

WAC 458-20-19401 Minimum nexus thresholds for apportionable activities and selling activities. (1) Introduction.

(a) The state of Washington imposes business and occupation (B&O) tax on persons that have "substantial nexus" with this state. For apportionable activities and for selling activities taxable under RCW 82.04.250(1), 82.04.257(1) or 82.04.270, substantial nexus does not require a physical presence in this state, as that phrase is described in RCW 82.04.067(6).

(b) This rule only applies to periods after May 31, 2010, and applies as follows:

(i) In 2015, Washington changed the thresholds for substantial nexus described in subsection (3)(a)(iii) of this rule.

(ii) Prior to September 1, 2015, these thresholds only applied to apportionable activities, and did not apply to wholesaling or retailing activity.

(iii) Effective September 1, 2015, Washington expanded the scope of these tests to apply to wholesaling activity.

(iv) Effective July 1, 2017, Washington expanded the scope of some of these tests to apply to retailing activity taxable under RCW 82.04.250(1) or 82.04.257(1).

(c) Effective July 1, 2017, the thresholds are measured based on a person's payroll, property, and receipts in the current or immediately preceding calendar year. For the period from September 1, 2015, to June 30, 2017, the thresholds were measured based on a person's payroll, property, and receipts in the immediately preceding calendar year. See subsection (9) of this rule for additional information. For periods from June 1, 2010, to August 31, 2015, the thresholds were based on the person's payroll, property, and receipts in the current calendar year. See subsection (10) of this rule for additional information.

(d) **Other rules that may apply.** Readers may also want to refer to other rules for additional information, including those in the following list:

(i) WAC 458-20-193 Interstate sales of tangible personal property. This rule describes the taxation of interstate sales of tangible personal property.

(ii) 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.

(iii) 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.

(iv) WAC 458-20-19403 Apportionable royalty receipts attribution. 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.

(v) 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 December 31, 2015.

(vi) WAC 458-20-19404A 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 between June 1, 2010, and December 31, 2015.

(e) 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 or from making wholesale or retail sales. Also, unless otherwise stated, the years in the examples are time periods that occur after June 30, 2017.

The minimum nexus thresholds described in this rule and used in examples are unadjusted for consumer price index changes applicable for years after 2017.

(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) 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) "**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.

(i) "**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.

(j) "**Wholesale sales**" means wholesale sales taxable under RCW 82.04.257(1) or 82.04.270 and "**wholesaling**" means the activity of making such sales. For substantial nexus standards applicable to wholesale sales taxable under another classification, see WAC 458-20-193.

(3) **Substantial nexus.**

(a) With respect to taxes on persons engaged in apportionable activities as defined in RCW 82.04.460 or making wholesale sales taxable under RCW 82.04.257(1) or 82.04.270, substantial nexus exists where, in the current or immediately preceding calendar year, a person is:

(i) An individual and is a resident or domiciliary of this state;

(ii) A business entity and is organized or commercially domiciled in this state; or

(iii) A nonresident individual or a business entity that is organized and commercially domiciled outside this state, and the person had:

(A) More than fifty-three thousand dollars of property in this state;

(B) More than fifty-three thousand dollars of payroll in this state;

(C) More than two hundred sixty-seven thousand dollars of receipts from this state from apportionable activities, from selling activities, or from a combination of both; or

(D) At least twenty-five percent of the person's total property, total payroll, or total receipts in this state.

(b) With respect to taxes on a person making sales at retail taxable under RCW 82.04.250(1) or 82.04.257(1), substantial nexus exists if, in the current or immediately preceding calendar year:

(i) The person has a physical presence in this state as that phrase is described in RCW 82.04.067(6); or

(ii) The person's receipts exceed the receipts threshold described in (a)(iii)(C) or (D) of this subsection.

(c) A person who has a substantial nexus with this state in the current calendar year based solely on exceeding property, payroll, or receipts thresholds during the current calendar year, but did not exceed the thresholds in the immediately preceding year, is subject to B&O tax on business activity occurring on and after the date that the person established a substantial nexus with this state in the current calendar year. RCW 82.04.220(2). If the person exceeded any of the thresholds in the immediately preceding year, the person is subject to B&O tax on its business activity occurring throughout the current year.

Example 1. 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.

(d) 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. (These adjustments are published in ETA 3195 "Economic Nexus Minimum Thresholds.")

(e) The minimum nexus thresholds are applied on a calendar year basis.

Example 2. Assume Corporation N, which is not commercially domiciled or organized in Washington, earns receipts attributable to Washington in 2017 that exceed the minimum nexus receipts threshold for determining substantial nexus. If Corporation N's 2018 and later payroll, property, and receipts do not exceed any of the minimum nexus thresholds for determining substantial nexus, its B&O tax reporting obligation for any gross receipts attributable to Washington continues through the calendar year 2018.

Example 3. Company Q is organized and domiciled outside of Washington. Company Q maintains an office in Washington which housed a single employee in the immediately preceding calendar year. In 2016, Company Q had \$40,000 in property located in Washington, paid \$45,000 in compensation to the Washington employee, and had \$200,000 in apportionable receipts attributed to Washington and \$0 wholesaling or retailing receipts sourced to Washington. In 2016, Company Q's total property everywhere was valued at \$200,000, total payroll was

\$400,000, and total apportionable and wholesaling or retailing receipts were \$5,000,000. In 2017, Company Q had \$45,000 in property located in Washington, paid \$48,000 in compensation to the Washington employee, and had \$200,000 in apportionable receipts attributed to Washington and \$0 wholesaling or retailing receipts sourced to Washington. In 2017, Company Q's total property everywhere was valued at \$225,000, total payroll was \$420,000, and total apportionable and wholesaling or retailing receipts were \$6,000,000. Although Company Q has physical presence in Washington, as described in RCW 82.04.067(6), it is not treated as having substantial nexus with Washington with respect to its apportionable and wholesaling activities because (a) it is not organized or domiciled in Washington and (b) it did not have sufficient property, payroll, or receipts in the current or immediately preceding calendar year to exceed the minimum nexus thresholds identified in subsection (3)(a)(iii) 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 is 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.

Examples 4 and 5 assume the businesses depicted are not engaged in retailing activity. Therefore, the businesses' mere physical presence in Washington is not used as the basis for determining whether they have nexus with Washington.

Example 4. In January 2013, ABC Corp. bought Machinery for \$65,000 for use in State X. On March 1, 2018, ABC Corp. brought that Machinery into Washington for the remainder of the year. ABC Corp. has nexus with Washington beginning on March 1, 2018, 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 5. In 2018, out-of-state Business X rented office space in Washington for \$6,000 and had \$7,000 of office furniture and equipment in Washington. Business X has nexus with Washington in 2018 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 \$53,000 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 \$53,000 property threshold has been exceeded, 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. Examples 6 through 9 assume the businesses depicted are not engaged in retailing activity. Therefore, the businesses' mere physical presence in Washington is not used as the basis for determining whether they have nexus with Washington.

Example 6. Company Y has property in Washington valued at \$90,000 on January 1st and \$20,000 on December 31st. The value of property in Washington is \$55,000 $((90,000 + 20,000)/2)$. Company Y exceeds the property threshold in this calendar year because it exceeds the \$53,000 property threshold.

Example 7. Company A had no property located in Washington on January 1st or on December 31st. However, it brought \$100,000 in property into Washington on January 15th and removed it from Washington on November 15th of that calendar year. In this situation, the department may compute the value of Company A's property over the period of time it was in the state during the calendar year in order to properly reflect its average value $(\$100,000 \text{ multiplied by ten (months) divided by 12 (months), which is } \$83,333)$. Company A exceeds the \$53,000 property threshold in this calendar year.

Example 8. Company B had no property located in Washington on January 1st or on December 31st of 2018. However, it brought \$100,000 in property into Washington on January 15th and removed it from Washington on February 15th of that calendar year. In this situation, the department may compute the value of Company B's property over the period of time it was in the state during the calendar year to properly reflect its average value, \$8,333. $(\$100,000 \text{ multiplied by one (month) divided by 12 (months).)$ Company B also had no property located in Washington on January 1st or on December 31st of 2019. However, it brought \$100,000 in property into Washington on January 15th and removed it from Washington on October 15th of that calendar year. For 2019, the average value of Company A's property is \$75,000 $(\$100,000$

multiplied by nine (months) divided by 12 (months)). Company B exceeds the property threshold in 2019 based on the average value of its property in Washington during 2019, but it did not exceed the property threshold based on the average value of its property in Washington during 2018.

Example 9. IT Co. is commercially domiciled in State X with Employee located in Washington who works from a home office. In 2018, IT Co. provided to Employee \$5,000 of office supplies and \$50,000 of equipment owned by IT Co. In 2019, the employee returned an unneeded portion of the equipment and IT Co. provided no other equipment to the employee. The cost of returned equipment was \$25,000 of the total \$50,000 of equipment. IT Co. is treated as having substantial nexus with Washington in both 2018 and 2019 based on the \$53,000 property threshold because the value of its property in this state in 2018 (\$55,000) exceeded \$53,000. For 2018, IT Co. exceeded the threshold for the current year, and in 2019, IT Co. exceeded the threshold for the immediately preceding calendar year. If IT Co. does not exceed the property threshold in 2020, beginning in 2020 it will no longer have substantial nexus unless it exceeds another 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.

Examples 10 and 11 assume the businesses depicted are not engaged in retailing activity. Therefore, the businesses' physical presence in Washington is not relevant in determining whether they have nexus with Washington.

Example 10. Company D is commercially domiciled in State X and has a single Employee whose pay of \$80,000 2018 and 2019 was properly reportable in Washington for unemployment compensation purposes. Company D has substantial nexus with Washington during 2018 and 2019 because the compensation paid to Employee during the current or immediately preceding calendar year exceeds the \$53,000 payroll threshold in both years. Company D will also have substantial nexus in 2020 because the payroll in the immediately preceding year (2019) exceeded the \$53,000 payroll threshold.

Example 11. Assume the same facts as Example 9 except only 50% of Employee's pay for 2018 and 2019 was properly reportable in Washington for unemployment compensation purposes. Employee's Washington compensation of \$40,000 does not exceed the \$53,000 payroll threshold to establish substantial nexus with Washington during the current or immediately preceding calendar year, unless this amount exceeds 25% of total payroll compensation in the current or immediately preceding calendar year.

(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 exceeded if a taxpayer's receipts from apportionable and selling activities attributed and sourced, respectively, to Washington totaled more than \$267,000 in the current or immediately preceding calendar year.

(a) All receipts from all apportionable and selling activities are accumulated to determine if the receipts threshold is satisfied. Receipts from activities other than apportionable and selling activities (e.g., extracting) are not used to determine if the receipts threshold has been satisfied.

(b) Apportionable receipts are attributed to Washington per WAC 458-20-19402 (general attribution), WAC 458-20-19403 (royalties), WAC 458-20-19404 (financial institutions, after 2015), and WAC 458-20-19404A (financial institutions, before 2016). Receipts from wholesale and retail sales are sourced to Washington in accordance with RCW 82.32.730.

Example 12. Company E is organized and commercially domiciled in State X. In a calendar year it had \$50,000 in receipts from wholesale sales sourced to Washington in accordance with RCW 82.32.730, \$50,000 in receipts from retail sales sourced to Washington in accordance with RCW 82.32.730, \$50,000 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 in the calendar year because its total of \$300,000 in receipts from apportionable activities attributed to Washington and retail and wholesale sales sourced to Washington in a calendar year exceeded the \$267,000 receipts threshold. It does not matter that a portion of the receipts were from apportionable activities that are subject to tax under different B&O tax classifications or that the receipts from apportionable activities or wholesaling or retailing activities did not separately exceed the receipts threshold. The receipts threshold is determined by the total-ity of the taxpayer's apportionable and selling activities in Wash-ington.

(7) Application of 25% threshold.

(a) If, in the current or immediately preceding year, at least twenty-five percent of an out-of-state taxpayer's property, payroll, or receipts from apportionable and selling activities consisted of Washington property, Washington payroll, or Washington receipts, then the taxpayer has substantial nexus with Washington with respect to its apportionable and wholesaling activities.

(b) If, in the current or immediately preceding year, at least twenty-five percent of an out-of-state taxpayer's receipts from appor-tionable and selling activities consisted of Washington receipts, then the taxpayer also has substantial nexus with Washington with respect to its retailing activities.

(c) The twenty-five percent threshold is determined by dividing:

(i) The value of property located in Washington by the total val-ue of taxpayer's property;

(ii) Payroll located in Washington by taxpayer's total payroll;
or

(iii) Apportionable, wholesaling and retailing receipts attrib-uted and sourced to Washington by total apportionable, wholesaling and retailing receipts.

Example 13. Company G is organized and commercially domiciled in State X. In 2018 it had \$45,000 in property, \$45,000 in payroll, and \$240,000 in gross receipts attributed to Washington. In 2018, its to-tal property was valued at \$200,000; its worldwide payroll was \$150,000; and its gross receipts, all from apportionable activities, totaled \$2,000,000. Company G had twenty-two and a half percent of its property, thirty percent of its payroll, and twelve percent of its re-ceipts attributed to Washington. With respect to its apportionable ac-

tivities, Company G has substantial nexus with Washington in 2018 because at least twenty-five percent of its payroll in 2018 was located in Washington. Based on its payroll in 2018, Company G will also have substantial nexus in 2019.

(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) **Periods from September 1, 2015, through June 30, 2017.**

(a) Apportionable and wholesaling activities. From September 1, 2015, through June 30, 2017, substantial nexus with Washington of a nonresident individual or a business entity organized and commercially domiciled outside this state was established with respect to that person's apportionable activities and wholesaling activities taxable under RCW 82.04.257 or 82.04.270 in a particular calendar year by measuring the person's payroll, property, and receipts only in the immediately preceding calendar year. Pursuant to RCW 82.04.220, in effect during this period, once established, substantial nexus continued through the following calendar year. See WAC 458-20-193 regarding the continuing application of the physical presence substantial nexus standard on wholesaling activity not subject to the economic nexus thresholds discussed in this rule.

(b) Retailing activities. Prior to July 1, 2017, a nonresident individual or a business entity organized and commercially domiciled outside of Washington was deemed to have substantial nexus with this state with respect to its retailing activity taxable under RCW 82.04.250(1) in a calendar year only if it had a physical presence in Washington in the calendar year. See WAC 458-20-193 regarding the continuing application of the physical presence substantial nexus standard on retailing activities.

(10) **Periods from June 1, 2010, through August 31, 2015.**

(a) Apportionable activities. From June 1, 2010, through August 31, 2015, substantial nexus with Washington of a nonresident individual or a business entity organized and commercially domiciled outside this state was established with respect to that person's apportionable activities in a particular calendar year by measuring the person's payroll, property, and receipts in that calendar year rather than by measuring the person's payroll, property, and receipts in the immediately preceding calendar year. Pursuant to RCW 82.04.220, in effect during this period, once established, substantial nexus continued through the following calendar year.

Example 14. Company E was organized and commercially domiciled in State X. In 2013 it had \$275,000 in gross receipts from apportionable activities attributed to Washington per WAC 458-20-19402. Company E had substantial nexus with Washington in 2013 because its total receipts from apportionable activities attributed to Washington in that calendar year, \$275,000, exceeded the receipts threshold. Therefore, Company E was subject to B&O taxes for the entire 2013 calendar year and its substantial nexus continued through at least the 2014 calendar year.

(b) Wholesaling activity. Prior to September 1, 2015, other than as a result of continuing substantial nexus pursuant to RCW 82.04.220, a nonresident individual or a business entity organized and commercially domiciled outside of Washington was deemed to have substantial nexus with this state with respect to its wholesaling activity in a calendar year only if it had a physical presence in Washington in the calendar year. See WAC 458-20-193 regarding the continuing application of the physical presence substantial nexus standard on wholesaling ac-

tivity not subject to the economic nexus thresholds discussed in this rule.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 18-06-078, § 458-20-19401, filed 3/6/18, effective 4/6/18; WSR 16-13-040, § 458-20-19401, filed 6/7/16, effective 7/8/16. Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.04.067, 82.04.460, and 82.04.462. WSR 15-04-004, § 458-20-19401, filed 1/22/15, effective 2/22/15. 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.]