

WAC 458-20-211 Leases or rentals of tangible personal property, bailments.

(1) **Introduction.** This section explains how persons are taxable who rent or lease tangible personal property or rent equipment with an operator. It explains that some activities performed by operated equipment may be taxable under classifications other than retail sales if the operator and equipment perform activities as a prime contractor or subcontractor and these activities are specifically classified under other tax classifications by the revenue act. Readers may want to refer to rules in the following list:

- (a) WAC 458-20-102 Reseller permits.
- (b) WAC 458-20-13501 Timber harvest operations.
- (c) WAC 458-20-170 Constructing and repairing of new or existing buildings or other structures upon real property.
- (d) WAC 458-20-17001 Government contracting—Construction, installations, or improvements to government real property.
- (e) WAC 458-20-171 Building, repairing or improving streets, roads, etc., which are owned by a municipal corporation or political subdivision of the state or by the United States and which are used primarily for foot or vehicular traffic.
- (f) WAC 458-20-180 Motor carriers.
- (g) WAC 458-20-198 Installment sales, method of reporting.
- (h) WAC 458-20-209 Farming for hire and horticultural services performed for farmers.

(2) **Definitions.**

(a) The terms "leasing" and "renting" are used interchangeably and refer generally to the act of granting to another the right of possession to and use of tangible personal property for a consideration. When "lease," "leasing," "lessee," or "lessor" are used in this section, these terms are intended to include rentals as well, even if not specifically stated.

Persons may not claim to be leasing or renting equipment to themselves since they are not granting to another the right of possession.

(b) The term "bailment" refers to the act of granting to another the temporary right of possession to and use of tangible personal property for a stated purpose without consideration to the grantor.

(c) The term "subcontractor" refers to a person who has entered into a contract for the performance of an act with the person who has already contracted for its performance. A subcontractor is generally responsible for performing the work to contract specification and determines how the work will be performed. In purchasing subcontract services, the customer is primarily purchasing the knowledge, skills, and expertise of the contractor to perform the task, as distinguished from the operation of the equipment.

(d) The term "rental of equipment with operator" means the provision of equipment with an operator to a lessee to perform work under the specific direction of the lessee. In such cases the lessor is generally not responsible for performing work to contract specification and does not determine how the work will be performed.

(e) (i) The term "true object test" as it relates to this section means the analysis of a transaction involving the rental of equipment with an operator, to determine if the lessee is simply purchasing the use of the equipment or purchasing the knowledge, skills, and expertise of the operator beyond those needed to operate the equipment. Even if it is determined that the customer is purchasing the knowledge, skills, and expertise of the operator, the transaction may still be a retail sale if the activity is specifically included by statute

within the definition of a retail sale. This test can also be applied to rentals of tangible personal property without an operator, where the lessor performs some service in connection with the rental property. See examples 5 and 6.

(ii) The "true object test" described in this section is distinguished from the "true object test" described in RCW 82.08.190 for bundled transactions of two or more products. See example 15.

(iii) The "true object test" described in this section is also distinguished from transactions involving two or more products where one or more of the products is real property or a service to real property. See example 10.

(f) The term "true lease" (often referred to as an "operating lease") refers to the act of leasing property to another for consideration with the property under the dominion and control of the lessee for the term of the lease with the intent that the property will revert back to the lessor at the conclusion of the lease.

(g) The term "financing lease" (often referred to as a "capital lease") typically involves the lease of property for a stated period of time with ownership transferring to the "lessee" at the conclusion of the lease for a nominal or minimal payment. The transaction is structured as a lease, but retains some elements of an installment sale. Financing leases will generally be taxed as if they are installment sales. The presence of some or all of the following factors indicates a financing lease with the transaction treated as an installment sale:

(i) The lessee is given an option to purchase the equipment, and, if so, the option price is nominal (sometimes referred to as a "bargain purchase option");

(ii) The lessee acquires equity in the equipment;

(iii) The lessee is required to bear the entire risk of loss;

(iv) The lessee pays all the charges and taxes imposed on ownership;

(v) There is a provision for acceleration of rent payments; and

(vi) The property was purchased specifically for lease to this lessee.

(3) A true lease, rental, or bailment of personal property does not arise unless the lessee or bailee, or employees or independent operators hired by the lessee or bailee actually takes possession of the property and exercises dominion and control over it. Where the owner/lessor of the equipment or the owner's/lessor's employees or agents maintain dominion and control over the personal property and actually operate it, the owner/lessor has not generally relinquished sufficient control over the property to give rise to a true lease, rental, or bailment of the property.

(4) (a) RCW 82.04.050 excludes from the definition "retail sale" any purchases for the purpose of resale, "as tangible personal property." Persons who use equipment in performing services either as prime contractors or as subcontractors are not purchasing the equipment for purposes of reselling the equipment as tangible personal property. These contractors must pay retail sales tax or use tax at the time the equipment is acquired and are not eligible to use a reseller permit for the purchase.

(b) Persons renting operated equipment to others may purchase the equipment without payment of retail sales tax only when the equipment is rented as tangible personal property. This can be demonstrated only when:

(i) The agreement between the parties is designated as an outright lease or rental, without reservations; and

(ii) The lessee acquires the right of possession, dominion, and control of the equipment, even to the exclusion of the lessor.

This last requirement is a factual question and the burden of proof is upon the owner/operator of the equipment to establish that the degree of control has been relinquished necessary to constitute a lessor-lessee relationship. Weight will be given to such factors as who has physical, operating control of the equipment; who is responsible for its maintenance, fueling, repair, storage, insurance (risk of loss or damage), safety and security of operation, and whether the operator is a loaned employee. If control of these factors is left with the owner/operator, then as a matter of fact, there has not been a relinquishing of control of the equipment to the degree necessary to create a lessor-lessee relationship for the rental of tangible personal property. This is true, even though the customer exercises some constructive control over such matters as when and where the equipment is used in connection with the construction work being performed, i.e., the contractor controls the job site.

(5) Business and occupation (B&O) tax.

(a) Outright rentals of bare (unoperated) equipment or other tangible personal property as well as leases of operated equipment are generally subject to the retailing B&O tax.

(i) When a lessor purchases equipment for bare rental or lease, the seller of the equipment is making a wholesale sale to the lessor and is required to obtain a reseller permit from the lessor to document the wholesale nature of any sale, as provided in WAC 458-20-102 (Reseller permits).

(ii) Under unique circumstances when equipment is rented by a lessee for use as a rental to other lessees without intervening use, the original rental is subject to wholesaling B&O tax and the subsequent rental is subject to the retailing B&O tax. The original seller is required to obtain a reseller permit (WAC 458-20-102) to substantiate the wholesale nature of the transaction.

(iii) Persons who purchase equipment for use as prime contractors or subcontractors are considered consumers of the equipment, as the contractor, not their customers, actually use the equipment. Sales of equipment and tools to prime contractors and subcontractors are generally subject to retailing B&O tax, unless purchased for resale without any use on the part of the purchaser.

(b) Persons who provide equipment or other tangible personal property and, in addition, operate the equipment or supply an employee to operate the same for a charge, without relinquishing substantial dominion and control to the customer, are providing a service that is classified as a retail sale unless the nature of the activity is specifically classified under another tax classification. Where a specific tax classification applies to the activity, the income is subject to B&O tax (or public utility tax (PUT)) according to the classification of the activities performed by the equipment operator. In the case of building construction, it is presumed that the rental of equipment with an operator to a contractor is a retail sale unless the operator is responsible for performing construction to contract specifications and assumes control over how the work will be performed.

(c) Under some circumstances, the rental or lease of tangible personal property is subject to the "retailing of interstate transportation equipment" B&O tax classification. This classification applies if the sale is exempt from retail sales tax because of the specific

tax exemptions provided in RCW 82.08.0261, 82.08.0262, or 82.08.0263. These exemptions apply primarily to sales to private or common carriers who are engaged in interstate or foreign commerce.

(6) **Retail sales tax.** Persons who rent or lease tangible personal property to consumers are required to collect retail sales tax measured by the selling price of the rentals as of the time the rental payments become due. See RCW 82.08.010.

(a) RCW 82.04.050 excludes from the definition of the term "retail sale," purchases for the purpose of resale in the regular course of business without intervening use "as tangible personal property." Thus, the retail sales tax does not apply to sales of tangible personal property to persons who purchase the same solely for the purpose of renting or leasing such property without operators in the regular course of business. However, the retail sales tax applies upon sales to persons who provide such property with operators for a charge, without relinquishing substantial dominion and control, or who intend to make some use of the property other than or in addition to renting or leasing it.

(b) For state tax purposes, financing leases are treated as installment sales. The retail sales tax applies to the full selling price. Refer to WAC 458-20-198.

(7) **Use tax or deferred retail sales tax.** Consumers who rent or lease tangible personal property from others and who have not paid retail sales tax to their lessors are liable for retail sales tax or use tax on the amount of the rental payments as of the time the payments fall due unless an exemption from the tax applies. In cases where rental payments do not represent a reasonable rental value for the article, the taxable value shall be determined according to the rental charges made by other sellers of similar articles of like quality and character. This may include using the rate of return as a percentage of the capitalized value that lessors of the particular type of property are generally using in rate setting.

In some cases, lessors may lease articles wherein the lease payments do not include property taxes or insurance. These leases are often referred to as "net leases" with the insurance and property taxes paid directly by the lessee. If the lessor is the party insured and the party legally liable for payment of the taxes, the payments made directly by the lessee must be treated as additional consideration to the lessor and subject to retailing B&O tax and retail sales tax.

(a) Bailment. The value of tangible personal property held or used under bailment is subject to use tax if the property was purchased or acquired under conditions whereby the retail sales tax was not paid by the bailor. Tax liability is that of the bailor, or of the bailee if the bailor has not paid the tax. The measure of the use tax to the bailor is the fair market value of the article at the time the article was first put to use in Washington. The measure of the use tax to the bailee for articles acquired by bailment is the reasonable rental value, determined as nearly as possible according to the rental price at the place of use of similar products of like quality and character. In the absence of rental prices for similar products, the reasonable rental value may be computed by prorating the retail selling price over the period of possession by a bailee and payable in monthly installments. No further use tax is due upon property acquired by bailment after use tax has been paid by the bailee or any previous bailee upon the full original value of the article.

(b) Use tax does not apply to use by a bailee of any article of tangible personal property which is entirely consumed in the course of

research, development, experimental, and testing activities conducted by the user, providing the acquisition or use of such articles by the bailor are exempt from retail sales tax or use tax. (RCW 82.12.0265.)

(8) **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. In some situations it may be difficult to determine if the transaction is a retail equipment rental with operator. If in doubt as to whether a particular rental with an operator is a retail sale, taxpayers should contact the department for a tax ruling.

Example 1. ABC Contracting, Inc. (prime contractor) is hired by XYZ Property Rentals, Inc. (end consumer) to construct a retail shopping complex, including construction of an on-site parking lot adjacent to the shopping complex. ABC hires DEF Subcontracting, Inc. (subcontractor) to pave the parking lot. DEF will use its own equipment to complete the project, including equipment to pour, roll, and level the asphalt. As part of its contract with ABC, DEF is liable for meeting the contractual specifications set by XYZ (end consumer). At the time of purchase, ABC provides DEF with a reseller permit in lieu of paying retail sales tax.

In this scenario, DEF's business activity is classified as a construction service, rather than a rental of equipment with an operator, the charges for which are subject to wholesaling B&O tax, as construction services are eligible for resale in this case. This conclusion is supported by the fact that DEF is responsible for the actual performance of the construction activities, not merely the provision of equipment with an operator, which might also include services limited solely to the operation of the equipment.

Example 2. ABC Contracting, Inc. (prime contractor) enters into a contract with the city of Olympia, Washington, to construct a publicly owned road to specification. The contract includes separately stated charges for ABC's use of its own equipment and equipment operators to construct the publicly owned road. ABC's activities are assumed to meet the requirements of the public road construction B&O tax classification.

In this scenario, ABC's business activity is classified as a public road construction service, the charges for which, including charges for equipment and operators, are subject to the public road construction B&O tax. Additionally, ABC may be subject to deferred retail sales or use tax, if it has not previously reported and paid retail sales or use tax on its purchase of the equipment used to provide the public road construction services at issue in this scenario.

Example 3. GHI Crane Operators, Inc. is hired by UVW Terminal, Inc. to load storage containers onto a vessel. Under the terms of its contract with UVW, GHI will use its own crane and operator to load the storage containers onto the vessel. Additionally, GHI will use its own discretion in properly loading the vessel according to its experience in stevedoring. GHI's activities are assumed to meet the requirements of the stevedoring B&O tax classification.

In this scenario, GHI's business activity is classified as a stevedoring service, the charges for which are subject to stevedoring B&O tax. Additionally, GHI may be subject to deferred retail sales tax or use tax, if it has not previously reported and paid tax on its purchase of the crane used to provide stevedoring services.

Example 4. JKL Trucking, Inc. contracts with MNO Builders, Inc. to lease to MNO several motor carrier vehicles that are operated by

JKL employees. The vehicles are used to haul construction materials from MNO's headquarters in Yakima, Washington, to a construction site in Vancouver, Washington, over state highways. JKL's activities are assumed to meet the requirements of the motor transportation PUT classification.

In this scenario, JKL's business activity is classified as a motor transportation service, the charges for which are subject to motor transportation PUT.

Example 5. ZYX Construction Co. contracts with WVU Rental Co. for the rental of scaffolding. WVU's technicians set up, move, and dismantle the equipment. After assembly, ZYX assumes dominion and control over the use of the scaffolding until it is dismantled by WVU upon conclusion of the construction project.

In this scenario, WVU's business activity is classified as a rental of tangible personal property without an operator, the charges for which are subject to retailing B&O and retail sales tax. As the consumer of the scaffolding, ZYX is not eligible to use a reseller permit in lieu of paying retail sales tax.

Example 6. ABC Crane Co. is hired by DEF Builders Co. to supply a crane and operator to lift air conditioning equipment from the ground and hold it in place on the roof of a six-story building while DEF employees bolt the unit down. ABC's operator will retain control over the crane. ABC has no responsibility to attach wiring, plumbing, or otherwise make the unit operational.

In this scenario, ABC's business activity is classified as a rental of equipment with an operator, the charges for which are subject to retailing B&O and retail sales tax. RCW 82.04.050(9). This is demonstrated by the fact that ABC is not responsible for the performance of any services, other than those necessary to operate the crane.

Additionally, ABC may be subject to retail sales tax or use tax on its use of the crane, if it has not already paid the tax at the time ABC initially acquired or used the crane in Washington.

Example 7. ABC Crane Co. (ABC) is hired by DEF Builders Co. (DEF), the prime contractor, to install a neon sign on the side of a new six-story building DEF is constructing. At the time of purchase, DEF provides ABC with a reseller permit in lieu of paying retail sales tax. ABC is responsible for making certain that the sign is correctly fastened to the side of the building and in accordance with the contract specifications established between DEF and the property owner.

In this scenario, ABC's business activity is classified as a construction service, the charges for which are generally subject to retailing B&O and retail sales tax. RCW 82.04.050(2). However, in this scenario the charges are subject to wholesaling B&O tax, as construction services are eligible for resale, and ABC received a reseller permit from DEF, who is reselling construction services to the property owner.

Example 8. ABC Crane Co. is an Oregon business. ABC purchases a crane in Oregon for \$75,000, which it will rent to customers. ABC's employees will operate the crane and ABC will retain dominion and control over the crane at all times. In the first two years following ABC's purchase of the crane, all rentals occur in Oregon. In the third year, ABC moves its operations to Washington, and begins renting the crane with an operator to Washington customers.

In this scenario, ABC owes use tax upon its first use of the crane as a consumer. This occurred in the third year of ownership when ABC first used the crane as a consumer in Washington. The measure of the tax is the retail market value of the crane at the time ABC puts

it to use. At that time, the comparable retail value of the crane is determined to be \$50,000, which is the measure of the use tax.

Example 9. DEF Builders Co. (prime contractor) is hired to construct an apartment complex. DEF is performing a significant portion of the construction services associated with the project on its own behalf, including construction of the building's foundation. After constructing forms for the apartment's foundation, DEF contracts with XYZ Concrete Co. to pump premixed concrete from a ready mix truck (located at the construction site) into the forms. XYZ operates its own pumping equipment, however, DEF controls the flow and placement of the concrete, directing XYZ's operator to start and stop the pump. The premixed concrete is not provided by XYZ. DEF is responsible for finishing the concrete.

In this scenario, XYZ is providing stand-alone concrete pumping services, and its business activity is classified as a rental of equipment with an operator, the charges for which are subject to retailing B&O and retail sales tax. Additionally, XYZ's activity is not eligible for resale, as DEF is considered the consumer of the operated rental equipment.

Example 10. DEF Builders Co. (prime contractor) is hired to construct an apartment complex. DEF is performing a significant portion of the construction services associated with the project on its own behalf, including construction of the building's foundation. After constructing forms for the apartment's foundation, DEF contracts with XYZ Concrete Co. to provide premixed concrete and to pump for the pour. XYZ operates its own pumping equipment, however, DEF controls the flow and placement of the concrete, directing XYZ's operator to start and stop the pump. At the time of its purchase, DEF provides XYZ with a reseller permit in lieu of paying retail sales tax.

In this scenario, where the taxpayer is providing both the concrete materials and the concrete pumping equipment and pumping services, XYZ's activity is classified according to subsection (2)(e)(iii) of this rule. In this case, the transaction's true object (or primary purpose) is the sale of premixed concrete. The sale of tangible personal property (concrete) for resale is subject to wholesaling B&O tax.

Example 11. DEF Builders Co. (prime contractor) is hired to construct an apartment complex. DEF hires subcontractors to perform a significant portion of the construction services associated with the project, including construction of the building's foundation. DEF contracts with XYZ Concrete Co. to pour and finish the building's concrete foundation, including construction of forms to pour the foundation. XYZ operates its own pumping equipment, in addition to providing on-site contractors who will manage the flow and placement of the pumped concrete. After the pour, XYZ is responsible for finishing the concrete. XYZ's contract with DEF requires the finished foundation meet the contract specifications entered into between DEF and its customer, the building owner.

In this scenario, XYZ's business activity is classified as the sale of subcontracted construction services, the charges for which are subject to wholesaling B&O tax, provided XYZ received a reseller permit from DEF.

Example 12. Farm Services, Inc. specializes in the cutting and baling of hay for farmers. Farm Services contracts with PQR Farms, Inc. (farmer) to cut and bale PQR's hay. The hay, after being cut and baled, is sold by PQR.

In this instance, Farm Services' business activity is a farming for hire service, the proceeds from which are subject to service and other business activities B&O tax. See WAC 458-20-209.

Example 13. Helicopter, Inc. contracts with Logs, Inc. to move logs from where they have been cut in the woods to a landing approximately one mile away where the logs will be sorted, loaded on trucks, and transported to a mill. Total control over the helicopter operation rests with Helicopter, Inc.

In this scenario, Helicopter, Inc.'s business activity is classified as an extracting for hire service, the proceeds from which are subject to extracting for hire B&O tax. This is not a rental of equipment with an operator, nor is it considered as an air transportation service as the activity is directly part of the timber extracting and harvesting activity. See WAC 458-20-13501.

Example 14. ABC Sound Productions Co. contracts with DEF Entertainers, Inc. (entertainment promoter) to provide lighting, amplifying equipment, and speakers for a performance run and operated by DEF. As part of its contract with DEF, ABC's employees operate all of the equipment provided. DEF will oversee and direct the operators as to the specific use of the equipment.

In this scenario, ABC's business activity is classified as a rental of equipment with an operator, the proceeds from which are subject to retailing B&O tax and retail sales tax. In applying the true object test, DEF is primarily purchasing the use of lighting and sound equipment. DEF maintains the authority to specify the color, location, and degree of lighting and also changes and modifications to the level of sound amplification during the performance. ABC's services are solely limited to the operation of the equipment itself.

Example 15. Fun Snacks, LLC is in the business of renting popcorn and cotton candy machines with an operator. Fun Snacks does not sell cotton candy or popcorn to individual customers attending an event, but rather charges a flat rate to event organizers in which attendees of the event consume either product for no additional charge. Fun Snacks is hired by Little Farm, Inc. to provide a cotton candy machine with an operator for a fall festival organized and operated by Little Farm. Little Farm staff will operate concessions at the event and will oversee the flavor and quantity of cotton candy made by the operator of the machine. Fun Snacks charges a flat rate of \$500 to Little Farm which includes the rental equipment, operator, and cotton candy ingredients and supplies.

In this scenario, Fun Snacks is selling a bundled transaction, subject to the "true object test" contemplated in RCW 82.08.190. Because one or more of the products included in the transaction are subject to retail sales tax, the rental of equipment with an operator and cotton candy ingredients and supplies, the total charge of \$500 is subject to retailing B&O tax and retail sales tax.

Example 16. John Doe purchases a vessel that he will rent to others as a bare boat rental. The rentals will be arranged through an agent at GHI Marina. GHI receives a commission based on any usage of the vessel, including usage by John Doe. The rental of the boat is a retail sale when the boat is rented to others. The usage of the boat by John Doe is not a rental. Since John Doe will be using the boat at times for his own use, he may not purchase the boat for resale. As a result, John Doe is subject to retail sales tax or use tax on his initial acquisition or use of the vessel in Washington.

[Statutory Authority: RCW 82.01.060(2) and 82.32.300. WSR 21-07-140, § 458-20-211, filed 3/24/21, effective 4/24/21. 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, § 458-20-211, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300 and 82.08.010(1). WSR 96-03-139, § 458-20-211, filed 1/24/96, effective 2/24/96. Statutory Authority: RCW 82.32.300. WSR 87-17-015 (Order 87-4), § 458-20-211, filed 8/11/87; WSR 83-08-026 (Order ET 83-1), § 458-20-211, filed 3/30/83; Order ET 71-1, § 458-20-211, filed 7/22/71; Order ET 70-3, § 458-20-211 (Rule 211), filed 5/29/70, effective 7/1/70.]