When a repair is made by the manufacturer-warrantor under the warranty, the repair performed is not a retail sale and no retail sales tax is collected.

(iii) When a person other than the manufacturer-warrantor makes a repair for the manufacturer-warrantor, the person making the repair is making a wholesale sale of the repair service to the manufacturer-warrantor. No retail sales tax is collected from the manufacturer-warrantor.

(b) Nonmanufacturer's warranties and manufacturer's warranties not included in the retail selling price of the article being sold.

(i) When a warranty is sold for a charge separate from the charge of the product, e.g., a warranty extending the manufacturer's warranty, the sale is not a retail sale and no retail sales tax is collected on the amount charged.

(ii) When a repair is made by the warrantor under its own separately stated warranty, the value of the labor and/or parts provided is not a retail sale and no retail sales tax is collected.

(iii) When a person other than the warrantor makes a repair for the warrantor, the person making the repair is making a retail sale of the repair service to the warrantor. Retail sales tax is collected from the warrantor measured by the labor and materials provided.

(c) Maintenance agreements are sales at retail and subject to retail sales tax under all circumstances.

(i) Parties subcontracting to the party selling the maintenance agreement are making sales at wholesale, and are required to take from their customer (maintenance seller) a resale certificate as provided in WAC 458-20-102.

(4) USE TAX.

(a) Manufacturer's warranties included in the retail selling price of the article being sold.

(i) When a manufacturer-warrantor makes repairs required under its warranty, the value of the parts used in making the repairs is not subject to use tax.

(ii) Where a third party makes repairs for a manufacturer-warrantor, the transaction is a wholesale sale and the parts used in the repair are not subject to use tax.

(b) Nonmanufacturer's warranties and manufacturer's warranties not included in the retail selling price of the article being sold.

(i) When a repair is made by the warrantor under a separately stated warranty, the warrantor is the consumer of the parts and the parts are subject to use tax measured by the warrantor's cost.

(ii) When a person other than the warrantor makes a repair for the warrantor, the person making the repair is making a retail sale to the warrantor. Retail sales tax, not use tax, is collected.

(c) Maintenance agreements.

(i) Persons performing services under the requirements of maintenance agreements sold by them, are not subject to use tax or retail sales tax on materials which become a part of the required repairs or services.

(5) **Additional service - Deductible.** In the event services are provided in addition to any warranty or maintenance agreement, such services are separately taxable as retail sales, subject to retail sales tax and retailing B&O tax. This includes so-called "deductible" amounts not covered by a warranty or maintenance agreement.

(6) **Mixed agreements.** If an agreement contains warranty provisions but also requires the actual specific performance of inspection, cleaning, servicing, altering, or improving the property on a regular or irregular basis, without regard to the operating condition of the property, such agreements are fully taxable as maintenance agreements, not warranties.

(7) **Examples:**

(a) An automobile dealer sells a vehicle to a customer for selling price of $15,000 cash and the selling price includes a manufacturer's limited warranty for 5 years or 50,000 miles. The owner of the vehicle has $600 ($200 parts and $400 labor) warranty work, paying no deductible, performed by the dealer who is not the manufacturer-warrantor. The tax liability of the dealer is as follows:

(i) Retail sales tax is collected on the $15,000 selling price.

(ii) The $15,000 selling price is reported under the retailing B&O tax classification. The $600 repair is reported under the wholesaling B&O tax classification.

(iii) The $200 of parts used in the repair are not subject to use tax.

(b) The automobile dealer in example (a) also sells its own extended warranty to the customer for $200. The dealer insures itself with an insurance carrier and under the policy, claims are paid on the retail value of the repairs. In addition to the repairs in example (a), the customer has the dealer complete $500 of repairs under the dealer's extended warranty. The customer paid the $100 deductible and the dealer received $400 from his insurance carrier. In completing the repair, the dealer installed parts from its inventory which had a cost to the dealer of $150 and subcontracted part of the repair to an electrical shop which charged the dealer $200. The tax liability to the dealer and the subcontractor are as follows:

(i) The dealer reports the $200 sale of the warranty under the service and other activities classification of B&O tax. No retail sales tax is collected on the sale.

(ii) The $100 deductible received by the dealer is a retail sale subject to retail sales tax and retailing B&O tax.

(iii) The $400 received by the dealer from the insurance company is a nontaxable insurance claim reimbursement.

(iv) The dealer is the consumer of the parts removed from its inventory and used in the repair. The $150 dealer cost of the parts taken from inventory is subject to use tax.

(v) The subcontractor is making a retail sale to the dealer subject to retail sales tax and retailing B&O.

[Statutory Authority: RCW 82.32.300. WSR 90-10-081, § 458-20-257, filed 5/2/90, effective 6/2/90.]

WAC 458-20-258 Travel agents and tour operators. (1) **Introduction**. This section describes the business and occupation (B&O) taxation of travel agents and tour operators. Travel agents are taxed at the special travel agent rate under RCW 82.04.260(10). Tour operators are generally taxed under the service or other business classification under RCW 82.04.290. However, the business activities of tour operators may sometimes include activities like those of a travel agent. This section recognizes the overlap of activities and taxes them consistently.

(2) **Definitions:**

(a) "Commission" means the fee or percentage of the charge or their equivalent, received in the ordinary course of business as compensation for arranging the service. The customer or receiver of the service, not the person receiving the commission, is always responsible for payment of the charge.

(b) "Pass-through expense" means a charge to a tour operator business where the tour operator is acting as an agent of the customer and the customer, not the tour operator, is liable for the charge. The tour operator cannot be primarily or secondarily liable for the charge other than as agent for the customer. See: WAC 458-20-111 Advances and reimbursements.

(c) "Tour operator business" means a business activity of providing directly or through third party providers, transportation, lodging, meals, and other associated services where the tour operator purchases or itself provides any or all of the services offered, and is itself liable for the services purchased.

(d) "Travel agent business" means the business activity of arranging transportation, lodging, meals, or other similar services which are purchased by the customer and where the travel agent or agency merely receives a commission for arranging the service.

(3) **Travel agents.**

(a) The gross income of a travel agent or a travel agent business is the gross commissions received without any deduction for the cost of materials used, labor costs, interest, discount, delivery cost, taxes, losses, or any other expense. It is taxed at the special travel agent rate.

(b) Gross receipts, other than commissions, from other business activities of a travel agent, including activities as a tour operator, are taxed in the appropriate B&O classification, service, retailing, etc., as the case may be.

(4) **Tour operators.**

(a) The gross income of a tour operator or a tour operator business is the gross commissions received when the activity is that of a travel agent business.

(i) When a tour operator receives commissions from a third party service provider for all or a part of the tour or tour package, the gross income of the business for that travel agent activity is the commissions received.

(b) However, if the activity is that of a tour operator business, receipts are B&O taxable in the service classification without any deduction for the cost of materials used, labor costs, interest, discount, delivery cost, taxes, losses, or any other expense; **except,** receipts attributable to pass-through expenses are not included as part of the gross income of the business.

(5) **Examples:**

(a) A travel agent issues an airplane ticket to a customer. The cost of the ticket is $250 which is paid by the customer. The travel agent receives $25 from the airline for providing the service.

(i) The gross income of the business for the travel agent is the $25 commission received.

(ii) The gross income of the business is taxed at the special travel agent rate.

(b) A tour operator offers a tour costing $1,500 per person. The tour cost consists of $800 airfare, $500 lodging and meals, and $200 bus transportation. The tour operator has an arrangement with each of the service providers to receive a 10% commission for each service of the tour, which in this case is $150 ($80 + $50 + $20). The tour operator issues tickets, etc, only when paid by the customer and is not liable for any services reserved but not provided.

(i) The tour operator is engaged in a travel agent activity and the gross income of the business is commissions received, $150.

(ii) The gross income of the business, $150, is taxed at the special travel agent rate.

(c) The same facts as in example (b) except that the tour operator has a policy of requiring 10% or $150 as a down payment with the remaining $1,350 payable 20 days prior to departure with 95% refundable up to 10 days prior to departure and nothing refunded after 10 days prior to departure. The customer cancels 15 days prior to departure and is refunded $1,425 with the tour operator retaining $75.

(i) The gross income of the tour operator business is the $75 retained. No amount is attributable to pass-through expense since the tour operator was not obligated to the service provider in the event of cancellation and the tour operator was not acting as the agent of the customer.

(ii) The gross income of the business, $75, is taxed in the service B&O tax classification.

(d) A tour operator offers a package tour for the Superbowl costing $800 per person. The tour operator purchases noncancellable rooms in a hotel for $300 per room for 2 nights, and game tickets which cost $100 each. The package includes airfare which costs $200 per person for which the tour operator receives the normal commission of $20. As an extra feature, the tour operator offers to provide, for an extra cost, special event tickets, if available, at his cost of $50 each. The tour operator is B&O taxable as follows:

(i) The gross income of the tour operator business is $600 ($800 less $200 airfare). Because the tour operator purchased the rooms and the game tickets in its own name and is liable for the rooms or tickets if not resold, the tour operator is not operating as a travel agent business and is B&O taxable in the service classification. If the tour operator receives a commission on the rooms sold to itself, the activity remains taxable as a tour operator business under the service classification and the commission received is treated as a cost discount, not included in the gross income of the business.

(ii) The $50 received for the special event ticket is attributable to a pass-through expense and is not included in the gross income of the tour operator business. The special event ticket receipt is attributable to a pass-through expense because the tour operator is acting as an agent for the customer.

(iii) The $20 received as commission from the sale of the airfare is a travel agent business activity and is included as gross income of a travel agent and taxed at the special travel agent rate.

[Statutory Authority: RCW 82.32.300. WSR 90-17-003, § 458-20-258, filed 8/2/90, effective 9/2/90.]

WAC 458-20-260 Oil spill response and administration tax. (1) **Introduction.** This rule explains the provisions of chapter 82.23B RCW which imposes an oil spill response tax and an oil spill administration tax. The taxes are imposed upon the privilege of receiving crude oil or petroleum products at a marine terminal in this state from a waterborne vessel or barge operating on the navigable waters of this state.

(2) **Definitions.** For purposes of this rule, the following terms will apply.

(a) "Tax" means the oil spill response and oil spill administration taxes imposed by chapter 82.23B RCW.

(b) "Barrel" means a unit of measurement of volume equal to forty-two United States gallons of crude oil or petroleum product.

(c) "Crude oil" means any naturally occurring liquid hydrocarbon at atmospheric temperature and pressure coming from the earth, including condensate and natural gasoline.

(d) "Department" means the department of revenue.

(e) "Marine terminal" means a facility of any kind, other than a waterborne vessel, that is used for transferring crude oil or petroleum products to or from a waterborne vessel or barge.

(f) "Navigable waters" means those waters of the state and their adjoining shorelines, that are subject to the ebb and flow of the tide, including the Columbia and Snake rivers.

(g) "Person" has the meaning provided in RCW 82.04.-030.

(h) "Petroleum product" means any liquid hydrocarbons at atmospheric temperature and pressure that are the product of the fractionation, distillation, or other refining or processing of crude oil, and that are used as, useable as, or may be refined as fuel or fuel blendstock, including but not limited to, gasoline, diesel fuel, aviation fuel, bunker fuel, and fuels containing a blend of alcohol and petroleum.

(i) "Taxpayer" means the person owning crude oil or petroleum products immediately after receipt of the same into the storage tanks of a marine terminal in this state from a waterborne vessel or barge and who is liable for the tax.

(j) "Waterborne vessel or barge" means any ship, barge, or other watercraft capable of travelling on the navigable waters of this state and capable of transporting any crude oil or petroleum product in quantities of ten thousand gallons or more for purposes other than providing fuel for its motor or engine.

(k) "Previously taxed product" means any crude oil or petroleum product which has been received in this state in a manner subject to the tax and upon which the tax has been paid.

(3) **Imposition, base, and reporting of tax.** The tax is imposed on the privilege of receiving crude oil or petroleum products at a marine terminal within this state from a waterborne vessel or barge operating on the navigable waters of this state. The tax is levied upon the owner of the crude oil or petroleum products immediately after receipt of the same into the storage tanks of a marine terminal from a waterborne vessel or barge.

(a) The tax is due for payment together with the timely filing of the return upon which it is reported, on or before the twenty-fifth day of the month following the month in which the taxable receipt occurs. In case any receipt commences on the last day of any month and extends past midnight, the receipt at the election of the marine terminal may be deemed to have occurred during the following month or may be deemed to have been completed at midnight and commenced at the instant after midnight.

(b) The number of barrels received must be computed as the net barrels received by the marine terminal operator. Net barrels must be computed by using an industry standard adjustment to gross barrels received to account for variations in temperature and content of water or other nonpetroleum substances.

(4) **Tax collection by the marine terminal operator.** Unless the taxpayer has been issued a direct payment certificate as provided in subsection (5) of this rule, the operator of any marine terminal located in this state where crude oil or petroleum products are received and placed into storage tanks is responsible for the collection of the tax from the taxpayer.

(a) Failure to collect the tax from the taxpayer and remit it to the department will cause the marine terminal operator to become personally liable for the tax, unless the marine terminal operator has billed the taxpayer for the tax or notified the taxpayer in writing of the imposition of the tax.

(i) The tax has been billed to a taxpayer when an invoice, statement of account, or notice of imposition of the tax is mailed or delivered to the taxpayer by the terminal operator within the operator's normal billing cycle and separately states the dates of receipt, rate of tax, number of barrels received and placed into storage tanks, and the amount of the tax required to be collected.

(ii) A taxpayer has been notified of the imposition of the tax when, within twenty days from the date of receipt, a notice is mailed or delivered to the taxpayer, or to an agent of the taxpayer authorized to accept notices of this type other than the marine terminal operator. This notice must separately state the dates of receipt, rate of tax, number of barrels received into storage tanks, and the amount of the tax required to be collected.

(iii) Marine terminal operators must maintain a record of the names and addresses of taxpayers billed for the tax, or in cases where taxpayers are sent written notification of the imposition of the tax, the names and addresses of the persons to whom notice is sent. Such records must indicate those persons billed or notified from whom the tax has been collected. Upon request, the records shall be made available for inspection by the department.

(b) The tax collected must be held in trust by the terminal operator until paid to the department. The tax is due from the marine terminal operator, along with reports and returns on forms prescribed by the department, within twenty-five days after the end of the month in which the tax is collected.

(c) A terminal operator who relies in good faith upon a direct payment certificate (see subsection (5) of this rule) issued to a taxpayer is relieved from any liability for the collection of the tax from the taxpayer. A marine terminal operator is likewise relieved from liability for collection of the tax from a taxpayer if the marine terminal operator relies in good faith upon a current roster of certificate holders published by the department which bears the name of a taxpayer.

(5) **Direct payment to the department.** Any taxpayer may apply to the department in writing for permission to pay the tax directly to the department. Upon approval of the department, any taxpayer making application for direct payment will be issued a direct payment certificate entitling the taxpayer to pay the tax directly to the department.

(a) In order to qualify for direct payment, the taxpayer must meet the following requirements:

(i) The taxpayer must be registered with the department.

(ii) The taxpayer must file a bond with the department in an amount equal to two months estimated liability for the tax, but in no event less than ten thousand dollars. The bond must be executed by the taxpayer as principal, and by a corporation approved by the department and authorized to engage in business as a surety company in this state, as surety. Two months estimated tax liability shall be the total number of barrels received and placed into the storage tanks of a marine terminal in this state by the taxpayer during the two months in the immediately preceding twelve-month period with the highest number of barrels received multiplied by the total tax rate. If the department determines that the result of the foregoing calculation does not represent a fair estimate of the actual tax liability which the taxpayer is expected to incur, it may set the bond requirement at such higher amount as the department determines in its judgment will secure the payment of the tax. The bond requirement may be waived upon proof satisfactory to the department that the taxpayer has sufficient assets located in this state to insure payment of the tax.

(iii) The taxpayer must be current in all of its tax obligations to the state having filed all returns as required by Title 82 RCW.

(b) The department may, from time to time, review the amount of any bond filed by a taxpayer possessing a direct payment certificate and may, upon twenty days written notice to the taxpayer, require such higher bond as the department determines to be necessary to secure the payment of the tax. The filing of a substitute bond in such higher amount is a condition to the continuation of the right to make direct payment under this section.

(c) A direct payment certificate issued under this section may be revoked by the department if the taxpayer fails to maintain a current registration, fails to file a substitute bond within twenty days from a written request, or becomes delinquent in the payment of the tax.

(d) The department maintains a current roster of all taxpayers who have a direct payment certificate. Copies of the roster are made available on a monthly basis to any interested person requesting to be placed on the roster subscription list. Requests to be placed on the subscription list should be mailed to the Department of Revenue, Taxpayer Services, attn: Public Records, P.O. Box 47478, Olympia, WA 98504-7478.

(e) Applications for a direct payment certificate shall be in writing and shall include the name and address of the applicant, the applicant's registration number if currently registered, and the name and phone number of a contact person. The application shall also contain a statement that if the application is approved, the taxpayer consents to the public disclosure that the taxpayer has been granted a direct payment certificate, or if the certificate is later revoked, the taxpayer consents to the public disclosure of the fact of revocation. Applications should be mailed to the Department of Revenue, Taxpayer Account Administration, P.O. Box 47476, Olympia, WA 98504-7476.

(6) **Exemption - Previously taxed crude oil or petroleum products.** The tax applies only to the first receipt of crude oil or petroleum products at a marine terminal in this state. RCW 82.23B.030 provides an exemption for the subsequent receipt at a marine terminal in this state of previously taxed crude oil or petroleum products. This exemption applies even though the previously taxed crude oil or petroleum products are refined or processed prior to subsequent transportation and receipt.

(7) **Presumption.** Any receipt of crude oil or petroleum products at a marine terminal within this state from a waterborne vessel or barge operating on the navigable waters of this state is presumed to be subject to the tax.

(a) A person may rebut this presumption by documenting that the crude oil or petroleum products received were previously subject to the tax. The proof may be in the form of information on the invoice or a written certification from the seller at the time of shipment or exchange. The written certification must be in substantially the form below stating that all or a specific, stated portion of the crude oil or petroleum products were previously subject to the tax or, in the alternative, stating the amount of tax remitted or to be remitted to the

state respective to the crude oil or petroleum products being sold.

Certification of Previous Payment of the Oil Spill Tax

I hereby certify that all or a portion of the crude oil or petroleum products specified herein were previously subject to the oil spill tax and that such tax was paid by the undersigned.

Identify product: _____

Amount of product in this shipment: _____

Percentage of product on which the tax has been paid: _____

OR

Amount of tax remitted or to be remitted to the state on product: _____

Name of recipient: _____

_____ _____

Authorized Signature of Seller Date

_____Firm Name _____

UBI Number

(b) Example. Crude oil is received at a marine terminal in this state and the tax is remitted. The crude oil is then commingled with crude oil from a source not involving a receipt at a marine terminal such as a receipt from a pipeline or a tank car. The commingled crude oil is refined into two petroleum products such as jet kerosene and unleaded gasoline. The petroleum products are then placed on separate waterborne vessels or barges and are shipped to a second marine terminal in this state. The receipt of petroleum products at the second marine terminal is presumed to be subject to the tax. The presumption may be rebutted by proof of what portion of each product of the shipment was previously subject to tax. Proof may be made by means of information on the invoice or a written certification that substantially conforms with the requirements set forth in subsection (7)(a) of this rule.

(c) Example. Petroleum product is received at a marine terminal in this state and the tax is remitted. Substances that were not previously subject to the tax are added to the petroleum product resulting in an increase of the volume of the petroleum product. The petroleum product is then placed on a waterborne vessel or barge and received at a second marine terminal in this state. Upon receipt at the second marine terminal the tax is due on the incremental increase in volume of the petroleum product caused by the addition of the substances.

(8) **Export credit.** A credit is allowed against the tax for any crude oil or petroleum products exported from or sold for export from the state.

(a) An export credit may be taken by any person who exports or sells for export any previously taxed product. When the person taking the export credit is not the person who remitted the tax, the proof of payment of tax may be made by information on an invoice or written certification that substantially conforms to the requirements set forth in subsection (7)(a) of this rule.

(b) A person exports product when he or she actually transports the product beyond the borders of this state for purposes of sale, or delivers the product to a common carrier for delivery and subsequent sale or use at a point outside this state. Documentation of export is described in (d) of this subsection.

(c) A person sells product for export when as a necessary incident to a contract of sale the seller agrees to, and does deliver previously taxed product:

(i) To the buyer at a destination outside this state;

(ii) To a carrier consigned to and for transportation to a destination outside this state;

(iii) To the buyer alongside or aboard a vessel or other vehicle of transportation under circumstances where it is clear that the process of exportation of the product has begun; or

(iv) Into a pipeline for transportation to a destination outside this state.

In all circumstances there must be a certainty of export evidenced by some overt step taken in the export process. A sale for export will not necessarily be deemed to have occurred if the product is merely in storage awaiting shipment, even though there is reasonable certainty that the product will be exported. The intention to export, as evidenced for example, by financial and contractual relationships does not indicate certainty of export if the product has not commenced its journey outside this state. The product must actually enter the export stream. Sales of petroleum products by delivery into the fuel tank of a vessel or other vehicle in quantities greater than one hundred gallons will be considered placed into the export stream, provided the vessel or vehicle is immediately destined for a point outside this state and the seller obtains and keeps the documentary evidence provided in (d) of this subsection.

(d) A person who takes the credit for export must show that the previously taxed product was exported or sold for export. An export or a sale for export may be shown by obtaining and keeping any of the following documentary evidence:

(i) A bona fide bill of lading in which the seller is the shipper/consignor and by which the carrier agrees to transport the product to the buyer at a destination outside this state; or

(ii) A written certification in substantially the following form:

Certificate of Export

I hereby certify that the crude oil or petroleum products specified herein, purchased by or transferred to the undersigned from (seller or transferor), have been received into the export stream and are for export for sale or use outside Washington state. I will become liable for any tax credit granted (seller or transferor) pertaining to any crude oil or petroleum products which are not so exported outside Washington state. This certificate is given with full knowledge of, and subject to the legally prescribed penalties for fraud.

Registration No. . . . . Type of Business . . . . . .
(If applicable)

Firm Name . . . . . Registered Name . . . . . .
(If different)

Authorized Signature . . . . . .

Title . . . . . .

Identity of Product . . . . . .
(Kind and amount by volume)

Date . . . . . ; or

(iii) Documents consisting of:

(A) Purchase orders or contracts of sale which show that the seller is required to place the product into the export stream, e.g., "f.a.s. vessel"; and

(B) Local delivery receipts, tripsheets, waybills, warehouse releases, etc., reflecting how and when the product was delivered into the export stream; and

(C) When available, records showing that the products were packaged, numbered or otherwise handled in a way which is exclusively attributable to products sold for export.

(e) Only the export or sale for export of crude oil or petroleum products will qualify for the export credit. Crude oil or petroleum products will not be eligible for the export credit if, prior to export, they are subject to further processing or used as ingredients in other compounds unless the resulting products are themselves crude oil or petroleum products.

(f) Crude oil or petroleum products delivered to purchasers in other states pursuant to location exchange agreements will not qualify for the export credit unless the crude oil or petroleum products were previously subject to the tax and credit has not yet been taken. A location exchange agreement is any arrangement where crude oil or petroleum products located in this state are exchanged through an accounts crediting system, or any other method, for like substances located in other states. Any person acquiring previously taxed product in this state for which no credit has been taken may claim a credit on any such product subsequently exported or sold for export, provided all of the requirements set forth in subsections (8) and (9) of this rule have been met.

(g) Persons claiming this credit must maintain records necessary to verify that the credit taking qualifications have been met. For this purpose any person claiming a credit who maintains those records required by WAC 458-20-19301 (Multiple activities tax credit), subsection (9), will be considered to have satisfied the requirements of this subsection.

(9) **Amount of credit.** The amount of the credit will be equal to the tax previously paid on the crude oil or petroleum product exported or sold for export and for which credit has not already been taken. In no event will a credit be allowed in excess of the tax paid on the product exported or sold for export.

(a) In the case of a person claiming credit who is not the taxpayer, the credit will be equal to that portion of the tax billed on an invoice or shown on a written certification that substantially conforms with the requirements set forth in subsection (7)(a) of this rule which relates to the particular product exported or sold for export.

In order to determine the amount of tax reflected on an invoice which relates to a particular product exported or sold for export, it may be necessary to convert the tax paid from a rate per barrel to a rate per gallon or some other unit of measurement. This conversion is computed by taking the total amount of tax paid on an invoice for a particular product and dividing that figure by the total quantity of the product expressed in terms of the unit of measurement used for export. The credit is then computed by multiplying the converted rate times the quantity of product exported or sold for export.

(b) When the product exported is previously taxed product commingled with untaxed product a person claiming the export credit may compute the amount of previously taxed product using one of the following methods:

(i) First-in, first-out method. Under this method the export credit is computed by treating existing inventory as sold before later acquired inventory.

(ii) Average of tax paid method. Under this method the export credit is determined by calculating the average rate of tax paid on all inventory. This method requires computing the tax by making adjustments in the rate of tax paid on all product on hand as it is removed from or added to storage.

(iii) Any other method approved by the department.

(c) The use of one of the methods set forth in this subsection (9) to account for tax paid on commingled crude oil or petroleum products constitutes an election to continue using the method selected. Once selected, no change in accounting method is permitted without the prior consent of the department.

(d) Examples. The following are examples of the way in which the credit is to be computed:

(i) A petroleum products distributor purchases 100 barrels each of premium unleaded gasoline and regular unleaded gasoline. The invoice from the refiner separately states that the invoice includes $5.00 of tax for each of the two types of products. The distributor pays the invoiced amount and later sells 2,000 gallons of the premium unleaded and 4,000 gallons of the regular unleaded to a retailer located outside Washington. In order to compute the amount of credit on the export sales the distributor must convert the tax paid from barrels to gallons. Since there are 42 US gallons in a barrel and 200 barrels purchased, the number of gallons equals 8400 (42 × 200). The per gallon tax paid on both products is equal to .119 cents per gallon ($10.00 ÷ 8400). The distributor would be eligible for credit equal to $2.38 for the premium unleaded (2,000 × $.00119) and $4.76 for the regular unleaded (4,000 × $.00119).

(ii) Example. A petroleum products distributor purchases 100 barrels of unleaded gasoline on which the tax has been remitted for a portion. The invoice for the unleaded separately states that the total price includes $4.00 of tax. This

previously taxed product is commingled with 30 barrels of gasoline received through a pipeline, that is, product that is not subject to tax. The distributor sells 2,940 gallons of commingled product to a retailer for sale outside Washington. The tax paid on the previously taxed product is equal to .095 cents per gallon ($4.00 ÷ 4200). Since the exported product has been blended with product that has not been taxed, only 76.9% of the exported product is eligible for credit (100 ÷ 130). The credit is $2.15 (2,940 × .769 × $.00095).

(iii) Example. A petroleum distributor purchases 100 barrels of gasoline and receives from the seller an invoice that states that the tax has been paid on 90% of the shipped product. The distributor exports the 100 barrels. The petroleum distributor may claim an export credit of $4.50. (90% of 100 barrels equals 90 barrels times the tax rate of $.05 equals $4.50.)

(iv) Example. A petroleum distributor purchases 100 barrels of unleaded gasoline from refinery A and later purchases 100 barrels from refinery B. The distributor stores all of its unleaded gasoline in a single storage tank. The invoice from refinery A separately states the amount of tax on the gasoline as $5.00 and the refinery B invoice states the tax as $4.00. The distributor pays the two invoiced amounts and sells 2,100 gallons of the commingled unleaded to a retailer located outside Washington. The distributor then purchases 100 more barrels of unleaded gasoline from distributor C. Distributor C's invoice separately states the tax as $3.00. Following payment of the invoice, the distributor exports an additional 2,100 gallons of unleaded. The distributor could choose to calculate the tax using one of the methods of accounting described in (b) of this subsection.

(A) Under the first-in, first-out method the distributor would treat all 4,200 gallons sold as if it was the unleaded gasoline purchased from refinery A. Under this method, the credit would be equal to .119 cents per gallon ($5.00 ÷ 4,200) or $5.00 total ($.00119 × 4,200).

(B) Under the average of tax paid method the distributor would recompute the tax paid on average for the entire commingled amount making adjustments as gasoline is sold or gasoline is added. Prior to the addition of the purchases from refinery B or distributor C, the rate would be .119 cents per gallon ($5.00 ÷ 4,200). Following the addition of the 100 barrels from refinery B the tank contains 8,400 gallons. The rate of tax would now be .107 cents per gallon (($5.00 + $4.00) ÷ 8,400). Out of this amount 2,100 gallons is exported in the first sale. The credit for this sale would be equal to $2.25 ($.00107 × 2,100).

(10) **Credit for use of petroleum products.** Effective March 26, 1992, any person having paid the tax imposed by this chapter may claim a refund or credit for the following:

(a) The use of petroleum products as a consumer for a purpose other than as a fuel. For this purpose, the term consumer shall be defined as provided in RCW 82.04.190; or

(b) The use of petroleum products as a component or ingredient in the manufacture of an item which is not a fuel.

(c) The amount of refund or credit claimed may not exceed the amount of tax paid by the person making such claim on the petroleum products so consumed or used.

[Statutory Authority: RCW 82.23B.050 and 82.32.300. WSR 02-16-016, § 458-20-260, filed 7/26/02, effective 8/26/02; WSR 92-24-049, § 458-20-260, filed 11/30/92, effective 12/31/92. Statutory Authority: RCW 82.23B.050. WSR 92-10-006, § 458-20-260, filed 4/24/92, effective 5/25/92.]

WAC 458-20-261 Commute trip reduction incentives. (1) **Introduction.** This rule explains the various commute trip reduction incentives that are available. First, RCW 82.04.355 and 82.16.047 provide exemptions from business and occupation (B&O) tax and public utility tax on amounts received from providing commuter ride sharing and ride sharing for persons with special transportation needs. RCW 82.08.0287 and 82.12.0282 provide sales and use tax exemptions for sales or use of passenger motor vehicles as ride-sharing vehicles. Finally, chapter 82.70 RCW provides commute trip reduction incentives in the form of B&O tax or public utility tax credit, effective July 1, 2003, in connection with ride sharing, public transportation, car sharing, and nonmotorized commuting.

(2) **B&O tax and public utility tax exemptions on providing commuter ride sharing or ride sharing for persons with special transportation needs.** Amounts received in the course of commuter ride sharing or ride sharing for persons with special transportation needs are exempt from the business and occupation tax and from the public utility tax. RCW 82.04.355 and 82.16.047.

(a) **What is "commuter ride sharing"?** "Commuter ride sharing" means a car pool or van pool arrangement, whereby one or more fixed groups:

(i) Not exceeding fifteen persons each, including the drivers; and

(ii) Either:

(A) Not fewer than five persons, including the drivers; or

(B) Not fewer than four persons, including the drivers, where at least two of those persons are confined to wheelchairs when riding;

Are transported in a passenger motor vehicle with a gross vehicle weight not exceeding ten thousand pounds, excluding any special rider equipment. The transportation must be between their places of residence or near such places of residence, and their places of employment or educational or other institutions. Each group must be in a single daily round trip where the drivers are also on the way to or from their places of employment or educational or other institutions.

(b) **What is "ride sharing for persons with special transportation needs"?** "Ride sharing for persons with special transportation needs" means an arrangement, whereby a group of persons with special transportation needs, and their attendants, is transported by a public social service agency or a private, nonprofit transportation provider, in a passenger motor vehicle as defined by the department of licensing to include small buses, cutaways, and modified vans not more than twenty-eight feet long. The driver need not be a person with special transportation needs.

(i) **What is a "private, nonprofit transportation provider"?** A "private, nonprofit transportation provider" is any private, nonprofit corporation providing transportation services for compensation solely to persons with special transportation needs.

(ii) **What is "persons with special transportation needs"?** "Persons with special transportation needs" are those persons, including their personal attendants, who

because of physical or mental disability, income status, or age, are unable to transport themselves or to purchase appropriate transportation.

(3) **Retail sales tax and use tax exemptions on sales or use of passenger motor vehicles as ride-sharing vehicles.** RCW 82.08.0287 and 82.12.0282 provide retail sales tax and use tax exemptions for sales and use of passenger motor vehicles as ride-sharing vehicles.

(a) **What are the requirements?** The requirements are that the passenger motor vehicles must be used:

(i) For commuter ride sharing or ride sharing for persons with special transportation needs; and

(ii) As ride-sharing vehicles for thirty-six consecutive months beginning from the date of purchase (retail sales tax exemption) and the date of first use (use tax exemption). If the vehicle is used as a ride-sharing vehicle for less than thirty-six consecutive months, the registered owner must pay the retail sales tax or use tax.

(b) **Additional requirements in certain cases.** Vehicles with five or six passengers, including the driver, used for commuter ride sharing must be operated within a county, or a city or town within that county, which has a commute trip reduction plan under chapter 70.94 RCW in order to be exempt from retail sales tax or use tax. In addition, for the exemptions to apply, at least one of the following conditions must apply:

(i) The vehicle must be operated by a public transportation agency for the general public;

(ii) The vehicle must be used by a major employer, as defined in RCW 70.94.524, as an element of its commute trip reduction program for their employees; or

(iii) The vehicle must be owned and operated by individual employees and must be registered either with the employer as part of its commute trip reduction program or with a public transportation agency serving the area where the employees live or work.

Individual-employee owned and operated motor vehicles require certification that the vehicle is registered with a major employer or a public transportation agency. Major employers who own and operate motor vehicles for their employees must certify that the commute ride-sharing arrangement conforms to a car pool/van pool element contained within their commute trip reduction program.

(4) **B&O tax or public utility tax credit for ride sharing, public transportation, car sharing, or nonmotorized commuting.** Effective July 1, 2003, RCW 82.70.020 provides a credit against B&O tax or public utility tax liability for ride sharing in vehicles carrying two or more persons, for using public transportation, for using car sharing, or for using nonmotorized commuting.

(a) **Who is eligible for this credit?**

(i) Employers in Washington are eligible for this credit, for amounts paid to or on behalf of their own or other employees, as financial incentives to such employees for ride sharing, for using public transportation, for using car sharing, or for using nonmotorized commuting.

(ii) Property managers who manage worksites in Washington are eligible for this credit, for amounts paid to or on behalf of persons employed at those worksites, as financial incentives to such persons for ride sharing, for using public transportation, for using car sharing, or for using nonmotorized commuting.

(b) **What is "ride sharing"?** "Ride sharing" means a car pool or van pool arrangement, whereby a group of at least two but not exceeding fifteen persons, including the driver, is transported in a passenger motor vehicle with a gross vehicle weight not exceeding ten thousand pounds, excluding any special rider equipment. The transportation must be between their places of residence or near such places of residence, and their places of employment or educational or other institutions. The driver must also be on the way to or from his or her place of employment or educational or other institution. "Ride sharing" includes ride sharing on Washington state ferries.

(c) **What is "public transportation"?** "Public transportation" means the transportation of packages, passengers, and their incidental baggage, by means other than by charter bus or sight-seeing bus, together with the necessary passenger terminals and parking facilities or other properties necessary for passenger and vehicular access to and from such people moving systems. "Public transportation" includes passenger services of the Washington state ferries.

(d) **What is "car sharing"?** "Car sharing" means a membership program intended to offer an alternative to car ownership under which persons or entities that become members are permitted to use vehicles from a fleet on an hourly basis.

(e) **What is "nonmotorized commuting"?** "Nonmotorized commuting" means commuting to and from the workplace by an employee, by walking or running or by riding a bicycle or other device not powered by a motor. "Nonmotorized commuting" does not include teleworking, which is a program where work functions normally performed at a traditional workplace are instead performed by an employee at his or her home, at least one day a week for the purpose of reducing the number of trips to the employee's workplace.

(f) **What is the credit amount?** The amount of the credit is equal to the amount paid to or on behalf of each employee multiplied by fifty percent, but may not exceed sixty dollars per employee per fiscal year.

(g) **What is a "fiscal year"?** A "fiscal year" begins at July 1st of one year and ends on June 30th of the following year.

(h) **When will the credit expire?** The credit program is scheduled to expire July 1, 2013.

(i) **What are the limitations of the credit?**

(i) **For periods after June 30, 2005:**

(A) The credit may not exceed the amount of B&O tax or public utility tax that would otherwise be due for the same fiscal year.

(B) A person may not receive credit for amounts paid to or on behalf of the same employee under both B&O tax and public utility tax.

(C) A person may not take a credit for amounts claimed for credit by other persons.

(D) Total credit received by a person against both B&O tax and public utility tax may not exceed two hundred thousand dollars for a fiscal year. This limitation does not apply to credits deferred from prior fiscal years as described in (i)(i)(G) and (H) of this subsection.

(E) Total credit granted to all persons under both B&O tax and public utility tax may not exceed two million seven hundred fifty thousand dollars for a fiscal year, including any credits carried forward from prior fiscal years as described in (i)(i)(G) of this subsection.

(F) No credit or portion of a credit denied, because of exceeding the limitations in (i)(i)(D) or (E) of this subsection, may be used against tax liability for other fiscal years, subject to (i)(i)(G) and (H) of this subsection.

(G) A person, with B&O tax and public utility tax liability equal to or in excess of the credit for a fiscal year, may use all or part of the credit deferred prior to July 1, 2005, for a period of not more than three fiscal years after the fiscal year in which the credit accrued. No credit deferred under this (i)(i)(G) may be used after June 30, 2008. The person must submit an application, as provided in (j)(i)(A) of this subsection, in the fiscal year tax credit will be applied, and the credit must be approved by the department before use. This application is subject to eligibility under (i)(i)(E) of this subsection for the fiscal year tax credit will be applied. If a deferred credit is subject to proportional reduction under (j)(i)(D) of this subsection, the amount of deferred credit reduced may be carried forward as long as the period of deferral does not exceed three years after the year the credit was earned.

(H) For deferred credit approved by the department after June 30, 2005, the approved credit may be carried forward to subsequent years until used. The limitation described in (i)(i)(E) of this subsection does not apply to such deferred credit approved after June 30, 2005.

(I) No person is eligible for the tax credit, including the deferred tax credit authorized under (i)(i)(G) and (H) of this subsection, after June 30, 2013.

(J) No person is eligible for tax credit if the additional revenues for the multimodal transportation account created under RCW 46.68.035(1), 82.08.020(3), 82.12.045(7), 46.16.233(2), and 46.16.690 (created by the Engrossed Substitute House Bill No. 2231, chapter 361, Laws of 2003) are terminated.

(ii) **For periods prior to July 1, 2005:**

(A) The credit may not exceed the amount of B&O tax or public utility tax that would otherwise be due for the same fiscal year.

(B) A person may not receive credit for amounts paid to or on behalf of the same employee under both B&O tax and public utility tax.

(C) A person may not take a credit for amounts claimed for credit by other persons.

(D) Total credit received by a person against both B&O tax and public utility tax may not exceed two hundred thousand dollars for a fiscal year. This limitation does not apply to credits deferred from prior fiscal years as described in (i)(ii)(G) of this subsection.

(E) Total credit granted to all persons under both B&O tax and public utility tax may not exceed two million two hundred fifty thousand dollars for a fiscal year, including any credits carried forward from prior fiscal years as described in (i)(ii)(G) of this subsection.

(F) No credit or portion of a credit denied, because of exceeding the limitations in (i)(ii)(D) or (E) of this subsection, may be used against tax liability for other fiscal years, subject to (i)(ii)(G) of this subsection.

(G) A person, with B&O tax and public utility tax liability equal to or in excess of the credit for a fiscal year, may defer all or part of the credit for a period of not more than three fiscal years after the fiscal year in which the credit accrued. Such person deferring tax credit must submit an application in the fiscal year tax credit will be applied. This application is subject to eligibility under (i)(ii)(E) of this subsection for the fiscal year tax credit will be applied.

(H) No person is eligible for the tax credit, including the deferred tax credit authorized under (i)(ii)(G) of this subsection, after June 30, 2013.

(I) No person is eligible for tax credit if the additional revenues for the multimodal transportation account created under RCW 46.68.035(1), 82.08.020(3), 82.12.045(7), 46.16.233(2), and 46.16.690 (created by the Engrossed Substitute House Bill No. 2231, chapter 361, Laws of 2003) are terminated.

(j) **What are the credit procedures?**

(i) **For periods after June 30, 2005:**

(A) Persons applying for the credit must complete an application. The application must be received by the department between January 1 and January 31, following the calendar year in which the applicants made incentive payments. The application must be made to the department in a form and manner prescribed by the department.

(B) An application due by January 31, 2006, must not include incentive payments made from January 1, 2005, to June 30, 2005.

(C) The department must rule on an application within sixty days of the January 31 deadline. In addition, the department must disapprove an application not received by the January 31 deadline. Once the application is approved and tax credit is granted, the department is not allowed to increase the credit.

(D) If the total amount of credit applied for by all applicants in a fiscal year exceeds the limitation as provided in (i)(i)(E) of this subsection, the amount of credit allowed for all applicants is proportionally reduced so as not to exceed the limit. The amount reduced may not be carried forward and claimed in subsequent fiscal years, except as provided in (i)(i)(G) of this subsection.

(ii) **For periods prior to July 1, 2005:**

(A) Persons apply for the credit, by completing a commute trip reduction reporting schedule and filing it with the excise tax return covering the period for which the credit is claimed. The commute trip reduction reporting schedule is available upon request from the department of revenue.

(B) Credit must be claimed by the due date of the last tax return for the fiscal year in which the payment to or on behalf of employees was made.

(I) Credit not previously claimed may not be claimed for the first time on supplemental or amended tax returns filed after the due date of the last tax return for the fiscal year in which the payment to or on behalf of employees was made.

(II) If the department of revenue has granted an extension of the due date for the last tax return for the fiscal year in which the payment to or on behalf of employees was made, the credit must be claimed by the extended due date.

(C) Once the statewide limitation of two million two hundred fifty thousand dollars is reached in a fiscal year, no further credit will be available for that fiscal year. Credit is

permitted by the department of revenue on a first-come-first-serve basis. Credit claimed after the statewide limitation is reached may be deferred to the next three fiscal years before the credit expires.

(k) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(i) An employer pays one hundred eighty dollars for a yearly bus pass for one employee. For another employee, the employer buys a bicycle helmet and bicycle lock for a total of fifty dollars. These are the total expenditures during a fiscal year of amounts paid to or on behalf of employees in support of ride sharing, using public transportation, using car sharing, and using nonmotorized commuting. The employer may claim a credit of sixty dollars for the amount spent for the employee using the bus pass. Fifty percent of one hundred eighty dollars is ninety dollars, but the credit is limited to sixty dollars per employee. The employer may claim a credit of twenty-five dollars (fifty percent of fifty dollars) for the amount spent for the employee who bicycles to work. Even though fifty percent of two hundred thirty dollars, the amount spent on both employees, works out to be less than sixty dollars per employee, the credit is computed by looking at actual spending for each employee and not by averaging the spending for both employees.

(ii) An employer provides parking spaces for the exclusive use of ride-sharing vehicles. Amounts spent for signs, painting, or other costs related to the parking spaces do not qualify for the credit. This is because the credit is for financial incentives paid to or on behalf of employees. While the parking spaces support the use of ride-sharing vehicles, they are not financial incentives and do not involve amounts paid to or on behalf of employees.

(iii) As part of its commute trip reduction program, an employer pays the cab fare for an employee who has an emergency and must leave the workplace but has no vehicle available because he or she commutes by ride-sharing vehicle. The cab fare qualifies for the credit, if it does not cause the sixty-dollar limitation to be exceeded, because it is an amount paid on behalf of a specific employee.

(iv) An employer pays the property manager for a yearly bus pass for one employee who works at the worksite managed by the property manager. The property manager in turn pays the amount received from the employer to a public transportation agency to purchase the bus pass. Either the employer or the property manager, but not both, may take the credit for this expenditure.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 06-01-026, § 458-20-261, filed 12/13/05, effective 1/13/06. Statutory Authority: RCW 82.32.300, 82.04.4453 and 82.16.048. WSR 00-11-097, § 458-20-261, filed 5/17/00, effective 6/17/00; WSR 99-08-035, § 458-20-261, filed 3/31/99, effective 5/1/99.]

WAC 458-20-262 Retail sales and use tax exemptions for agricultural employee housing. (1) **Introduction.** RCW 82.08.02745 and 82.12.02685 provide a retail sales and use tax exemption for agricultural employee housing. This section also explains the exemptions, who is entitled to the exemption and how to obtain an exemption certificate.

(2) **Definitions.** The following definitions apply throughout this section.

(a) "Agricultural employee" means any person who renders personal services to, or under the direction of, an agricultural employer in connection with the employer's agricultural activity (RCW 19.30.010).

(b) "Agricultural employer" means any person engaged in agricultural activity, including the growing, producing, or harvesting of farm or nursery products, or engaged in the forestation or reforestation of lands, which includes but is not limited to the planting, transplanting, tubing, precommercial thinning, and thinning of trees and seedlings, the clearing, piling and disposal of brush and slash, the harvest of Christmas trees, and other related activities (RCW 19.30.010).

(c) "Agricultural employee housing" means all facilities provided by an agricultural employer, housing authority, local government, state or federal agency, nonprofit community or neighborhood-based organization that is exempt from income tax under section 501(c) of the Internal Revenue Code of 1986 (26 U.S.C. sec. 501(c)), or for-profit provider of housing for housing agricultural employees on a year-round or seasonal basis, including bathing, food handling, hand washing, laundry, and toilet facilities, single-family and multifamily dwelling units and dormitories, and includes labor camps. The term also includes but is not limited to mobile homes, travel trailers, mobile bunkhouses, modular homes, fabricated components of a house, and tents. Agricultural employee housing does not include housing regularly provided on a commercial basis to the general public. Agricultural employee housing does not include housing provided by a housing authority unless at least eighty percent of the occupants are agricultural employees whose adjusted income is less than fifty percent of median family income, adjusted for household size, for the county where the housing is provided.

(d) "Person" means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, limited liability company, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise and the United States or any instrumentality thereof (RCW 82.04.030).

(e) "Agricultural land" has the same meaning as "agricultural and farm land" in RCW 84.34.020(2).

(3) **Retail sales and use tax exemptions for agricultural employee housing.** RCW 82.08.02745 and 82.12.-02685, respectively, provide retail sales tax and use tax exemptions for the purchase, construction, and use of agricultural employee housing. Both exemptions require that agricultural employee housing provided to year-round employees of the agricultural employer must be built to the current building code for single-family or multifamily dwellings according to the state building code, chapter 19.27 RCW. Neither of these exemptions apply to housing built for the occupancy of an employer, family members of an employer, or persons owning stock or shares in a farm partnership or corporation business.

(a) The retail sales tax does not apply to charges for labor and services rendered by any person in respect to the con-

structing, repairing, decorating, or improving of new or existing buildings or other structures used as agricultural employee housing. Also exempt are sales of tangible personal property that becomes an ingredient or component of the buildings or other structures, including but not limited to septic tanks, pump houses, cisterns, and driveways. Examples of ingredients or components include but are not limited to cement, lumber, nails, paint and wallpaper.

(i) Appliances and furniture, including but not limited to stoves, refrigerators, bed frames, lamps and television sets, bolted or strapped directly to the building or structure are considered components of the building or structure. Additionally, appliances and furniture bolted or strapped to another item that is bolted or strapped directly to the building or structure (e.g., a television set bolted to a refrigerator that is strapped to the structure) are considered components of the building or structure.

(ii) Items that are not bolted or strapped directly to the building or structure, or to another item similarly bolted or strapped, do not qualify for this exemption. These items include but are not limited to kitchen utensils, mattresses, bedding, portable heating units, and throw rugs. Stoves, refrigerators, bed frames, lamps and television sets that are not bolted or strapped as discussed in (a)(i) of this subsection, also do not qualify as components of the building or structure.

(iii) Purchases of labor and transportation charges necessary to move and set up mobile homes, mobile bunkhouses, and other property and component parts as agricultural employee housing are exempt of retail sales tax.

(iv) As a condition for exemption, the seller must take from the buyer an exemption certificate completed by the buyer to document the exempt nature of the sale. This requirement may be satisfied by using the department of revenue's "Farmers' Retail Sales Tax Exemption Certificate" which can be obtained through the following means:

(A) From the department's internet site at http://dor.wa.gov;

(B) By calling taxpayer services at 1-800-647-7706; or

(C) By writing to:

Taxpayer Services
Washington State Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478

The seller may accept a legible fax or duplicate copy of an original exemption certificate. In all cases, the exemption certificate must be retained by the seller for a period of at least five years. An exemption certificate may be provided for a single purchase or for multiple purchases over a period of time. If the certificate is provided for multiple purchases over a period of time, the certificate is valid for as long as the buyer and seller have a recurring business relationship. A "recurring business relationship" means at least one sale transaction within a period of twelve consecutive months. RCW 82.08.050 (7)(c). Failure to comply with the provisions in this section may result in a denial of the exemption and the agricultural employer may be subject to use tax plus penalties and interest.

(b) The use tax exemption is available for the use of tangible personal property that becomes an ingredient or component of buildings or other structures used as agricultural employee housing during the course of constructing, repairing, decorating, or improving the buildings or other structures by any person. Again, appliances and furniture that are bolted or strapped to the actual building or structure are considered components of the building or structure.

(i) The exemption for materials incorporated into buildings or other structures used as agricultural employee housing also applies to persons/consumers constructing these buildings or structures for the federal government or county housing authorities. (See also WAC 458-20-17001 on government contracting.)

(ii) An agricultural employer claiming the exemption who retitles a used mobile home or titles a new mobile home acquired from an out-of-state seller must provide a completed exemption certificate to the department of licensing or its agent to substantiate the exempt nature of the home.

(4) **Requirement to remit payment of tax if agricultural housing fails to continue to satisfy the conditions of exemption.** The agricultural employee housing must be used for at least five consecutive years from the date the housing is approved for occupancy to retain the retail sales and use tax exemption. If this condition is not satisfied, the full amount of tax otherwise due shall be immediately due and payable together with interest, but not penalties, from the date the housing is approved for occupancy until the date of payment.

If at any time agricultural employee housing that is not located on agricultural land ceases to be used as agricultural employee housing, the full amount of tax otherwise due shall be immediately due and payable with interest, but not penalties, from the date the housing ceased to be used as agricultural employee housing.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.08.02745 and 82.12.02685. WSR 08-14-017, § 458-20-262, filed 6/20/08, effective 7/21/08. Statutory Authority: RCW 82.32.300 and 82.08.02745. WSR 98-24-069, § 458-20-262, filed 11/30/98, effective 12/31/98.]

WAC 458-20-263 Fuel cell, wind, landfill gas, and solar energy electric generating facilities sales and use tax exemption. (1) **Introduction.** This rule explains the retail sales and use tax exemptions provided by RCW 82.08.02567 and 82.12.02567 for the sale and/or use of machinery and equipment used directly in generating electricity using fuel cells, wind, landfill gas, or solar energy as the principal source of power. These exemptions expire June 30, 2009.

(2) **Retail sales and use tax exemptions.** The following exemptions apply for retail sales and use taxes.

(a) For periods before July 1, 2001, the retail sales tax does not apply to the purchase or lease of machinery and equipment used directly in generating electricity using wind, landfill gas, or solar energy as the principal power source, but only if the purchaser develops with such machinery and equipment a facility capable of generating at least two hundred kilowatts of electricity.

For this period, RCW 82.12.02567 provided a corresponding use tax exemption for the use of machinery and equipment for these purposes.

(b) Effective July 1, 2001, the retail sales tax does not apply to the purchase or lease of machinery and equipment used directly in generating electricity using fuel cells, wind, landfill gas, or solar energy as the principal power source, but

only if the purchaser develops with such machinery and equipment a facility capable of generating at least two hundred watts of electricity. See RCW 82.08.02567.

For this period, RCW 82.12.02567 provides a corresponding use tax exemption for the use of machinery and equipment for these purposes, except that no use tax exemption existed with regard to fuel cells until June 10, 2004. Between July 1, 2001, and June 10, 2004, although the purchase of machinery and equipment used directly in generating electricity using fuel cells is exempt from sales tax, the purchaser owes use tax upon the first use in this state of the machinery and equipment.

(3) **What is "machinery and equipment"?** "Machinery and equipment" means industrial fixtures, devices, and support facilities that are integral and necessary to the generation of electricity using fuel cells, wind, landfill gas, or solar energy as the principal source of power.

A "support facility" is a part of a building, or a structure or improvement, used to contain or steady an industrial fixture or device. A support facility must be specially designed and necessary for the proper functioning of the industrial fixture or device and must perform a function beyond being a building or a structure or an improvement. It must have a function relative to an industrial fixture or a device. To determine if some portion of a building is a support facility, the parts of the building are examined. For example, a highly specialized structure, like a vibration reduction slab under generators in a landfill gas generating facility, is a support facility. Without the slab, the generators would not function properly. The ceiling and walls of the building housing the generator are not support facilities if they only serve to define the space and do not have a function relative to an industrial fixture or a device.

"Machinery and equipment" does not include:

(a) The utility grid system;

(b) Hand-powered tools;

(c) Property with a useful life of less than one year;

(d) Repair parts required to restore machinery and equipment to normal working order;

(e) Replacement parts that do not increase productivity, improve efficiency, or extend the useful life of the machinery and equipment;

(f) Buildings; or

(g) Building fixtures that:

(i) Are permanently affixed to and become a physical part of a building; but

(ii) Are not integral and necessary to the generation of electricity.

(4) **When is machinery and equipment "used directly" in generating electricity?** Machinery and equipment is used directly to generate electricity when it is used to:

(a) Capture the energy of fuel cells, the wind, landfill gas, or solar energy;

(b) Convert that energy to electricity; or

(c) Store, transform, or transmit that electricity for entry into or operation in parallel with electric transmission and distribution systems.

(5) **Examples of qualifying machinery and equipment.** This subsection provides examples of machinery and equipment that is used directly in generating electricity and qualifies for the retail sales tax exemption provided by RCW 82.08.02567 and the use tax exemption provided by RCW 82.12.02567. This list is illustrative only and is not intended to provide an exhaustive list of possible qualifying machinery and equipment.

(a) Where solar energy is the principal source of power: Solar modules; power conditioning equipment; batteries; transformers; power poles; power lines; and connectors to the utility grid system or point of use.

(b) Where wind is the principal source of power: Turbines; blades; generators; towers and tower pads; substations; guy wires and ground stays; power conditioning equipment; anemometers; recording meters; transmitters; power poles; power lines; and connectors to the utility grid system or point of use.

(c) Where landfill gas is the principal source of power: Turbines; blades; blowers; burners; heat exchangers; generators; towers and tower pads; substations; guy wires and ground stays; pipe; valves; power conditioning equipment; pressure control equipment; recording meters; transmitters; power poles; power lines; and connectors to the utility grid system or point of use.

(d) Where fuel cells are the principal source of power: Fuel cell assemblies; fuel storage and delivery systems; power inverters; transmitters; transformers; power poles; power lines; and connectors to the utility grid system or point of use.

(6) **Installation charges.** Retail sales and use taxes do not apply to installation charges for qualifying machinery and equipment. This includes charges for labor and services rendered to install the machinery and equipment. However, there is no exemption for charges for labor and services rendered in respect to constructing buildings or access roads that may be necessary to install or use qualifying machinery and equipment. Nor is there an exemption for tangible personal property, such as a crane or forklift, used by the buyer to install qualifying machinery and equipment.

(7) **Required documentation.** The prior approval of the department of revenue is not required to claim the retail sales tax exemption. The seller, at the time of sale, must retain in its records an exemption certificate completed by the buyer to document the exempt nature of the sale. This requirement may be satisfied by using the department's "buyer's retail sales tax exemption certificate," or another certificate with substantially the same information as it relates to the exemption provided by RCW 82.08.02567.

A blank exemption certificate can be obtained through the following means:

(a) From the department's internet web site at http://dor.wa.gov;

(b) By facsimile by calling Fast Fax at 360-705-6705 or 800-647-7706 (using menu options); or

(c) By writing to: Taxpayer Services, Washington State Department of Revenue, P.O. Box 47478, Olympia, Washington 98504-7478.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 05-02-036, § 458-20-263, filed 12/30/04, effective 1/30/05. Statutory Authority: RCW 82.32.300. WSR 99-11-106, § 458-20-263, filed 5/19/99, effective 6/19/99. Statutory Authority: RCW 82.32.300 and 82.08.02567. WSR 97-03-027, § 458-20-263, filed 1/8/97, effective 2/8/97.]

WAC 458-20-264 National Uniform Tobacco Settlement. (1) **Introduction.** In 1998 the state of Washington entered into an agreement with cigarette manufacturers called the Master Settlement Agreement. Subsequent to entering into that agreement, the Legislature enacted chapter 393, Laws of 1999, codified as chapter 70.157 RCW. The statute requires the department of revenue (department) to promulgate regulations to ascertain the amount of excise tax paid by certain tobacco product manufacturers on "cigarettes" as that term is defined in RCW 70.157.010 and as set forth below. The department will do that by determining the number of cigarettes sold in Washington that were manufactured by nonparticipating tobacco product manufacturers. This rule explains the information to be reported to the department by retailers of tobacco products purchased from a person who is not required to file in Washington the report required by this rule, tobacco products distributors, and cigarette wholesalers. These reporting requirements are in addition to any other tax-reporting requirements.

(2) **Definitions.** For the purposes of WAC 458-20-264 the following definitions apply unless the context requires otherwise.

(a) "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns," "is owned" and "ownership" mean ownership of an equity interest, or the equivalent thereof, of ten percent or more, and the term "person" means an individual, partnership, committee, association, corporation or any other organization or group of persons.

(b) "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains:

(i) Any roll of tobacco wrapped in paper or in any substance not containing tobacco; or

(ii) Tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or

(iii) Any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (i) of this definition.

The term "cigarette" includes "roll-your-own" tobacco (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette."

(c) "Cigarette wholesaler" means any person who is licensed pursuant to chapter 82.24 RCW.

(d) "Master Settlement Agreement" means the settlement agreement (and related documents) entered into on November 23, 1998, by the state and leading United States tobacco product manufacturers.

(e) "Nonparticipating manufacturer" means any manufacturer of cigarettes or "roll-your-own" tobacco who is not a signatory to the Master Settlement Agreement. A manufacturer ceases to be a nonparticipating manufacturer upon entering into the Master Settlement Agreement.

(f) "Tobacco products distributor" means any person who meets the definitions found in RCW 82.26.010(3).

(g) "Tobacco product manufacturer" means an entity that after May 18, 1999, directly (and not exclusively through any affiliate):

(i) Manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the Master Settlement Agreement) that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of subsections II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

(ii) Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

(iii) Becomes a successor of an entity described in paragraph (i) or (ii) of this definition.

The term "tobacco product manufacturer" does not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within any of (i) through (iii) above.

(h) "Units sold" means the number of individual cigarettes sold and each 0.09 ounces of "roll-your-own" tobacco sold in the state by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the state on packs bearing the excise tax stamp of the state or "roll-your-own" tobacco containers.

(3) **Report required.** Every person who sells at retail tobacco products purchased from a person who is not required to file in Washington the report required by this subsection, every tobacco products distributor, and every cigarette wholesaler must file a report in a form and manner requested by the department. The report must be filed within the twenty-five days after the end of the month in which the sales were made. Mail the report to Department of Revenue, Special Programs Division, P.O. Box 47477, Olympia, WA 98504-7477.

The report must include the information listed below with respect to units sold that were manufactured by a nonparticipating tobacco product manufacturer.

(a) The number of units sold;

(b) The brand of the unit;

(c) The name and address of the person from whom each unit was purchased;

(d) The name and address of the manufacturer of the unit, if known; and

(e) The name and address of the importer of the unit, if known, and whether that importer is the exclusive importer of the unit, if known.

Example: A retailer may need to file the report required in subsection (3) when purchasing roll-your-own tobacco

over the internet or through a catalog from a vendor located outside of Washington, from an enrolled member of an Indian tribe located on a reservation in Washington, or in person from a vendor located in another state.

(4) **Recordkeeping requirement.** Every person who sells at retail tobacco products purchased from a person who is not required to file in Washington the report required by the rule, every tobacco products distributor, and every cigarette wholesaler, must maintain complete and accurate records to support the data supplied pursuant to paragraph (3) of this section.

(5) **Confidentiality.** The data filed pursuant to this rule is confidential taxpayer information and subject to the protection provided in RCW 82.32.330.

[Statutory Authority: RCW 70.157.010 and 82.32.300. WSR 00-23-117, § 458-20-264, filed 11/22/00, effective 12/23/00.]

WAC 458-20-267 Annual reports for certain tax adjustments. (1) **Introduction.** In order to take certain tax exemptions, credits, and rates ("tax adjustments"), taxpayers must file an annual report with the department of revenue (the "department") detailing employment, wages, and employer-provided health and retirement benefits. This section explains the reporting requirements for tax adjustments provided to computer data centers, the aerospace manufacturing, aluminum manufacturing, electrolytic processing, solar electric manufacturing, semiconductor manufacturing, and newspaper industries. This section explains who is required to file annual reports, how to file reports, and what information must be included in the reports.

This section contains a number of examples. These examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The results of other situations must be determined after a review of all of the facts and circumstances.

(2) **Who is required to file the report?** A recipient of the benefit of the following tax adjustments must complete and file an annual report with the department:

(a) **Tax adjustments for the aerospace manufacturing industry:**

(i) The business and occupation ("B&O") tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes, component parts, and tooling specially designed for use in manufacturing commercial airplanes or components of such airplanes;

(ii) The B&O tax credit provided by RCW 82.04.4461 for qualified development aerospace product expenditures;

(iii) The B&O tax rate for FAR 145 Part certified repair stations under RCW 82.04.250(3);

(iv) The retail sales and use tax exemption provided by RCW 82.08.980 and 82.12.980 for constructing new buildings used for manufacturing superefficient airplanes;

(v) The leasehold excise tax exemption provided by RCW 82.29A.137 for facilities used for manufacturing superefficient airplanes;

(vi) The property tax exemption provided by RCW 84.36.655 for property used for manufacturing superefficient airplanes; and

(vii) The B&O tax credit for property taxes and leasehold excise taxes paid on property used for manufacturing of commercial airplanes as provided by RCW 82.04.4463.

(viii) An annual report must be filed with the department for any person who takes any of the above tax adjustments of this subsection for employment positions in Washington; however, persons engaged in manufacturing commercial airplanes or components of such airplanes may report per manufacturing job site.

(b) **Tax adjustments for the aluminum smelter industry:**

(i) The B&O tax rate provided by RCW 82.04.2909 for aluminum smelters;

(ii) The B&O tax credit for property taxes provided by RCW 82.04.4481 for aluminum smelter property;

(iii) The retail sales and use tax exemption provided by RCW 82.08.805 and 82.12.805 for property used at aluminum smelters; and

(iv) The use tax exemption provided by RCW 82.12.022 (5) for the use of natural or manufactured gas;

(c) **Tax adjustment for the electrolytic processing industry.**The public utility tax exemption provided by RCW 82.16.0421 for sales of electricity to electrolytic processing businesses.

(d) **Tax adjustment for the solar electric manufacturing industry.** The B&O tax rate for manufacturers of solar energy systems using photovoltaic modules, or silicon components of such systems provided by RCW 82.04.294.

(e) **Tax adjustments for the semiconductor manufacturing and processing industry.**

(i) The B&O tax rate for manufacturers or processors for hire of semiconductor materials provided by RCW 82.04.-2404.

(ii) The sales and use tax exemptions for sales of gases and chemicals used by a manufacturer or processor for hire in the production of semiconductor materials provided by RCW 82.08.9651, 82.12.9651, and 82.12.970.

(f) **Tax adjustments for various industries.**

(i) The B&O tax rate for printing a newspaper, publishing a newspaper, or both provided by RCW 82.04.260(14).

(ii) The sales tax exemption for sales of eligible server equipment to be installed without intervening use in an eligible computer data center as provided by chapters 1 and 23, Laws of 2010 sp. sess.

(3) **How to file annual reports.**

(a) **Required form.** The department has developed a report form that must be used to complete the annual report unless a person obtains prior written approval from the department to file the annual report in an alternative format.

(b) **Electronic filing.** Reports must be filed electronically unless the department waives this requirement upon a showing of good cause. A report is filed electronically when the department receives the report in an electronic format.

(c) **How to obtain the form.** Persons who have received a waiver of the electronic filing requirement from the department or who otherwise would like a paper copy of the report may obtain the report from the department's web site (www.dor.wa.gov). It may also be obtained from the department's district offices, by telephoning the telephone information center (800-647-7706), or by contacting the department's special programs division at:

Department of Revenue
Special Programs Division
Post Office Box 47477
Olympia, WA 98504-7477
Fax: 360-586-2163

(d) **Special requirement for persons who did not file an annual report during the previous calendar year.** If a person is a first-time filer or otherwise did not file an annual report with the department during the previous calendar year, the report must include information on employment, wages, and employer-provided health and retirement benefits for the two calendar years immediately preceding the due date of the report.

(e) **Due date.**

(i) **For reports due 2011 or later.** For persons claiming any B&O tax credit, tax exemption, or tax rate listed under subsection (2) of this section, the report must be filed or postmarked by April 30th following any calendar year in which the person becomes eligible to claim the tax credit, tax exemption, or tax rate.

(ii) **For reports due prior to 2010 or earlier.** For persons claiming any B&O tax credit, tax exemption, or tax rate listed under subsection (2) of this section, with the exception of the tax rate provided by RCW 82.04.2404, the report must be filed or postmarked by March 31st following any calendar year in which the tax credit, tax exemption, or tax rate is claimed. For persons claiming the tax rate provided by RCW 82.04.2404 the report must be filed or postmarked by April 30th following any calendar year in which the tax rate is claimed.

(iii) **Due date extensions.** The department may extend the due date for timely filing annual reports as provided in subsection (18) of this section.

(f) **Examples.**

(i) An aerospace firm begins taking the B&O tax rate provided by RCW 82.04.260(10) for manufacturers and processors for hire of commercial airplanes and component parts on October 1, 2010. By April 30, 2011, the aerospace firm must provide an annual report covering calendar years 2009 and 2010. If the aerospace firm continues to take the B&O tax rate provided by RCW 82.04.260(10) during calendar year 2011, a single annual report is due on April 30, 2012, covering calendar year 2011.

(ii) An aluminum smelter begins taking the B&O tax rate provided by RCW 82.04.2909 for aluminum smelters on July 31, 2010. By April 30, 2011, the aluminum smelter must provide an annual report covering calendar years 2009 and 2010. If the aluminum smelter continues to take the B&O tax rate provided by RCW 82.04.2909 during calendar year 2011, a single annual report is due on April 30, 2012, covering calendar year 2011.

(4) **What employment positions are included in the annual report?**

(a) **General rule.** Except as provided in (b) of this subsection, the report must include information detailing employment positions in the state of Washington.

(b) **Alternative method.** Persons engaged in manufacturing commercial airplanes or their components may report employment positions per job at the manufacturing site.

(i) **What is a "manufacturing site"?** For purposes of the annual report, a "manufacturing site" is one or more immediately adjacent parcels of real property located in Washington state on which manufacturing occurs that support activities qualifying for a tax adjustment. Adjacent parcels of real property separated only by a public road comprise a single site. A manufacturing site may include real property that supports nonqualifying activities such as administration offices, test facilities, warehouses, design facilities, and shipping and receiving facilities.

(ii)(A) **If the person files per job at the manufacturing site, which manufacturing site is included in the annual report for the aerospace manufacturing industry tax adjustments?** The location(s) where a person is manufacturing commercial airplanes or components of such airplanes within this state is the manufacturing site(s) included in the annual report. A "commercial airplane" has its ordinary meaning, which is an airplane certified by the Federal Aviation Administration ("FAA") for transporting persons or property, and any military derivative of such an airplane. A "component" means a part or system certified by the FAA for installation or assembly into a commercial airplane.

(B) **Are there alternative methods for reporting separately for each manufacturing site?** For purposes of completing the annual report, the department may agree to allow a person whose manufacturing sites are within close geographic proximity to consolidate its manufacturing sites onto a single annual report provided that the jobs located at the manufacturing sites have equivalent employment positions, wages, and employer-provided health and retirement benefits. A person may request written approval to consolidate manufacturing sites by contacting the department's special programs division at:

Department of Revenue
Special Programs Division
Post Office Box 47477
Olympia, WA 98504-7477
Fax: 360-586-2163

(c) **Examples.**

(i) ABC Airplanes, a company manufacturing FAA certified airplane landing gear, conducts activities at three locations in Washington state. ABC Airplanes is reporting tax under the B&O tax rate provided by RCW 82.04.260(10) for manufacturers and processors for hire of commercial airplanes and component parts. In Seattle, WA, ABC Airplanes maintains its corporate headquarters and administrative offices. In Spokane, WA, ABC Airplanes manufactures the brake systems for the landing gear. In Vancouver, WA, ABC Airplanes assembles the landing gear using the components manufactured in Spokane, WA. If filing per manufacturing site, ABC Airplanes must file separate annual reports for employment positions at its manufacturing sites in Spokane and Vancouver because these are the Washington state locations in which manufacturing occurs that supports activities qualifying for a tax adjustment.

(ii) Acme Engines, a company manufacturing engine parts, conducts manufacturing in five locations in Washington state. Acme Engines is reporting tax under the B&O tax rate provided by RCW 82.04.260(10) for manufacturers and processors for hire of commercial airplanes and component

parts. It manufactures FAA certified engine parts at its Puyallup, WA location. Acme Engines' four other locations manufacture non-FAA certified engine parts. If filing per manufacturing site, Acme Engines must file an annual report for employment positions at its manufacturing site in Puyallup because it is the only location in Washington state in which manufacturing occurs that supports activities qualifying for a tax adjustment.

(iii) Tacoma Rivets, located in Tacoma, WA, manufactures rivets used in manufacturing airplanes. Half of the rivets Tacoma Rivets manufactures are FAA certified to be used on commercial airplanes. The remaining rivets Tacoma Rivets manufactures are not FAA certified and are used on military airplanes. Tacoma Rivets is reporting tax on its sales of FAA certified rivets under the B&O tax rate provided by RCW 82.04.260(10) for manufacturers and processors for hire of commercial airplanes and component parts. If filing per manufacturing site, Tacoma Rivets must file an annual report for employment positions at its manufacturing site in Tacoma because it is the location in Washington state in which manufacturing occurs that supports activities qualifying for a tax adjustment.

(iv) Dynamic Aerospace Composites is a company that only manufactures FAA certified airplane fuselage materials. Dynamic Aerospace Composites conducts activities at three separate locations within Kent, WA. Dynamic Aerospace Composites is reporting tax under the B&O tax rate provided by RCW 82.04.260(10) for manufacturers and processors for hire of commercial airplanes and component parts. If filing per manufacturing site, Dynamic Aerospace Composites must file separate annual reports for each of its three manufacturing sites.

(v) Worldwide Aerospace, an aerospace company, manufactures wing systems for commercial airplanes in twenty locations around the world, but none located in Washington state. Worldwide Aerospace manufactures wing surfaces in San Diego, CA. Worldwide Aerospace sells the wing systems to an airplane manufacturer located in Moses Lake, WA and is reporting tax on these sales under the B&O tax rate provided by RCW 82.04.260(10) for sales, at retail or wholesale, of commercial airplanes, or components of such airplanes, manufactured by that person. Worldwide Aerospace is required to complete the annual report for any employment positions in Washington that are directly related to the qualifying activity.

(5) **What jobs are included in the annual report?**

(a) The annual report covers all full-time, part-time, and temporary jobs in this state or, for persons filing as provided in subsection (4)(b) of this section, at the manufacturing site as of December 31st of the calendar year for which an applicable tax adjustment is claimed. Jobs that support nonqualifying activities or support both nonqualifying and qualifying activities for a tax adjustment are included in the report if the job is located in the state of Washington or, for persons filing as provided in subsection (4)(b) of this section, at the manufacturing site.

(b) **Examples.**

(i) XYZ Aluminum, an aluminum smelter company, manufactures aluminum in Tacoma, WA. The company is reporting tax under the B&O tax rate provided by RCW 82.04.2909 for aluminum smelters. XYZ Aluminum's annual report for its Tacoma, WA location will include all of its employment positions in this state, including its nonmanufacturing employment positions.

(ii) AAA Tire Company manufactures tires at one manufacturing site located in Centralia, WA. The company is reporting tax under the B&O tax rate provided by RCW 82.04.260(10) for manufacturers and processors for hire of commercial airplanes and component parts. FAA certified tires comprise only 20% of the products it manufactures and are manufactured in a separate building at the manufacturing site. If filing under the method described in subsection (4)(b) of this section, AAA Tire Company must report all jobs at the manufacturing site, including the jobs engaged in the nonqualifying activities of manufacturing non-FAA certified tires.

(6) **How is employment detailed in the annual report?** The annual report is organized by employee occupational groups, consistent with the United States Department of Labor's Standard Occupation Codes (SOC) System. The SOC System is a universal occupational classification system used by government agencies and private industries to produce comparable occupational data. The SOC classifies occupations at four levels of aggregation:

(a) Major group;

(b) Minor group;

(c) Broad occupation; and

(d) Detailed occupation.

All occupations are clustered into one of twenty-three major groups. The annual report uses the SOC major groups to detail the levels of employment, wages, and employer-provided health and retirement benefits at the manufacturing site. A detailed description of the SOC System is available by contacting the department's special programs division or by consulting the United States Department of Labor, Bureau of Labor Statistics online at www.bls.gov/soc. The annual report does not require names of employees.

(7) **What is total employment?** The annual report must state the total number of employees for each SOC major group that are currently employed on December 31st of the calendar year for which an applicable tax adjustment is taken. Total employment includes employees who are on authorized leaves of absences such as sick leave, vacation, disability leave, jury duty, military leave, regardless of whether those employees are receiving wages. Leaves of absences do not include separations of employment such as layoffs or reductions in force. Vacant positions are not included in total employment.

(8) **What are full-time, part-time and temporary employment positions?** An employer must provide information on the number of employees, as a percentage of total employment in the SOC major group, that are employed in full-time, part-time or temporary employment positions on December 31st of the calendar year for which an applicable tax adjustment is claimed. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(a) **Full-time and part-time employment positions.** In order for a position to be treated as full time or part time, the employer must intend for the position to be filled for at least fifty-two consecutive weeks or twelve consecutive months. A full-time position is a position that satisfies any one of the following minimum thresholds:

(i) Works thirty-five hours per week for fifty-two consecutive weeks;

(ii) Works four hundred fifty-five hours, excluding overtime, each quarter for four consecutive quarters; or

(iii) Works one thousand eight hundred twenty hours, excluding overtime, during a period of twelve consecutive months.

A part-time position is a position in which the employee works less than the hours required for a full-time position. In some instances, an employee may not be required to work the hours required for full-time employment because of paid rest and meal breaks, health and safety laws, disability laws, shift differentials, or collective bargaining agreements, but receives wages equivalent to a full-time job. If, in the absence of these factors, the employee would be required to work the number of hours for a full-time position to receive full-time wages, the position should be reported as a full-time employment position.

(b) **Temporary positions.** A temporary position is a position that is intended to be filled for period of less than twelve consecutive months. Positions in seasonal employment are temporary positions. Temporary positions include workers furnished by staffing companies regardless of the duration of the placement with the person required to file the annual report.

(c) **Examples.** Assume these facts for the following examples. National Airplane Inc. manufactures FAA certified navigation systems at a manufacturing site located in Tacoma, WA. National Airplane Inc. is claiming all the tax adjustments available for manufacturers and processors for hire of commercial airplanes and component parts. National Airplane Inc. employs one hundred people. Seventy-five of the employees work directly in the manufacturing operation and are classified as SOC Production Occupations. Five employees work in the engineering and design division and are classified as SOC Architect and Engineering Occupations. Five employees are sales representatives and are classified as SOC Sales and Related Occupations. Five employees are service technicians and are classified as SOC Installation, Maintenance, and Repair Occupations. Five employees are administrative assistants and are classified as SOC Office and Administrative Support. Five executives are classified as SOC Management Occupations.

(i) Through a college work-study program, National Airplane Inc. employs six interns from September through June in its engineering department. The interns work twenty hours a week. The six interns are reported as temporary employees, and not as part-time employees, because the intern positions are intended to be filled for a period of less than twelve consecutive months. Assuming the five employees classified as SOC Architect and Engineering Occupations are full-time employees, National Airplane Inc. will report a total of eleven employment positions in SOC Architect and Engineering Occupations with 45% in full-time employment positions and 55% in temporary employment positions.

(ii) National Airplane Inc. manufactures navigation systems in two shifts of production. The first shift works eight hours from 8:00 a.m. to 5:00 p.m. Monday thru Friday. The second shift works six hours from 6:00 p.m. to midnight Monday thru Friday. The second shift works fewer hours per week (thirty hours) than the first shift (forty hours) as a pay differential for working in the evening. If a second shift employee transferred to the first shift, the employee would be required to work forty hours with no overall increase in wages. The second shift employees should be reported as full-time employment positions, rather than part-time employment positions.

(iii) On December 1st, ten National Airplane Inc. full-time employees classified as SOC Production Occupations take family and medical leave for twelve weeks. National Airplane Inc. hires five people to perform the work of the employees on leave. Because the ten employees classified as SOC Production Occupations are on authorized leave, National Airplane Inc. will include those employees in the annual report as full-time employment positions. The five people hired to replace the absent employees classified as SOC Production Occupations will be included in the report as temporary employees. National Airplane Inc. will report a total of eighty employment positions in SOC Production Occupations with 93.8% in full-time employment positions and 6.2% in temporary employment positions.

(iv) On December 1st, one full-time employee classified as SOC Sales and Related Occupations resigns from her position. National Airplane Inc. contracts with Jane Smith d/b/a Creative Enterprises, Inc. to finish an advertising project assigned to the employee who resigned. Because Jane Smith is an independent contractor, National Airplane Inc. will not include her employment in the annual report. Because the resignation has resulted in a vacant position, the total number of employment positions National Airplane Inc. will report in SOC Sales and Related Occupations is reduced to four employment positions.

(v) All National Airplane Inc. employees classified as SOC Office and Administrative Support Occupations work forty hours a week, fifty-two weeks a year. On November 1st, one employee must limit the number of hours worked to thirty hours each week to accommodate a disability. The employee receives wages based on the actual hours worked each week. Because the employee works less than thirty-five hours a week and is not paid a wage equivalent to a full-time position, the employee's position is a part-time employment position. National Airplane Inc. will report a total of five employment positions in SOC Office and Administrative Support Occupations with 80% in full-time employment positions and 20% in part-time employment positions.

(9) **What are wages?** For the purposes of the annual report, "wages" means the base compensation paid to an individual for personal services rendered to an employer, whether denominated as wages, salary, commission, or otherwise. Compensation in the form of overtime, tips, bonuses, benefits (insurance, paid leave, meals, etc.), stock options, and severance pay are not "wages." For employees that earn an annual salary, hourly wages are determined by dividing annual salary by 2080. If an employee is paid by commission, hourly wages are determined by dividing the total amount of commissions paid during the calendar year by 2080.

(10) **How are wages detailed for the annual report?**

(a) An employer must provide information on the number of employees, as a percentage of the total employment in the SOC major group, paid a wage within the following five hourly wage bands:

Up to $10.00 an hour;
$10.01 an hour to $15.00 an hour;
$15.01 an hour to $20.00 an hour;
$20.01 an hour to $30.00 an hour; and
$30.01 an hour or more.

Percentages should be rounded to the nearest 1/10th of 1% (XX.X%). For purposes of the annual report, wages are measured on December 31st of the calendar year for which an applicable tax adjustment is claimed.

(b) **Examples.** Assume these facts for the following examples. Washington Airplane Inc. manufactures FAA certified navigation systems at a manufacturing site located in Tacoma, WA. Washington Airplane Inc. is claiming all the tax adjustments available for manufacturers and processors for hire of commercial airplanes and component parts. Washington Airplane Inc. employs five hundred people at the manufacturing site, which constitutes its entire work force in this state. Four hundred employees engage in activities that are classified as SOC Production Occupations. Fifty employees engage in activities that are classified as SOC Architect and Engineer Occupations. Twenty-five employees are engaged in activities classified as SOC Management Occupations. Twenty employees are engaged in activities classified as SOC Office and Administrative Support Occupations. Five employees are engaged in activities classified as SOC Sales and Related Occupations.

(i) One hundred employees classified as SOC Production Occupations are paid $12.00 an hour. Two hundred employees classified as SOC Production Occupations are paid $17.00 an hour. One hundred employees classified as SOC Production Occupations are paid $25.00 an hour. For SOC Production Occupations, Washington Airplane Inc. will report 25% of employment positions are paid $10.01 an hour to $15.00 an hour; 50% are paid $15.01 an hour to $20.00 an hour; and 25% are paid $20.01 an hour to $30.00 an hour.

(ii) Ten employees classified as SOC Architect and Engineering Occupations are paid an annual salary of $42,000; another ten employees are paid $50,000 annually; and the remaining employees are all paid over $70,000 annually. In order to report wages, the annual salaries must be converted to hourly amounts by dividing the annual salary by 2080 hours. For SOC Architect and Engineering Occupations, Washington Airplane Inc. will report 40% of employment positions are paid $20.01 an hour to $30.00 an hour and 60% are paid $30.00 an hour or more.

(iii) All the employees classified as SOC Sales and Related Occupations are sales representatives that are paid on commission. They receive $10.00 commission for each navigation system sold. Three sales representatives sell 2,500 navigation systems during the calendar year. Two sales representatives sell 3,500 navigation systems during the calendar year and receive a $10,000 bonus for exceeding company's sales goals. In order to report wages, the employee's commissions must be converted to hourly amounts by dividing the total commissions by 2080 hours. Washington Airplane Inc. will report that 60% of employment positions classified as SOC Sales and Related Occupations are paid $10.01 an hour to $15.00 an hour. Because bonuses are not included in wages, Washington Airplane Inc. will report 40% of employment positions classified as SOC Sales and Related Occupations are paid $15.01 an hour to $20.00 an hour.

(iv) Ten of the employees classified as SOC Office and Administrative Support Occupations earn $9.50 an hour. The remaining ten employees classified as SOC Office and Administrative Support Occupations earn wages between $10.01 an hour to $15.00 an hour. On December 1st, Washington Airplane Inc. announces that effective December 15th, all employees classified as SOC Office and Administrative Support Occupations will earn wages of at least $10.50 an hour, but no more than $15.00 an hour. Because wages are measured on December 31st, Washington Airplane Inc. will report 100% of employment positions classified as SOC Office and Administrative Support Occupations Sales and Related Occupations are paid $10.01 an hour to $15.00 an hour.

(11) **Reporting workers furnished by staffing companies.** For temporary positions filled by workers that are furnished by staffing companies, the person filling out the annual report must provide the following information:

(a) Total number of staffing company employees furnished by staffing companies;

(b) Top three occupational codes of all staffing company employees; and

(c) Average duration of all staffing company employees.

(12) **What are employer-provided health benefits?** For purposes of the annual report, "health benefits" means compensation, not paid as wages, in the form of a health plan offered by an employer to its employees. A health plan that is equally available to employees and the general public is not an "employer-provided" health benefit.

(a) "Dental care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease of human teeth, alveolar process, gums, or jaw.

(b) "Dental care plan" means a health plan for the purpose of providing for its employees or their beneficiaries' dental care services.

(c) "Health plan" means any plan, fund, or program established, maintained, or funded by an employer for the purpose of providing for its employees or their beneficiaries, through the purchase of insurance or otherwise, medical care and dental care services. Health plans include any "employee welfare benefit plan" as defined by the Employee Retirement Income Security Act (ERISA), any "health plan" or "health benefit plan" as defined in RCW 48.43.005, any self-funded multiple employer welfare arrangement as defined in RCW 48.125.010, any "qualified health insurance" as defined in Section 35 of the Internal Revenue Code, an "Archer MSA" as defined in Section 220 of the Internal Revenue Code, a "health savings plan" as defined in Section 223 of the Internal Revenue Code, any "health plan" qualifying under Section 213 of the Internal Revenue Code, governmental plans, and church plans.

(d) "Medical care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease.

(e) "Medical care plan" means a health plan for the purpose of providing for its employees or their beneficiaries' medical care services.

(13) **How are employer-provided health benefits detailed in the annual report?** The annual report is orga-

nized by SOC major group and by type of health plan offered to or with enrolled employees on December 31st of the calendar year for which an applicable tax adjustment is claimed.

(a) **Detail by SOC major group.** For each SOC major group, report the number of employees, as a percentage of total employment in the SOC major group, eligible to participate in an employer-provided medical care plan. An employee is "eligible" if the employee can currently participate in a medical care plan provided by the employer. Waiting periods, tenure requirements, minimum work hour requirements, preexisting conditions, and other limitations may prevent an employee from being eligible for coverage in an employer's medical care plan. If an employer provides multiple medical care plans, an employee is "eligible" if the employee can currently participate in one of the medical care plans. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(b) **Examples.**

(i) On December 31st, Acme Engines has one hundred employees classified as SOC Production Occupations. It offers these employees two medical care plans. Plan A is available to all employees at the time of hire. Plan B is available to employees after working ninety days. For SOC Production Occupations, Acme Engines will report 100% of its employees are eligible for employer-provided medical benefits because all of its employees are eligible for at least one medical care plan offered by Acme Engines.

(ii) Apex Aluminum has fifty employees classified as SOC Transportation and Material Moving Occupations, all of whom have worked for Apex Aluminum for over five years. Apex Aluminum offers one medical care plan to its employees. Employees must work for Apex Aluminum for six months to participate in the medical care plan. On October 1st, Apex Aluminum hires ten new employees classified as SOC Transportation and Material Moving Occupations. For SOC Transportation and Material Moving Occupations, Apex Aluminum will report 83.3% of its employees are eligible for employer-provided medical benefits.

(c) **Detail by type of health plan.** The report also requires detailed information about the types of health plans the employer provides. If an employer has more than one type of health plan, it must report each health plan separately. If a person offers more than one of the same type of health plan as described in (c)(i) of this subsection, the person may consolidate the detail required in (c) through (e) of this subsection by using ranges to describe the information. The details include:

(i) A description of the type of plan in general terms such as self-insured, fee for service, preferred provider organization, health maintenance organization, health savings account, or other general description. The report does not require a person to disclose the name(s) of their health insurance carrier(s).

(ii) The number of employees eligible to participate in the health plan, as a percentage of total employment at the manufacturing site or as otherwise reported. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iii) The number of employees enrolled in the health plan, as a percentage of employees eligible to participate in the health plan at the manufacturing site or as otherwise reported. An employee is "enrolled" if the employee is currently covered by or participating in an employer-provided health plan. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iv) The average percentage of premium paid by employees enrolled in the health plan. "Premium" means the cost incurred by the employer to provide a health plan or the continuance of a health plan, such as amounts paid to health carriers or costs incurred by employers to self-insure. Employers are generally legally responsible for payment of the entire cost of the premium for enrolled employees, but may require enrolled employees to share in the cost of the premium to obtain coverage. State the amount of premium, as a percentage, employees must pay to maintain enrollment under the health plan. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(v) If necessary, the average monthly contribution to enrolled employees. In some instances, employers may make contributions to an employee health plan, but may not be aware of the percentage of premium cost borne by the employee. For example, employers may contribute to a health plan sponsored by an employee organization, or may sponsor a medical savings account or health savings account. In those instances where the employee's contribution to the health plan is unknown, an employer must report its average monthly contribution to the health plan by dividing the employer's total monthly costs for the health plan by the total number of employees enrolled in the health plan.

(vi) Whether legal spouses, state registered domestic partners, and unmarried dependent children can obtain coverage under the health plan and if there is an additional premium for such coverage.

(vii) Whether part-time employees are eligible to participate in the health plan.

(d) **Medical care plans.** In addition to the detailed information required for each health plan, report the amount of enrolled employee point of service cost-sharing for hospital services, prescription drug benefits, and primary care physician services for each medical care plan. If differences exist within a medical care plan, the lowest cost option to the enrolled employee must be stated in the report. For example, if employee point of service cost-sharing is less if an enrolled employee uses a network of preferred providers, report the amount of point of service cost-sharing using a preferred provider. Employee point of service cost-sharing is generally stated as a percentage of cost, a specific dollar amount, or both.

(i) "Employee point of service cost-sharing" means amounts paid to health carriers directly providing medical care services, health care providers, or health care facilities by enrolled employees in the form of copayments, co-insurance, or deductibles. Copayments and co-insurance mean an amount specified in a medical care plan which is an obligation of enrolled employees for a specific medical care service which is not fully prepaid. A deductible means the amount an enrolled employee is responsible to pay before the medical care plan begins to pay the costs associated with treatment.

(ii) "Hospital services" means covered in-patient medical care services performed in a hospital licensed under chapter 70.41 RCW.

(iii) "Prescription drug benefit" means coverage to purchase a thirty-day or less supply of generic prescription drugs from a retail pharmacy.

(iv) "Primary care provider services" means nonemergency medical care services provided in an office setting by the employee's primary care provider.

(e) **Dental care plans.** In addition to the health plan information required for each dental care plan, the annual maximum benefit for each dental care plan must be stated in the report. Most dental care plans have an annual dollar maximum benefit. This is the maximum dollar amount a dental care plan will pay toward the cost of dental care services within a specific benefit period, generally one year. The enrolled employee is personally responsible for paying costs above the annual maximum.

(f) **Examples.**

(i) Assume the following facts for the following examples. Mosaic Aerospace employs one hundred employees and offers two medical care plans as health benefits to employees at the time of hire. Plan A is a managed care plan (HMO). Plan B is a fee for service medical care plan.

(A) Forty Mosaic Aerospace employees are enrolled in Plan A. It costs Mosaic Aerospace $750 a month for each employee covered by Plan A. Enrolled employees must pay $150 each month to participate in Plan A. If an enrolled employee uses its network of physicians, Plan A will cover 100% of the cost of primary care provider services with employees paying a $10.00 copayment per visit. If an enrolled employee uses its network of hospitals, Plan A will cover 100% of the cost of hospital services with employees paying a $200 deductible. If an enrolled employee does not use a network provider, Plan A will cover only 50% of the cost of any service with a $500 employee deductible. An enrolled employee must use a network of retail pharmacies to receive any prescription drug benefit. Plan A will cover the cost of prescription drugs with enrolled employees paying a $10.00 copayment. If an enrolled employee uses the mail-order pharmacy option offered by Plan A, copayment for prescription drug benefits is not required.

Mosaic Aerospace will report Plan A separately as a managed care plan. One hundred percent of its employees are eligible to participate in Plan A. The percentage of eligible employees enrolled in Plan A is 40%. The percentage of premium paid by an employee is 20%. Mosaic Aerospace will also report that employees have a $10.00 copayment for primary care provider services and a $200 deductible for hospital services because this is the lowest cost option within Plan A. Mosaic Aerospace will report that employees have a $10.00 copayment for prescription drug benefit. Mosaic Aerospace cannot report that employees do not have a prescription drug benefit copayment because "prescription drug benefit" is defined as coverage to purchase a thirty-day or less supply of generic prescription drugs from a retail pharmacy, not a mail-order pharmacy.

(B) Fifty Mosaic Aerospace employees are enrolled in Plan B. It costs Mosaic Aerospace $1,000 a month for each employee covered by Plan B. Enrolled employees must pay $300 a month to participate in Plan B. Plan B covers 100% of the cost of primary care provider services and 100% of the cost of prescription drugs with employees paying a $200 annual deductible for each covered service. Plan B covers 80% of the cost of hospital services with employees paying a $250 annual deductible.

Mosaic Aerospace will report Plan B separately as a fee for service medical care plan. One hundred percent of its employees are eligible to participate in Plan B. The percentage of eligible employees enrolled in Plan B is 50%. The percentage of premium paid by an employee is 30%. Mosaic Aerospace will also report that employees have a $200 annual deductible for both primary care provider services and prescription drug benefits. Hospital services have a $250 annual deductible and 20% co-insurance obligation.

(C) On December 1st, Mosaic Aerospace acquires General Aircraft Inc., a company claiming all the tax adjustments available for manufacturers and processors for hire of commercial airplanes and component parts. General Aircraft Inc. had fifty employees, all of whom were retained by Mosaic Aerospace. At General Aircraft Inc., employees were offered one managed care plan (HMO) as a benefit. The former General Aircraft Inc. employees will retain their current managed care plan until the following June when employees would be offered Mosaic Aerospace benefits. On December 31st, Mosaic Aerospace is offering employees two managed care plans. Mosaic Aerospace may report each managed care plan separately or may consolidate the detail required in (c) through (e) of this subsection for this type of medical care plan by using ranges to report the information.

(ii) Aero Turbines employs one hundred employees. It offers employees health savings accounts as a benefit to employees who have worked for the company for six months. Aero Turbines established the employee health savings accounts with a local bank and makes available to employees a high deductible medical care plan to be used in conjunction with the account. Aero Turbines deposits $500 a month into each employee's health savings account. Employees deposit a portion of their pretax earnings into a health savings account to cover the cost of primary care provider services, prescription drug purchases, and the high deductible medical care plan for hospital services. The high deductible medical care plan has an annual deductible of $2,000 and covers 75% of the cost of hospital services. Sixty-six employees open health savings accounts. Four employees have not worked for Aero Turbines for six months.

Aero Turbines will report the medical care plan as a health savings account. Ninety-six percent of employees are eligible to participate in health savings accounts. The percentage of eligible employees enrolled in health savings accounts is 68.8%. Because the amount of employee deposits into their health savings accounts will vary, Aero Turbines will report the average monthly contribution of $500 rather than the percentage of premium paid by enrolled employees. Because employees are responsible for covering their primary care provider services and prescription drugs costs, Aero Turbines will report that this health plan does not include these services. Because the high deductible medical care plan covers the costs of hospital services, Aero Turbines will report that the medical care plan has an annual deductible of $2,000 and employees have 25% co-insurance obligation.

(14) **What are employer-provided retirement benefits?** For purposes of the annual report, "retirement benefits" mean compensation, not paid as wages, in the form of a retirement plan offered by an employer to its employees. A

"retirement plan" means any plan, account, deposit, annuity, or benefit, other than a life insurance policy, that provides for retirement income or deferred income to employees for periods extending to the termination of employment or beyond. Retirement plans include pensions, annuities, stock bonus plans, employee stock ownership plans, profit sharing plans, self-employed retirement plans, individual retirement accounts, individual retirement annuities, and retirement bonds, as well as any other plan or program, without regard to its source of funding, and without regard to whether the retirement plan is a qualified plan meeting the guidelines established in the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code. A retirement plan that is equally available to employees and the general public is not an "employer-provided" retirement benefit.

(15) **How are employer-provided retirement benefits detailed in the annual report?** The annual report is organized by SOC major group and by type of retirement plans offered to employees or with enrolled employees on December 31st of the calendar year for which an applicable tax adjustment is claimed. Inactive or terminated retirement plans are excluded from the annual report. An inactive retirement plan is a plan that is not offered to new employees, but has enrolled employees, and neither enrolled employees nor the employer are making contributions to the retirement plan.

(a) **Detail by SOC major group.** For each SOC major group, report the number of employees, as a percentage of total employment in the SOC major group, eligible to participate in an employer-provided retirement plan. An employee is "eligible" if the employee can currently participate in a retirement plan provided by the employer. Waiting periods, tenure requirements, minimum work hour requirements, and other limitations may prevent an employee from being eligible for coverage in an employer's retirement plan. If an employer provides multiple retirement plans, an employee is "eligible" if the employee can currently participate in one of the retirement plans. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(b) **Examples.**

(i) Lincoln Airplane has one hundred employees classified as SOC Production Occupations. Fifty employees were enrolled in defined benefit pension at the time of hire. All employees are eligible to participate in a 401(k) Plan. For SOC Production Occupations, Lincoln Airplane will report 100% of its employees are eligible for employer-provided retirement benefits because all of its employees are eligible for at least one retirement plan offered by Lincoln Airplane.

(ii) Fly-Rite Airplanes has fifty employees classified in SOC Computer and Mathematical Occupations. Fly-Rite Airplane offers a SIMPLE IRA to its employees after working for the company one year. Forty-five employees classified in SOC Computer and Mathematical Occupations have worked for the company more than one year. For SOC Computer and Mathematical Occupations, Fly-Rite Airplanes will report 90% of its employees are eligible for retirement benefits.

(c) **Detail by retirement plan.** The report also requires detailed information about the types of retirement plans an employer offers employees. If an employer offers multiple retirement plans, it must report each type of retirement plan separately. If an employer offers more than one of the same type of retirement plan, but with different levels of employer contributions, it may consolidate the detail required in (i) through (iv) of this subsection by using ranges to describe the information. The report includes:

(i) The type of plan in general terms such as 401(k) Plan, SEP IRA, SIMPLE IRA, cash balance pension, or defined benefit plan.

(ii) The number of employees eligible to participate in the retirement plan, as a percentage of total employment at the manufacturing site, or as otherwise reported. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iii) The number of employees enrolled in the retirement plan, as a percentage of employees eligible to participate in the retirement plan at the manufacturing site. An employee is "enrolled" if the employee currently participates in an employer-provided retirement plan, regardless of whether the employee has a vested benefit. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iv) The maximum benefit the employer will contribute into the retirement plan for enrolled employees. The maximum benefit an employer will contribute is generally stated as a percentage of salary, specific dollar amount, or both. This information is not required for a defined benefit plan meeting the qualification requirements of Employee Retirement Income Security Act (ERISA) that provides benefits according to a flat benefit, career-average, or final pay formula.

(d) **Examples.**

(i) General Airspace is a manufacturer of airplane components located in Centralia, WA. General Airspace employs one hundred employees. Fifty employees are eligible for and enrolled in a defined benefit pension with a flat benefit at the time of retirement. Twenty-five employees are eligible for and enrolled in a cash balance pension with General Airspace contributing 7% of an employee's annual compensation with a maximum annual contribution of $10,000. All General Airspace employees can participate in a 401(k) Plan. Sixty-five employees are participating in the 401(k) Plan. General Airspace does not make any contributions into the 401(k) Plan. Five employees are former employees of United Skyways, a company General Airspace acquired. United Skyways employees were enrolled in a cash balance pension at the time of hire. When General Airspace acquired United Skyways, it did not terminate or liquidate the United Skyways cash balance plan. Rather, General Airspace maintains cash balance plan only for former United Skyways employees, allowing only interest to accrue to the plan.

(A) General Airspace will report that it offers three retirement plans - A defined benefit pension, a cash-balance pension, and a 401(k) Plan. General Airspace will not report the inactive cash balance pension it maintains for former United Skyways employees.

(B) For the defined benefit pension, General Airspace will report 50% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 100% are enrolled.

(C) For the cash-balance pension, General Airspace will report 25% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 100% are enrolled. General Airspace will report a maximum contribution of $10,000 or 7% of an employee's annual compensation.

(D) For the 401(k) Plan, General Airspace will report 100% of its total employment positions are eligible to participate in the retirement plan. Of the employment positions eligible to participate, 65% are enrolled. General Airspace will report that it does not make any contributions into the 401(k) Plan.

(ii) Washington Alloys is an aluminum smelter located in Grandview, WA. Washington Alloys employs two hundred employees. Washington Alloys offers a 401(k) Plan to its employees after one year of hire. One hundred seventy-five employees have worked for Washington Alloys for one year or more. Of that amount, seventy-five have worked more than five years. Washington Alloys will match employee contributions up to a maximum 3% of annual compensation. If an employee has worked for Washington Alloys for more than five years, Washington Alloys will contribute 5% of annual compensation regardless of the employee's contribution. One hundred employees receive a 3% matching contribution from Washington Alloys. Fifty employees receive a contribution of 5% of annual compensation.

(A) Washington Alloys can report each 401(k) Plan separately - A 401(k) Plan with a maximum employer contribution of 3% of annual compensation and a 401(k) Plan with a maximum employer contribution to 5% of annual compensation. Alternatively, Washington Alloys can report that it offers a 401(k) Plan with a maximum employer contribution ranging from 3% to 5% of annual compensation.

(B)(I) If Washington Alloys reports each 401(k) Plan separately, for the 401(k) Plan with a maximum employer contribution of 3% of annual compensation, Washington Alloys will report 50% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 100% are enrolled.

For the 401(k) Plan with a maximum employer contribution of 5% of annual compensation, Washington Alloys will report 37.5% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 66.6% are enrolled.

(II) If Washington Alloys consolidates its detailed information about its 401(k) Plans, it will report that 87.5% of its total employment positions are eligible to participate in 401(k) Plans. Of the employment positions eligible to participate in the 401(k) Plans, 85.7% are enrolled.

(16) **Additional reporting for aluminum smelters and electrolytic processing businesses.** For an aluminum smelter or electrolytic processing business, the annual report must indicate the quantity of product produced in this state during the time period covered by the report.

(17) **Are annual reports confidential?** Except for the additional information that the department may request which it deems necessary to measure the results of, or to determine eligibility for the tax preference, annual reports are not subject to the confidentiality provisions of RCW 82.32.330 and may be disclosed to the public upon request.

(18) **What are the consequences for failing to file a complete annual report?**

(a) If a person claims a tax adjustment that requires an annual report under this section but fails to submit a complete report by the due date or any extension under RCW 82.32.-590 the amount of the tax adjustment claimed for the previous calendar year becomes immediately due and payable. Interest, but not penalties, will be assessed on these amounts due. The interest will be assessed at the rate provided for delinquent taxes provided for in RCW 82.32.050, retroactively to the date the tax preference was claimed, and accrues until the taxes for which the tax preference was claimed are repaid.

(b) **Complete annual report.** An annual report is complete if:

(i) The annual report is filed on the form required by this section; and

(ii) The person makes a good faith effort to substantially respond to all report questions required by this section.

The answer "varied," "various," or "please contact for information" is not a good faith response to a question.

(c) **Extension for circumstances beyond the control of the taxpayer.** If the department finds that the failure of a taxpayer to file an annual report by the due date was the result of circumstances beyond the control of the taxpayer, the department will extend the time for filing the report. The extension will be for a period of thirty days from the date the department issues its written notification to the taxpayer that it qualifies for an extension under this section. The department may grant additional extensions as it deems proper.

In making a determination whether the failure of a taxpayer to file an annual report by the due date was the result of circumstances beyond the control of the taxpayer, the department will apply the provisions adopted by the department in WAC 458-20-228 for the waiver or cancellation of penalties when the underpayment of untimely payment of any tax was due to circumstances beyond the control of the taxpayer.

(d) **One-time only extension.** A taxpayer who fails to file an annual report required under this section by the due date of the report is entitled to an extension of the due date. A request for an extension under this subsection must be made in writing to the department.

(i) To qualify for an extension, a taxpayer must have filed all annual reports and surveys, if any, due in prior years by their respective due dates, beginning with annual reports and surveys due in the calendar year 2010.

(ii) An extension is for ninety days from the original due date of the annual report.

(iii) No taxpayer may be granted more than one ninety-day extension.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-22-087, § 458-20-267, filed 11/1/10, effective 12/2/10; WSR 10-10-037, § 458-20-267, filed 4/27/10, effective 5/28/10; WSR 06-20-004, § 458-20-267, filed 9/21/06, effective 10/22/06.]

WAC 458-20-268 Annual surveys for certain tax adjustments. (1) **Introduction.** In order to take certain tax credits, deferrals, and exemptions ("tax adjustments"), taxpayers must file an annual survey with the department of revenue (the "department") containing information about their business activities and employment. This section explains the survey requirements for the various tax adjustments. This section also explains who is required to file an annual survey, how to file a survey, and what information must be included in the survey.

Refer to WAC 458-20-267 (Annual reports for certain tax adjustments) for more information on the annual report requirements for certain tax incentive programs.

This section provides examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(2) **Who is required to file the annual survey?** The following persons must file a complete annual survey:

(a) A person claiming the business and occupation ("B&O") tax credit provided by RCW 82.04.4452 for engaging in qualified research and development. A separate annual survey must be filed for each tax reporting account. If the person has assigned its entire B&O tax credit provided by RCW 82.04.4452 to another person, the assignor is not required to file an annual survey. In such an instance, the assignee of the B&O tax credit is required to file an annual survey. If the person has assigned a portion of its B&O tax credit to another person, both the assignor and the assignee are required to file an annual survey. Refer to WAC 458-20-24003 (Tax incentives for high technology businesses) for more specific information about this tax adjustment.

(b) A recipient of a deferral of taxes under chapter 82.60 RCW for sales and use taxes on an eligible investment project in high unemployment counties, except as provided in (f) of this subsection. Refer to WAC 458-20-24001 (Sales and use tax deferral—Manufacturing and research/development activities in high unemployment counties—Applications filed after June 30, 2010) for more specific information about this tax adjustment.

(c) A recipient of a deferral of taxes under chapter 82.63 RCW for sales and use taxes on an eligible investment project in high technology, except as provided in (g) of this subsection. Refer to WAC 458-20-24003 (Tax incentives for high technology businesses) for more specific information about this tax adjustment.

(d) A recipient of a deferral of taxes under chapter 82.74 RCW for sales and use taxes on eligible investment project in certain agricultural or cold storage facilities, except as provided in (g) of this subsection.

(e) Deferral of taxes under chapter 82.75 RCW for sales and use taxes on an eligible investment project in biotechnology products, except as provided in (g) of this subsection.

(f) A recipient of a deferral of taxes under chapter 82.82 RCW for sales and use taxes on a corporate headquarters, except as provided in (f) of this subsection (2).

(g) A lessee of an eligible investment project under chapters 82.60, 82.63, 82.74 or 82.82 RCW who receives the economic benefit of the deferral. A lessor, by written contract, must agree to pass the economic benefit of the deferral to its lessee. The economic benefit of the deferral to the lessee must be no less than the amount of tax deferred by the lessor as evidenced by written documentation of any type, whether by payment, credit, or other financial arrangement between the lessor or owner of the qualified building and the lessee. An applicant who is a lessor of an eligible investment project that received a deferral of taxes under chapters 82.60, 82.63, 82.74 or 82.82 RCW and who meets these requirements is not required to complete and file an annual survey.

(h) A person claiming the B&O tax exemption provided by RCW 82.04.4268 for dairy product manufacturers, RCW 82.04.4269 for seafood product manufacturers, and RCW 82.04.4266 for fruits and vegetable manufacturers.

(i) A person claiming the B&O tax credit provided by RCW 82.04.449 for customized employment training.

(j) A person claiming the B&O tax rate provided by RCW 82.04.260(11) for timber products, unless the person is a "small harvester" as defined in RCW 84.33.035.

(k) A person claiming the B&O tax credit provided by RCW 82.04.4483 for new employees created by businesses engaging in computer software manufacturing or programming in rural counties.

(l) A person claiming the B&O tax credit provided by RCW 82.04.4484 for persons providing information technology help desk services to third parties.

(3) **How to file annual surveys.**

(a) **Required form.** The department has developed a survey form that must be used to complete the annual survey unless a person obtains prior written approval from the department to file the annual survey in an alternative format.

(b) **Electronic filing.** Surveys must be filed electronically unless the department waives this requirement upon a showing of good cause. A survey is filed electronically when the department receives the survey in an electronic format.

(c) **How to obtain the form.** Persons who have received a waiver of the electronic filing requirement from the department or who otherwise would like a paper copy of the survey may obtain the survey from the department's web site (www.dor.wa.gov). It may also be obtained from the department's district offices, by telephoning the telephone information center (800-647-7706), or by contacting the department's special programs division at:

Department of Revenue
Special Programs Division
Post Office Box 47477
Olympia, WA 98504-7477
Fax: 360-586-2163

(d) **Due date.**

(i) **For surveys due in 2011 or later.** For persons claiming any B&O tax credit, tax exemption, or tax rate listed under subsection (2) of this section, the survey must be filed or postmarked by April 30th following any calendar year in which the person becomes eligible to claim the tax credit, tax exemption, or tax rate .

For recipients of any sales tax deferrals listed under subsection (2) of this section or for lessees required to file the annual survey as provided in subsection (2)(g) of this section, the survey must be filed or postmarked by April 30th of the year following the calendar year in which an eligible investment project is certified by the department as being operationally complete and each of the seven succeeding calendar years.

(ii) **For surveys due in 2010 or earlier.** For persons claiming any B&O tax credit, tax exemption, or tax rate listed under subsection (2) of this section, the survey must be filed or postmarked by March 31st following any calendar year in which the tax credit, tax exemption, or tax rate is claimed.

For recipients of any sales tax deferrals listed under subsection (2) of this section or for lessees required to file the annual survey as provided in subsection (2)(g) of this section, the survey must be filed or postmarked by March 31st of the year following the calendar year in which an eligible investment project is certified by the department as being opera-

tionally complete and each of the seven succeeding calendar years.

(iii) **Due date extensions.** The department may extend the due date for timely filing annual surveys as provided in subsection (11) of this section.

(e) **Special requirement for person who did not file an annual survey during the previous calendar year.** If a person is a first-time filer or otherwise did not file an annual survey with the department during the previous calendar year, the annual survey must include the information described in subsection (4) of this section for the two calendar years immediately preceding the due date of the survey.

(f) **Examples.**

(i) Advanced Computing, Inc. qualifies for the B&O tax credit provided by RCW 82.04.4452 and applied it against taxes due in calendar year 2010. Advanced Computing, Inc. filed an annual survey in March 2010 for credit claimed under RCW 82.04.4452 in 2009. Advanced Computing, Inc. must electronically file an annual survey with the department by April 30, 2011.

(ii) In 2009, Biotechnology, Inc. applied for and received a sales and use tax deferral under chapter 82.63 RCW for an eligible investment project in qualified research and development. The investment project was certified by the department as being operationally complete in 2010. Biotechnology, Inc. filed an annual survey in March 2010 for credit claimed under RCW 82.04.4452 in 2009. For the sales and use tax deferral under chapter 82.63 RCW. Biotechnology, Inc. must file its annual survey with the department for the 2010 calendar year by April 30, 2011. A survey is due from Biotechnology, Inc. by April 30th each following year, with its last survey due April 30, 2018.

(iii) Advanced Materials, Inc. has been conducting manufacturing activities in a building leased from Property Management Services since 2009. Property Management Services is a recipient of a deferral under chapter 82.60 RCW, and the building was certified by the department as operationally complete in 2009. In order to pass on the entire economic benefit of the deferral, Property Management Services charges Advanced Materials, Inc. $5,000 less in rent each year. Advanced Materials, Inc. is a first-time filer of annual surveys. Advanced Materials, Inc. must file its annual survey with the department covering the 2008 and 2009 calendar years by March 31, 2010, assuming all the requirements of subsection (2)(f) of this section are met. A survey is due from Advanced Materials, Inc. by April 30th each following year, with its last survey due by April 30, 2017.

(iv) Fruit Canning, Inc. claims the B&O tax exemption provided in RCW 82.04.4266 for the canning of fruit in 2010. Fruit Canning, Inc. is a first-time filer of annual surveys. Fruit Canning, Inc. must file an annual survey with the department by April 30, 2011, covering calendar years 2009 and 2010. If Fruit Canning, Inc. claims the B&O tax exemption during subsequent years, it must file an annual survey for each of those years by April 30th of each following year.

(4) **What information does the annual survey require?** The annual survey requests information about the following:

(a) Amount of tax deferred, the amount of B&O tax exempted, the amount of B&O tax credit taken, or the amount of B&O tax reduced under the preferential rate;

(b) For persons claiming the tax deferral under chapter 82.60 or 82.63 RCW:

(i) The number of new products or research projects by general classification; and

(ii) The number of trademarks, patents, and copyrights associated with activities at the investment project;

(c) For persons claiming the B&O tax credit under RCW 82.04.4452:

(i) The qualified research and development expenditures during the calendar year for which the credit was claimed;

(ii) The taxable amount during the calendar year for which the credit was claimed;

(iii) The number of new products or research projects by general classification;

(iv) The number of trademarks, patents, and copyrights associated with the research and development activities for which the credit was claimed; and

(v) Whether the credit has been assigned and who assigned the credit.

(d) The following information for employment positions in Washington:

(i) The total number of employment positions;

(ii) Full-time, part-time, and temporary employment positions as a percent of total employment. Refer to subsection (7) of this section for information about full-time, part-time, and temporary employment positions;

(iii) The number of employment positions according to the wage bands of less than $30,000; $30,000 or greater, but less than $60,000; and $60,000 or greater. A wage band containing fewer than three individuals may be combined with the next lowest wage band; and

(iv) The number of employment positions that have employer-provided medical, dental, and retirement benefits, by each of the wage bands; and

(e) Additional information the department requests that is necessary to measure the results of, or determine eligibility for the tax adjustments.

(i) The department is required to report to the state legislature summary descriptive statistics by category and the effectiveness of certain tax adjustments, such as job creation, company growth, and such other factors as the department selects or as the statutes identify. The department has included questions related to measuring these effects.

(ii) In addition, the department has included questions related to:

(A) The person's use of the sales and use tax exemption for machinery and equipment used in manufacturing provided in RCW 82.08.02565 and 82.12.02565; and

(B) The Unified Business Identifier used with the Washington state employment security department and all employment security department reference numbers used on quarterly tax reports that cover the employment positions reported in the annual survey.

(5) **What is total employment in the annual survey?**

(a) The annual survey requires information on all full-time, part-time, and temporary employment positions located in Washington state on December 31st of the calendar year covered by the survey. Total employment includes persons who are on leaves of absence such as sick leave, vacation, disability leave, jury duty, military leave, and workers compensation leave, regardless of whether those persons are

receiving wages. Total employment does not include separation from employment such as layoffs or reductions in force. Vacant positions are not included in total employment.

(b) **Examples.** Assume these facts for the following examples. National Construction Equipment (NCE) manufactures bulldozers, cranes, and other earth-moving equipment in Ridgefield, WA and Kennewick, WA. NCE received a deferral of taxes under chapter 82.60 RCW for sales and use taxes on its new manufacturing site in Kennewick, WA.

(i) NCE employs two hundred workers in Ridgefield manufacturing construction cranes. NCE employs two hundred fifty workers in Kennewick manufacturing bulldozers and other earth-moving equipment. Although NCE's facility in Ridgefield does not qualify for any tax adjustments, NCE's annual survey must report a total of four hundred fifty employment positions. The annual survey includes all Washington state employment positions, which includes employment positions engaged in activities that do not qualify for tax adjustments.

(ii) On November 20th, NCE lays off seventy-five workers. NCE notifies ten of the laid off workers on December 20th that they will be rehired and begin work on January 2nd. The seventy-five employment positions are excluded from NCE's annual survey, because a separation of employment has occurred. Although NCE intends to rehire ten employees, those employment positions are vacant on December 31st.

(iii) On December 31st, NCE has one hundred employees on vacation leave, five employees on sick leave, two employees on military leave, one employee who is scheduled to retire as of January 1st, and three vacant employment positions. The employment positions of employees on vacation, sick leave, and military leave must be included in NCE's annual survey. The one employee scheduled to retire must be included in the annual survey because the employment position is filled on December 31st. The three vacant positions are not included in the annual survey.

(iv) In June, NCE hires two employees from a local college to intern in its engineering department. When the academic year begins in September, one employee ends the internship. The other employee's internship continues until the following June. NCE must report one employment position on the annual survey, representing the one intern employed on December 31st.

(6) **When is an employment position located in Washington state?** The annual survey seeks information about Washington employment positions only. An employment position is located in Washington state if:

(a) The service of the employee is performed entirely within the state;

(b) The service of the employee is performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state;

(c) The service of the employee is performed both within and without the state, and the employee's base of operations is within the state;

(d) The service of the employee is performed both within and without the state, but the service is directed or controlled in this state; or

(e) The service of the employee is performed both within and without the state and the service is not directed or controlled in this state, but the employee's individual residence is in this state.

(f) **Examples.** Assume these facts for the following examples. Acme Computer, Inc. develops computer software and claims the B&O tax credit provided by RCW 82.04.4452 for its research and development spending. Acme Computer, headquartered in California, has employees working at four locations in Washington state. Acme Computer also has offices in Oregon and Texas.

(i) Ed is a software engineer in Acme Computer's Vancouver office. Ed occasionally works at Acme Computer's Portland, Oregon office when other software engineers are on leave. Ed's position must be included in the number of total employment in Washington state that Acme Computer reports on the annual survey. Ed performs services both within and without the state, but the services performed without the state are incidental to the employee services within Washington state.

(ii) John is an Acme Computer salesperson. John travels throughout Washington, Oregon, and Idaho promoting sales of new Acme Computer products. John's activities are directed by his manager in Acme Computer's Spokane office. John's position must be included in the number of total employment in Washington state that Acme Computer reports on the annual survey. John performs services both within and without the state, but the services are directed or controlled in Washington state.

(iii) Jane, vice-president for product development, works in Acme Computer's Portland, Oregon office. Jane regularly travels to Seattle to review the progress of research and development projects conducted in Washington state. Jane's position must not be included in the number of total employment in Washington state that Acme Computer reports on the annual survey. Although Jane regularly performs services within Washington state, her activities are directed or controlled in Oregon.

(iv) Roberta, a service technician, travels throughout the United States servicing Acme Computer products. Her activities are directed from Acme Computer's corporate offices in California, but she works from her home office in Tacoma. Roberta's position must be included in the number of total employment in Washington state that Acme Computer reports on the annual survey. Roberta performs services both within and without the state and the service is not directed or controlled in this state, but her residence is in Washington state.

(7) **What are full-time, part-time and temporary employment positions?** The survey must separately identify the number of full-time, part-time, and temporary employment positions as a percent of total employment.

(a) **Full-time and part-time employment positions.** A position is considered full-time or part-time if the employer intends for the position to be filled for at least fifty-two consecutive weeks or twelve consecutive months, excluding any leaves of absence.

(i) A full-time position is a position that requires the employee to work, excluding overtime hours, thirty-five hours per week for fifty-two consecutive weeks, four hundred fifty-five hours a quarter for four consecutive quarters, or one thousand eight hundred twenty hours during a period of twelve consecutive months.

(ii) A part-time position is a position in which the employee may work less than the hours required for a full-time position.

(iii) In some instances, an employee may not be required to work the hours required for full-time employment because of paid rest and meal breaks, health and safety laws, disability laws, shift differentials, or collective bargaining agreements. If, in the absence of these factors, the employee would be required to work the number of hours for a full-time position to receive their current wage, the position must be reported as a full-time employment position.

(b) **Temporary positions.** There are two types of temporary positions.

(i) **Employees of the person required to complete the survey.** In the case of a temporary employee directly employed by the person required to complete the survey, a temporary position is a position intended to be filled for a period of less than fifty-two consecutive weeks or twelve consecutive months. For example, seasonal employment positions are temporary positions. These temporary positions must be included in the information required in subsections (5), (8), and (9) of this section.

(ii) **Workers furnished by staffing companies.** A temporary position also includes a position filled by a worker furnished by a staffing company, regardless of the duration of the placement. These temporary positions must be included in the information required in subsections (5), (8), and (9) of this section. In addition, the person filling out the annual survey must provide the following additional information:

(A) Total number of staffing company employees furnished by staffing companies;

(B) Top three occupational codes of all staffing company employees; and

(C) Average duration of all staffing company employees.

(c) **Examples.** Assume these facts for the following examples. Worldwide Materials, Inc. is a developer of materials used in manufacturing electronic devices at a facility located in Everett, WA. Worldwide Materials claims the B&O tax credit provided by RCW 82.04.4452 for its research and development spending. Worldwide Materials has one hundred employees.

(i) On December 31st, Worldwide Materials has five employees on workers' compensation leave. At the time of the work-related injuries, the employees worked forty hours a week and were expected to work for fifty-two consecutive weeks. Worldwide Materials must report these employees as being employed in a full-time position. Although the five employees are not currently working, they are on workers' compensation leave and Worldwide Materials had intended for the full-time positions to be filled for at least fifty-two consecutive weeks.

(ii) In September, Worldwide Materials hires two employees on a full-time basis for a two-year project to design composite materials to be used in a new airplane model. Because the position is intended to be filled for a period exceeding twelve consecutive months, Worldwide Materials must report these positions as two full-time positions.

(iii) Worldwide Materials has two employees who clean laboratories during the evenings. The employees regularly work 5:00 p.m. to 11:00 p.m., Monday through Friday, fifty-two weeks a year. Because the employees work less than thirty-five hours a week, the employment positions are reported as part-time positions.

(iv) On November 1st, a Worldwide Materials engineer begins twelve weeks of family and medical leave. The engineer was expected to work forty hours a week for fifty-two consecutive weeks. While the engineer is on leave, Worldwide Materials hires a staffing company to furnish a worker to complete the engineer's projects. Worldwide Materials must report the engineer as a full-time position on the annual survey. Worldwide Materials must also report the worker furnished by the staffing company as a temporary employment position and include the information as required in (b) of this subsection.

(v) Worldwide Materials allows three of its research employees to work on specific projects with a flexible schedule. These employees are not required to work a set amount of hours each week, but are expected to work twelve consecutive months. The three research employees are paid a comparable wage as other research employees who are required to work a set schedule of forty hours a week. Although the three research employees may work fewer hours, they are receiving comparable wages as other research employees working forty hours a week. Worldwide Materials must report these positions as full-time employment positions, because each position is equivalent to a full-time employment position.

(vi) Worldwide Materials has a large order to fulfill and hires ten employees for the months of June and July. Five of the employees leave at the end of July. Worldwide Materials decides to have the remaining five employees work on an on-call basis for the remainder of the year. As of December 31st, three of the employees are working for Worldwide Materials on an on-call basis. Worldwide Materials must report three temporary employment positions on the annual survey and include these positions in the information required in subsections (5), (8), and (9) of this section.

(8) **What are wages?** For the purposes of the annual survey, "wages" means compensation paid to an individual for personal services, whether denominated as wages, salary, commission, or otherwise as reported on the W-2 forms of employees. Stock options granted as compensation to employees are wages to the extent they are reported on the W-2 forms of the employees and are taken as a deduction for federal income tax purposes by the employer. The compensation of a proprietor or a partner is determined in one of two ways:

(a) If there is net income for federal income tax purposes, the amount reported subject to self-employment tax is the compensation.

(b) If there is no net income for federal income tax purposes, reasonable cash withdrawals or cash advances is the compensation.

(9) **What are employer-provided benefits?** The annual survey requires persons to report the number of employees that have employer-provided medical, dental, and retirement benefits, by each of the wage bands. An employee has employer-provided medical, dental, and retirement benefits if the employee is currently eligible to participate or receive the benefit. A benefit is "employer-provided" if the medical, dental, and retirement benefit is dependent on the employer's

establishment or administration of the benefit. A benefit that is equally available to employees and the general public is not an "employer-provided" benefit.

(a) **What are medical benefits?** "Medical benefits" means compensation, not paid as wages, in the form of a health plan offered by an employer to its employees. A "health plan" means any plan, fund, or program established, maintained, or funded by an employer for the purpose of providing for its employees or their beneficiaries, through the purchase of insurance or otherwise, medical and/or dental care services.

(i) Health plans include any:

(A) "Employee welfare benefit plan" as defined by the Employee Retirement Income Security Act (ERISA);

(B) "Health plan" or "health benefit plan" as defined in RCW 48.43.005;

(C) Self-funded multiple employer welfare arrangement as defined in RCW 48.125.010;

(D) "Qualified health insurance" as defined in Section 35 of the Internal Revenue Code;

(E) "Archer MSA" as defined in Section 220 of the Internal Revenue Code;

(F) "Health savings plan" as defined in Section 223 of the Internal Revenue Code;

(G) "Health plan" qualifying under Section 213 of the Internal Revenue Code;

(H) Governmental plans; and

(I) Church plans.

(ii) "Health care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease.

(b) **What are dental benefits?** "Dental benefits" means a dental health plan offered by an employer as a benefit to its employees. "Dental health plan" has the same meaning as "health plan" in (a) of this subsection, but is for the purpose of providing for employees or their beneficiaries, through the purchase of insurance or otherwise, dental care services. "Dental care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease of human teeth, alveolar process, gums, or jaw.

(c) **What are retirement benefits?** "Retirement benefits" means compensation, not paid as wages, in the form of a retirement plan offered by an employer to its employees. An employer contribution to the retirement plan is not required for a retirement plan to be employer-provided. A "retirement plan" means any plan, account, deposit, annuity, or benefit, other than a life insurance policy, that provides for retirement income or deferred income to employees for periods after employment is terminated. The term includes pensions, annuities, stock bonus plans, employee stock ownership plans, profit sharing plans, self-employed retirement plans, individual retirement accounts, individual retirement annuities, and retirement bonds, as well as any other plan or program, without regard to its source of funding, and without regard to whether the retirement plan is a qualified plan meeting the guidelines established in the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code.

(d) **Examples.** Assume these facts for the following examples. Medical Resource, Inc. is a pharmaceutical manufacturer located in Spokane, WA. Medical Resource, Inc. claims the B&O tax credit provided by RCW 82.04.4452 for its research and development spending. It employs two hundred full-time employees and fifty part-time employees. Medical Resource, Inc. also hires a staffing company to furnish seventy-five workers.

(i) Medical Resource, Inc. offers its employees two different health plans as a medical benefit. Plan A is available at no cost to full-time employees. Employees are not eligible to participate in Plan A until completing thirty days of employment. Plan B costs employees $200 each month. Full-time and part-time employees are eligible for Plan B after six months of employment. One hundred full-time employees are enrolled in Plan A. One hundred full-time and part-time employees are enrolled in Plan B. Forty full-time and part-time employees chose not to enroll in either plan. Ten part-time employees are not yet eligible for either Plan A or Plan B. Medical Resource, Inc. must report two hundred employees as having employer-provided medical benefits, because this is the number of employees enrolled in the health plans it offers.

(ii) Medical Resource, Inc. does not offer medical benefits to the employees of the staffing company. However, twenty-five of these workers have enrolled in a health plan through the staffing company. Medical Resource, Inc. must report these twenty-five employment positions as having employer-provided medical benefits.

(iii) Medical Resource, Inc. does not offer its employees dental insurance, but has arranged with a group of dental providers to provide all employees with a 30% discount on any dental care service. No action, other than Medical Resource, Inc. employment, is required by employees to receive this benefit. Unlike the medical benefit, employees are eligible for the dental benefit as of the first day of employment. This benefit is not provided to the workers furnished by the staffing company. Medical Resource, Inc. must report two hundred and fifty employment positions as having dental benefits, because this is the number of employees enrolled in this dental plan.

(iv) Medical Resource, Inc. offers a 401(k) Plan to its full-time and part-time employees after six months of employment. Medical Resource, Inc. makes matching contributions to an employee's 401(k) Plan after two years of employment. On December 31st, two hundred and twenty-five workers are eligible to participate in the 401(k) Plan. Two hundred workers are enrolled in the 401(k) Plan. One hundred of these workers receive matching contributions. Medical Resource, Inc. must report two hundred employment positions as having employer-provided retirement benefits, because this is the number of employees enrolled in the 401(k) Plan.

(v) Medical Resource, Inc. coordinates with a bank to insert information in employee paycheck envelopes on the bank's Individual Retirement Account (IRA) options offered to bank customers. Employees who open an IRA with the bank can arrange to have their contributions directly deposited from their paychecks into their accounts. Fifty employees open IRAs with the bank. Medical Resource, Inc. cannot report that these fifty employees have employer-provided

retirement benefits. IRAs are not an employer-provided benefit because the ability to establish the IRA is not dependent on Medical Resource, Inc.'s participation or sponsorship of the benefit.

(10) **Is the annual survey confidential?** The annual survey is subject to the confidentiality provisions of RCW 82.32.330. However, information on the amount of tax adjustment taken is not subject to the confidentiality provisions of RCW 82.32.330 and may be disclosed to the public upon request, except as provided in (b) and (c) of this subsection. More confidentiality provisions in regards to the annual surveys are as follows:

(a) **Failure to timely file a complete annual survey subject to disclosure.** If a taxpayer fails to file a complete annual survey as required by law, then the fact that the taxpayer fails to timely file a complete annual survey and the amount required to be repaid as a result of the taxpayer's failure to file a complete annual survey is not confidential and may be disclosed to the public upon request.

(b) **Amount reported in annual survey is different from the amount claimed or allowed.** If a taxpayer reports a tax adjustment amount on the annual survey that is different than the amount actually claimed on the taxpayer's tax returns or otherwise allowed by the department, then the amount actually claimed or allowed may be disclosed.

(c) **Tax adjustment is less than ten thousand dollars.** If the tax adjustment is less than ten thousand dollars during the period covered by the annual survey, then the taxpayer may request the department to treat the amount of the tax adjustment as confidential under RCW 82.32.330. The request must be made for each survey in writing, dated and signed by the owner, corporate officer, partner, guardian, executor, receiver, administrator, or trustee of the business, and filed with the department's special programs division at the address provided above in subsection (3) of this section.

(11) **What are the consequences for failing to timely file a complete annual survey?**

(a) **What is a "complete annual survey"?** An annual survey is complete if:

(i) The annual survey is filed on the form required by this section or in an electronic format as required by law; and

(ii) The person makes a good faith effort to substantially respond to all survey questions required by this section.

Responses such as "varied," "various," or "please contact for information" are not good faith responses to a question.

(b) If a person claims a tax adjustment that requires an annual survey under this section but fails to submit a complete annual survey by the due date of the survey or any extension under RCW 82.32.590, the amount of the tax adjustment claimed for the previous calendar year becomes immediately due. If the tax adjustment is a deferral of tax, twelve and one-half percent of the deferred tax is immediately due. If the economic benefits of the deferral are passed to a lessee, the lessee is responsible for payment to the extent the lessee has received the economic benefit. Interest, but not penalties, will be assessed on these amounts. The interest will be assessed at the rate provided for delinquent taxes provided for in RCW 82.32.050, retroactively to the date the tax adjustment was claimed, and accrues until the taxes for which the tax adjustment was claimed are repaid.

(c) **Extension for circumstances beyond the control of the taxpayer.** If the department finds that the failure of a taxpayer to file an annual survey by the due date was the result of circumstances beyond the control of the taxpayer, the department will extend the time for filing the survey. The extension will be for a period of thirty days from the date the department issues its written notification to the taxpayer that it qualifies for an extension under this section. The department may grant additional extensions as it deems proper.

In making a determination whether the failure of a taxpayer to file an annual survey by the due date was the result of circumstances beyond the control of the taxpayer, the department will apply the provisions adopted by the department in WAC 458-20-228 for the waiver or cancellation of penalties when the underpayment of untimely payment of any tax was due to circumstances beyond the control of the taxpayer.

(d) **One-time only extension.** A taxpayer who fails to file an annual survey required under this section by the due date of the survey is entitled to an extension of the due date. A request for an extension under this subsection must be made in writing to the department.

(i) To qualify for an extension, a taxpayer must have filed all annual reports and surveys, if any, due in prior years by their respective due dates, beginning with annual reports and surveys due in the calendar year 2010.

(ii) An extension is for ninety days from the original due date of the annual survey.

(iii) No taxpayer may be granted more than one ninety-day extension.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 10-22-087, § 458-20-268, filed 11/1/10, effective 12/2/10; WSR 10-10-038, § 458-20-268, filed 4/27/10, effective 5/28/10; WSR 07-02-074, § 458-20-268, filed 12/29/06, effective 1/29/07.]

WAC 458-20-270 Telephone program excise tax rates. RCW 82.72.020 requires the department of revenue (department) to collect certain telephone program excise taxes. Those taxes include the tax on switched access lines imposed by RCW 43.20A.725 (telephone relay service—TRS) and 80.36.430 (Washington telephone assistance program—WTAP). Pursuant to those statutes, the department must annually determine the rate of each respective tax according to the statutory formulas.

Effective August 1, 2013, Second Engrossed Second Substitute House Bill No. 1971 (chapter 8, Laws of 2013 2nd sp.s.) repeals the TRS and WTAP taxes. Telephone service providers will no longer collect these taxes as of the effective date.

The monthly telephone program excise tax rates per switched access line are as follows:

Period	TRS Rate	WTAP Rate
7/1/2009 - 6/30/2010	11 cents	13 cents
7/1/2010 - 6/30/2011	19 cents	14 cents
7/1/2011 - 6/30/2012	19 cents	14 cents
7/1/2012 - 6/30/2013	17 cents	14 cents
7/1/2013 - 7/31/2013	17 cents	14 cents

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 43.20A.725, and 80.36.430. WSR 13-15-074, § 458-20-270, filed 7/16/13, effective 8/16/13;

WSR 12-14-039, § 458-20-270, filed 6/27/12, effective 7/28/12; WSR 11-13-110, § 458-20-270, filed 6/21/11, effective 7/22/11; WSR 10-14-032, § 458-20-270, filed 6/28/10, effective 7/29/10; WSR 09-14-037, § 458-20-270, filed 6/24/09, effective 7/25/09; WSR 08-16-054, § 458-20-270, filed 7/30/08, effective 8/30/08; WSR 07-17-110, § 458-20-270, filed 8/17/07, effective 9/17/07; WSR 06-16-137, § 458-20-270, filed 8/2/06, effective 9/2/06; WSR 05-18-017, § 458-20-270, filed 8/26/05, effective 9/26/05.]

WAC 458-20-272 Tire fee—Core deposits or credits. (1) **Introduction.** This section describes the tire fee imposed under RCW 70.95.510 and the business and occupation (B&O), sales, and use tax consequences related to battery core charges and core deposits or credits, including the exemptions described in RCW 82.08.036 and 82.12.038.

(2) **Tire fee.**

(a) **What is the tire fee?** The tire fee is a one-dollar fee collected by the seller from the buyer on every retail sale of each new replacement vehicle tire. If new tires are leased, the fee must be collected once at the beginning of the lease.

(b) **How do I report the tire fee?** A seller must report on the excise tax return the number of new replacement vehicle tires sold. Tire sellers may retain ten percent of the fee and must remit the remainder to the department of revenue (department). As a result, the amount that must be reported and paid to the department is the number of new replacement vehicle tires sold during the tax reporting period multiplied by ninety cents.

(c) **What if the seller fails to collect the fee or does not pay the fee on time?** The seller is personally liable for payment of the fee, whether or not the fee is collected from the buyer. Any seller who appropriates or converts the fee collected to his or her own use or to any use other than the payment of the fee by the due date, minus the ten percent retained, is guilty of a gross misdemeanor. Interest and penalties apply to late payments. Refer to WAC 458-20-228 (Returns, payments, penalties, extensions, interest, stay of collection) for more information.

(d) **What happens if a buyer fails to pay the fee?** The tire fee, until paid by the buyer to the seller or the department, is considered a debt from the buyer to the seller. Any buyer who refuses to pay the fee is guilty of a misdemeanor.

(e) **Is sales tax imposed on the tire fee?** No. The measure of the sales tax does not include the tire fee. See RCW 82.08.036.

(f) **Is the ten percent amount retained by the seller taxed?** Yes. The seller must report the retained amount as gross income under the service and other activities tax classification on the excise tax return.

(g) **What tires are subject to the tire fee?** All new replacement vehicle tires are subject to the tire fee. Refer to RCW 70.95.030 for the definition of "vehicle."

(i) Examples of vehicles for which new replacement tires are subject to the fee include:

(A) Automobiles;

(B) Trucks;

(C) Recreational vehicles;

(D) Trailers;

(E) All-terrain vehicles (ATVs);

(F) Agricultural vehicles, such as tractors or combines;

(G) Industrial vehicles, such as forklifts;

(H) Construction vehicles, such as loaders or graders; and

(I) Golf carts.

(ii) Bicycles, wheelbarrows, and hand trucks are examples of devices to which the new replacement tire fee does not apply.

(iii) The tire fee does not apply to the sale of retreaded vehicle tires. Nor does it apply to tires provided free of charge under the terms of a recall or warranty.

(h) **May I refund the fee if a tire is returned?** If a customer returns the purchased new tire and the entire selling price is refunded to the customer, the one-dollar tire fee is likewise refundable. The refunded amount may be claimed on the excise tax return in the same manner as refunded sales tax. If the seller does not refund the full sales price to the customer, the one-dollar fee is not refundable. Refer to WAC 458-20-108 (Returned goods, allowances, cash discounts) for more information.

(i) **Does the tire fee apply on sales to the federal government or Indians and Indian tribes?** The tire fee is not imposed on sales to the federal government and need not be collected by the seller. The tire fee does not apply to sales of tires delivered to enrolled members or tribes in "Indian country." Refer to WAC 458-20-190 and 458-20-192 for more information.

(j) **If the sale is exempt from sales tax, is the tire fee due?** Statutory exemptions from sales tax do not apply to the tire fee. The tire fee is due on every retail sale of a new replacement tire whether or not sales tax is due.

(3) **Core deposits or credits - Battery core charges.**

(a) **Definitions.** For purposes of this section, the following definitions apply:

(i) "Core deposits or credits" means the amount representing the value of returnable products such as batteries, starters, brakes, and other products with returnable value added for purposes of recycling or remanufacturing.

(ii) "Battery core charge" refers to a core deposit, not less than five dollars, which must by law be retained by the seller when a retail purchaser has no used battery to exchange or trade in. A buyer may return within thirty days of the purchase with a used battery of equivalent size and claim the core charge amount. See RCW 70.95.630 and 70.95.640.

(b) **How is tax calculated when the buyer receives a core deposit or credit?** Retail sales and use taxes do not apply to consideration received in the form of core deposits or credits when a purchaser exchanges or trades in a core for recycling or remanufacturing. Therefore, the measure of the sales or use tax may be reduced by the amount of the core deposit or credit. See RCW 82.08.036 and 82.12.038. The core deposit and credit exemptions apply only to the retail sales and use taxes. There is no equivalent exemption or deduction for B&O tax purposes. Therefore, the amount reported under the appropriate B&O tax classification must include the value of core deposits or credits.

(c) **Examples.** This subsection provides examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(i) **Example 1.** A customer purchases at retail a new replacement battery and reconditioned starter, providing the seller with a battery core and a starter core in exchange. The selling price of the new battery, including the battery core

charge, is $60.00. The customer is allowed a $5.00 credit because a battery core is exchanged, meaning the cost of the battery to the customer, excluding sales tax, is $55.00. The selling price of the starter is $50.00. The seller allows a $3.00 credit for the starter core, meaning the cost to the customer, excluding sales tax, is $47.00. Retailing B&O tax is due upon the total value of cash plus core value, in this case $110.00, or $60.00 plus $50.00. However, the $8.00 of core deposits or credits may be deducted from the measure of the retail sales tax under RCW 82.08.036. Thus, retail sales tax is due on $102.00, or $55.00 plus $47.00.

(ii) **Example 2.** The seller delivers the starter and battery cores accepted in the exchange to wholesalers. A starter wholesaler issues a refund and a battery wholesaler issues a credit memorandum to be applied against future wholesale battery purchases. The return of the used products by the auto parts store for recycling or remanufacturing and subsequent receipt of a refund or credit for the core deposit or credit is not considered taxable consideration for purposes of the B&O tax.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), 70.95.630, and 70.95.640. WSR 09-19-136, § 458-20-272, filed 9/22/09, effective 10/23/09. Statutory Authority: RCW 82.32.330, 82.01.060(2), and 34.05.230. WSR 06-12-017, § 458-20-272, filed 5/26/06, effective 6/26/06.]

WAC 458-20-273 Renewable energy system cost recovery. (1) **Introduction.** This section explains the renewable energy system cost recovery program provided in RCW 82.16.110 through 82.16.140. This program authorizes a customer investment cost recovery incentive payment (incentive payment) to help offset the costs associated with the purchase and use of renewable energy systems located in Washington state that produce electricity. Qualified renewable energy systems include:

• Solar energy systems;

• Wind generators; and

• Certain types of anaerobic digesters that process manure from livestock into biogas and dried manure using microorganisms in a closed oxygen-free container, in which the biogas (such as methane) fuels a generator that creates electricity.

(a) Any individual, business, local government, or participant in a qualifying community solar project that purchases and uses or supports such a system may apply for an incentive payment from the light and power business that serves the property. Neither a state governmental entity nor a federal governmental entity can participate in the incentive payment program.

(b) Participation by a light and power business in this incentive payment program is discretionary.

(c) No incentive payment may be made for kilowatt-hours generated before July 1, 2005, or after June 30, 2020. The right to earn tax credits under this section expires June 30, 2020. Credits may not be claimed after June 30, 2021.

(2) **Definitions.** The definitions in this section apply throughout this section unless the context clearly requires otherwise.

(a) "Administrator" means an owner and assignee of a community solar project defined in (c)(i) and (iii) of this subsection, that is responsible for applying for the investment cost recovery incentive on behalf of the other owners and performing such administrative tasks on behalf of the other owners as may be necessary; such as receiving investment cost recovery incentive payments, and allocating and paying appropriate amounts of such payments to other owners.

(b) "Applicant" has the following three meanings in this definition.

(i) For other than community solar projects, applicant means an individual, business, or local government, that owns the renewable energy system that qualifies under the definition of "customer-generated electricity."

(ii) For purposes of a community solar project defined in (c)(i) or (iii) of this subsection, the administrator, defined in (a) of this subsection, is the applicant.

(iii) For purposes of a utility-owned community solar project defined in (c)(ii) of this subsection, the utility will act as the applicant for its ratepayers that provide financial support to participate in the project.

(c) "Community solar project" means any one of the three definitions, below:

(i) A solar energy system located in Washington state that is capable of generating up to seventy-five kilowatts of electricity and is owned by local individuals, households, nonprofit organizations, or nonutility businesses that is placed on the property owned in fee simple by a cooperating local governmental entity that is not in the light and power business or in the gas distribution business.

(ii) A utility-owned solar energy system located in Washington state that is capable of generating up to seventy-five kilowatts of electricity and that is voluntarily funded by the utility's ratepayers where, in exchange for their financial support, the utility gives contributors a payment or credit on their utility bill for their share of the value of the electricity generated by the solar energy system.

(iii) A solar energy system located in Washington state, placed on the property owned in fee simple by a cooperating local governmental entity that is not in the light and power business or in the gas distribution business, that is capable of generating up to seventy-five kilowatts of electricity, and that is owned by a company whose members are each eligible for an investment cost recovery incentive payment for the same customer-generated electricity as defined in (e) of this subsection.

(A) The cooperating local governmental entity that owns the property on which the solar energy system is located may also be a member of the company.

(B) A member may hold an interest in the company constituting ownership of either a portion of the solar energy system or a portion of the value of the electricity generated by the solar energy system, or both.

(d) For purposes of "community solar project" as defined in (c) of this subsection, the following definitions apply.

(i) "Capable of generating up to seventy-five kilowatts of electricity" means that the solar energy system will qualify if it generates seventy-five kilowatts of electricity or less. If the solar energy system or a community solar project produces more than seventy-five kilowatts the entire project is ineligible for the incentive payment program.

(ii) "Company" means an entity that is:

(A)(I) A limited liability company created under the laws of Washington state;

(II) A cooperative formed under chapter 23.86 RCW; or

(III) A mutual corporation or association formed under chapter 24.06 RCW; and

(B) Not a "utility" as defined in (d)(v) of this subsection.

(iii) "Local individuals, households, nonprofit organizations, or nonutility businesses" mean individuals, households, nonprofit organizations, or nonutility businesses that are:

• Located within the service area of the light and power business where the renewable energy system is located; and

• Residents of Washington state.

(iv) "Nonprofit organization" means an organization exempt from taxation under 26 U.S.C. Sec. 501 (c)(3) of the federal Internal Revenue Code of 1986, as amended, as of January 1, 2009.

(v) "Owned in fee simple" means an interest in land that is the broadest property interest allowed by law.

(vi) "Utility" means a light and power business, an electric cooperative, or a mutual corporation that provides electricity service.

(e) "Customer-generated electricity" means the alternating current electricity that is generated from a renewable energy system located in Washington state, that is installed on an individual's, businesses', local government's or utility's real property and the real property involved is served by a light and power business.

(i) Except for utility-owned community solar systems, a system located on a leasehold interest does not qualify under this definition. For a community solar project requiring the cooperation of a local governmental entity, the cooperating local governmental entity must own in fee simple the real property on which the solar energy system is located to qualify as "customer-generated electricity." A leasehold interest held by a cooperating local governmental entity will not qualify. However, for nonutility community solar projects, a solar energy system located on land owned in fee simple by a cooperating local governmental entity that is leased to local individuals, households, nonprofit organizations, nonutility businesses or companies will qualify as "customer-generated electricity."

(ii) Except for a utility-owned solar energy system that is voluntarily funded by the utility's ratepayers, "customer-generated electricity" does not include electricity generated by a light and power business with greater than one thousand megawatt hours of annual sales or a gas distribution business.

(f) "Local governmental entity" means any unit of local government of Washington state including, but not limited to:

• Counties;
• Cities;
• Towns;
• Municipal corporations;
• Quasi-municipal corporations;
• Special purpose districts;
• Public stadium authorities; or
• Public school districts.

"Local governmental entity" does not include a state or federal governmental entity, such as a:

• State park;
• State-owned building;
• State-owned university;
• State-owned college;
• State-owned community college; and
• Federal-owned building.

(g) "Light and power business" means the business of operating a plant or system of generation, production or distribution of electrical energy for hire or sale and/or for the wheeling of electricity for others.

(h) "Gas distribution business" means the business of operating a plant or system for the production or distribution for hire or sale of gas, whether manufactured or natural.

(i) "Photovoltaic cell" means a device that converts light directly into electricity without moving parts.

(j) "Renewable energy system" means:

• A solar energy system used in the generation of electricity;

• An anaerobic digester that processes livestock manure into biogas and dried manure using microorganisms in a closed oxygen-free container, in which the biogas (such as methane) fuels a generator that creates electricity; or

• A wind generator used for producing electricity.

(k) "Solar energy system" means any device or combination of devices or elements that rely upon direct sunlight as an energy source for use in the generation of electricity.

(l) "Solar inverter" means the device used to convert direct current to alternating current in a photovoltaic cell system.

(m) "Solar module" means the smallest nondivisible self-contained physical structure housing interconnected photovoltaic cells and providing a single direct current electrical output.

(3) **Who may receive an incentive payment?** Any of the following may receive an incentive payment:

(a) An individual, business, or local governmental entity, not in a light and power business or in a gas distribution business owning a qualifying renewable energy system; or

(b) A participant in a community solar project with an ownership interest in the:

• Solar energy system;
• Company that owns the solar energy system; or
• Value of the electricity produced by the solar energy system.

(4) **Must you be a customer of a light and power business to be a recipient of an incentive payment?** Yes, only owners of qualifying renewable energy systems located on interconnected properties belonging to customers of a light and power business are eligible to receive incentive payments. This is because the electricity generated by the renewable energy system must be able to be transformed or transmitted for entry into or operated in parallel with electricity transmission and distribution systems. In the case of community solar projects, the land on which the renewable energy system is located may be owned in fee simple by a local governmental entity or owned in fee simple or leased by a utility and they will be the customer of the light and power business.

(5) **To whom do I apply?** An applicant must apply to the light and power business serving the real property on which the renewable energy system is located. The applicant applies for an incentive payment based on customer-generated electricity during each fiscal year beginning on July 1st and ending on June 30th. Participation by a light and power business in the cost recovery incentive program is voluntary. An appli-

cant should first contact their light and power business to verify that it is participating

(6) **Do I need a certification before applying to the light and power business?** Before submitting the first application to the light and power business for the incentive payment allowed under this section, the applicant must submit to the department of revenue a certification request in a form and manner prescribed by the department of revenue.

(a) There are two forms for this certification found at the department of revenue's web site at www.dor.wa.gov, entitled:

• Community Solar Project Renewable Energy System Cost Recovery Certification; and

• Renewable Energy System Cost Recovery Certification.

(b) The department of revenue will evaluate these certification requests with assistance from the climate and rural energy development center at the Washington State University.

(c) In the case of community solar projects:

• Only one certification can be obtained for each system;

• Applicants may rely upon a prior issued certification of the system;

• The administrator must apply for the certification if it is a community solar project placed on property owned by a cooperating local government and owned by individuals, households, nonprofit organizations, or nonutility businesses;

• The company acting as an administrator must apply for the certification if it is a community solar project placed on property owned by a cooperating local government and owned by a company; and

• The utility acting as administrator must apply for the certification if it is a utility-owned community solar project on property owned or leased by the utility.

(d) **Property purchased with existing system.** Except for community solar projects, if an applicant has just purchased a property with a certified renewable energy system, the applicant must reapply for certification as the new owner with the department of revenue.

(e) **Requirements of the certification request.** This certification request must contain, but is not limited to, the following information:

(i) The name and address of the applicant and location of the renewable energy system:

(A) If the applicant is an administrator of a community solar project, the certification request must also include the current name and address of each of the participants in the community solar project.

(B) If the applicant is a company that owns a community solar project that is acting as an administrator, the certification request must also include the current name and address of each member of the company that is a participant in the community solar project.

(ii) The applicant's tax registration number;

(iii) Confirmation that the electricity produced by the applicant meets the definition of "customer-generated electricity" and that the renewable energy system produces electricity with:

(A) Any solar inverters and solar modules manufactured in Washington state;

(B) A wind generator powered by blades manufactured in Washington state;

(C) A wind generator with an inverter manufactured in Washington state;

(D) A solar inverter manufactured in Washington state;

(E) A solar module manufactured in Washington state;

(F) Solar or wind equipment manufactured outside of Washington state; or

(G) An anaerobic digester which processes manure from livestock into biogas and dried manure using microorganisms in a closed oxygen-free container, in which the biogas (such as methane) fuels a generator that creates electricity.

(iv) Confirmation that the electricity can be transformed or transmitted for entry into or operation in parallel with the electricity transmission and distribution systems;

(v) The date that the local jurisdiction issued its final electrical permit on the renewable energy system; and

(vi) A statement that the applicant understands that this information is true, complete, and correct to the best of applicant's knowledge and belief under penalty of perjury.

(f) **Response from the department of revenue.** Within thirty days of receipt of the certification the department of revenue must notify the applicant whether the renewable energy system qualifies for an incentive payment under this section. This notification may be delivered by either mail or electronically as provided in RCW 82.32.135.

(i) The department of revenue may consult with the climate and rural energy development center to determine eligibility for the incentive.

(ii) System certifications and the information contained therein are subject to disclosure under RCW 82.32.330 (3)(m).

(7) **How often do I apply to the light and power business?** You must annually apply by August 1st of each year to the light and power business serving the location of your renewable energy system. The incentive payment applied for covers the production of electricity by the system between July 1st and June 30th of each prior fiscal year.

(8) **What about the application to the light and power business?** The department of revenue has two application forms for use by customers when applying for the incentive payment with their light and power business. These applications are found at the department of revenue's web site at www.dor.wa.gov, entitled:

• Community Solar Project Renewable Energy System Cost Recovery Annual Incentive Payment Application; and

• Renewable Energy System Cost Recovery Annual Incentive Payment Application.

However, individual light and power businesses may create their own forms or use the department of revenue's form in conjunction with their additional addendums.

(a) **Information required on the application to the light and power business.** The application must include, but is not limited to, the following information:

(i) The name and address of the applicant and location of the renewable energy system:

(A) If the applicant is an administrator of a community solar project, the application must also include the current name and address of each of the participants in the community solar project.

(B) If the applicant is a company that owns a community solar project that is acting as an administrator, the application must also include the current name and address of each member of the company that is a participant in the community solar project.

(C) If the applicant is the utility involved with a utility-owned community solar project that is acting as an administrator, the application must also include the current name and address of each customer-ratepayer participating in the community solar project.

(ii) The applicant's tax registration number;

(iii) The date of the notification from the department of revenue stating that the renewable energy system is eligible for the incentives under this section;

(iv) A statement of the amount of gross kilowatt-hours generated by the renewable energy system in the prior fiscal year; and

(v) A statement that the applicant understands that this information is provided to the department of revenue in determining whether the light and power business correctly calculates its credit allowed for customer incentive payments and that the statements are true, complete, and correct to the best of applicant's knowledge and belief under penalty of perjury.

(b) **Light and power business response.** Within sixty days of receipt of the incentive payment application the light and power business serving the location of the system must notify the applicant in writing whether the incentive payment will be authorized or denied.

(i) The light and power business may consult with the climate and rural energy development center to determine eligibility for the incentive payment.

(ii) Incentive payment applications and the information contained therein are subject to disclosure under RCW 82.32.330 (3)(m).

(c) **Light and power business may verify initial certification of system.** Your light and power business has the authority to verify and make separate determinations on the matters covered in your earlier certification with the department of revenue. If your light and power business finds the certification process made an error in determining whether your renewable energy system's generated electricity can be transformed or transmitted for entry into or operation in parallel with the electricity transmission and distribution systems, then the determination by the light and power business will be controlling and it has the authority to decertify your system.

(9) **What are the possible procedures an applicant and their light and power business may follow in setting up incentive payments?** This subsection first discusses recommended procedures an applicant should follow when requesting that the light and power businesses set up an applicant's incentive payments and second discusses the possible procedures the light and power business may follow.

(a) **Steps an applicant may take include, but are not limited to:**

• Contacting their light and power business to ask whether it is participating and what application procedures apply;

• Submitting an application to the light and power business that serves their property;

• Submitting to the light and power business proof that the applicant's renewable energy system is certified by the department of revenue for the incentive payment program;

• Submitting to the light and power business a copy of the approved certification and letter from the department of revenue; and

• Signing an agreement that the light and power business will provide to the applicant.

(b) **Steps the applicant's local light and power business may take include, but are not limited to:**

• Sending a utility serviceman to inspect the system;

• Installing an electric production meter if one meeting its specifications is not already installed since a meter is required to properly measure production;

• Reading the applicant's production meter at least annually;

• Processing the annual incentive payment;

• Notifying the applicant within sixty days whether the incentive payment is authorized or denied;

• Calculating annual production payments based on the meter reading or readings made prior to the accounting date of July 1st; and

• Sending the applicant's incentive payment check on or before December 15th; and

• Alternatively, the light and power business may credit the applicant's account on or before December 15th.

However, if the applicant is a net generator, that applicant must be paid by check. Net generator means the measured difference, in kilowatt-hours between the electricity supplied to a power and light business' customer and the electricity generated by the same customer from the renewable energy system and delivered to the light and power business at the same point of interconnection that is in excess of the electricity used at the same location.

(10) **How may the procedures differ with my light and power business when dealing with a utility-owned solar energy system?** A utility-owned community solar project is voluntarily funded by ratepayers of the specific light and power business offering the program. Only customer-ratepayers of that utility may participate in the program. In exchange for a customer's support the utility gives contributors a payment or credit on their utility bill for the value of the electricity produced by the project. It is important that the customer-ratepayer realize when contributing to this program, they are in effect investing in the utility to receive a stated "value." This value is defined in the agreement between the customer-ratepayer and the utility and this agreement is a contract. Customer-ratepayers need to protect their interest in this investment the same as a person would in any other investment.

(11) **What is the formal agreement between the applicant and the light and power business?** The formal agreement between the applicant and the light and power business serving the property governs the relationship between the parties. This document may:

• Contain the necessary safety requirements and interconnection standards;

• Allow the light and power business the contractual right to review the applicant's substantiation documents for four years, upon five working days' notice;

• Allow the light and power business the contractual right to assess against the applicant, with interest, for any overpayment of incentive payments;

• Delineate any extra metering costs for an electric production meter to be installed on the applicant's property;

• Contain a statement allowing the department of revenue to send proof of the applicant's system certification electronically to applicant's light and power business, which will include the applicant's department of revenue taxpayer's identification number;

• Contain other information required by the light and power business to effectuate and properly process the applicant's incentive payment; and

• In the case of a utility-owned solar energy system, contain a detailed description of the "value" the customer-ratepayer will receive in consideration of the financial support given to the utility.

(12) **Must the renewable energy system be owned or can it be leased?** The renewable energy system must be owned by the individual, business, local governmental entity, utility in a utility-owned renewable energy system, local individuals, households, nonprofit organizations or nonutility business in a community-solar project, or company in a company-owned system. Leasing a renewable energy system does not constitute ownership.

(13) **Must you keep records regarding your incentive payments?** Applicants receiving incentive payments must keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of incentive applied for and received.

(a) **Examination of records.** Such records must be open for examination at any time upon notice by the light and power business that made the payment or by the department of revenue.

(b) **Overpayment.** If upon examination of any records or from other information obtained by the light and power business or department of revenue it appears that an incentive has been paid in an amount that exceeds the correct amount of incentive payable, the light and power business may assess against the person the amount found to have been paid in excess of the correct amount of the incentive payment. Interest will be added to that amount in the manner that the department of revenue assesses interest upon delinquent tax under RCW 82.32.050.

(c) **Underpayment.** If it appears that the amount of incentive paid is less than the correct amount of incentive payable, the light and power business may authorize additional payment.

(14) **How is an incentive payment computed?** The computation for the incentive payment involves a base rate that is multiplied by an economic development factor determined by the amount of the system's manufacture in Washington state to determine the incentive payment rate. The incentive payment rate is then multiplied by the system's gross kilowatt-hours generated to determine the incentive payment.

(a) **Determining the base rate.** The first step in computing the incentive payment is to determine the correct base rate to apply, specifically:

• Fifteen cents per economic development kilowatt-hour; or

• Thirty cents per economic development kilowatt-hour for community solar projects.

If requests for incentive payments exceed the amount of funds available for credit to the participating light and power business, the incentive payments must be reduced proportionately.

(b) **Economic development factors.** For the purposes of this computation, the base rate paid for the investment cost recovery incentive may be multiplied by the following economic development factors:

(i) For customer-generated electricity produced using solar modules manufactured in Washington state, two and four-tenths;

(ii) For customer-generated electricity produced using a solar or a wind generator equipped with an inverter manufactured in Washington state, one and two-tenths;

(iii) For customer-generated electricity produced using an anaerobic digester, or by other solar equipment or using a wind generator equipped with blades manufactured in Washington state, one; and

(iv) For all other customer-generated electricity produced by wind, eight-tenths.

(c) **What if a solar system has both a module and inverter manufactured in Washington state or a wind generator has both blades and inverter manufactured in Washington state?** In these two situations the above-described economic development factors are added together. For example, if your system is solar and has both solar modules and an inverter manufactured in Washington state, you would compute your incentive payment by using the factor three and six-tenths (3.6) (computed 2.4 plus 1.2). Therefore, you would multiply either the fifteen cent or thirty cent base rate by three and six-tenths (3.6) to get your incentive payment rate and then multiple this by the gross kilowatt-hours generated to get the incentive payment amount. Further, if your wind generator has both blades and an inverter manufactured in Washington state you would multiply the fifteen cents base rate by two and two-tenths (2.2) (computed 1.0 plus 1.2) to get your incentive payment rate and then multiply this by the kilowatt-hours generated to get the incentive payment amount.

(d) **Tables for use in computation.** The following tables describe the computation of the incentive payment using the appropriate base rate and then multiplying it by the applicable economic development factors to determine the incentive payment rate. The incentive payment rate is then multiplied by the gross kilowatt-hours generated. The actual incentive payment you receive must be computed using your renewable energy system's actual measured gross electric kilowatt-hours generated.

Annual Incentive Payment Calculation Table for Noncommunity Projects

Customer-generated power applicable factors	Base rate (0.15) multiplied by applicable factor equals incentive payment rate	Gross kilowatt-hours generated	Incentive payment amount equals incentive payment rate multiplied by kilowatt-hours generated
Solar modules manufactured in Washington state **Factor: 2.4** (two and four-tenths)	$0.36		
Solar or wind generating equipment with an inverter manufactured in Washington state **Factor: 1.2** (one and two-tenths)	$0.18		
Anaerobic digester or other solar equipment or wind generator equipped with blades manufactured in Washington state **Factor: 1.0** (one)	$0.15		
All other electricity produced by wind **Factor: 0.8** (eight-tenths)	$0.12		
Both solar modules and inverters manufactured in Washington state. **Factor:** (2.4 + 1.2) = 3.6	$0.54		
Wind generator equipment with both blades and inverter manufactured in Washington state. **Factor:** (1.0 + 1.2) = 2.2	$0.33		

Annual Incentive Payment Calculation Table for Community Solar Projects

Customer-generated power applicable factors	Base rate (0.30) multiplied by applicable factor equals incentive payment rate	Gross kilowatt-hours generated	Incentive payment amount equals incentive payment rate multiplied by kilowatt-hours generated
Solar modules manufactured in Washington state **Factor: 2.4** (two and four-tenths)	$0.72		
Solar equipment with an inverter manufactured in Washington state **Factor: 1.2** (one and two-tenths)	$0.36		
Other solar equipment **Factor: 1.0** (one)	$0.30		
Both solar modules and inverters manufactured in Washington state. **Factor:** (2.4 + 1.2) = 3.6	$1.08		

(e) **Examples to illustrate how incentive payments are calculated.** Assume for the following ten examples that the renewable energy system involved generates 2,500 kilowatt-hours.

(i) If a noncommunity solar system has a module manufactured in Washington state and an inverter manufactured out-of-state the computation would be as follows: (0.15 x 2.4) x 2,500 = $900.00.

(ii) If a noncommunity solar system has an out-of-state module and inverter manufactured in Washington state the computation would be as follows: (0.15 x 1.2) x 2,500 = $450.00.

(iii) If a noncommunity solar system has both modules and an inverter manufactured in Washington state the computation would be as follows: (0.15 x (2.4 + 1.2)) x 2,500 = $1,350.00.

(iv) If wind generator equipment has out-of-state blades and an inverter manufactured in Washington state the computation would be as follows: (0.15 x 1.2) x 2,500 = $450.00.

(v) If wind generator equipment has blades manufactured in Washington state and an out-of-state inverter the computation would be as follows: (0.15 x 1.0) x 2,500 = $375.00.

(vi) If wind generator equipment has both blades and an inverter manufactured in Washington state the computation would be as follows: (0.15 x (1.0 + 1.2)) x 2,500 = $825.00.

(vii) If wind generator equipment has both out-of-state blades and an out-of-state inverter the computation would be as follows: (0.15 x 0.8) x 2,500 = $300.00.

(viii) If a community solar system has a module manufactured in Washington state and an out-of-state inverter the computation would be as follows: (0.30 x 2.4) x 2,500 = $1,800.00.

(ix) If a community solar system has an out-of-state module and inverter manufactured in Washington state the computation would be as follows: (0.30 x 1.2) x 2,500 = $900.00.

(x) If a community solar system has both modules and an inverter manufactured in Washington state the computation would be as follows: (0.30 x (2.4 + 1.2)) x 2,500 = $2,700.00.

(15) **What constitutes manufactured in Washington?** The statute authorizing this incentive payment program defines a "solar module" to mean the smallest nondivisible self-contained physical structure housing interconnected photovoltaic cells and providing a single direct current electrical output. Thus, for a module to qualify as manufactured in Washington state, the manufactured module must meet this definition. However, when determining whether an inverter or blades are manufactured in Washington the department of revenue will apply the definition of manufacturing in WAC 458-20-136. Of particular interest is WAC 458-20-136(7), which defines when assembly constitutes manufacturing. The department of revenue, in consultation with the climate and rural energy development center at Washington State University's energy extension, will apply this rule on manufacturing when analyzing a request for certification.

(16) **How can an applicant determine the system's level of manufacture in Washington state?** For systems installed after the date this section is adopted, the manufacturer must supply the department of revenue with a statement delineating the system's level of manufacture in Washington state, signed under penalty of perjury. The department of revenue will issue a binding letter ruling to the manufacturer stating its determination.

(a) **Manufacturer's statement.** This manufacturer's statement must be specific as to what processes were carried out in Washington state to qualify the system for one or more of the multiplying economic development factors discussed in subsection (13) of this section. The manufacturer can request a binding letter ruling from the department of revenue at this web address:
http://dor.wa.gov/content/contactus/con_TaxRulings.aspx.

(b) **Penalty of perjury.** The manufacturer's statement must be under penalty of perjury and specifically state that the manufacturer understands that the department of revenue will use the statement in deciding whether customer incentive payments and corresponding tax credits are allowed under the renewable energy system cost recovery incentive payment program.

(c) **Document retention.** The applicant must retain this documentation for five years after the receipt of applicant's last incentive payment from the light and power business.

(d) **Certificate of manufacture in Washington state.** If the department of revenue has issued a binding letter ruling stating a module, inverter, or blades qualifies as manufactured in Washington state, the manufacturer may apply to the climate and rural energy development center at Washington State University energy program for a certificate stating the same.

(17) **What about guidelines and standards for manufactured in Washington?** The climate and rural energy development center at the Washington State University energy program may establish guidelines and standards for technologies that are identified as Washington manufactured and therefore most beneficial to the state's environment.

(18) **Do condominiums or community solar projects need more than one meter?** No, the requirement of measuring the kilowatt hours of customer-generated electricity for computing the incentive payments only requires one meter for the renewable energy system, not one meter for each owner, in the case of a condominium, or each applicant, in the case of a community solar project. Thus for example, in the case of a renewable energy system on a condominium with multiple owners, while such a system would not qualify as a community solar project, only one meter is needed to measure the system's gross generation and then each owner's share can be calculated by using each owner's percentage of ownership in the condominium building on which the system is located. With regard to a community solar project, only one meter is needed to measure the system's gross generation and each applicant's share in the project can be calculated by each applicant's interest in the project.

(19) **Is there an annual limit on an incentive payment to one payee?** There is an annual limit on an incentive payment.

(a) **Applicant limit.** No individual, household, business, or local governmental entity is eligible for incentive payments of more than five thousand dollars per year.

(b) **Community solar projects.**

• Each owner or member of a company in a community solar project located on a cooperating local government's property is eligible for an incentive payment, not to exceed

five thousand dollars per year, based on their ownership share.

• Each ratepayer in a utility-owned community solar project is eligible for an incentive payment, not to exceed five thousand dollars per year, in proportion to their contribution resulting in their share of the value of electricity generated.

(20) **Are the renewable energy system's environmental attributes transferred?** Except for utility-owned community solar systems, the environmental attributes of the renewable energy system belong to the applicant, and do not transfer to the state or the light and power business upon receipt of the incentive payment. In the case of utility-owned community solar system, the utility involved owns the environmental attributes of the renewable energy system.

(21) **Is the light and power business allowed a tax credit for the amount of incentive payments made during the year?** A light and power business will be allowed a credit against public utility taxes in an amount equal to incentive payments made in any fiscal year under RCW 82.16.120. The following restrictions apply:

• The credit must be taken in a form and manner as required by the department of revenue.

• The credit for the fiscal year may not exceed one-half percent of the light and power business' taxable power sales due under RCW 82.16.020 (1)(b) or one hundred thousand dollars, whichever is greater.

• Incentive payments to applicants in a utility-owned community solar project as defined in RCW 82.16.110 (1)(a)(ii) may only account for up to twenty-five percent of the total allowable credit. This means that the amount of the light and power business's credit on its public utility tax made on production from all utility-owned community solar projects in total may not exceed twenty-five percent of the fiscal year limitation of one-half percent of the light and power business's taxable power sales due under RCW 82.16.020 (1)(b) or one hundred thousand dollars, whichever is greater. Thus, for example, if Light and Power Business' taxable power sales are six million dollars, the maximum available credit is one hundred thousand dollars, which is greater than one-half percent of the six million dollar taxable power sales. Of that one hundred thousand dollars, the maximum amount of incentive payments to applicants in a utility-owned solar project is twenty-five thousand dollars.

• Incentive payments to participants in a company-owned community solar project as defined in RCW 82.16.-110 (1)(a)(ii) may only account for up to five percent of the total allowable credit. This means that the amount of the light and power business's credit on its public utility tax made on production from all company-owned community solar projects in total may not exceed five percent of the fiscal year limitation of one-half percent of the light and power business's taxable power sales due under RCW 82.16.020 (1)(b) or one hundred thousand dollars, whichever is greater. Thus, for example, if Light and Power Business has thirty million dollars in taxable power sales, the maximum total tax credit available to the light and power business is one hundred fifty thousand dollars. Of this one hundred fifty thousand dollars, the maximum tax credit that the light and power business can claim relative to incentive payments to participants in a company-owned community solar project is seven thousand five hundred dollars. Alternatively, the maximum tax credit that light and power business can claim relative to incentive payments to applicants in a utility-owned solar project is thirty-seven thousand five hundred dollars.

Computation examples. The following table provides:

Taxable Power Sales by the light and power business	Maximum tax credit (greater of .5% of total taxable power sales or $100,000)	Maximum amount of tax credit available for incentive payments in a utility-owned community solar project	Maximum amount of tax credit available for incentive payments in a company-owned community solar project
$5,000,000	$100,000	$25,000	$5,000
$50,000,000	$250,000	$62,500	$12,500
$500,000,000	$2,500,000	$625,000	$125,000

• The credit may not exceed the tax that would otherwise be due under the public utility tax described in chapter 82.16 RCW. Refunds will not be granted in the place of credits.

• Expenditures not used to earn a credit in one fiscal year may not be used to earn a credit in subsequent years.

(22) **When community solar projects are located on the same property, how do you determine whether their systems are one combined system or separate systems for determining the seventy-five kilowatts limitation?** In determining whether a community solar project's system is capable of generating more than seventy-five kilowatts of electricity when more than one community solar project is located on one property, the department of revenue will treat each project's system as separate from the other projects if there are:

• Separate meters;

• Separate inverters;

• Separate certification documents submitted to the department of revenue; and

• Separate owners in each community solar project, except for utility-owned systems that are voluntarily funded by the utility's ratepayers, which must have a majority of different ratepayers funding each system.

(23) **What if a light and power business claims an incentive payment in excess of the correct amount?** For any light and power business that has claimed credit for amounts that exceed the correct amount of the incentive payable under RCW 82.16.120, the amount of tax against which credit was claimed for the excess payments will be immediately due and payable.

• The department of revenue will assess interest but not penalties on the taxes against which the credit was claimed.

• Interest will be assessed at the rate provided for delinquent excise taxes under chapter 82.32 RCW, retroactively to

the date the credit was claimed, and will accrue until the taxes against which the credit was claimed are repaid.

(24) **Does the department of revenue consider the incentive payment taxable income?** No, the department of revenue does not consider the incentive payment an applicant receives to be taxable income.

(25) **What is the relationship between the department of revenue and the light and power business under this program?** The department of revenue is not regulating light and power businesses; it is only administering a tax credit program relating to the public utility tax. Therefore, for purposes of the customer investment cost recovery incentive payment, the department of revenue will generally focus its audit of light and power businesses to include, but not be limited to, whether:

• Claimed credit amount equals the amount of the total incentive payments made during the fiscal year;

• Each individual incentive payment is properly calculated;

• Payment to each applicant or participant in a community solar project is proportionally reduced by an equal percentage if the limit of total allowed credits is reached;

• Applicant payments are based on measured gross production of the renewable energy systems; and

• The credit and incentive payment limitations have not been exceeded.

[Statutory Authority: RCW 82.32.300 and 82.01.060. WSR 10-17-004, § 458-20-273, filed 8/5/10, effective 9/5/10; WSR 06-16-097, § 458-20-273, filed 7/31/06, effective 8/31/06.]

WAC 458-20-274 Staffing services. (1) **Introduction.** This section explains the application of business and occupation (B&O) tax, public utility tax (PUT); and the retail sales tax collection responsibilities of staffing businesses providing staffing services.

(2) **To whom does this section apply?** This section applies to any person engaged in the business activity of providing staffing services. This section does not apply to persons providing professional employer services. Persons providing professional employer services should refer to RCW 82.04.540 for information on their tax-reporting responsibilities.

(3) **What is the definition of a staffing business and staffing services?** A "staffing business" is a person engaged in the business activity of providing staffing services. "Staffing services" means services consisting of a person:

• Recruiting and hiring its own employees;

• Finding other organizations that need the services of those employees;

• Assigning those employees on a temporary basis to perform work at or services for the other organizations to support or supplement the other organizations' work forces, or to provide assistance in special work situations such as, but not limited to, employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects, all under the direction and supervision of the customer; and

• Customarily attempting to reassign the employees to other organizations when they finish each assignment.

(4) **Generally, what kinds of business activities are workers assigned by a staffing business?** Business activities may include, but are not limited to, services rendered with respect to:

• Construction (both custom and speculative);

• Customer software design and implementation;

• Manufacturing and light industrial activities;

• Professional services including medical and clerical; and

• Other skilled and unskilled labor.

(5) **Is the gross income received by a staffing business subject to Washington tax?** Yes, the gross income received by a staffing business is subject to B&O and/or PUT tax.

(6) **Is the tax paid by a staffing business or is the tax collected from the client to whom the workers are assigned?**

• B&O tax and/or PUT are paid by the staffing business.

• When the activity of the assigned worker is a retail sale, retail sales tax must be collected from the client unless a specific exemption or exclusion, such as the activity being a sale for resale, applies. The collected tax is paid by the staffing business to the department.

(7) **May a staffing business deduct payroll and other business expenses from gross income?**

• Chapters 82.04 and 82.16 RCW provide limited deductions from the B&O tax and PUT.

• The requirements of each specific deduction or exemption must be met to qualify for the deduction or exemption.

• Generally, amounts paid to the worker, amounts deducted for payroll taxes, or any other expenses paid or accrued may not be deducted by a staffing business.

• But income received for work performed outside the state may be deducted from gross income for B&O tax purposes. Similarly, an interstate haul is deducted from the PUT.

• Bad debts on which tax has been paid and which may be written off for federal tax purposes may be deducted from the gross income of both B&O and PUT.

• Exemptions, deductions and special tax rates that may apply to the client do not automatically also apply to the staffing business.

• **Example 1.**

– Under the Revenue Act, certain nonprofit hospitals may qualify for a B&O tax deduction for income received through medicare.

– Also, nonprofit and public hospitals are taxable under a special B&O tax classification.

– However, because the staffing business does not meet the criteria for the B&O tax deduction for income received through medicare or, for the B&O tax special nonprofit hospital classification, the income received by a staffing business from assigning physicians, nurses, or other health care workers to the hospital is taxable under the service and other activities classification.

• **Example 2.**

– Similarly, the Revenue Act exempts from B&O tax income received by licensed adult family homes.

– However, the gross income received by a staffing business from assigning a health care worker to the adult family home is taxable under the service and other activities B&O tax classification.

(8) **What if an activity is not subject to sales tax because it is a sale for resale?**

• When a service that would otherwise be a retail sale is performed for a person that resells that service, such as construction work performed for a general contractor, sales tax is not collected when the staffing business receives a completed resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, from the client reselling the service. Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

• When a resale certificate for sales made before January 1, 2010, or a seller permit for sales made on or after January 1, 2010, is received, the staffing business must report such charges for the worker under the wholesaling B&O tax classification.

(9) **What is the tax rate?**

• The B&O tax rate and/or the PUT rate is determined by the classification of the activity engaged in by the assigned worker.

• The retail sales tax rate is determined, generally, by the location of where the retail sale is performed. See WAC 458-20-145.

(10) **If the B&O tax rate is determined by the B&O tax classification, who determines or identifies the correct classification?**

• It is the responsibility of the staffing business to determine or identify the applicable B&O tax classification for the activity performed by the assigned worker.

• This determination should be made prior to dispatching the worker to the customer.

• It is important for the staffing business to know whether retail sales tax should be collected from the customer, or if a resale certificate, reseller permit, exemption certificate, or other documentation should be received from the customer as evidence of a sales tax exemption.

(11) **Is the proper B&O tax classification as reported by the staffing business always the same classification as reported by the client customer to whom the worker is assigned?**

• Regardless of the nature of the customer's business, the staffing business looks to the activity engaged in by the worker assigned.

• The staffing business should not assume that the income it receives through the activities of its workers is taxable under the same classification that the customer reports.

• It is the activity of each worker, not the reporting classification of the customer that determines the tax classification.

• **Example:**

– A person operating an insurance agency is taxable under the insurance agents B&O tax classification.

– If the staffing business assigns a receptionist for the insurance agency, the gross income received for the receptionist's services is subject to B&O tax under the service and other activities classification. The service classification applies because the receptionist is not providing services under the authority of an insurance agent's license.

– However, if the staffing business assigns a worker licensed as an insurance agent to an insurance agency, and the licensed insurance agent performs services under the authority of his/her license, the related income is taxable under the insurance agents B&O tax classification.

(12) **What are the major B&O tax classifications?** The major B&O tax classifications include:

• Retailing.
• Wholesaling.
• Manufacturing.
• Processing for hire.
• Service and other activities.
• Stevedoring.
• Travel agent activities.

(13) **Where can I get a description of the activities included in the major B&O tax classification? Where can I get a complete list of the B&O tax classifications and more information?**

• The department's *Staffing Industry Guide* provides detailed information on the staffing industry and includes a description of the activities included in the major B&O tax classifications. The *Staffing Industry Guide* is located on the department's web site http://dor.wa.gov/

• A complete list of the B&O tax classifications and more information about the B&O and PUT can be found on the department's web site http://dor.wa.gov/

(14) **What is the public utility tax (PUT)? What are the major classifications of PUT?**

• The public utility tax is a tax on gross receipts, similar to the B&O tax.

• It applies to most utility services, such as water, power, and gas distribution, and sewerage collection.

• It also applies to providing transportation of persons or property for hire within five miles of the city limits (urban transportation classification) and beyond (motor transportation classification).

– These classifications apply whether or not the person performing the work owns the vehicle with which the activity is being performed.

– Examples include taxi cab service, limousine service, and hauling goods belonging to others (hauling for hire).

(15) **How is income reported when the assigned worker is engaging in more than one activity?**

• An assigned worker provided by a staffing business to a client may engage in several different activities while on the same job.

• The different activities may be taxable under separate B&O tax and/or PUT classifications.

• If the staffing business separates the amounts it charges the client by activities, the separated charges are reported.

• If the staffing business does not separate its charge to the client the charge is reported under the classification of the predominant activity.

• "Predominant activity" for two worker activities is when more than fifty percent of the worker's time is spent working in one tax classified activity.

• "Predominant activity" for more than two worker activities is the activity the worker spends the greatest amount of time doing.

• When two or more workers, engaged in different activities, are assigned to one client, the charge for each worker is

reported based on the predominant activity of each individual worker.

• **Example 1:**

– A staffing business assigns a housekeeper whose primary job is to clean an apartment (subject to the service and other activities B&O tax classification).

– The job also calls for the housekeeper to prepare one meal per day (subject to retailing B&O tax and retail sales tax).

– The majority (over half) of the time spent is associated with the housekeeping service (apartment cleaning - subject to the service and other activities B&O tax classification).

– No segregated charge is made for the preparation of the meal.

– In this case, the predominant activity is cleaning the apartment.

– Therefore, the gross income received by staffing business from the charge to the client is reportable under the service and other activities B&O tax classification. Retail sales tax will not apply.

• **Example 2:**

– A staffing business assigns a construction worker to a client that is a developer/property owner performing construction-related services (subject to retailing B&O tax and retail sales tax).

– The assigned worker has a commercial driver's license and is only occasionally required to drive the client's truck within the city to pick up a load of gravel (an activity subject to the urban transportation PUT classification).

– The worker also spends about one hour per day helping in the office.

– The predominant activity is the retailing activity of performing construction work because the greatest amount of time is spent performing retailing construction work.

– The staffing business has not segregated charge for the other lesser activities.

– In this case, the staffing business reports the gross amount charged to the client under the retailing B&O tax classification. Additionally, the staffing business must also collect from the client retail sales tax measured by the gross charge to the client.

• **Example 3:**

– Same facts as Example 2, except the staffing business also provides a receptionist to the client (developer/property owner).

– As demonstrated in Example 2, the staffing business is subject to the retailing B&O tax on the gross amount charged to the client for work done by the construction worker; and retail sales tax must be collected on this charge.

– However, the staffing business is subject to service and other activities B&O tax on the gross amount charged to the client for the receptionist's work. The service and other activities B&O tax classification is the proper classification notwithstanding the client reports under the retailing classification.

(16) **Is the staffing business required to keep documentation of the activities their assigned workers performed?**

• The staffing business must keep documentation showing what services their assigned workers performed.

• All available information should be recorded concurrently with the assignment of the worker and the charge for the service.

• It is important that the client's labor and skill requirements are detailed up front as much as possible prior to dispatch.

• This is particularly important for purposes of billing retail sales tax.

• Documentation may be in the form of a copy of a client order or other documented request by a client for a worker.

• The documentation must state the specific work to be performed, and/or the worker skills requested by the client.

• If the client's request comes in by telephone, the staffing business should ask exactly what type of services are required and write them down on an order form, or as a memo to the client's file.

• Also, the worker can provide a written explanation of the services actually performed.

• Documentation to support the B&O tax classification must be sufficiently detailed to support the classification reported.

• The classification of primary interest to the client is retailing. Only under retailing is the staffing company, as seller of the service, required to collect retail sales tax from the client.

• Any other classification which does not directly impact the client may be of less interest to the client. Nevertheless, because the rates may vary between classifications, it is in the person providing staffing service's best interest to gather enough information to classify all services correctly.

• If, subsequent to filing a return, it is later determined that income has been incorrectly classified, amended returns should be submitted to the department to make the appropriate adjustment.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-070, § 458-20-274, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 07-17-132, § 458-20-274, filed 8/20/07, effective 9/20/07.]

WAC 458-20-277 Certified service providers—Compensation. (1) **Introduction.** This section explains compensation paid to certified service providers (CSPs) as defined in Substitute Senate Bill No. 5089 (SSB 5089), chapter 6, Laws of 2007 and RCW 82.58.080. The section also lists rights and responsibilities applicable to these CSPs when collecting and remitting retail sales and use taxes in Washington. On March 22, 2007, Washington enacted SSB 5089, a legislative package that brings Washington's sales and use tax laws into conformity with the streamlined sales and use tax agreement (SSUTA). For more information concerning the SSUTA, visit http://www.streamlinedsalestax.org. The web sites referenced in this section are not maintained by Washington or the department of revenue (department). These referenced web sites may contain recommendations that require a change to Washington law prior to becoming effective in Washington.

(2) **CSP compensation for volunteer sellers.**

(a) **What is a CSP?** A CSP is an agent of the seller certified under the SSUTA to perform all of a seller's retail sales and use tax functions, other than the seller's obligation to remit retail sales and use tax on its own purchases. For more

information concerning CSP certification or a list of current CSPs, visit the SSUTA web site located at: http://www.streamlinedsalestax.org.

(b) **What is a volunteer seller?** A volunteer seller is any seller that has selected a CSP, as agent, to perform all of that seller's retail sales and use tax functions, other than the obligation to remit retail sales and use tax on the seller's own purchases and who has voluntarily registered through the SSUTA central registration system (CRS) in accordance with the terms of the CSP contract (CSP contract). The CSP contract is the agreement executed between each CSP and the streamlined sales tax governing board under which CSPs perform services in SSUTA associate and member states.

(c) **What are member states and associate member states?** Member states are those states that have petitioned and been granted full membership under the SSUTA. Associate member states are those states that have petitioned and been designated associate member status under the SSUTA. Washington became an associate member state on July 1, 2007. Washington has been granted full membership status as of July 1, 2008. For a list of the current member and associate member states, visit the SSUTA web site at: http://www.streamlinedsalestax.org.

(d) **What are monetary allowances?** As a condition of becoming an associate member and member state, Washington has agreed to permit CSPs to act as agents for sellers in collecting and remitting sales and use taxes in Washington. Washington has agreed to provide monetary allowances to CSPs acting as agents for volunteer sellers. A CSP will obtain these monetary allowances by retaining a portion of the Washington retail sales and use tax they collect. However, monetary allowances will not reduce the retail sales and use taxes collected for and remitted to local taxing jurisdictions. The calculation of these monetary allowances is discussed in subsection (3) of this section.

(e) **What is a certified automated system (CAS)?** A certified automated system is software certified by Washington under the SSUTA: To calculate the sales and use tax imposed by each taxing jurisdiction on a transaction; to determine the amount of tax to remit; and to maintain a record of the transaction.

(3) **How are monetary allowances calculated?** The formula for determining monetary allowances is set forth in the CSP contract. This monetary allowance is the CSP's sole form of compensation with respect to volunteer sellers during the term of the CSP contract and is the same with respect to all CSPs.

This monetary allowance is calculated by using the following formula: (The combined volume of taxes due to all member and associate member states from a volunteer seller in such capacity) multiplied by (the applicable base rate). Simply stated, the formula is (combined collected taxes) x (base rate). Affiliated volunteer sellers will be treated as a single volunteer seller if they are related persons under 267(b) or 707(b) of the United States Internal Revenue Code. The base rate resets annually. Table A below sets forth the schedule for "combined collected taxes" and the applicable "base rate":

Table A

Combined Collected Taxes:			Base Rate:
$0.00	-	$250,000	8%
$250,000.01	-	$1,000,000	7%
$1,000,000.01	-	$2,500,000	6%
$2,500,000.01	-	$5,000,000	5%
$5,000,000.01	-	$10,000,000	4%
$10,000,000.01	-	$25,000,000	3%
Over $25,000,000.01			2%

(a) **Can volunteer sellers lose volunteer seller status?** Volunteer seller status ceases when the seller conducts activities in Washington that would require the seller to legally register in Washington as described in the CSP contract.

(b) **Seller statements.** Each volunteer seller must periodically send written statements (statement) to the CSP verifying that the seller continues to qualify as a volunteer seller in Washington. The volunteer seller must send the first statement twenty-four consecutive months from the date on which the CSP began remitting sales and use taxes for the volunteer seller in Washington. Subsequently, volunteer sellers will send a statement every twelve consecutive months thereafter. A CSP may request a statement verifying a seller's volunteer seller status at any time. The CSP must notify the department when a seller loses volunteer seller status and this notification must be sent no later than ten business days after receipt of a seller's statement indicating the seller is no longer a volunteer seller. Notice to the department must be provided consistent with the notice provisions contained in the CSP contract. Entitlement to monetary allowances will be terminated after a seller sends a statement that the seller is no longer a volunteer seller.

(c) **When will monetary allowances terminate?** A CSP is entitled to retain monetary allowances granted prior to receiving a statement indicating that the seller has lost volunteer seller status. However, entitlement to monetary allowances will end on the first day of the month following receipt of such statement. Regardless, a CSP will be entitled to monetary allowances for services performed under this section with respect to a volunteer seller for a period of twenty-four months (beginning on the date the CSP commenced remitting sales and use taxes for the volunteer seller in Washington and ending twenty-four consecutive months later).

(4) **CSP rights and responsibilities.**

(a) **Responsibility for retail sales and use taxes.** A CSP is liable to the member states and associate member states for the retail sales and use taxes on the sales transactions that it processes.

If the CSP does not remit the collected retail sales and use taxes when due, those taxes are delinquent. Washington may send a notice of delinquency to a CSP for these delinquent taxes. The CSP must then remit the delinquent taxes within ten business days of that notification. If the CSP does not remit the delinquent taxes within those ten business days, the CSP is not entitled to monetary allowances with respect to the delinquent taxes and is liable for the payment of the taxes along with penalties and interest. However, if the taxes are

delinquent because a seller has not remitted part or all of the delinquent taxes to the CSP, the CSP will be given relief if it properly notifies the department. In order to obtain this relief, the CSP must notify the department of the seller's failure to remit the retail sales and use taxes to the CSP within ten business days of the date on which those delinquent taxes should have been remitted to the department. Notice by the CSP under this subsection must be provided consistent with the notice provisions contained in the CSP contract.

(b) **CSP liability relief.** A CSP is not liable for charging or collecting the incorrect amount of sales or use tax where that error results from reliance on incorrect data provided in the department's taxability matrix, or from tax rates, boundaries, and taxing jurisdiction assignments listed in Washington's rates and boundaries data bases. To obtain a copy of the taxability matrix, visit the SSUTA web site located at: http://www.streamlinedsalestax.org. Additionally, CSPs will be held harmless and not liable for sales and use taxes, interest, and penalties on those taxes not collected due to reliance on Washington's certification of the CSP's CAS. Pursuant to RCW 82.58.080, sellers that contract with a CSP are not liable to Washington for sales or use tax due on transactions processed by the certified service provider unless the seller misrepresents the type of items it sells or commits fraud.

(c) **Seller's contract with the CSP.** A CSP must provide the department with a copy of its agreement with contracting sellers if requested.

(d) **Credits or refunds with respect to bad debt.** A CSP may, on the behalf of a seller, claim credits or refunds for sales taxes paid on bad debts. Bad debts have the same meaning provided in 26 U.S.C. Section 166, as amended in 2003. Bad debts do not include expenses incurred in collecting bad debts; repossessed property; and amounts due on property in the possession of the seller until the full purchase price has been paid. See section 103, SSB 5089 and WAC 458-20-196 for more information regarding bad debts.

(e) **Retention of personally identifiable consumer information.** With limited exceptions, CSPs must perform their services without retaining personally identifiable consumer information. A CSP may retain personally identifiable consumer information only as long as it is needed to ensure the validity of tax exemptions or to show the intended use of the goods or services purchased. See section 601, SSB 5089 for more information regarding personally identifiable consumer information.

(f) **Filing of tax returns and remittance of retail sales and use taxes.** CSP will file retail sales and use excise tax returns using Washington's electronic filing system (E-file). CSPs will remit retail sales and use taxes due with respect to these returns using ACH Debit, ACH Credit, or the Fedwire Funds Transfer System.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and 82.32.715. WSR 08-01-017, § 458-20-277, filed 12/7/07, effective 1/7/08.]

WAC 458-20-27701 Model 2 volunteer sellers—Compensation. (1) **Introduction.** As a requirement of membership in the Streamlined Sales and Use Tax Agreement (SSUTA), Washington has agreed to provide compensation to model 2 volunteer sellers collecting and remitting retail sales and use taxes in Washington. For more information concerning the SSUTA, visit http://www.streamlinedsalestax.org. This section explains who qualifies as a model 2 volunteer seller and the compensation available to such sellers as authorized under RCW 82.32.715.

The web site referenced in this section is not maintained by Washington or the department of revenue (department). This referenced web site may contain recommendations that require a change to Washington law before becoming effective in Washington. The web site is current as of the date of adoption of this section, but may change in future periods by action of the owner of the web site without notice.

(2) **Model 2 volunteer sellers.** This subsection discusses the qualifications for status as a model 2 seller and a model 2 volunteer seller. Only those model 2 sellers qualifying as model 2 volunteer sellers are eligible to receive compensation for remitting sales and use taxes to Washington under subsection (3) of this section. A taxpayer that qualifies as a model 2 volunteer seller under this subsection will be referred to as a "qualified seller."

(a) **What is a model 2 seller?** You will qualify as a model 2 seller if you meet all of the following conditions:

(i) You use a certified automated system to perform part of your sales and use tax functions. (See (f) of this subsection for a definition of certified automated system); and

(ii) You retain the responsibility for remitting your sales and use taxes to Washington.

(b) **What is a model 2 volunteer seller?** If you are a model 2 seller under (a) of this subsection, you will be a model 2 volunteer seller if you are registered through the SSUTA central registration system (CRS) as a model 2 seller and you meet the following additional conditions:

(i) You have represented that you do not have a legal requirement to register and do not in fact have a legal requirement to register in Washington at the time you register with the CRS, regardless of any previous registration you may have made in Washington; or

(ii) You register with Washington through the CRS after November 12, 2002, and you meet all of the following requirements immediately before the date of your registration with Washington through the CRS (and you do not cease to meet these requirements thereafter pursuant to subsection (3)(d) of this section):

(A) You have no fixed place of business in Washington for more than thirty days;

(B) You have less than fifty thousand dollars of property in Washington;

(C) You have less than fifty thousand dollars of payroll in Washington; and

(D) You have less than twenty-five percent of your total property or payroll in Washington.

If you have registered in Washington because you had a legal requirement to register resulting from an administrative, legislative, or judicial action before October 1, 2005, you cannot be a model 2 volunteer seller under this subsection.

(c) **If I am a qualified seller, do I still need to register with the department for Washington state tax purposes under RCW 82.32.030(1)?** Your status as a qualified seller does not impact your requirement to register with the department. If you meet the conditions for registration with the department under RCW 82.32.030, you must register with the department.

(d) **What is property for purposes of (b) of this subsection and how is it valued?** Property refers to the "average value" of the real property and tangible personal property that you own and rent. You will value owned property at its original cost basis. Rented property will be valued at eight times the net annual rental rate of that property. The net annual rental rate is the annual rental rate paid by you less any annual rental rates you receive from subrentals.

You must determine the "average value" of this property by averaging the value of property at the beginning of the twelve-month period immediately before the date you register with Washington with the value of property at the end of the twelve-month period immediately before you register with Washington.

(e) **What is payroll for purposes of (b) of this subsection?** Payroll is the total amount paid by you for compensation during the twelve-month period immediately proceeding the date you register with Washington. Compensation means wages, salaries, commissions, and any other form of payment to employees or similar persons that meet the definition of gross income under section 61 of the Internal Revenue Code in effect on the effective date of this section.

Compensation is deemed to be payroll in Washington if:

(i) The employee's service is performed entirely within Washington;

(ii) The employee's service is performed both within and outside Washington, and the performance of services outside Washington is merely incidental to the services performed within Washington;

(iii) The employee performs some services within Washington, and the base of operations or the place from which the services are directed or controlled is within Washington; or

(iv) The employee performs some services within Washington, and the base of operations or place from which the services are directed or controlled is not within any state (where some part of the services are performed), but the employee's residence is within Washington.

(f) **What is a certified automated system for purposes of this section?** A certified automated system is software certified by Washington under the SSUTA: To calculate the sales and use tax imposed by each taxing jurisdiction on a transaction; to determine the amount of tax to remit; and to maintain a record of the transaction.

(3) **Qualified seller compensation.** This subsection explains compensation available to qualified sellers.

(a) **What type of compensation is available to qualified sellers?** If you are a qualified seller, you are eligible to receive monetary allowances from Washington under this subsection and this is in addition to any existing discount afforded by each member state. For a list of SSUTA member and associate member states visit http://www.streamlinedsalestax.org. You obtain these monetary allowances from Washington by retaining a portion of the Washington state retail sales and use taxes you collect and report to Washington. You are not entitled to monetary allowances unless you are a qualified seller and have filed and paid a timely return.

(b) **How long are qualified sellers permitted to receive monetary allowances?** If you install a certified automated system on or after July 1, 2007, you are eligible to receive monetary allowances under this subsection for a period up to twenty-four months from the date that you install your certified automated system.

(c) **How do qualified sellers calculate their monetary allowances?** You will calculate your monetary allowance under the following formula:

(Applicable rate) multiplied by (Washington retail sales and use taxes you collect and report).

The applicable rate for this formula is one and one-half percent. Your total monetary allowance for the first twelve months of the twenty-four month period described in (b) of this subsection cannot exceed ten thousand dollars. Your total monetary allowance for the second twelve months of the twenty-four month period described in (b) of this subsection cannot exceed ten thousand dollars. For purposes of determining when each ten thousand dollar limit is reached, affiliated qualified sellers must be treated as a single qualified seller if they would qualify as "related persons" under sections 267(b) or 707(b) of the Internal Revenue Code in effect on the effective date of this section.

You may not retain monetary allowances under this subsection based on any sales taxes determined or calculated without the use of a certified automated system. Moreover, you may not retain monetary allowances under this subsection based on any sales taxes determined or calculated with a certified automated system that you have failed to update or modify in accordance with your agreement with your certified automated system provider. It is your duty to make sure all updates and modifications to your certified automated system are properly implemented.

(d) **Can a qualified seller continue to receive monetary allowances if it ceases to be a qualified seller?** No. If you cease to be a qualified seller, you are not entitled to monetary allowances. If you cease to be a qualified seller during any part of a calendar month, you will not be entitled to monetary allowances for that entire month. You will cease to be a qualified seller if you conduct activities in Washington that would require you to register in Washington and as a result of these activities fail to meet one or more of the requirements of subsection (2)(b)(ii)(A) through (D) of this section. The meanings given to property and payroll in subsection (2)(d) and (e) of this section apply for purposes of this subsection (3)(d). However, you must determine the "average value" of property and the amount of payroll under this subsection (3)(d) as follows:

(i) You must determine the "average value" of property by averaging the values at the beginning and end of your last fiscal year that terminates at least thirty days before the date the determination is made.

(ii) You must determine payroll, by calculating the total amount of compensation paid to employees during your last fiscal year that terminates at least thirty days before the date the determination is made.

(e) **Are monetary allowances funded from both Washington state and local retail sales and use taxes?** No, monetary allowances will only be funded from the Washington state portion of the retail sales and use taxes that you collect and must remit.

(4) **Do qualified sellers have any liability protections when operating in Washington?** You are not liable for charging or collecting the incorrect amount of sales or use tax

when that error results from reliance on incorrect data provided in the department's taxability matrix. To obtain a copy of the taxability matrix, visit the SSUTA web site located at: http://www.streamlinedsalestax.org.

Additionally, you will be held harmless and not liable for sales and use taxes, including interest and penalties on those taxes, not collected due to reliance on Washington's certification of the certified automated system you use. However, you will not be held harmless for the incorrect classification of an item or transaction into a product based exemption certified by the department unless that item or transaction is listed within a product definition approved by the SSUTA's governing board or the department. See also RCW 82.32.745.

(5) **Filing returns and remitting taxes.** Qualified sellers must electronically file retail sales and use excise tax returns and must remit retail sales and use taxes due with respect to these returns using ACH Debit, ACH Credit, or the Fed Wire Funds Transfer System.

[Statutory Authority: RCW 82.32.300, 82.32.715, and 82.01.060(2). WSR 08-22-048, § 458-20-27701, filed 10/31/08, effective 12/1/08.]

WAC 458-20-27702 Taxpayer relief—Sourcing compliance—One thousand dollar credit and certified service provider compensation for small businesses. (1) **Introduction.** RCW 82.32.760 provides sourcing compliance relief to certain eligible taxpayers impacted by RCW 82.14.490 and 82.32.730. RCW 82.14.490 and 82.32.730 govern where the local retail sales taxes attributable to the sale of tangible personal property, retail services, extended warranties, and the lease of tangible personal property are sourced. "Sourced" and "sourcing" refer to the location (as in a local taxing district, jurisdiction, or authority) where a sale or lease is deemed to occur and is subject to tax. Effective July 1, 2008, RCW 82.14.490 and 82.32.730 will change the way in which many sellers collect Washington's local retail sales taxes, resulting in some added transitional costs to these sellers. This section gives information about the relief provided in RCW 82.32.760 related to these new sourcing provisions.

In subsection (3)(c) of this section, the department of revenue (department) provides an example that identifies facts and then states a conclusion. This example should be used only as a general guide. The tax results of other situations must be determined separately after a review of all of the facts and circumstances.

(2) **Commonly used terms.**

(a) **What is a certified service provider (CSP)?** A CSP is an agent of the seller certified under the Streamlined Sales and Use Tax Agreement (SSUTA) to perform all of that seller's retail sales and use tax functions, other than the seller's obligation to remit retail sales and use taxes on its own purchases. For a list of current CSPs visit the SSUTA web site located at: http://www.streamlinedsalestax.org. This web site is not maintained by the state of Washington or the department. The web site is current as of the date of adoption of this section, but may change in future periods by action of the owner of the web site without notice.

(b) **Who is an eligible taxpayer?** You will be an eligible taxpayer if you meet all of the following conditions:

(i) You are registered with the department and are engaged in making sales of tangible personal property delivered to physical locations away from your place of business on June 30, 2008; and

(ii) You meet all of the following requirements for the 2008 calendar year:

(A) You have a physical presence in Washington;

(B) You have annual gross income of the business in an amount less than five hundred thousand dollars;

(C) You have at least five percent of your annual gross income from sales subject to sales tax in Washington derived from sales of tangible personal property delivered to physical locations away from your place of business; and

(D) You have at least one percent of your annual gross income from sales subject to sales tax in Washington derived from deliveries of tangible personal property to destinations in local Washington jurisdictions other than the one to which you reported the most local sales tax.

"Gross income of the business" for the purpose of applying (b) of this subsection means gross income of the business as defined under chapter 82.04 RCW that is subject to tax in Washington. The requirements under (b)(ii) of this subsection apply only to the 2008 calendar year. This means for instance that an eligible taxpayer may earn over five hundred thousand dollars in gross income of the business for the calendar years 2009 and 2010 respectively and not lose eligibility under this section.

(c) **What are eligible costs?** Eligible costs represent those goods and services purchased and labor costs incurred for the purpose of complying with local sales and use tax sourcing rules under RCW 82.14.490 and 82.32.730. Examples of eligible costs include but are not limited to the purchase of new software or modification of existing software used to implement the new local sourcing rules; the hiring of professionals such as accountants, consultants, or attorneys to implement the new local sourcing rules; the costs for the purchase or modification of equipment used to implement the new local sourcing rules (including but not limited to cash registers and similar items); and payroll expenses associated with the implementation of the new local sourcing rules. These costs must be actually incurred between July 1, 2007, and June 30, 2009, to be eligible.

(3) **What relief does Washington provide?** If you are an eligible taxpayer, you are entitled either to take up to a one thousand dollar credit for your eligible costs, or you may use the services of a CSP subsidized by Washington for a period of up to two years. You may choose either the credit or the CSP services option, but not both. You will not need to apply in order to take advantage of these options, but you must keep records sufficient to allow the department to determine eligibility.

(a) **How does the one thousand dollar credit option work?** You may take a tax credit of up to one thousand dollars for your eligible costs (see subsection (2)(c) of this section). You must take this credit against Washington state retail sales taxes imposed by RCW 82.08.020(1) that you collect or your business and occupation taxes imposed under chapter 82.04 RCW. The credit may not be taken against the local sales taxes you collect. The amount of your credit is equal to the sum of your eligible costs. You may take the credit only for costs actually incurred from July 1, 2007, through June 30, 2009.

You must first make a claim for the credit during those tax reporting periods that fall between July 1, 2008, and June 30, 2009. Thus, you must make a claim for the credit within the applicable deadline associated with the filing of your returns for that one-year period. However, this does not affect your ability to take unused credit after June 30, 2009, for costs actually incurred before that date until your credit is used. You may not obtain a refund instead of the credit.

(b) **How does the CSP services option work?** You may use the services of a CSP for up to a two-year period starting July 1, 2008, and ending June 30, 2010. Washington will compensate your CSP for its services in collecting and remitting sales and use taxes for Washington on your behalf. Washington will not compensate the CSP unless it is performing for you the full services contractually required of a CSP under the CSP description provided in subsection (2)(a) of this section. If the CSP is providing a lesser level of service, Washington will not compensate the CSP for any of that service. However, you may be able to claim the credit of up to one thousand dollars for what the CSP charges you in such instances.

Washington will not compensate a CSP for services provided to you prior to July 1, 2008, or after June 30, 2010. If you use a CSP under this section, you will generally not be liable to Washington for sales or use taxes due on transactions processed and paid to the state of Washington by your CSP unless you misrepresent the type of items you sell or you commit fraud. CSP compensation will not be funded from any portion of the local retail taxes that are collected and reported. These local retail sales taxes must be remitted to the department in full. This option is not available to model 1 volunteer sellers using the services of a CSP as described in WAC 458-20-277.

(c) **CSPs: Filing returns, remitting taxes, and compensation.**

(i) **How do CSPs file tax returns and remit retail sales taxes under this section?** CSPs must file retail sales and use excise tax returns for eligible taxpayers electronically. CSPs must pay retail sales and use taxes due with respect to these returns using ACH Debit, ACH Credit, or the Fedwire Funds Transfer System.

(ii) **How do CSPs determine their compensation under this section?** A CSP computes its compensation by multiplying the amount of Washington state and local retail sales and use taxes collected and reported by the CSP on behalf of an eligible taxpayer (taxes due) for each applicable calendar year by the established CSP compensation rate.

The compensation rates established for CSPs are provided in Table A below. The applicable calendar years during which a CSP may compute compensation are as follows: Calendar year 2008 (computed from July 1, 2008, through December 31, 2008), calendar year 2009 (computed from January 1, 2009, through December 31, 2009), and calendar 2010 (computed from January 1, 2010, through June 30, 2010).

(iii) **What are the CSP compensation rates?** The CSP compensation rates are contained in Table A below.

Table A

Taxes Due	Compensation Rate:
$0.00 - $5,000.00	4%
$5,000.01 - $20,000.00	3.7%
$20,000.01 - $50,000.00	3.3%
$50,000.01 - $100,000.00	3%
$100,000.01 - $200,000.00	2.7%
$200,000.01 - $500,000.00	2.3%
Over $500,000.01	2%

• The compensation rate in Table A is graduated. For example, the highest rate (4%) applies to the first five thousand dollars of taxes due, and the next highest rate (3.7%) applies to the next fifteen thousand dollars of taxes due.

• The compensation rate in Table A resets each calendar year. For example, the highest rate (4%) applies to the first five thousand dollars of taxes due for each applicable calendar year that the CSP provides CSP services to an eligible taxpayer, with the next highest rate (3.7%) applying to the next fifteen thousand dollars of taxes due for the applicable calendar year.

(iv) **Example - Determining CSP compensation.** Widgets is an eligible taxpayer that does not claim the $1,000 credit described in (a) of this subsection. Widgets retains a CSP, Easysoft, to perform all of its retail sales and use tax functions other than the obligation to remit retail sales and use taxes on its own purchases. Easysoft files Widgets' Washington state excise tax returns and remits the related taxes due electronically.

(A) **First year - Calendar year 2008.** From July 1, 2008, through December 31, 2008, Easysoft collects and reports $5,000 in taxes due for Widgets. Easysoft may retain $200 of the taxes due as compensation, which is computed as follows:

• 4% of the first $5,000 of taxes due = $200

(B) **Second year - Calendar year 2009.** From January 1, 2009, through December 31, 2009, Easysoft collects and reports $200,000 in taxes due for Widgets. Easysoft may retain $5,945 of the taxes due as compensation ($200 + $555 + $990 + $1,500 +$2,700), which is computed as follows:

• 4% of the first $5,000 of taxes due = $200
• 3.7% of the next $15,000 of taxes due = $555
• 3.3% of the next $30,000 of taxes due = $990
• 3% of the next $50,000 in taxes due = $1,500
• 2.7% of the next $100,000 in taxes due = $2,700

(C) **Third year - Calendar year 2010.** From January 1, 2010, through June 30, 2010, Easysoft collects and reports $120,000 in taxes due for Widgets for this period. Easysoft may retain $3,785 of the taxes due as compensation ($200 + $555 + $990 + $1,500 + $540), which is computed as follows:

• 4% of the first $5,000 of taxes due = $200
• 3.7% of the next $15,000 of taxes due = $555
• 3.3% of the next $30,000 of taxes due = $990

• 3% of the next $50,000 in taxes due = $1,500
• 2.7% of the next $20,000 in taxes due = $540

(d) **Taxpayer liability.**

(i) **What happens if I incorrectly claim the one thousand dollar credit option under (a) of this subsection?** If you take a credit under (a) of this subsection and are not an eligible taxpayer, you are immediately liable to the department for the amount of the credit erroneously claimed. If any amounts due under this subsection are not paid by the due date of any notice informing you of such liability, the department shall apply interest, but not penalties, to amounts remaining due.

(ii) **What happens if I incorrectly claim the CSP services option under (b) of this subsection?** If you use a CSP and the CSP retains compensation under (b) of this subsection and you are not an eligible taxpayer, you are immediately liable to the department for the compensation retained by the CSP. If any amounts due under this subsection are not paid by the due date of any notice informing you of such liability, the department shall apply interest, but not penalties, to amounts remaining due.

[Statutory Authority: RCW 82.32.300, 82.32.760, and 82.01.060(2). WSR 08-14-083, § 458-20-27702, filed 6/26/08, effective 7/27/08.]

WAC 458-20-279 Clean alternative fuel vehicles and high gas mileage vehicles. (1) **Introduction.** This section provides information about the requirements for the retail sales and use tax exemptions provided for clean alternative fuel vehicles by RCW 82.08.809 and 82.12.809, respectively, and the exemption from the 0.3 percent retail sales tax on retail sales of motor vehicles provided for high gas mileage vehicles by RCW 82.08.020(7) ("the exemptions").

(2) **Exemption periods.** The exemption periods provided for clean alternative fuel vehicles and high gas mileage vehicles differ.

(a) **Clean alternative fuel vehicles.**

(i) **New vehicles.** The exemptions provided for new passenger cars, light duty trucks, and medium duty passenger vehicles that are exclusively powered by a clean alternative fuel apply to purchases made from January 1, 2009, through July 1, 2015.

(ii) **Used vehicles.** The exemptions provided for qualifying used passenger cars, light duty trucks, and medium duty passenger vehicles, which were modified after their initial purchase, with an EPA certified conversion to be exclusively powered by a clean alternative fuel apply to purchases made from July 12, 2010, through July 1, 2015.

(iii) **Use of previously exempt vehicles on or after July 1, 2015.** Use tax does not apply to the use, on or after July 1, 2015, of a vehicle if:

• The person used the vehicle in this state before July 1, 2015; and

• The use prior to July 1, 2015, was exempt from use tax as described in (a)(i) or (ii) of this subsection.

(b) **High gas mileage vehicles.** The exemptions provided for new passenger cars, light duty trucks, and medium duty passenger vehicles that utilize hybrid technology and have a United States Environmental Protection Agency estimated highway gasoline mileage rating of at least forty miles per gallon apply as follows:

(i) **January 1, 2009, through July 31, 2009.** The exemptions apply to all retail sales and use taxes.

(ii) **August 1, 2009, through December 31, 2010.** The exemption is limited to the 0.3 percent retail sales tax imposed by RCW 82.08.020(3) on retail sales of motor vehicles.

(3) **Definitions.** The following definitions apply throughout this section:

(a) "Clean alternative fuel" means natural gas, propane, hydrogen, or electricity, when used as a fuel in a motor vehicle that meets the California motor vehicle emission standards in Title 13 of the California code of regulations, effective January 1, 2005, and the rules of the Washington state department of ecology. See RCW 82.08.809(3) and 82.12.809(2).

(b) "Gross vehicle weight rating" is the value specified by the manufacturer as the maximum design loaded weight of a single vehicle. See WAC 173-423-040(4).

(c) "Hybrid technology" means propulsion units powered by both electricity and gasoline. See RCW 82.08.813(3) and 82.12.813(2).

(d) "Light duty truck" is any vehicle certified to the standards in Title 13, CCR, section 1961 (a)(1) rated at eight thousand five hundred pounds gross vehicle weight or less, and any other motor vehicle rated at six thousand pounds gross vehicle weight or less, which is designed primarily for the purposes of transportation of property or is a derivative of such vehicle, or is available with special features enabling off-street or off-highway operation and use. See WAC 173-423-040(8).

(e) "Medium duty passenger vehicle" is any medium duty vehicle with a gross vehicle weight rating of less than ten thousand pounds that is designed primarily for the transportation of persons. The medium duty passenger vehicle definition does not include any vehicle which:

(i) Is an "incomplete truck," i.e., is a truck that does not have the primary load carrying device or container attached; or

(ii) Has a seating capacity of more than twelve persons; or

(iii) Is designed for more than nine persons in seating rearward of the driver's seat; or

(iv) Is equipped with an open cargo area of seventy-two inches in interior length or more. A covered box not readily accessible from the passenger compartment will be considered an open cargo area for the purpose of this definition. See WAC 173-423-040(9).

(f) "Medium duty vehicle" is a vehicle with a gross vehicle weight rating of eight thousand five hundred one to fourteen thousand pounds. See WAC 173-423-100(2).

(g) "Model year" is the manufacturer's annual production period which includes January 1 of a calendar year. If the manufacturer has no annual production period, "model year" is the calendar year. In the case of any vehicle manufactured in two or more stages, the time of manufacture shall be the date of completion of the chassis. See WAC 173-423-040(10).

(h) "New motor vehicle" is any motor vehicle that:

• Is self-propelled;

• Is required to be registered and titled under Title 46 RCW;

• Has not been previously titled to a retail purchaser or lessee; and

• Is not a vehicle which has been sold, bargained, exchanged, given away, or title transferred from the person who first took title to it from the manufacturer or first importer, dealer, or agent of the manufacturer or importer, and so used as to have become what is commonly known as "secondhand" within the ordinary meaning thereof. See RCW 46.70.011 and 46.04.660.

The model year of the vehicle is not determinative of whether it meets the definition of "new motor vehicle."

(i) "Passenger car" means every motor vehicle except motorcycles and motor-driven cycles designed primarily for transportation of persons and having a design capacity of twelve persons or less. See WAC 173-423-040(13) and RCW 46.04.382.

(j) "Qualifying used passenger cars, light duty trucks, and medium duty passenger vehicles" means vehicles that:

• Are part of a fleet of at least five vehicles, all owned by the same person;

• Have an odometer reading of less than thirty thousand miles;

• Are less than two years past their original date of manufacture; and

• Are being sold for the first time after modification.

(4) **New passenger cars, light duty trucks, and medium duty passenger vehicles.** In order to qualify for the exemptions, the vehicle must meet the definition of "passenger car," "light duty truck," or "medium duty passenger vehicle" in addition to meeting the definition of "new motor vehicle."

(5) **Purchases of previously owned clean alternative fuel or high gas mileage vehicles.** The exemptions do not apply to purchases of used vehicles unless they are qualifying used passenger cars, light duty vehicles, or medium passenger vehicles, which were modified after their initial purchase, with an EPA certified conversion to be exclusively powered by clean alternative fuel.

(a) **Example 1.** Mike purchases a *used* 2009 model year hybrid vehicle from a dealer or private party in July 2011. The purchase would not qualify for the exemptions. The exemption for vehicles using hybrid technology only applies to new vehicles.

(b) **Example 2.** Nicole purchases a *new* 2008 model year hybrid vehicle in July 2009 from a dealer. This purchase would be exempt (assuming it meets the other requirements). A new vehicle could be any model year as long as it has not been previously titled to a retail purchaser or lessee.

(c) **Example 3.** Joe purchases a *new* 2009 model year hybrid vehicle on August 5, 2009, from a dealer. This purchase is not exempt from all retail sales taxes but, assuming it meets the other requirements, is exempt from the 0.3 percent retail sales tax on retail sales of motor vehicles.

(6) **Conversions.** For purposes of this section, a conversion refers to the alteration of an otherwise nonqualifying vehicle exclusively powered by gasoline or diesel into a qualifying vehicle that either:

(a) Is exclusively powered by clean alternative fuel; or

(b) Utilizes hybrid technology and has a United States environmental protection agency estimated highway gasoline mileage rating of at least forty miles per gallon.

(i) **Purchases of converted vehicles.** The purchase of a new vehicle, or a used vehicle satisfying the requirements described in subsection (2)(a)(ii) of this section, that is converted prior to or as part of the retail sale to the purchaser and that otherwise satisfies the requirements of the exemptions will qualify for the exemptions. If the conversion is performed after the retail sale, the purchase of the vehicle will not qualify for the exemptions.

(ii) **Purchases of the service of converting vehicles.** While the purchase of a new vehicle converted by the seller prior to or as part of the retail sale to the purchaser qualifies for the exemptions as described in subsection (6)(a) of this section, the purchase of the service of converting a vehicle does not qualify for the exemptions. However, if the seller hires a third party to convert the vehicle, it can give the third party a resale certificate (WAC 458-20-102A) for work completed before January 1, 2010, or a reseller permit (WAC 458-20-102) for work completed on or after January 1, 2010. Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(A) **Example 1.** Tom wants to purchase a new nonqualifying vehicle from Dealer but have it converted as a part of the purchase transaction. Dealer hires John's Shop to convert the vehicle for Tom, and Tom purchases the converted vehicle from Dealer. Tom's purchase of the converted vehicle qualifies for the exemptions.

(B) **Example 2.** Tom purchases a new nonqualifying vehicle from Dealer. Tom then hires John's Shop to convert the vehicle. The purchase of the nonqualifying vehicle does not qualify for the exemptions, even if Dealer delivers the vehicle directly to John's Shop on Tom's behalf for conversion.

(7) **Use tax.** The use of a qualifying vehicle by the original title holder is exempt from use tax if the vehicle is purchased during the applicable exemption period specified in subsection (2) of this section.

(a) **Example 1.** Will, a Washington resident, purchases a new qualifying clean alternative fuel vehicle in Oregon from Dealer on February 1, 2009, and returns to Washington in the vehicle on February 2, 2009. Will's use of the vehicle in Washington is exempt from use tax.

(b) **Example 2.** Oliver, an Oregon resident, purchases a new qualifying hybrid vehicle from Dealer in Oregon on April 1, 2009. Oliver moves to Washington on May 15, 2009. Oliver's use of the vehicle in Washington is exempt from use tax. Note: In the absence of the exemptions discussed in this section, Oliver's purchase would be subject to use tax since his first use of the vehicle in Washington occurred within 90 days of his acquisition and use of the vehicle in another state. See RCW 82.12.0251.

(8) **Extended warranties and maintenance agreements.** The sale of an extended warranty or maintenance agreement is subject to retail sales tax even though the vehicle itself may qualify for the exemptions. See WAC 458-20-257.

(9) **Replacement parts and/or repair services.** The sale of replacement parts or repair services is subject to retail sales tax even though the vehicle itself may have qualified for the exemptions. Only the purchase and use of a qualifying vehicle is exempt from retail sales and use taxes.

(10) **Accessories.** A qualifying vehicle includes all accessories installed or sold as part of the sale of the vehicle.

(a) **Example 1.** A dealership installs a ski rack and applies pinstriping on an otherwise qualifying vehicle on January 5, 2009, before a customer purchases the vehicle. Any separate, itemized charges for the accessories listed on the vehicle sales invoice are exempt from retail sales tax.

(b) **Example 2.** On January 5, 2009, a customer purchases an otherwise qualifying vehicle, and as a condition of the purchase requires that the seller install stereo speakers and apply paint sealant. The seller does not have the accessories in stock, but the customer takes delivery of the vehicle. The customer then brings the vehicle back to the seller, and the accessories are installed and applied on January 12, 2009. Any separate, itemized charges for the accessories listed on the vehicle sales invoice are exempt from retail sales tax.

(11) **Leases.** A vehicle is exempt from retail sales and use taxes on a lease if the other requirements are met. If the vehicle is new, registered, and titled in the lessee's name during the applicable exemption period specified in subsection (2) of this section, the retail sales tax exemption will apply only to amounts due during the exemption period. See also WAC 458-20-103 and 458-20-235.

(a) **Example 1.** Alex leases a new hybrid vehicle that he registers and titles on December 8, 2008. None of his lease payments will qualify for the exemptions because the vehicle was registered and titled prior to January 1, 2009.

(b) **Example 2.** Beth leases a new clean alternative fuel vehicle that she registers and titles on December 8, 2010. Assuming that the other requirements of the exemptions are met, any amounts due under the lease before January 1, 2011, are exempt from retail sales tax.

(12) **Payments made prior to January 1, 2009.** Any payment made toward the purchase of an otherwise qualifying vehicle prior to the effective date of the exemptions, January 1, 2009, qualifies for the exemptions if:

(a) The vehicle sold is titled and registered on or after January 1, 2009, but before the applicable exemption expires; and

(b) The purchaser takes possession of the vehicle on or after January 1, 2009, but before the applicable exemption expires. See WAC 458-20-103, 458-20-197, and 458-20-235.

Example. Greg makes a down payment toward the purchase of a new qualifying hybrid vehicle on November 7, 2008, but does not actually take possession of the vehicle at the dealership lot until January 2, 2009. The vehicle is titled and registered on January 9, 2009. The purchase of the vehicle is exempt from all retail sales taxes.

(13) **Payments made prior to the expiration date of the applicable exemption.** Any payment made toward the purchase of an otherwise qualifying vehicle prior to the expiration date of the applicable exemption does not qualify for the exemption if:

(a) The vehicle sold is titled or registered on or after the expiration date of the exemption; or

(b) The purchaser takes possession of the vehicle on or after the expiration date of the exemption. See WAC 458-20-103, 458-20-197, and 458-20-235.

Example. Craig makes a down payment toward the purchase of a new qualifying clean alternative fuel vehicle on November 7, 2010, but does not actually take possession of the vehicle at the dealership lot until January 2, 2011. The vehicle is titled and registered on January 11, 2011. The purchase of the vehicle is subject to retail sales tax and the 0.3 percent retail sales tax imposed by RCW 82.08.020(3) on retail sales of motor vehicles.

[Statutory Authority: RCW 82.32.300 and 82.01.60 [82.01.060]. WSR 10-17-069, § 458-20-279, filed 8/13/10, effective 9/13/10. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 09-02-051, § 458-20-279, filed 12/31/08, effective 1/31/09.]