

# HOUSE BILL REPORT

## HB 1666

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**As Passed House:**

February 14, 2022

**Title:** An act relating to clarifying the method for determining the value of specified tangible personal property incorporated as part of certain public infrastructure for the purposes of use tax and business and occupation tax.

**Brief Description:** Clarifying the method for determining the value of specified tangible personal property incorporated as part of certain public infrastructure for the purposes of use tax and business and occupation tax.

**Sponsors:** Representatives Wylie and Orcutt.

**Brief History:**

**Committee Activity:**

Finance: 1/20/22, 2/3/22 [DP].

**Floor Activity:**

Passed House: 2/14/22, 97-0.

**Brief Summary of Bill**

- Allows the cost-basis method to be used to determine the value of certain tangible personal property used in public infrastructure projects in calculating use and business and occupation taxes.

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### HOUSE COMMITTEE ON FINANCE

**Majority Report:** Do pass. Signed by 16 members: Representatives Frame, Chair; Berg, Vice Chair; Walen, Vice Chair; Orcutt, Ranking Minority Member; Chase, Chopp, Harris-Talley, Morgan, Orwall, Ramel, Springer, Stokesbary, Thai, Vick, Wylie and Young.

**Staff:** Tracey Taylor (786-7152).

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

## **Background:**

### Retail Sales and Use Tax.

Retail sales taxes are imposed on retail sales of most articles of tangible personal property, digital products, and some services. A retail sale is a sale to the final consumer or end user of the property, digital product, or service. If retail sales taxes were not collected when the user acquired the property, digital products, or services, then use tax applies to the value of property, digital product, or service when used in this state. The state, all counties, and all cities levy retail sales and use taxes. The state sales and use tax rate is 6.5 percent; local sales and use tax rates vary from 0.5 percent to 4.0 percent, depending on the location.

When determining use tax on tangible personal property, the value of the article shall be determined based on the first act within the state by which the taxpayer takes or assumes dominion or control over the article. The value includes installation, storage, distribution, or any other act preparatory to subsequent use or consumption within the state.

Tangible personal property incorporated as an ingredient or component of public road construction used by the taxpayer is subject to use tax. The method to determine the value of these components is the value of external sales. There are five factors used to determine if the value of these components can be determined by the proceeds from other sales by the taxpayer:

1. sales at comparable locations;
2. products of like quality and character;
3. comparable conditions of sale;
4. comparable purchasers; and
5. similar quantities.

In the absence of sales of similar products as a guide to value, the value may be determined using a cost basis.

### Business & Occupation Tax.

Washington's major business tax is the business and occupation (B&O) tax. The B&O tax is imposed on the gross receipts of business activities conducted within the state, without any deduction for the costs of doing business. Businesses must pay the B&O tax even though they may not have any profits or may be operating at a loss.

A taxpayer may have more than one B&O tax rate, depending on the types of activities conducted. Major B&O tax rates are 0.471 percent for retailing; 0.484 percent for manufacturing, wholesaling, and extracting; and 1.5 percent (businesses with taxable income of less than \$1 million) or 1.75 percent (businesses with taxable income of \$1 million or more) for services and for activities not classified elsewhere. Several preferential rates also apply to specific business activities.

The value of products for the purposes of imposing the B&O tax is the gross proceeds from

the sale received from the purchaser, except where the products are extracted or manufactured for commercial or industrial use, or where the products are transferred out of state. The value must correspond to the gross proceeds from sales of similar products of like quality and character by other taxpayers.

Consumer.

To determine if a sale at retail or wholesale has occurred, it must be determined who is the consumer in the transaction. A consumer is any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business. A consumer also includes any person engaged in the business of contracting for the building, repairing, or improving of any street or similar public infrastructure which is owned by a government or municipal corporation and which is to be used for foot or vehicle traffic, in respect to tangible personal property when such person incorporates such property as an ingredient or component of such publicly owned public infrastructure by installing, placing, or spreading the property in or upon the site.

Tangible personal property is personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses.

**Summary of Bill:**

The method for calculating tangible personal property incorporated into public infrastructure projects is codified. When calculating use tax, the cost-basis method shall be used to determine the value of tangible personal property incorporated as an ingredient or component to a public infrastructure project by a person meeting the definition of "consumer" where there is no purchase price. The value will include all direct and indirect overhead costs. This applies to articles of tangible personal property incorporated as an ingredient or component of a publicly owned street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle by installing, placing, or spreading the property in or upon the right-of-way of such street, place, road, highway, easement, bridge, tunnel, or trestle, or in or upon the site of such public mass transportation terminal or parking facility.

If the article of tangible personal property has a purchase price, the value of the article when the taxpayer takes control over the article will continue to be used to calculate use tax.

This also applies in determining the B&O taxes on the value of products used in public road construction for persons engaged in such public road construction.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the

bill is passed.

**Staff Summary of Public Testimony:**

(In support) This legislation clarifies the calculation of the use tax and the B&O tax for paving and construction companies that manufacture and use their asphalt in public infrastructure projects. Under current law, if there are no comparable sales, the cost-basis method can be used. Due to a recent change in interpretation of the law by the Department of Revenue, these taxpayers were directed to use a comparable sales method instead of the method that had been used for decades. In order to use a "comparable sale," the sale must meet all five of the statutory criteria. That is extremely difficult. There are no comparable sales to the large asphalt used in public infrastructure projects such as roads. This legislation is not designed to give a class of taxpayer special treatment, but to ensure easy, consistent, and accurate calculation of taxes.

(Opposed) This legislation contravenes good tax policy and benefits a small group with special treatment. When this issue was litigated, it was determined that there were comparable sales. This would complicate the tax code, cause inequities, and encourage other tax preferences to be sought. There should only be comprehensive and holistic changes to the tax code.

**Persons Testifying:** (In support) Representative Sharon Wylie, prime sponsor; Lisa Thatcher, Miles Resources; Dave Gent, Washington Asphalt Pavement Association; Dax Woolston, Lakeside Industries; and Wes Plummer, ICON Materials.

(Opposed) Steve Ewing, Department of Revenue.

**Persons Signed In To Testify But Not Testifying:** None.