

# FINAL BILL REPORT

## EHB 2163

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Synopsis as Enacted

**Brief Description:** Relating to revenue.

**Sponsors:** Representative Ormsby.

### House Committee on Finance

#### **Background:**

##### Sales and Use Tax.

Retail sales taxes are imposed on retail sales of most articles of tangible personal property, digital products, and some services. A retail sale is a sale to the final consumer or end user of the property, digital product, or service. If retail sales taxes were not collected when the user acquired the property, digital products, or services, then use taxes apply to the value when used in this state. The state, most cities, and all counties levy retail sales and use taxes. The state sales and use tax rate is 6.5 percent. Local sales and use tax rates vary depending on the location.

##### Business and Occupation Tax.

Washington's major business tax is the business and occupation (B&O) tax. The B&O tax is imposed on persons engaging in business in Washington that have a substantial nexus with the state. "Substantial nexus" occurs when an individual is a resident or domiciliary of the state, a business entity is organized or commercially domiciled in this state, or a nonresident meets certain thresholds. A nonresident has "substantial nexus" for B&O tax purposes if the individual or business has more than \$50,000 in property or payroll in the state, has more than \$250,000 in receipts in the state, or at least 25 percent of the individual or business's total property, payroll, or receipts are in Washington.

The B&O tax is imposed on the gross receipts of business activities conducted within the state, without any deduction for the costs of doing business. Businesses must pay the B&O tax even though they may not have any profits or may be operating at a loss. The major B&O tax rates are 0.471 percent for retailing, 0.484 percent for manufacturing, wholesaling, and extracting, and 1.5 percent for services and activities not classified elsewhere. There are also preferential rates that apply to specific business activities.

##### Nexus.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Nexus is required before a taxing jurisdiction may impose taxes on an entity. In the case of sales or use taxes, nexus is necessary in determining whether an out-of-state business selling products into a state is liable for the collection of sales or use taxes for that state. A legal analysis of nexus involves the Dormant Commerce Clause and the Due Process Clause in the United States Constitution. If a tax violates either, it will be invalid. The Dormant Commerce Clause analysis focuses on the structural concerns on the national economy and whether the tax inhibits interstate commerce. The Due Process Clause analysis focuses on the authority of a state to impose the tax on a particular taxpayer.

In 2015 Washington adopted "click through" nexus. Under this nexus standard, certain remote sellers are required to collect and remit Washington sales tax for sales made into the state and may also have to pay B&O tax on their Washington sales. A remote seller is covered by "click through" nexus if the remote seller: enters into agreements with Washington residents who, for a commission or other consideration, refers potential customers to the remote seller, such as by a link on a website; and generates more than \$10,000 in gross receipts during the prior calendar year under such agreements from sales into this state.

#### Streamlined Sales and Use Tax Agreement.

In 2007 legislation was enacted fully adopting the Streamlined Sales and Use Tax Agreement (SSUTA). The SSUTA includes provisions for determining where a sale is deemed to occur for local sales and use tax purposes. As part of the legislation, the Streamlined Sales and Use Tax Mitigation Account was created to mitigate the effect of the change in sourcing rules to negatively impacted local jurisdictions. Each July 1, the State Treasurer must transfer an amount determined by the DOR to fully mitigate negatively impacted local jurisdictions. The DOR determines each local jurisdiction's annual losses. Distributions are made quarterly representing one-fourth of a jurisdiction's annual loss less voluntary compliance revenue from the previous quarter.

#### Public Utility district Privilege Tax.

The public utility district privilege tax is levied by the state and cities. The tax applies when a public utility district (PUD) generates, distributes, and sells electricity. The tax rate is based on the type of facility generating the electricity. The tax rate for thermal generating facilities is 1.5 percent of the wholesale value of energy produced for sale or use. The tax rate for hydroelectric dams and other generating facilities is 2 percent of the gross revenue from the sale of power to consumers that is distributed through the district's own distribution system plus 5 percent of the first 4 mills per kilowatt-hour of the wholesale value of self-generated energy distributed to its own customers and the revenue from the sale for resale of self-generated energy. All have an additional 7 percent surtax applied.

#### **Summary:**

#### Eliminating or Narrowing Tax Preferences.

The sales tax exemption for bottled water is eliminated; however, there are exceptions for medically prescribed water or if a person's primary source of drinking water is considered unsafe.

The state use tax exemption for self-produced fuel is narrowed to include only biomass fuels. The state use tax for refinery fuel gas is as follows:

- 6.5 percent from August 1, 2017 through December 31, 2017;
- 0.963 percent for calendar year 2018;
- 1.926 percent for calendar year 2019;
- 2.889 percent for calendar year 2020; and
- 3.852 percent beginning January 1, 2021.

The value of refinery fuel gas is set to the United States natural gas wellhead price and local sales tax does not apply.

#### Remote Sellers, Referrers & Marketplace Facilitators.

Beginning January 1, 2018, remote sellers, marketplace facilitators and referrers that meet the statutory criteria must remit sales or use tax, or comply with notice and reporting requirements. An election by a marketplace facilitator, referrer, or remote seller to collect and remit sales or use tax may only be changed upon written notice to the DOR. The change will not take effect until January 1 of the calendar year at least 12 months past the date of election to collect and remit, and the written notice must occur at least 30 days prior to the election being changed. The remit or report requirements for certain digital goods and digital codes is delayed until January 1, 2020.

The requirements to collect and remit tax or comply with notice and reporting requirements apply to marketplace facilitators or remote sellers that have gross receipts sourced to Washington of at least \$10,000. A referrer must comply with the requirements if during the current or previous calendar year, the gross business income received from its referral services sourced to Washington, whether or not they are subject to sales or use tax, is at least \$267,000.

#### *Notice and Reporting Requirements.*

A seller that meets the nexus criteria in this act, but not the physical presence nexus, and who does not collect and remit sales or use tax on all taxable retail sales into Washington, must comply with the reporting and notice requirements.

A seller, other than a referrer, must post a conspicuous notice on its website or catalog, as well as on its invoices or sales receipts, that includes a statement for Washington consumers that sales or use tax is due on certain purchases and that Washington requires the purchaser to file a use tax return. In addition, the seller must also provide an annual report to each Washington purchaser that the seller did not collect sales or use tax on any sales and must include the details on the purchaser's transactions in the previous year. Finally, a seller, other than a referrer, must file an annual report with the DOR that includes Washington purchasers' information and an affidavit signed under penalty of perjury from a seller's officer affirming that the seller has made reasonable efforts to comply with consumer notice and reporting requirements. These reporting requirements do not apply to sellers registered with the DOR to collect and remit sales and use tax and who make a reasonable effort to comply with the updated requirements.

A referrer must post conspicuous notice on its platform that informs Washington purchasers that sales or use tax is due on certain purchases, and a purchaser may have to file a use tax return with the DOR. Annually, a referrer must send a report to its marketplace sellers to

whom the referrer transferred a potential purchaser located in Washington during the previous year. The report to a referrer's seller must state that Washington imposes a sales or use tax on retail sales, and a seller meeting the acts requirements must either collect and remit sales or use tax, or comply with the state's notice and reporting requirements for sellers. The referrer must also send a report to the DOR that includes a list of sellers who received notice and an affidavit signed under the penalty of perjury from a referrer's officer stating that the referrer has made reasonable efforts to comply with the notice and reporting requirements.

#### *Penalties.*

A \$20,000 penalty is imposed on a seller, other than a referrer, who fails to provide notice or post a conspicuous notice to consumers at the time of purchase. A penalty is imposed on a seller, other than a referrer, who fails to provide a report to each of its purchasers of all sales in the previous calendar year (CY) as follows:

- If the gross receipts of the seller through the seller's marketplace sourced to Washington is less than \$50,000, the penalty is \$5,000.
- If the gross receipts of the seller through the seller's marketplace sourced to Washington is at least \$50,000, but less than \$150,000, the penalty is \$10,000.
- If the gross receipts of the seller through the seller's marketplace sourced to Washington is at least \$150,000, but less than \$300,000, the penalty is \$50,000.
- If the gross receipts of the seller through the seller's marketplace sourced to Washington is at least \$300,000, the penalty is \$100,000, plus \$20,000 for every \$50,000 in gross receipts over \$300,000.

A \$20,000 penalty is imposed on a referrer that fails to post a notice to consumers on its platform. A penalty is imposed on a referrer who fails to provide a report to each of its sellers of all potential purchasers referred from Washington in the previous CY as follows:

- If the gross income of the referrer through the referrer's referral services sourced to Washington is at least \$267,000, but less than \$300,000, the penalty is \$50,000.
- If the gross income of the referrer through the referrer's referral services sourced to Washington is at least \$300,000, the penalty is \$100,000, plus \$20,000 for every \$50,000 in gross receipts over \$300,000.

A penalty of \$25 per failure, but not less than \$20,000, is imposed on any seller who fails to file required reports with the the DOR.

A seller is entitled to a conditional waiver if the seller enters into a written agreement to fully comply with all notice and reporting requirements beginning on a date acceptable to the DOR. The DOR may grant a waiver for one or more violations; however, the DOR may not grant more than one request by a seller for a waiver. A conditional waiver may also be granted for reasonable cause. A conditional waiver may be invalidated if the seller fails to comply.

#### *Definitions.*

A "marketplace facilitator" is a person that contracts with sellers to facilitate, for consideration, regardless of whether its deducted as fees from a transaction, the sale of the seller's products through a catalog or a physical or electronic marketplace, and engages:

- directly or indirectly, through one or more affiliated persons in: communicating an offer and acceptance between the buyer and seller; owning or operating the infrastructure (electronic or physical) that brings buyers and sellers together; providing virtual currency; or software development or research and development related to the marketplace operated; and
- in any of the following activities with respect to sellers or producers: payment processing services; fulfillment or storage services; listing for sale for consideration; setting prices; branding sales as those of the marketplace facilitator; order taking; advertising or promotion; or providing customer service and assistance with returns and exchanges.

A "marketplace seller" is a seller that makes retail sales through a physical or electronic marketplace operated by a marketplace facilitator, regardless of whether the seller is required to be registered with the DOR.

A "referrer" is a person who contracts or otherwise agrees with a seller to list or advertise for sale items in any medium, receives a commission, fee, or other consideration from a seller for listing or advertising, transfers a potential purchaser to a seller or an affiliated person to complete the sale, and does not collect receipts from the purchasers for the transaction. A referrer does not include a newspaper or a newspaper publisher nor does it include a person who provides Internet advertising services and does not ever provide either the marketplace seller's shipping terms or advertise whether a marketplace seller charges sales tax.

A "remote seller" refers to any seller who does not have a physical presence in this state and makes sales to purchasers.

*Liability for Unpaid Taxes.*

A marketplace facilitator or referrer is relieved of liability for failure to collect the correct sales or use tax if it can show that the error was due to incorrect information from an unaffiliated seller. The seller would be solely liable for unpaid tax. A marketplace facilitator or referrer is also relieved of liability, if: (1) the sale was made in a marketplace facilitator's marketplace or directly resulting from referral by the referrer; (2) the seller is unaffiliated; and (3) the seller fails to pay the tax, not due to sourcing the sale. The maximum amount of relief is phased in and represents a percentage of a marketplace facilitator's total tax due or a percentage of a referrer's taxable retail sales in Washington.

The marketplace seller is relieved of liability for failure to collect and remit the correct sales or use tax if there is documentation that the marketplace facilitator is registered with the DOR and it will collect all applicable taxes on behalf of the marketplace seller made through the facilitator's marketplace. In addition, a marketplace seller is relieved of liability for all taxes on sales made through a marketplace facilitator if the marketplace seller is also a remote seller and the marketplace facilitator provides the seller with written confirmation that the facilitator has elected to comply with notice and reporting requirements in lieu of collecting sales or use tax. The relief of liability does not affect the obligation of any purchaser to remit sales or use tax concerning any applicable taxable transaction in which the seller or seller's agent does not collect and remit sales tax.

Class action lawsuits are prohibited against a marketplace facilitator on behalf of buyers arising from overpayment of sales or use tax. In addition, the act is subject to compliance with the Streamlined Sales and Use Tax Agreement and federal law.

Sellers or consumers currently subject to sales or use tax are not relieved from their statutory responsibilities related to the collection and remittance of sales or use tax. The DOR likewise is not prevented from administering or enforcing those taxes.

Economic Nexus for B&O taxes.

Economic nexus for B&O taxes is extended to persons engaged in retail sales so long as the person has more than \$267,000 in receipts from Washington or at least 25 percent of the person's total property, payroll or total receipts are in this state during the current or immediately preceding calendar year.

Streamlined Sales Tax Mitigation to Local Governments.

The streamlined sales tax mitigation payments to local governments are repealed as of October 1, 2019. Adjusted mitigation payments through October 1, 2019, reflect the impact of marketplace fairness on local tax revenues and will be made only to cities, counties, and public facilities districts.

Public Utility District Privilege Tax.

The public utility district privilege tax distributions to the state and local governments will be made on the first business day in July.

Application.

The act applies prospectively.

**Votes on Final Passage:**

Third Special Session

House	53	40	
Senate	33	16	(Senate amended)
House	51	42	(House concurred)

**Effective:** July 7, 2017  
August 1, 2017 (Sections 101–109)  
July 23, 2017 (Section 213)  
July 1, 2017 (Sections 301–304)  
January 1, 2018 (Section 502)