

SSB 6143 - S AMD 334

By Senator Benton

NOT ADOPTED 3/06/2010

1 On page 15, beginning on line 1, strike everything through page 20
2 line 3 and insert the following:

3 "NEW SECTION. Sec. 201. A new section is added to chapter
4 82.32 RCW to read as follows:

5 (1) Unless otherwise specifically provided in statute, the
6 department must respect the form of a transaction.

7 (2) The following transactions are considered to be "specified
8 tax avoidance transactions:"

9 (a) Joint venture arrangements between construction contractors
10 and the owner/developer of construction projects that are in essence
11 guaranteed payments for the purchase of construction services
12 specifically characterized by a failure of the joint venture
13 agreements to provide for the contractor to share substantial
14 profits and bear significant risk in the venture;

15 (b) A transaction, related series of transactions or other
16 arrangement without a valid business purpose that result in a person
17 avoiding tax on the receipt of income that would otherwise without
18 such planning be subject to taxation in Washington provided that
19 such income derives from a transaction with a person that is not
20 affiliated with the taxpayer; and

21 (c) For purposes of this subsection, "affiliated" means under
22 common control. "Control" means the possession, directly or
23 indirectly, of more than fifty percent of the power to direct or
24 cause the direction of the management and policies of a person,
25 whether through the ownership of voting shares, by contract, or
26 otherwise.

27 (3) Solely for purposes of denying the tax benefit that would
28 otherwise result on specified tax avoidance transactions, the
29 department may take any reasonable steps necessary to deny the tax
30 benefit that would otherwise arise as a result of the specified tax
31 avoidance transaction.

1 (3) The department must by rule provide guidance on specified
2 tax transactions. The adoption of a rule as required under this
3 subsection is not a condition precedent for the department to use
4 the authority provided in this section to correct specified tax
5 avoidance transactions. The rule adopted under this section must
6 include examples of specified tax avoidance transactions.

7 NEW SECTION. Sec. 202. A new section is added to chapter 82.
8 RCW to read as follows:

9 (1)(a) The department may not use section 201 of this act to
10 disregard any transaction, plan, or arrangement initiated before
11 April 1, 2010.

12 **Sec. 203.** RCW 82.32.090 and 2006 c 256 s 6 are each amended to
13 read as follows:

14 (1) If payment of any tax due on a return to be filed by a
15 taxpayer is not received by the department of revenue by the due
16 date, there (~~shall be~~) is assessed a penalty of five percent of
17 the amount of the tax; and if the tax is not received on or before
18 the last day of the month following the due date, there (~~shall~~
19 ~~be~~) is assessed a total penalty of fifteen percent of the amount of
20 the tax under this subsection; and if the tax is not received on or
21 before the last day of the second month following the due date,
22 there (~~shall be~~) is assessed a total penalty of twenty-five
23 percent of the amount of the tax under this subsection. No penalty
24 so added shall be less than five dollars.

25 (2) If the department of revenue determines that any tax has
26 been substantially underpaid, there (~~shall be~~) is assessed a
27 penalty of five percent of the amount of the tax determined by the
28 department to be due. If payment of any tax determined by the
29 department to be due is not received by the department by the due
30 date specified in the notice, or any extension thereof, there
31 (~~shall be~~) is assessed a total penalty of fifteen percent of the
32 amount of the tax under this subsection; and if payment of any tax
33 determined by the department to be due is not received on or before
34 the thirtieth day following the due date specified in the notice of
tax due, or any extension thereof, there (~~shall be~~) is assessed a
total penalty of twenty-five percent of the amount of the tax under

1 this subsection. No penalty so added (~~shall~~) may be less than five
2 dollars. As used in this section, "substantially underpaid" means
3 that the taxpayer has paid less than eighty percent of the amount of
4 tax determined by the department to be due for all of the types of
5 taxes included in, and for the entire period of time covered by, the
6 department's examination, and the amount of underpayment is at
least one thousand dollars.

7 (3) If a warrant (~~be~~) is issued by the department (~~of~~
8 ~~revenue~~) for the collection of taxes, increases, and penalties,
9 there (~~shall be~~) is added thereto a penalty of ten percent of the
10 amount of the tax, but not less than ten dollars.

11 (4) If the department finds that a person has engaged in any
12 business or performed any act upon which a tax is imposed under this
13 title and that person has not obtained from the department a
14 registration certificate as required by RCW 82.32.030, the
15 department (~~shall~~) must impose a penalty of five percent of the
16 amount of tax due from that person for the period that the person
17 was not registered as required by RCW 82.32.030. The department
18 (~~shall~~) may not impose the penalty under this subsection (4) if a
19 person who has engaged in business taxable under this title without
20 first having registered as required by RCW 82.32.030, prior to any
21 notification by the department of the need to register, obtains a
22 registration certificate from the department.

23 (5) If the department finds that all or any part of a
24 deficiency resulted from the disregard of specific written
25 instructions as to reporting or tax liabilities, the department
26 (~~shall~~) must add a penalty of ten percent of the amount of the
27 additional tax found due because of the failure to follow the
28 instructions. A taxpayer disregards specific written instructions
29 when the department (~~of revenue~~) has informed the taxpayer in
30 writing of the taxpayer's tax obligations and the taxpayer fails to
31 act in accordance with those instructions unless the department has
32 not issued final instructions because the matter is under appeal
33 pursuant to this chapter or departmental regulations. The department
34 (~~shall~~) may not assess the penalty under this section upon any
taxpayer who has made a good faith effort to comply with the
specific written instructions provided by the department to that
taxpayer. Specific written instructions may be given as a part of a

1 tax assessment, audit, determination, or closing agreement, provided
2 that such specific written instructions (~~((shall))~~) apply only to the
3 taxpayer addressed or referenced on such documents. Any specific
4 written instructions by the department (~~((of revenue shall))~~) must be
5 clearly identified as such and (~~((shall))~~) must inform the taxpayer
6 that failure to follow the instructions may subject the taxpayer to
7 the penalties imposed by this subsection.

8 (6) If the department finds that all or any part of a
9 deficiency resulted from engaging in a specified tax avoidance
10 transaction, as described in section 201(2) of this act, the
11 department must assess a penalty of thirty-five percent of the
12 additional tax found to be due as a result of engaging in the
13 specified tax avoidance transaction. The penalty provided in this
14 subsection may be assessed together with any other applicable
15 penalties provided in this section on the same tax found to be due,
16 except for the evasion penalty provided in subsection (7) of this
17 section. The department may not assess the penalty under this
18 subsection if, before the department discovers the taxpayer's use of
19 the specified tax avoidance transaction, the taxpayer discloses its
20 participation in the transaction to the department.

21 (7) If the department finds that all or any part of the
22 deficiency resulted from an intent to evade the tax payable
23 (~~((hereunder))~~), a further penalty of fifty percent of the additional
24 tax found to be due (~~((shall))~~) must be added.

25 ~~((7))~~ (8) The penalties imposed under subsections (1) through
26 (4) of this section can each be imposed on the same tax found to be
27 due. This subsection does not prohibit or restrict the application
28 of other penalties authorized by law.

29 ~~((8))~~ (9) The department (~~((of revenue))~~) may not impose both
30 the evasion penalty and the penalty for disregarding specific
31 written instructions or the penalty provided in subsection (6) of
32 this section on the same tax found to be due.

33 ~~((9))~~ (10) For the purposes of this section, "return" means
34 any document a person is required by the state of Washington to
35 file to satisfy or establish a tax or fee obligation that is
36 administered or collected by the department (~~((of revenue))~~), and
37 that has a statutorily defined due date.

1 NEW SECTION. Sec. 204. (1) The legislature finds that this
2 state's tax policy with respect to the taxation of transactions
3 between affiliated entities and the income derived from such
4 transactions (intercompany transactions) has motivated some
5 taxpayers to engage in transactions designed solely or primarily to
6 minimize the tax effects of intercompany transactions. The
7 legislature further finds that some intercompany transactions result
8 from taxpayers that are required to establish affiliated entities to
9 comply with regulatory mandates and that transactions between such
10 affiliates effectively increases the tax burden in this state on the
11 affiliated group of entities. The legislature also finds that
12 certain legal doctrines available in other jurisdictions may be
13 beneficial in administering state excise taxes.

14 (2) Therefore, the department of revenue is directed to conduct
15 a review of the state's tax policy with respect to the taxation of
16 intercompany transactions. The review must include the impacts of
17 such transactions under the state's business and occupation tax and
18 state and local sales and use taxes. The department may include
19 other taxes in the review as it deems appropriate. The department
20 shall also study the necessity for and desirability of adopting
21 certain interpretive and judicial doctrines in administering excise
22 taxes.

23 (3) In conducting the review, the department must examine how
24 this state's tax policy compares to the tax policy of other states
25 with respect to the taxation of intercompany transactions and the
26 use of certain interpretive doctrines. The department's review must
27 include an analysis of potential alternatives to the current policy
28 of taxing intercompany transactions, including their estimated
29 revenue impacts if practicable.

30 (4) In conducting this review, the department must seek input
31 from members of the business community and others as it deems
32 appropriate.

33 (5) The department must report its findings to the fiscal committees
34 of the house of representatives and senate by December 1, 2010.
However, if the department has not completed its review by December 1,
2010, the department must provide the fiscal committees of the

1 legislature with a brief status report by December 1, 2010, and the
2 final report by December 1, 2011."

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4 On page 111, beginning on line 14, strike everything through page
5 111, line 22.

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7

8 Renumber the sections consecutively and correct any internal
9 references accordingly.

10

EFFECT: The broad grant of authority is removed. Specific and narrow authorities are added. The list of judicial doctrines is removed. The liberal construction clause is removed as is retroactive application. Requires the department to provide by rule guidance on specific transactions. Requires the department to study the necessity for and desirability of adopting certain interpretive and judicial doctrines in administering excise taxes.

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