

WSR 22-09-029

EXPEDITED RULES

DEPARTMENT OF REVENUE

[Filed April 12, 2022, 11:54 a.m.]

Title of Rule and Other Identifying Information: WAC 458-20-119 Sales by caterers and food service contractors, 458-20-124 Restaurants, cocktail bars, taverns, and similar businesses, 458-20-168 Hospitals, nursing homes, assisted living facilities, adult family homes and similar health care facilities, 458-20-169 Nonprofit organizations, 458-20-244 Food and food ingredients, and 458-20-249 Artistic or cultural organizations.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department is amending these rules to account for general updates, including readability, and to incorporate the following legislation: SSB 5034 (2021); HB 1296 (2021); HB 2390 (2020); and SHB 2246 (2020).

Reasons Supporting Proposal: Updating these rules to reflect recently passed legislation provides readers with current information.

Statutory Authority for Adoption: RCW 82.32.300, 82.01.060.

Statute Being Implemented: RCW 82.04.385, 82.04.755, 82.04.4290; and chapter 24.03A RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: Leslie Mullin, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1589; Implementation and Enforcement: John Ryser, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1605.

This notice meets the following criteria to use the expedited adoption process for these rules:

Adopts or incorporates by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule.

Explanation of the Reason the Agency Believes the Expedited Rule-Making Process is Appropriate: The expedited rule-making process is appropriate for these rule updates because the department is incorporating changes resulting from 2020 and 2021 legislation.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Leslie Mullin, Department of Revenue, P.O. Box 47467, Olympia, WA 98504-7467, phone 360-534-1589, fax 360-534-1606, email LeslieMu@dor.wa.gov, AND RECEIVED BY June 20, 2022.

April 12, 2022
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OTS-3696.2

AMENDATORY SECTION (Amending WSR 12-07-060, filed 3/19/12, effective 4/19/12)

WAC 458-20-119 Sales by caterers and food service contractors.

(1) **Introduction.** This ~~((section))~~ rule 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))~~ 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.

(b) ~~((What other sections might apply?))~~ **Other rules that may apply.** The following ~~((sections))~~ rules may contain additional relevant information:

((+)) (i) WAC 458-20-107 Requirement to separately state sales tax—Advertised prices including sales tax.

((+)) (ii) WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses.

((+)) (iii) WAC 458-20-166 Hotels, motels, boarding houses, rooming houses, resorts, ~~((summer camps))~~ hostels, trailer camps, ~~((ete))~~ short-term rentals and similar lodging businesses.

((+)) (iv) WAC 458-20-167 Educational institutions, school districts, student organizations, and private schools.

((+)) (v) WAC 458-20-168 Hospitals, nursing homes, ~~((boarding homes))~~ assisted living facilities, adult family homes and similar health care facilities.

((+)) (vi) 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.

((+)) (vii) WAC 458-20-189 Sales to and by the state of Washington ~~((r))~~ and municipal corporations, including counties, cities, towns, school districts, and fire districts.

((+)) (viii) WAC 458-20-190 Sales to and by the United States and certain entities created by the United States—Doing business on federal reservations—Sales to foreign governments.

((+)) (ix) 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)~~ rule 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))~~ 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))~~ 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))~~ or operating the dietary facilities of a hospital, nursing home, or similar institution, for the purpose of providing meals or prepared foods to its 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) Example 1. 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) Example 2. 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)~~) regarding 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))~~ nonprofit organization organized under chapter 24.03A or 24.12 RCW. However, this exemption does not apply to purchases of prepared meals by ~~((not-for-profit))~~ nonprofit organizations, such as hospitals, which provide the meals to patients as a part of the services they render ~~((-))~~; and

(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 ~~((re-sale certificates for sales made before January 1, 2010, or))~~ a reseller permit ~~((s))~~ 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 ~~((-.))~~ for many catering and food service items, as follows:

(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 tax or use tax does not apply to purchases of food or beverage products ~~((which))~~ that 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))~~ from 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.]

AMENDATORY SECTION (Amending WSR 15-21-092, filed 10/21/15, effective 11/21/15)

WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses. (1) **Introduction.** This rule explains how Washington's business and occupation (B&O) tax and retail sales tax apply to sales by restaurants, cocktail bars, taverns, and similar businesses. It discusses sales of meals, beverages, and foods at prices ~~((inclusive of the))~~ that include 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 Sales by caterers and food service contractors, to determine their tax liability.

(a) **Definition. 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 website pertaining to prepared food and beverage sales,) Other rules that may apply. The following rules may contain other relevant information:

((+)) (i) WAC 458-20-107 Requirement to separately state sales tax—Advertised prices including sales tax.

((+)) (ii) WAC 458-20-119 Sales by caterers and food service contractors.

((+)) (iii) WAC 458-20-131 Gambling activities.

((+)) (iv) WAC 458-20-183 (~~(Amusement, recreation, and physical fitness services)~~) Recreational services and activities.

((+)) (v) WAC 458-20-187 Tax responsibility of (~~(persons owning and/or operating vending machines, amusement devices, and service machines)~~) vending machine owners and operators.

((+)) (vi) WAC 458-20-189 Sales to and by the state of Washington and municipal corporations, including counties, cities, towns, school districts, and fire districts.

((+)) (vii) WAC 458-20-190 Sales to and by the United States and certain entities created by the United States—Doing business on federal reservations—Sales to foreign governments.

((+)) (viii) WAC 458-20-243 Litter tax.

((+)) (ix) WAC 458-20-244 Food and food ingredients.

(2) **Retailing B&O and retail sales taxes.** Sales of meals and prepared foods to consumers by restaurants, cocktail bars, taverns, and similar businesses are subject to ((the)) retailing B&O tax ((classification)) and generally subject to retail sales tax. Retail sales tax exemptions are 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)) nonprofit organization organized under chapter 24.03A 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; and

(d) (~~(Effective July 1, 2011, RCW 82.08.9995 provides a retail sales tax exemption for)~~) Meals provided without specific charge by a restaurant to its employees. ((Such)) RCW 82.08.9995. These meals are also exempt from B&O tax and use tax. ((+))RCW 82.04.750 and 82.12.9995.((+)) However, 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, 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)), if a separate charge is made for such food and beverages, and~~ 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 (2)(d) 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 a copy of the purchaser's reseller permit to document the wholesale nature of any sale as provided in WAC 458-20-102 Reseller permits.

(4) **Service and other business activities 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. WAC 458-20-187. Persons operating ~~((games))~~ contests of chance should refer to WAC 458-20-131.

(5) ~~((Exemptions. Effective October 1, 2013, RCW 82.08.210 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) Retail sales tax or use tax applies to purchases of dishes, kitchen utensils, linens, and items that do not become an ingredient of the meal.

(b) Retail sales tax or use tax applies to purchases of equipment, repairs, appliances, and construction.

(c) Retail sales tax or use tax does not apply to purchases of food or beverage products that are ingredients of the meals being sold.

(d) Retail sales tax or use tax does not apply to purchases of paper plates, paper cups, paper napkins, toothpicks, or any other articles that are furnished to customers, the first actual use of which

renders such articles unfit for further use, when purchased by restaurants and similar businesses making actual sales of meals.

~~((7))~~ **(6) 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))~~ **(7) 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 are calculated on the reduced price actually received by the seller.

Persons who provide meals free of charge to persons other than their 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))~~ **(8) Sales of meals, beverages and food at prices that include retail sales tax.** Persons may advertise and/or sell meals, beverages, or any kind of food product at prices including retail 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. WAC 458-20-107.

~~((10))~~ **(9) Spirits, beer, and wine restaurant licensees.** Restaurants operating under the authority of a license from the liquor ~~((control))~~ and cannabis 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 may not be 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 retail 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. The department presumes 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 retail 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 retail 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 are part of the selling price and are subject to both the retailing B&O and retail sales taxes.~~

~~(12))~~ (d) **Examples.**

~~((a))~~ (i) Example 1. 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 retail 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 that separately state the retail sales tax. As an example, a typical well drink purchased in the bar for ~~(((\$2.50))~~ \$7.00 inclusive of the retail sales tax, is sold for ~~(((\$2.50))~~ \$7.00 plus retail 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 B&O and retail sales tax liability.

~~((b))~~ (ii) Example 2. 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 that state the price of the meal exclusive of retail sales tax, the retail 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 retail sales tax is included in the price of the drinks, RBS may factor the retail sales tax out of the gross receipts received from its drink sales when determining its taxable retail sales.

~~((c))~~ (iii) Example 3. Z Tavern sells all foods and drinks at a price ~~((inclusive of))~~ that includes 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 B&O and retail sales taxes. Z Tavern has failed to meet the conditions for selling foods and drinks at prices including retail sales tax. Z Tavern may not assume ~~((that))~~ the gross receipts include any retail sales tax and may not factor the retail sales tax out of the gross receipts.

(10) **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 are part of the selling price and are subject to both the retailing B&O and retail sales taxes.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and 2015 c 86. WSR 15-21-092, § 458-20-124, filed 10/21/15, effective 11/21/15. 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.]

AMENDATORY SECTION (Amending WSR 21-01-062, filed 12/9/20, effective 1/9/21)

WAC 458-20-168 Hospitals, nursing homes, assisted living facilities, adult family homes and similar health care facilities. (1) **Introduction.** This rule 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;
- Assisted living facilities as defined in RCW 18.20.020;
- Adult family homes as defined in RCW 70.128.010; and
- Similar health care facilities.

(a) **Examples.** This rule 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 of other situations must be determined after a review of all of the facts and circumstances.

(b) (~~What other rules might apply?~~ The department of revenue (department) has adopted other rules that may apply to the provision of health care.) **Other rules that may apply.** Readers may want to refer to the rules in the following list for additional information:

- (i) WAC 458-20-102 Reseller permits.
- (ii) WAC 458-20-111 Advances and reimbursements.
- (iii) WAC 458-20-150 Optometrists, ophthalmologists, and opticians.
- (iv) WAC 458-20-151 Dentists, audiologists, and other health care providers ~~((τ))~~—Dental laboratories ~~((τ))~~ and dental technicians.
- (v) WAC 458-20-169 Nonprofit organizations.
- (vi) WAC 458-20-178 Use tax and the use of tangible personal property.
- (vii) WAC 458-20-18801 Medical substances, devices, and supplies for humans—Drugs prescribed for human use—Medically prescribed oxygen—Prosthetic devices—Mobility enhancing equipment—Durable medical equipment.

(viii) 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.** For ~~((the))~~ purposes of this ~~((subsection))~~ rule, the following definitions apply:

- **"Hospital"** - The term hospital is as defined in RCW 70.41.020. It includes hospitals that come within the scope of chapter 71.12 RCW, but only if they are also licensed under chapter 70.41 RCW.
- **"Public hospital" or "nonprofit hospital"** - Public or nonprofit hospitals are hospitals operated by the state or any of its political subdivisions or operated as nonprofit corporations.

(a) **Hospital services to patients.** Gross income earned by hospitals for providing personal or professional services to patients is subject to B&O tax as shown ~~((en))~~ in the table below. RCW 82.04.260.

((Report Income From Providing Personal or Professional Services	Time Frame Prior to May 1, 2010	Time Frame May 1, 2010 and After
For-profit hospitals	Service and other B&O tax classification	For-profit hospitals B&O tax classification
Public and nonprofit hospitals	Public or nonprofit hospitals B&O tax classification	Public or nonprofit hospitals B&O tax classification))

<u>Report Income From Providing Personal or Professional Services</u>	<u>Reporting Classification</u>
<u>For profit hospitals</u>	<u>For profit hospitals B&O tax classification</u>
<u>Public and nonprofit hospitals</u>	<u>Public or nonprofit hospitals B&O tax classification</u>

Gross income earned for providing nonmedical services, interest received on patient accounts receivable, and amounts earned for providing transcribing services to physicians are subject to service and other activities B&O tax.

(b) **Clinics and departments operated by hospitals.** Gross income earned by medical clinics and departments providing services to patients and operated by a hospital is subject to B&O tax as shown in ~~((the table in))~~ subsection (2) (a) of this rule, where the operation of a medical clinic or department is covered by the hospital's license. If the clinic or department is not covered by the hospital's license, the gross income earned by a medical clinic or department providing services to patients is subject to B&O tax under the service and other activities B&O tax classification.

(i) **Example 1.** Acme Hospital is a nonprofit hospital that has a medical clinic that is physically located within the hospital. The clinic is open only during ~~((regular business))~~ the hours of ((+))8:00 a.m. to 5:00 p.m.((+)), and provides no domiciliary care or overnight facilities to its patients. The medical clinic is covered under Acme Hospital's hospital license. Gross income earned by the medical clinic for providing patient care is subject to the Public and Nonprofit Hospital B&O Tax Classification because the clinic is covered under the hospital license.

(ii) **Example 2.** Mountain Hospital is a for profit hospital with a cancer treatment facility that is located one mile from the hospital campus. The cancer treatment facility provides the type of services normally provided by hospitals to cancer patients but only during regular business hours. The cancer treatment facility is covered under the hospital's license. Gross income earned by the cancer treatment facility is subject to the For Profit Hospitals B&O tax ((as shown in the table in subsection (2) (a) of this rule)) classification because the facility is covered under the hospital's license.

(c) **Educational programs and services.** Amounts earned 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 the educational programs and services 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 ~~((tax))~~ 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. Only those educational programs and services offered by a hospital that would be very difficult or impossible to du-

plicate 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 received from educational programs and services are subject to the service and other activities B&O tax when the educational programs or services could be provided by any physician, clinic, or trained lay person.

(3) **Personal and professional services from other medical clinics, nursing homes, and similar health care facilities.** Gross income earned by medical clinics, nursing homes, and similar health care facilities for providing personal and professional services is subject to service and other activities B&O tax. Physicians performing these services are also subject to service and other activities B&O tax on gross income earned. Services provided are ones not integral, interrelated, and an essential part of a hospital operation.

(4) **Assisted living facilities and domiciliary care.** For the purpose of this rule, "assisted living facilities" and "domiciliary care" have the same meaning as found in RCW 18.20.020. A preferential B&O tax rate is provided by RCW 82.04.2908 to persons operating assisted living facilities licensed under chapter 18.20 RCW. Persons operating licensed assisted living facilities should report their gross income derived from providing room and domiciliary care to residents under the licensed assisted living facilities B&O tax classification. Refer to subsection (9)(h) of this rule for B&O tax deductions and exemptions available to persons operating assisted living facilities.

(5) **Hospitals or other health care facilities operated by the state of Washington.** Gross income earned by the state of Washington for operating a hospital or other health care facilities, whether or not owned by the state, is not subject to B&O tax.

(6) **Nonprofit corporations and associations performing research and development.** A separate B&O tax rate applies to nonprofit corporations and nonprofit associations for gross income earned in performing research and development within this state, including medical research. See RCW 82.04.260.

(7) **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, assisted living facilities, adult family homes, and similar health care facilities. This includes charges for making copies of medical records. The seller must collect retail sales tax from the buyer and remit the tax 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.

For example, when a hospital charges a patient for drugs physically administered by the hospital staff, the charges to the patient are subject to B&O tax under the appropriate tax classification as shown in ~~((the table in))~~ subsection (2)(a) of this rule based on the hospital making the charge. ~~((On the other hand))~~ However, charges for drugs sold to persons or their caregivers, either for self-administration or administration by a caregiver other than the seller, are sub-

ject 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, assisted living facilities, 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 earned by hospitals, nursing homes, assisted living facilities, and similar health care facilities for furnishing meals to patients or residents are subject to B&O tax as part of the services provided to those patients or residents. Such amounts are not subject to retail sales tax.

RCW 82.08.0293 and 82.12.0293 provide, respectively, retail sales tax and use tax exemptions for prepared meals sold to senior citizens, disabled persons, or low-income persons by a ~~((not-for-profit))~~ non-profit organization organized under chapter 24.03A or 24.12 RCW. The exemptions apply to sales of prepared meals to ~~((not-for-profit))~~ non-profit organizations organized under chapter 24.03A 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, assisted living facilities, and similar health care facilities may have restaurants, cafeterias, or other dining facilities where meals are sold to doctors, employees, and visitors. These sales of meals are subject to retailing B&O and retail sales taxes. For additional information regarding the sale of meals, including meals furnished to employees, refer to WAC 458-20-124.

(8) **Industry reporting.** This subsection discusses common reporting issues affecting persons operating medical or other health care facilities.

(a) **Adjustments to revenues.** Many hospitals 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.

(b) ~~((What are the))~~ **Tax consequences ((when)) if 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 pri-

marily or secondarily, for paying the service provider, other than as agent for the patients, then the hospital may deduct from its gross income the amount it receives and pays to the service provider.

In addition, the service provider is subject to service and other activities B&O tax on the amount earned from the hospital for providing these services for the hospital. If the service provider subcontracts with a third party, such as a physician or nurse, to help provide medical services as an independent contractor, the service provider may not deduct from its gross income amounts paid to the subcontractor where the service provider is personally liable, either primarily or secondarily, for paying the subcontractor. If, however, the hospital is alone liable for paying the subcontractor, 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 the amount it receives from the hospital and pays to the subcontractor. For additional information regarding deductible advances and reimbursements, refer to WAC 458-20-111.

(c) ~~((May))~~ **Nursing homes and assisted living facilities may not claim a B&O tax exemption for the rental of real estate.** ~~((? No.))~~ The purpose of nursing homes is to provide medical care to their residents. The purpose of assisted living facilities is to assume general responsibility for the safety and well-being of their residents and to provide other services to residents such as housekeeping, meals, laundry, and activities. Assisted living facilities may also provide residents with assistance with activities of daily living, health support services, and intermittent nursing services. Because the purpose of nursing homes and assisted living facilities is to provide services and not to lease or rent real property, no part of the gross income of nursing homes or assisted living facilities is exempted from B&O tax as the rental of real estate.

(9) **B&O tax deductions, credits, and exemptions.** This subsection provides information about B&O tax deductions, credits, and exemptions available to persons operating medical or other health care facilities.

Deductible amounts should be included in the gross income reported on the combined excise tax return and then identified on the appropriate deduction detail line of the ~~((excise tax))~~ return to determine the amount of taxable income.

(a) **Organ procurement organizations.** RCW 82.04.326 provides a B&O tax exemption for amounts earned 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.

(b) **Contributions, donations, and endowment funds.** RCW 82.04.4282 provides a B&O tax deduction for amounts received as contributions, donations, and endowment funds, including grants, which are not in exchange for goods, services, or business benefits. For example, a 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 may not take a B&O tax deduction on amounts earned from a state university for work-study programs or training seminars, because the university receives business benefits in return, as students receive education and training while enrolled in the university's degree programs.

(c) **Adult family homes.** RCW 82.04.327 provides a B&O tax exemption for 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. This exemption does not apply to persons who provide home care services to clients in the clients' own residences.

For the purpose of this rule, "adult family home" has the same meaning as in RCW 70.128.010.

(d) **Nonprofit kidney dialysis facilities, hospice agencies, and nonprofit nursing homes and homes for unwed mothers.** RCW 82.04.4289 provides a B&O tax exemption for amounts earned 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, nonprofit nursing homes and homes for unwed mothers operated as religious or charitable organizations. This exemption applies only if no part of the net earnings earned 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 nonprofit nursing homes 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.** RCW 82.04.4297 provides a B&O tax deduction to health or social welfare organizations, as defined in RCW 82.04.431, for amounts earned 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.

(~~Effective August 1, 2011,~~) RCW 82.04.4275 provides a B&O tax deduction for amounts health or social welfare organizations receive as compensation for providing child welfare services under a government-funded program.

A deduction is not allowed, however, for amounts that are received under an employee benefit plan. 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 earned under a health service program subsidized by federal or state government.** RCW 82.04.4311 provides a B&O tax deduction to:

- 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, for amounts earned 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. This deduction applies to amounts received directly or through a third party from the qualified programs or plans. However, it does not apply to amounts received from patient copayments or patient deductibles. For purposes of the deduction provided by RCW 82.04.431, "community health center" means a federally qualified health center as defined in 42 U.S.C. Sec. 1396d as existed on August 1, 2005.

Example 3. 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 deduct only the \$600 received from medicare.

(g) **Blood and tissue banks.** Except as otherwise provided, RCW 82.04.324 provides a B&O tax exemption for amounts earned by a qualifying blood bank, a qualifying tissue bank, or a qualifying blood and tissue bank to the extent such amounts are exempt from federal income tax.

~~((Effective October 1, 2013, RCW 82.04.324 provides that persons claiming this exemption must report amounts exempt under this subsection to the department on their excise tax returns. Except for persons whose primary business purpose is the collection, preparation, and processing of blood, the exemption per person is limited to one hundred fifty thousand dollars in tax per calendar year. RCW 82.04.324(3) is scheduled to expire June 30, 2016.))~~

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, that 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.

~~((Effective October 1, 2013, the definition of "qualifying blood bank" includes an exempt organization, as described above, that tests or processes blood, on behalf of itself or other qualifying blood bank or qualifying blood and tissue bank. This definition is scheduled to expire June 30, 2016.))~~ "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" means 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., Parts 607 and 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.

~~((Effective October 1, 2013, the definition of "qualifying blood and tissue bank" includes an exempt organization, as described in (g)(iii) of this subsection, that tests or processes blood, on behalf of itself or other qualifying blood bank or qualifying blood and tissue bank.))~~ "Qualifying blood and tissue bank" does not include a comprehensive cancer center that is recognized as such by the National Cancer Institute. ~~((This definition is scheduled to expire June 30, 2016.))~~

(h) **Assisted living facilities.** RCW 82.04.4337 provides a B&O tax deduction to licensed assisted living facility operators for amounts earned as compensation for providing adult residential care, enhanced adult residential care, or assisted living services under contract with the department of social and health services authorized by chapter 74.39A RCW to residents who are medicaid recipients. For the purpose of this rule, "adult residential care," "enhanced adult residential care," and "assisted living services" have the same meaning as in RCW 74.39A.009.

In addition, RCW 82.04.4264 provides a B&O tax exemption for amounts earned by a nonprofit assisted living facility licensed under chapter 18.20 RCW for providing room and domiciliary care to residents of the assisted living facility. For purposes of this rule, "nonprofit assisted living facility" means an assisted living facility 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 24.03A RCW, is operated as part of a nonprofit hospital, or is operated as part of a public hospital district.

(i) **Comprehensive cancer centers.** RCW 82.04.4265 provides a B&O tax exemption for amounts earned by a comprehensive cancer center to the extent such amounts are exempt from federal income tax. For purposes of this rule, "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) **Prescription drugs administered by the medical service provider.** RCW 82.04.620 allows a deduction from the measure of tax for reporting under the service and other activities classification of the B&O tax (RCW 82.04.290) for amounts earned 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 the purpose of this deduction only, amounts that "are covered or required under a health care service program subsidized by the fed-

eral 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 amount earned for a specific drug charge. If the total amount earned by the physician or clinic for a specific drug exceeds the federal reimbursement rate, none of the total amount earned 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 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 (8)(a) of this rule. 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 does not exceed the federal rate.

(10) **Sales, use, and other specified taxes deductions and exemptions.** Unless otherwise exempt by law, hospitals, nursing homes, adult family homes, assisted living facilities, and similar health care providers are required to pay retail sales tax on purchases of equipment and supplies. The deductions and exemptions listed in this subsection are available to qualified persons.

(a) For the purpose of this subsection, the following definitions apply:

(i) "**Chemical**" means any catalyst, solvent, water, acid, oil, or other additive that physically or chemically interacts with blood, bone, or tissue.

(ii) "**Materials**" for the purposes of RCW 82.08.02807 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.

(iii) "**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.

(iv) **"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.

(b) **Temporary medical housing provided by a health or social welfare organization.** RCW 82.08.997 provides an exemption from state and local retail 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 chapter 36.100

RCW;

(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.

(c) **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 copy of their reseller permit to the seller to document the wholesale nature of the sale. (~~Reseller permits replaced resale certificates effective January 1, 2010.~~)

(d) **Sales of medical supplies, chemicals, or materials to a comprehensive cancer center.** RCW 82.08.808 and 82.12.808 provide, respectively, retail sales tax and use tax exemptions for sales of medical supplies, chemicals, or materials to a comprehensive cancer center. These exemptions do not apply to sales of construction materials, office equipment, building equipment, administrative supplies, or vehicles.

(e) **Sales of medical supplies, chemicals, or materials to organ procurement organizations.** RCW 82.08.02807 and 82.12.02749 provide(~~s~~), respectively, retail sales tax and use tax exemptions for sales of medical supplies, chemicals, or materials to organ procurement organizations exempt under RCW 82.04.326. These exemptions do not apply to the sale of construction materials, office equipment, building equipment, administrative supplies, or vehicles.

(11) **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 the purchases are specifically exempt by law. For detailed information regarding the use tax, refer to WAC 458-20-178.

(a) (~~How do I report~~) **Reporting 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 combined excise tax return. As the combined excise tax return does not have a separate

line for reporting deferred sales tax, the buyer should report the tax liability on the use tax line. If a deferred sales tax or use tax liability is incurred by a person who is not required to be registered with the department, the person must report the tax on a "Consumer Use Tax Return" and remit the appropriate tax to the department.

(b) ~~((Where can I obtain a))~~ **Consumer Use Tax Return(?)**. The Consumer Use Tax Return may be obtained from the department's website at dor.wa.gov, or by calling the department's telephone information center at ~~((1-800-647-7706))~~ 1-360-705-6705.

[Statutory Authority: RCW 82.24.550, 82.01.060, 82.08.808, 82.12.808, 82.08.02807 and 82.12.02749. WSR 21-01-062, § 458-20-168, filed 12/9/20, effective 1/9/21. Statutory Authority: RCW 82.32.300, 82.01.060(2), and 2015 c 86. WSR 15-21-092, § 458-20-168, filed 10/21/15, effective 11/21/15. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 14-18-019, § 458-20-168, filed 8/25/14, effective 9/25/14. 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.]

AMENDATORY SECTION (Amending WSR 20-21-104, filed 10/21/20, effective 11/21/20)

WAC 458-20-169 Nonprofit organizations. (1) **Introduction.** Unlike the tax systems of most states and the federal government, Washington's tax system, including its primary business tax, applies to the activities of nonprofit organizations. Washington's business and occupation (B&O) tax is imposed on all entities that generate gross receipts or proceeds, unless there is a specific statutory exemption or deduction. This rule explains how the 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.,))~~ such as the public utility tax or insurance premium taxes on income from utility or insurance activities~~((+))~~, these taxes are not discussed in this rule. The rule describes the most common B&O, retail sales, and use tax exemptions and deductions that are specifically provided to nonprofit organizations by state law. Other exemptions or deductions not specific to nonprofit organizations may also apply.

(a) **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.

(b) **Other rules that may ~~((be relevant))~~ apply.** Rules in the following list may contain additional ~~((relevant))~~ information for nonprofit organizations:

(i) WAC 458-20-101 Tax registration and tax reporting.

(ii) WAC 458-20-167 Educational institutions, school districts, student organizations, and private schools~~((
(ii))~~).

(iii) WAC 458-20-168 Hospitals, nursing homes, assisted living facilities, adult family homes and similar health care facilities~~((
(iii))~~).

(iv) WAC 458-20-183 ~~((Amusement, recreation, and physical fitness services;~~

~~((iv))~~ Recreational services and activities.

(v) WAC 458-20-249 Artistic or cultural organizations~~((
(v))~~).

(vi) WAC 458-20-256 Trade shows, conventions and seminars.

(2) **Registration and reporting 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 that))~~ are subject to the registration and reporting requirements as described in WAC 458-20-101. Whether registering and reporting are required depends upon the level and type of taxes the nonprofit organization is 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 with less than twelve thousand dollars per year in gross receipts and that 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 information on whether registration with the department is required see WAC 458-20-101)).

(3) **Filing combined excise tax returns.** Nonprofit organizations making retail sales that require the collection of retail sales tax must file an excise tax return, regardless of the annual level of gross receipts or gross income and whether or not any B&O tax is due. For information on when a taxpayer may qualify for a small business B&O tax credit, see 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. Under certain conditions the department may authorize taxpayers to file and remit payment on either a quarterly or an annual basis or be placed on an "active nonreporting" status by the department. For information on how reporting frequencies are assigned to taxpayers, see WAC 458-20-22801 Tax reporting frequency, and WAC 458-20-101.

~~((Nonprofit organizations that do not have retail sales tax to remit, but are required to register, do not have to file an excise 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. For additional information on whether an organization qualifies for the "active nonreporting" status see WAC 458-20-101.))~~

(4) **General tax reporting responsibilities.** While Washington state law provides some tax exemptions and deductions specifically for nonprofit organizations, these organizations otherwise have the same tax-reporting responsibilities as for-profit organizations.

(a) **Business and occupation tax.** Chapter 82.04 RCW imposes a B&O tax on every person with substantial nexus in Washington ~~((see RCW~~

~~82.04.067~~)) engaged in business activities within this state, unless the income is specifically exempt or deductible under state law. RCW 82.04.067. 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 applying to income received by nonprofit organizations are the retailing, wholesaling, and service and other activities classifications. RCW 82.04.250, 82.04.270, and 82.04.290. If an organization engages in more than one kind of business activity, it must report the gross income from each activity under the appropriate tax classification. RCW 82.04.440(1).

(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 may apply to nonprofit organizations are those for:

(i) Sales of certain food products. ~~((see))~~ WAC 458-20-244 ~~((r))~~ Food and food ingredients ~~((r))~~;

(ii) Construction materials purchased by a health or social welfare organization for new construction of alternative housing to be licensed as a family foster home for youth in crisis. ~~((see))~~ RCW 82.08.02915 ~~((r))~~. New construction includes renovating an existing structure to provide new housing for youth in crisis; and

(iii) Fund-raising activities ~~((see))~~ in subsection (5)(g) of this rule. ~~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 if the seller takes from the buyer a copy of the buyer's reseller permit. The reseller permit documents the wholesale nature of any sale. ~~((Reseller permits replaced resale certificates effective January 1, 2010.))~~ For additional information on reseller permits see WAC 458-20-102 Reseller permits.

(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 retail 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. When the out-of-state seller does not collect Washington's retail sales or use tax, the buyer is statutorily required to remit use tax directly to the department. For more information on use tax and the use of tangible personal property, see WAC 458-20-178 Use tax and the use of tangible personal property.

Except for fund-raising, use tax exemptions generally correspond to retail sales tax exemptions. For example, the 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 ~~((+))~~ in RCW 82.12.02915 ~~((+))~~, corresponds with the retail sales tax exemption described in subsection (4)(b) of this rule for purchasing these construction materials.

(i) **Use tax exemption for donated items.** RCW 82.12.02595 provides a use tax exemption for personal property donated to a nonprofit charitable organization. This exemption:

(A) Is available for the nonprofit charitable organization and the donor, if the donor did not previously use the personal property as a consumer~~((It also))~~; or

(B) 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))~~; or

(C) 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,))~~

(I) Example 1. 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))~~

(II) Example 2. 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, so the gift of the car would not qualify for the exemption as a gift of donated items. 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~~((7))~~ 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)(g) of this rule explains that a retail sales tax exemption is available for certain fund-raising sales. However, there is usually no comparable use tax exemption provided to the ~~((buyer/user))~~ buyer or user of property purchased at these fund-raising sales. While the nonprofit organization is not obligated to collect use tax from the buyer, the organization is encouraged to inform the buyer of the buyer's possible use tax obligation.

(iii) **Contests of chance.** RCW 82.12.225 provides a use tax exemption for the use of any article of personal property, purchased or received as a prize in a contest of chance, as defined in RCW 82.04.285, from a nonprofit organization or a library, if the value is less than the current value limit. This exemption only applies if the gross income from the sale by the nonprofit organization or library is exempt under RCW 82.04.3651.

(A) The current value limit is (~~twelve thousand dollars~~) \$12,000. Beginning in 2020, the value limit must be adjusted annually each December for inflation. The department will calculate an adjusted value limit for use in the next calendar year, using the consumer price index for the Seattle area. Adjusted value limits may not decrease from one year to the next. If an adjusted value limit calculation based on the consumer price index results in less than the current year's value limit, the current year's value limit will apply in the following calendar year. Adjusted value limits are published on the department's website and take effect January 1st for the following year.

(B) The following definitions apply to (c)(iii) of this subsection unless the context clearly requires otherwise:

(I) "Consumer price index" means the consumer price index for all urban consumers, all items, (CPI-U) as calculated by the United States Bureau of Labor Statistics or successor agency.

(II) "Seattle area" means the geographic area sample that includes Seattle and surrounding areas.

(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.** RCW 82.04.327 exempts from B&O tax amounts received by licensed adult family homes or adult family homes that are exempt from licensing under rules of the department of social and health services.

(b) **Nonprofit assisted living facilities.** RCW 82.04.4264 exempts from B&O tax amounts received by a nonprofit assisted living facility licensed under chapter 18.20 RCW for providing room and domiciliary care to residents of the assisted living facility. (~~Nonprofit assisted living facilities were formerly known as "nonprofit boarding homes" in the statute.~~) For the purposes of this exemption, the terms:

(i) "Domiciliary care" has the meaning provided in RCW 18.20.020;
and

(ii) "Nonprofit assisted living facility" means an assisted living facility 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 24.03A RCW, is operated as part of a nonprofit hospital, or is operated as part of a public hospital district.

(c) **Camp or conference centers.** RCW 82.04.363 and 82.08.830, respectively, exempt from B&O tax and retail sales tax 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). For information about property tax exemptions that may apply see: WAC 458-16-210 (~~(+)~~) Nonprofit organizations or associations organized and conducted for nonsectarian purposes (~~(+)~~); WAC 458-16-220 (~~(+)~~) Church camps (~~(+)~~); and WAC 458-16-230 (~~(+)~~) Character building organizations (~~(+)~~).

Amounts received from the sale of the following items and services are 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, including electronically transferred items, available exclusively to the participants at the camp, conference, or meeting and not available to the public at large.

(d) **Child care resource and referral services.** RCW 82.04.3395 exempts from B&O tax amounts received by nonprofit organizations for providing child care resource and referral services. Child care resource and referral services do not include child care services provided directly to children.

(e) **Credit and debt services.** RCW 82.04.368 exempts from B&O tax 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.

(f) **Day care provided by churches.** RCW 82.04.339 exempts from B&O tax amounts received by a church for the care of children of any age for periods of less than (~~twenty-four~~) 24 hours, provided the church is exempt from property tax under RCW 84.36.020.

(g) **Fund-raising.** RCW 82.04.3651 and 82.08.02573, respectively, exempt from B&O tax and retail sales tax amounts received from certain fund-raising activities.

These exemptions apply only to the fund-raising income received by the nonprofit organization. For example, commission income received by a nonprofit organization selling books owned by a for-profit entity on a consignment basis is exempt from tax only if the statutory requirements are satisfied. The nonprofit organization is generally responsible for collecting and remitting retail sales tax on the gross proceeds of sales when selling items for another person. For additional information on the taxability of sales by agents, auctioneers and other similar types of sellers see WAC 458-20-159.

(i) ~~((What))~~ **Qualifying 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), 501 (c) (4) (social welfare), or 501 (c) (10) (fraternal societies operating as lodges) of the Internal Revenue Code; or

(B) A nonprofit organization that would qualify for tax exemption under section 501 (c) (3), (4), or (10) 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.

(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 solicit-

ing organization and the organization or person solicited, for furthering the goals of the nonprofit organization. The following are examples of qualifying fund-raising activities:

(A) Example 3. 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) Example 4. 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 B&O tax and retail sales tax to the extent these amounts represent an exchange of 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) Example 5. 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 B&O tax and retail sales 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 on the nonprofit broadcaster airing its seminars is not a contribution regardless of how the amount paid is 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+)) may include 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 benefiting 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 is not a significant service or benefit.

(iv) **Nonqualifying fund-raising 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 busi-

ness depend on the type of business being conducted. The following are examples of nonqualifying fund-raising activities:

(A) Example 6. In the example in (g)(iii) of this subsection 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 is in the business of broadcasting programs. It has a regular site for broadcasting programs and broadcasts (~~(twenty-four)~~) 24 hours every day. Broadcasting is 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) Example 7. A nonprofit organization that makes catalog sales throughout the year with a (~~(twenty-four)~~) 24 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)~~) 24 hours a day. Catalog sales are not exempt as fund-raising amounts even though the funds are raised for a nonprofit purpose.

(C) Example 8. A nonprofit group organized as a community playhouse (~~(has)~~) performs three plays during the year at a leased (~~(theatre)~~) theater. 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)~~) operate 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) Example 9. A nonprofit student group(~~(r)~~) that raises money for scholarships and other educational needs(~~(r)~~) 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 provides that (~~(the sale of)~~) selling used books, used videos, used sound recordings, or similar used information products in a library is not (~~(the operation of)~~) operating a regular place of business, if the proceeds are used solely 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. In addition to the B&O tax exemption under RCW 82.04.3651, RCW 82.08.02573 provides a comparable retail sales tax exemption for the same sales made by a library.

(h) **Group training homes.** RCW 82.04.385 exempts from B&O tax 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. As defined in RCW 71A.22.020, a nonprofit group training home is an approved 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.

(i) **Sheltered workshops.** RCW 82.04.385 also exempts from B&O tax amounts received by a nonprofit organization for operating a sheltered workshop.

(i) ~~((What is))~~ **Definition of 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))~~ adjustment services for ~~((a handicapped))~~ persons with disabilities or to provide gainful employment or rehabilitation services to ~~((a handicapped))~~ persons with disabilities. The sheltered workshop ~~((can))~~ may 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""))~~ persons with disabilities**. Gainful employment or rehabilitation services must be an interim step in the rehabilitation process that 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,")~~ "Persons with disabilities," for the purposes of this exemption, means persons with 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.))~~, such as having a prior criminal history or low-income status ~~((+))~~.

(j) **Student loan services**. RCW 82.04.367 exempts from B&O tax amounts received by 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.

(k) **Grants received to fund education programs pertaining to litter control, waste reduction, recycling, and composting**. ~~((Effective July 24, 2015,))~~ RCW 82.04.755 provides a B&O tax exemption for grants received by a nonprofit organization from the matching fund competitive grant program established in RCW ~~((70.93.180 (1) (b) (ii)))~~ 70A.200.140 (1) (b) (ii). This program provides funding for local or statewide education programs designed to help the public with litter control, waste reduction, recycling, and composting of primarily products upon which litter tax is imposed. For information on the state litter tax program, see chapter 82.19 RCW. The requirements for the grants are listed in RCW ~~((70.93.180 (1) (b) (ii). Chapter 15, Laws of 2015 (ESHB 1060))~~ 70A.200.140 (1) (b) (ii).

(6) **B&O tax deduction of payments made to health or social welfare organizations**.

(a) **Compensation from public entities**. 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 or to support health or social welfare services, rendered by a health or social welfare organization, as defined in RCW 82.04.431, or by a municipal corporation or political subdivision. These deductible amounts should be included in the gross income reported on the excise tax return, entered on the deduction page, and then deducted on the return when determining the amount of the organization's taxable in-

come. A deduction is not allowed, however, for amounts that are received under an employee benefit plan.

(b) **Mental health services or ((chemical dependency)) substance use disorder treatment services under a government-funded program.**

~~((RCW 82.04.4277))~~ Effective April 26, 2021, RCW 82.04.4290 provides a B&O tax deduction for health or social welfare organizations for amounts received as compensation for providing mental health services or ((chemical dependency)) substance use disorder treatment services under a government-funded program. During the period August 24, 2011, to December 31, 2019, RCW 82.04.4277 provided a similar B&O tax deduction for mental health services and chemical dependency services under a government-funded program. This rule explains the B&O tax deduction in RCW 82.04.4290.

A behavioral health administrative services organization may deduct from the measure of tax amounts received from the state of Washington for distribution to a health or social welfare organization that is eligible to deduct the distribution for providing mental health services of substance use disorder treatment services under a government-funded program.

(i) The following definitions apply to (b) of this subsection unless the context clearly requires otherwise:

(A) ~~((("Chemical dependency" has the same meaning as provided in RCW 70.96A.020;))~~ "Behavioral health administrative services organization" has the same meaning as provided in RCW 71.24.025;

(B) "Health and social welfare organization" has the meaning provided in RCW 82.04.431; ~~((and))~~

(C) "Mental health services" ~~((and "behavioral health organization" have the meanings))~~ has the same meaning provided in ((RCW 71.24.025.

~~((ii))~~ The deduction for amounts received as compensation for providing chemical dependency services under a government-funded program is effective April 1, 2016. Regional support networks, which are renamed behavioral health organizations effective April 1, 2016, may also deduct from the measure of tax amounts received from the state of Washington for distribution to health or social welfare organizations eligible to deduct the distribution under RCW 82.04.4277.

~~((iii))~~ chapter 71.24 RCW; and

(D) "Substance use disorder treatment services" means substance use disorder treatment services as described in chapter 71.24 RCW.

((ii)) Persons claiming a deduction ~~((s))~~ under RCW ~~((82.04.4277))~~ 82.04.4290 must file an annual tax performance report with the department. Refer to RCW 82.32.534 and WAC 458-20-267 Annual tax performance reports for certain tax preferences, for information regarding filing an annual tax performance report.

~~((iv))~~ These deductions are)) ((iii)) This deduction is scheduled to expire January 1, ((2020)) 2032.

(c) **Child welfare services.** RCW 82.04.4275 provides a B&O tax deduction for health or social welfare organizations for amounts received as compensation for providing child welfare services under a government-funded program. Persons may also deduct from the measure of tax amounts received from the state of Washington for distribution to health or social welfare organizations eligible to deduct the distribution under RCW 82.04.4275(1).

(d) ~~((What is a))~~ **Definition of health or social welfare organization((?)).** A health or social welfare organization is an organization, including any community action council, providing health or social welfare services as defined in ~~((subsection (6))~~ (e) of this

((rule)) subsection. To be exempt under RCW 82.04.4297, a corporation must satisfy all of the following conditions:

- (i) Be a corporation sole under chapter 24.12 RCW or a domestic or foreign (~~(not-for-profit)~~) nonprofit corporation under chapter 24.03A RCW. A corporation providing professional services as authorized under chapter 18.100 RCW does not qualify as a health or social welfare organization;
 - (ii) Be governed by a board of not less than eight individuals who are not paid corporate employees when the organization is a (~~(not-for-profit)~~) nonprofit corporation;
 - (iii) Not pay 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 pay 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) Have irrevocably dedicated 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) Be duly licensed or certified as required by law or regulation;
 - (vii) Use government payments to provide health or social welfare services;
 - (viii) Make its services available regardless of race, color, national origin, or ancestry; and
 - (ix) Provide access to the corporation's books and records to the department's authorized agents upon request.
- (e) **Qualifying health or welfare services.** The term "health or social welfare services" includes, and is limited to:
- (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 benefits 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 causes of poverty in communities of the state of Washington; and
 - (xiii) Temporary medical housing, as defined in RCW 82.08.997, if the housing is provided 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.

[Statutory Authority: RCW 82.32.300 and 82.01.060. WSR 20-21-104, § 458-20-169, filed 10/21/20, effective 11/21/20. Statutory Authority: RCW 82.32.300, 82.01.060(2), 82.32.534, 82.32.585, 82.32.590, 82.32.600, 82.32.605, 82.32.607, 82.32.710, 82.32.790, 82.32.808, 82.04.240, 82.04.2404, 82.04.260, 82.04.2909, 82.04.426, 82.04.4277, 82.04.4461, 82.04.4463, 82.04.448, 82.04.4481, 82.04.4483, 82.04.449, 82.08.805, 82.08.965, 82.08.9651, 82.08.970, 82.08.980, 82.08.986, 82.12.022, 82.12.025651, 82.12.805, 82.12.965, 82.12.9651, 82.12.970, 82.12.980, 82.16.0421, 82.29A.137, 82.60.070, 82.63.020, 82.63.045, 82.74.040, 82.74.050, 82.75.040, 82.75.070, 82.82.020, 82.82.040, 84.36.645, and 84.36.655. WSR 18-13-094, § 458-20-169, filed 6/19/18, effective 7/20/18. Statutory Authority: RCW 82.32.300, 82.01.060(2), and 82.04[.]4277. WSR 16-20-011, § 458-20-169, filed 9/23/16, effective 10/24/16. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 16-07-047, § 458-20-169, filed 3/14/16, effective 4/14/16; WSR 14-13-105, § 458-20-169, filed 6/17/14, effective 7/18/14. 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.]

AMENDATORY SECTION (Amending WSR 19-20-061, filed 9/26/19, effective 10/27/19)

WAC 458-20-244 Food and food ingredients. (1) Introduction.

This rule 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 rule 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.

(2) **Other rules that may apply.** Rules in the following list may contain additional relevant information:

(a) WAC 458-20-119 Sales by caterers and food service contractors;

(b) WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses;

(c) (~~WAC 458-20-12401 Special stadium sales and use tax;~~

~~(d)~~) WAC 458-20-166 Hotels, motels, boarding houses, rooming houses, resorts, hostels, trailer camps, short-term rentals and similar lodging businesses;

~~((e))~~ (d) WAC 458-20-167 Educational institutions, school districts, student organizations, and private schools;

~~((f))~~ (e) WAC 458-20-168 Hospitals, nursing homes, assisted living facilities, adult family homes and similar health care facilities;

~~((g))~~ (f) WAC 458-20-169 Nonprofit organizations;

~~((h))~~ (g) WAC 458-20-229 Refunds; and

~~((i))~~ (h) WAC 458-20-243 Litter tax.

(3) Items qualifying 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.

(4) **Items not qualifying 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))~~ 10 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))~~ 10 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 item~~((s))~~ that contains tobacco.

(e) **Marijuana.** Marijuana, useable marijuana, marijuana concentrates, or marijuana-infused products, as defined in RCW 69.50.101, are excluded from the definition of food and food ingredients. "Marijuana" means all parts of the plant Cannabis, whether growing or not, with a THC concentration greater than 0.3 percent on a dry weight basis.

(f) **Bottled water.** Bottled water is excluded from the exemptions for food and food ingredients. "Bottled water" means water that is placed in a safety sealed container or package for human consumption.

(i) 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.

(ii) **Exemptions for tax on bottled water.** There are limited retail sales tax exemptions on bottled water. Sellers must collect the retail sales tax on all sales of bottled water, unless the bottled water is delivered to the buyer as described in (f)(ii)(C) of this subsection. Any buyer that has paid at least (~~twenty-five dollars~~) \$25.00 in state and local taxes on purchases of bottled water subject to the exemptions described in (f)(ii)(A) and (B) of this subsection may apply for a refund of the taxes directly from the department.

(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 is exempt. RCW 82.08.9994. The bottled water must be prescribed, through an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission, by a licensed practitioner authorized by Washington law to prescribe.

(B) (~~Potable water not readily available.~~) **Primary water source unsafe.** Bottled water for human use by persons whose primary source of drinking water is unsafe is exempt. RCW 82.08.99941. A person's primary source of drinking water is unsafe if:

(I) The public water system providing the drinking water has issued a public notification that the drinking water may pose a health risk, and the notification is still in effect on the date that the bottled water was purchased;

(II) Test results on the person's drinking water, which are no more than (~~twelve~~) 12 months old, from a laboratory certified to perform drinking water testing show that the person's drinking water does not meet safe drinking water standards applicable to public water systems; or

(III) The person otherwise establishes, to the department's satisfaction, that the person's drinking water does not meet safe drinking water standards applicable to public water systems.

(C) **Bottled water delivered to the buyer in a reusable container not sold with the water.** Buyers claiming an exemption listed in (f)(ii)(A) or (B) of this subsection that have the qualifying water delivered in a reusable container that is not sold with the water must complete a retail sales exemption certificate and provide it to the seller. The seller must retain a copy of the certificate.

(iii) For information regarding exemption certificates and refund requests, visit dor.wa.gov.

(g) **Soft drinks.** Soft drinks are excluded from the exemptions for food and food ingredients. "Soft drinks" means any nonalcoholic beverage that contains natural or artificial sweeteners, except beverages that contain:

- (i) Milk or milk products;
- (ii) Soy, rice, or similar milk substitutes; or
- (iii) More than (~~fifty~~) 50 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 food or food ingredients and are not subject to retail sales tax.

(h) **Dietary supplements.** Dietary supplements are excluded from the exemptions for food and food ingredients. "Dietary supplement" means any product intended to supplement the diet, other than tobacco, which meets all of the following requirements:

(i) Contains a vitamin; mineral; herb or other botanical; an amino acid; a substance for use by humans to increase total dietary intake; or a concentrate, metabolite, constituent, extract; or a combination of any of (~~them~~) these ingredients;

(ii) 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

(iii) 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 retail sales tax exemption applicable to dietary supplements dispensed under a prescription.

(i) **Prepared food.** Prepared food is excluded from the exemptions for food and food ingredients. Prepared food generally means heated foods, combined foods, or foods sold with utensils provided by the seller, as described in more detail in subsection (5) of this rule.

(5) **Items designated as prepared foods.** 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:

(i) Bakery items (defined in (a) of this subsection);

(ii) Items that the seller only cuts, repackages, or pasteurizes;

(iii) 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

(iv) 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 pre-packaged 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~~) 75 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 retail sales of prepared food under (a), (b), and (c) (ii) of this subsection equal more than (~~seventy-five~~) 75 percent of the seller's gross retail sales of all food and food ingredients, including prepared food, soft drinks, bottled water, and dietary supplements.

(A) **Exception for four or more servings.** Even if a seller has more than (~~seventy-five~~) 75 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~~) 90 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~~) 90 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 retail sales of all food and food ingredients, including prepared food, soft drinks, bottled water, and dietary supplements is \$100,000. Of this gross retail 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~~) 75 percent of Fast Cafe's total retail sales of food and food ingredients, including prepared food, soft drinks, bottled water, 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~~) 75 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 retail sales were sales of hot coffee and hot and cold mixed coffee and milk beverages. The remainder of its retail sales were sales of sandwiches, whole fruits, cookies and other pastries. Under these facts, Fast Cafe does not have more than (~~seventy-five~~) 75 percent prepared food sales. Thus, the items sold by Fast Cafe are taxed as follows:

(A) 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.

(B) 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.

(C) Cold soft drinks are not exempt and are subject to retail sales tax.

(D) 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.

(E) 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.

(F) 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.

(6) **Combined sales of taxable and exempt items.** 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:

(a) The entire transaction is taxable if the seller's purchase price or sales price of the taxable items is greater than (~~fifty~~) 50 percent of the combined purchase price or sales price; and

(b) The entire transaction is exempt from retail sales tax if the seller's purchase price or sales price of the taxable items is (~~fifty~~) 50 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.

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~~) \$10.00. 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~~) \$10.00 is greater than (~~fifty~~) 50 percent of the combined purchase price (~~twelve dollars~~) \$12.00.

(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.

(7) **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.

(8) **Other retail sales tax exemptions that may apply.**

(a) **Meals served to certain persons.** 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(6);

(ii) Provided to senior citizens, individuals with disabilities, or low-income persons by a ((not for profit)) nonprofit organization organized under chapter 24.03A or 24.12 RCW; or

(iii) Provided to residents, ((sixty-two)) 62 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)) 62 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, bottled water, 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)) must 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~~) \$13.00. 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.

(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 retail 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 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, soft drinks, and bottled water.** 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 and bottled water, 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:

$$\text{gross machine proceeds} - [(\text{gross machine proceeds}) / (1 + \text{sales tax rate})] = \text{tax in gross}$$

(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~~) 57 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(~~%~~) percent 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 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	Combined Retail Sales Tax Rate
Seattle	\$2,500	\$10,000	.101
Spokane	\$3,000	\$6,000	.089

To determine the amount of retail sales tax she collected on the sale of cocoa and coffee (food dispensed in a heated state, subject to retail sales tax), Jane calculates the "tax in gross" deduction amount as follows:

gross machine proceeds - [(gross machine proceeds)/(1 + sales tax rate)] = tax in gross

$$\begin{aligned} \$2,500 - (\$2,500 / 1.101) &= \$229.34 && \text{(Seattle coffee machine)} \\ \$3,000 - (\$3,000 / 1.089) &= \$245.18 && \text{(Spokane coffee machine)} \\ &\underline{\hspace{1.5cm}} && \\ & \$474.52 && \end{aligned}$$

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 \$474.52.

To determine the amount of retail sales tax she collected on the sale of candy, Jane calculates the "tax in gross" deduction amount as follows:

(gross machine proceeds x .57) x sales tax rate = tax in gross

$$\begin{aligned} \$10,000 \times .57 \times .101 &= \$575.70 && \text{(Seattle candy machine)} \\ \$6,000 \times .57 \times .089 &= \$304.38 && \text{(Spokane candy machine)} \\ &\underline{\hspace{1.5cm}} && \\ & \$880.08 && \end{aligned}$$

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 \$880.08.

Jane must also report an exempt food sales deduction representing the remaining 43((%)) percent of the gross candy machine proceeds.

(43% x gross machine proceeds) - tax in gross = exempt food deduction

$$(.43 \times \$16,000) - \$880.08 = \$5999.92$$

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, 82.12.0293, 82.08.9994, 82.08.99941, 82.12.9994, and 82.12.99941. WSR 19-20-061, § 458-20-244, filed 9/26/19, effective 10/27/19. Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 15-01-006, § 458-20-244, filed 12/4/14, effective 1/4/15. 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.]

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

AMENDATORY SECTION (Amending WSR 21-01-064, filed 12/9/20, effective 1/9/21)

WAC 458-20-249 Artistic or cultural organizations. (1) **Introduction.** This rule explains deductions and exemptions from Washington business and occupation tax, retail sales tax and use tax as applied to artistic and cultural organizations. Readers may refer to the following for additional information.

(a) Statutes that may apply:

(i) RCW 82.04.4327 Deductions—Artistic and cultural organizations (~~(Income from business activities)~~).

(ii) RCW 82.04.4328 "Artistic or cultural organization" defined.

(iii) RCW 82.08.031 Exemptions—Sales to artistic or cultural organizations of certain objects acquired for exhibition or presentation.

(iv) RCW 82.12.031 Exemptions—Use by artistic or cultural organizations of certain objects.

(b) Other rules that may apply:

(i) WAC 458-20-169 Nonprofit organizations.

(ii) WAC 458-20-178 Use tax and the use of tangible personal property.

(2) **Definitions.**

(a) "Artistic or cultural organization" means an organization that 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 and meets all of the following requirements:

(i) The organization is a (~~(not-for-profit)~~) nonprofit corporation under chapter 24.03A RCW;

(ii) The organization is managed by a governing board of not less than eight individuals none of whom is a paid employee of the organization;

(iii) No part of the organization's 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;

(iv) Salary or compensation paid to the organization's 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;

(v) Assets of the corporation must be irrevocably dedicated to the activities for which the exemption is granted;

(vi) On the liquidation, dissolution, or abandonment by the corporation, assets of the corporation may not inure directly or indirectly to the benefit of any member or individual except a nonprofit organization, association, or corporation (~~(which)~~) that also would be entitled to the exemption;

- (vii) The corporation must be duly licensed or certified when licensing or certification is required by law or regulation;
- (viii) The amounts received that qualify for exemption must be used for the activities for which the exemption is granted;
- (ix) Services must be available regardless of race, color, national origin, or ancestry; and
- (x) The director of revenue must have access to its books in order to determine whether the corporation is exempt from taxes.
- (b) The term "artistic or cultural exhibitions, presentations, or performances or cultural or art education programs" includes and is limited to:
- (i) 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;
- (ii) A musical or dramatic performance or series of performances;
- or
- (iii) 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.
- (3) **Business and occupation tax deduction.** In computing tax under RCW 82.04.4327, an artistic or cultural organization may deduct the following from the measure of tax:
- (a) All amounts received by the artistic or cultural organization; and
- (b) The value of articles manufactured by the artistic or cultural organization solely for use by the organization in displaying art objects or presenting artistic or cultural exhibitions, performances, or programs for attendance or viewing by the general public.
- (4) **Retail sales tax.**
- (a) Artistic or cultural organizations that charge for goods or services included in the definition of "retail sale" under RCW 82.04.050(~~r~~) must collect and report the retail sales tax. No retail sales tax exemption is available for sales by such organizations.
- (b) Such organizations are exempt from paying retail sales tax on their purchases of certain "objects" for the purpose of exhibition or presentation to the general public if the objects are:
- (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. (RCW 82.08.031)
- (c) The term "objects" means items of tangible personal property. It does not include professional or commercial services rendered by third parties. Where certain services (~~are~~) performed (~~which~~) are merely incidental to sales of tangible personal property, e.g., designing playbills or altering stage curtains (~~which~~) that are then sold to qualifying organizations, the total charge will be exempt.
- (d) 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."
- (e) Exempt sales include rentals of exempt objects. Examples of objects that qualifying artistic or cultural organizations may purchase without payment of retail sales tax are:

(i) Tickets, programs, signs, posters, fliers, and playbills printed for particular displays or performances; scenery, costumes, stage props, scrims, and materials for their construction;

(ii) Stage lights, filters, control panels, color medium, stage drapes, sets, set paint, gallery exhibition materials, risers, display platforms, and materials for their construction;

(iii) Sheet music, recordings, musical instruments and musical supplies for the staging of displays and performances;

(iv) Movie projectors, films, sound systems, video and sound equipment and supplies, computer hardware and standard, prewritten software directly used exclusively in the staging of performances or actual display of art objects.

(f) Examples of objects that qualifying artistic or cultural organizations may purchase, on which the retail sales tax must be paid are:

(i) Supplies and equipment for clerical support, including bulk tickets for general use, stationery, (~~typewriters~~) computers, copy machines, and general office supplies;

(ii) Theater seats, lobby furniture, carpeting, vending machines, and general supplies for audience or (~~patrons~~) patron convenience and use;

(iii) Shipping and packing materials, crates, boxes, dunnage, labels, tags, and container-related items for transfer or storage of exempt objects;

(iv) 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);

(v) 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.

(g) 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)

(h) Vendors who accept such certifications in good faith are not required to collect and remit retail sales tax on such sales.

(6) **Use tax.** Under RCW 82.12.031, the use tax does not apply to the use of any objects that would be exempt from retail sales tax had the objects been purchased in this state. The use tax applies to all other items of tangible personal property that artistic or cultural organizations use upon which retail sales tax has not been paid.

[Statutory Authority: RCW 82.01.060 and 82.32.300. WSR 21-01-064, § 458-20-249, filed 12/9/20, effective 1/9/21. Statutory Authority: RCW 82.32.300. WSR 86-07-006 (Order ET 86-4), § 458-20-249, filed 3/6/86.]