

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE SENATE BILL 6470

Chapter 332, Laws of 1998
(partial veto)

55th Legislature
1998 Regular Session

CANNED AND CUSTOM SOFTWARE--TAX TREATMENT

EFFECTIVE DATE: 7/1/98

Passed by the Senate March 12, 1998
YEAS 49 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House March 12, 1998
YEAS 98 NAYS 0

CLYDE BALLARD

**Speaker of the
House of Representatives**

Approved April 3, 1998, with the
exception of section 8, which is
vetoed.

GARY LOCKE

Governor of the State of Washington

CERTIFICATE

I, Mike O Connell, Secretary of the
Senate of the State of Washington, do
hereby certify that the attached is
ENGROSSED SUBSTITUTE SENATE BILL 6470
as passed by the Senate and the House
of Representatives on the dates hereon
set forth.

MIKE O'CONNELL

Secretary

FILED

April 3, 1998 - 3:09 p.m.

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE SENATE BILL 6470

Passed Legislature - 1998 Regular Session

State of Washington 55th Legislature 1998 Regular Session

By Senate Committee on Ways & Means (originally sponsored by Senators West, Anderson, Kohl, Snyder, Loveland, Fairley, T. Sheldon and Jacobsen; by request of Governor Locke)

Read first time 02/06/98.

1 AN ACT Relating to the tax treatment of canned and custom software;
2 amending RCW 82.04.050, 82.04.060, and 82.12.020; reenacting and
3 amending RCW 82.04.190; adding new sections to chapter 82.04 RCW;
4 creating a new section; and providing an effective date.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The legislature finds that the creation and
7 customization of software is an area not fully addressed in our excise
8 tax statutes, and that certainty of tax treatment is essential to the
9 industry and consumers. Therefore, the intent of this act is to make
10 the tax treatment of software clear and certain for developers,
11 programmers, and consumers.

12 **Sec. 2.** RCW 82.04.050 and 1997 c 127 s 1 are each amended to read
13 as follows:

14 (1) "Sale at retail" or "retail sale" means every sale of tangible
15 personal property (including articles produced, fabricated, or
16 imprinted) to all persons irrespective of the nature of their business
17 and including, among others, without limiting the scope hereof, persons
18 who install, repair, clean, alter, improve, construct, or decorate real

1 or personal property of or for consumers other than a sale to a person
2 who presents a resale certificate under RCW 82.04.470 and who:

3 (a) Purchases for the purpose of resale as tangible personal
4 property in the regular course of business without intervening use by
5 such person; or

6 (b) Installs, repairs, cleans, alters, imprints, improves,
7 constructs, or decorates real or personal property of or for consumers,
8 if such tangible personal property becomes an ingredient or component
9 of such real or personal property without intervening use by such
10 person; or

11 (c) Purchases for the purpose of consuming the property purchased
12 in producing for sale a new article of tangible personal property or
13 substance, of which such property becomes an ingredient or component or
14 is a chemical used in processing, when the primary purpose of such
15 chemical is to create a chemical reaction directly through contact with
16 an ingredient of a new article being produced for sale; or

17 (d) Purchases for the purpose of consuming the property purchased
18 in producing ferrosilicon which is subsequently used in producing
19 magnesium for sale, if the primary purpose of such property is to
20 create a chemical reaction directly through contact with an ingredient
21 of ferrosilicon; or

22 (e) Purchases for the purpose of providing the property to
23 consumers as part of competitive telephone service, as defined in RCW
24 82.04.065. The term shall include every sale of tangible personal
25 property which is used or consumed or to be used or consumed in the
26 performance of any activity classified as a "sale at retail" or "retail
27 sale" even though such property is resold or utilized as provided in
28 (a), (b), (c), (d), or (e) of this subsection following such use. The
29 term also means every sale of tangible personal property to persons
30 engaged in any business which is taxable under RCW 82.04.280 (2) and
31 (7) and 82.04.290.

32 (2) The term "sale at retail" or "retail sale" shall include the
33 sale of or charge made for tangible personal property consumed and/or
34 for labor and services rendered in respect to the following:

35 (a) The installing, repairing, cleaning, altering, imprinting, or
36 improving of tangible personal property of or for consumers, including
37 charges made for the mere use of facilities in respect thereto, but
38 excluding sales of laundry service to members by nonprofit associations

1 composed exclusively of nonprofit hospitals, and excluding services
2 rendered in respect to live animals, birds and insects;

3 (b) The constructing, repairing, decorating, or improving of new or
4 existing buildings or other structures under, upon, or above real
5 property of or for consumers, including the installing or attaching of
6 any article of tangible personal property therein or thereto, whether
7 or not such personal property becomes a part of the realty by virtue of
8 installation, and shall also include the sale of services or charges
9 made for the clearing of land and the moving of earth excepting the
10 mere leveling of land used in commercial farming or agriculture;

11 (c) The charge for labor and services rendered in respect to
12 constructing, repairing, or improving any structure upon, above, or
13 under any real property owned by an owner who conveys the property by
14 title, possession, or any other means to the person performing such
15 construction, repair, or improvement for the purpose of performing such
16 construction, repair, or improvement and the property is then
17 reconveyed by title, possession, or any other means to the original
18 owner;

19 (d) The sale of or charge made for labor and services rendered in
20 respect to the cleaning, fumigating, razing or moving of existing
21 buildings or structures, but shall not include the charge made for
22 janitorial services; and for purposes of this section the term
23 "janitorial services" shall mean those cleaning and caretaking services
24 ordinarily performed by commercial janitor service businesses
25 including, but not limited to, wall and window washing, floor cleaning
26 and waxing, and the cleaning in place of rugs, drapes and upholstery.
27 The term "janitorial services" does not include painting, papering,
28 repairing, furnace or septic tank cleaning, snow removal or
29 sandblasting;

30 (e) The sale of or charge made for labor and services rendered in
31 respect to automobile towing and similar automotive transportation
32 services, but not in respect to those required to report and pay taxes
33 under chapter 82.16 RCW;

34 (f) The sale of and charge made for the furnishing of lodging and
35 all other services by a hotel, rooming house, tourist court, motel,
36 trailer camp, and the granting of any similar license to use real
37 property, as distinguished from the renting or leasing of real
38 property, and it shall be presumed that the occupancy of real property

1 for a continuous period of one month or more constitutes a rental or
2 lease of real property and not a mere license to use or enjoy the same;

3 (g) The sale of or charge made for tangible personal property,
4 labor and services to persons taxable under (a), (b), (c), (d), (e),
5 and (f) of this subsection when such sales or charges are for property,
6 labor and services which are used or consumed in whole or in part by
7 such persons in the performance of any activity defined as a "sale at
8 retail" or "retail sale" even though such property, labor and services
9 may be resold after such use or consumption. Nothing contained in this
10 subsection shall be construed to modify subsection (1) of this section
11 and nothing contained in subsection (1) of this section shall be
12 construed to modify this subsection.

13 (3) The term "sale at retail" or "retail sale" shall include the
14 sale of or charge made for personal, business, or professional services
15 including amounts designated as interest, rents, fees, admission, and
16 other service emoluments however designated, received by persons
17 engaging in the following business activities:

18 (a) Amusement and recreation services including but not limited to
19 golf, pool, billiards, skating, bowling, ski lifts and tows, day trips
20 for sightseeing purposes, and others, when provided to consumers;

21 (b) Abstract, title insurance, and escrow services;

22 (c) Credit bureau services;

23 (d) Automobile parking and storage garage services;

24 (e) Landscape maintenance and horticultural services but excluding
25 (i) horticultural services provided to farmers and (ii) pruning,
26 trimming, repairing, removing, and clearing of trees and brush near
27 electric transmission or distribution lines or equipment, if performed
28 by or at the direction of an electric utility;

29 (f) Service charges associated with tickets to professional
30 sporting events; and

31 (g) The following personal services: Physical fitness services,
32 tanning salon services, tattoo parlor services, steam bath services,
33 turkish bath services, escort services, and dating services.

34 (4) The term shall also include the renting or leasing of tangible
35 personal property to consumers and the rental of equipment with an
36 operator.

37 (5) The term shall also include the providing of telephone service,
38 as defined in RCW 82.04.065, to consumers.

1 (6) The term shall also include the sale of canned software other
2 than a sale to a person who presents a resale certificate under RCW
3 82.04.470, regardless of the method of delivery to the end user, but
4 shall not include custom software or the customization of canned
5 software.

6 (7) The term shall not include the sale of or charge made for labor
7 and services rendered in respect to the building, repairing, or
8 improving of any street, place, road, highway, easement, right of way,
9 mass public transportation terminal or parking facility, bridge,
10 tunnel, or trestle which is owned by a municipal corporation or
11 political subdivision of the state or by the United States and which is
12 used or to be used primarily for foot or vehicular traffic including
13 mass transportation vehicles of any kind.

14 (~~(7)~~) (8) The term shall also not include sales of chemical
15 sprays or washes to persons for the purpose of postharvest treatment of
16 fruit for the prevention of scald, fungus, mold, or decay, nor shall it
17 include sales of feed, seed, seedlings, fertilizer, agents for enhanced
18 pollination including insects such as bees, and spray materials to:
19 (a) Persons who participate in the federal conservation reserve
20 program, the environmental quality incentives program, the wetlands
21 reserve program, and the wildlife habitat incentives program, or their
22 successors administered by the United States department of agriculture;
23 (b) farmers for the purpose of producing for sale any agricultural
24 product; and (c) farmers acting under cooperative habitat development
25 or access contracts with an organization exempt from federal income tax
26 under 26 U.S.C. Sec. 501(c)(3) or the Washington state department of
27 fish and wildlife to produce or improve wildlife habitat on land that
28 the farmer owns or leases.

29 (~~(8)~~) (9) The term shall not include the sale of or charge made
30 for labor and services rendered in respect to the constructing,
31 repairing, decorating, or improving of new or existing buildings or
32 other structures under, upon, or above real property of or for the
33 United States, any instrumentality thereof, or a county or city housing
34 authority created pursuant to chapter 35.82 RCW, including the
35 installing, or attaching of any article of tangible personal property
36 therein or thereto, whether or not such personal property becomes a
37 part of the realty by virtue of installation. Nor shall the term
38 include the sale of services or charges made for the clearing of land
39 and the moving of earth of or for the United States, any

1 instrumentality thereof, or a county or city housing authority. Nor
2 shall the term include the sale of services or charges made for
3 cleaning up for the United States, or its instrumentalities,
4 radioactive waste and other byproducts of weapons production and
5 nuclear research and development.

6 NEW SECTION. **Sec. 3.** A new section is added to chapter 82.04 RCW,
7 to be codified between RCW 82.04.020 and 82.04.220, to read as follows:

8 (1) "Canned software" means software that is created for sale to
9 more than one person.

10 (2) "Custom software" means software created for a single person.

11 (3) "Customization of canned software" means any alteration,
12 modification, or development of applications using or incorporating
13 canned computer software for a specific person. "Customization of
14 canned software" includes individualized configuration of software to
15 work with other software and computer hardware but does not include
16 routine installation. Customization of canned software does not change
17 the underlying character or taxability of the original canned software.

18 (4) "Master copies" of software means copies of software from which
19 a software developer, author, inventor, publisher, licensor,
20 sublicensor, or distributor makes copies for sale or license.

21 (5) "Retained rights" means any and all rights, including
22 intellectual property rights such as those rights arising from
23 copyrights, patents, and trade secret laws, that are owned or are held
24 under contract or license by a software developer, author, inventor,
25 publisher, licensor, sublicensor, or distributor.

26 (6) "Software" means any information, program, or routine, or any
27 set of one or more programs, routines, or collections of information
28 used, or intended for use, to convey information that causes one or
29 more computers or pieces of computer-related peripheral equipment, or
30 any combination thereof, to perform a task or set of tasks. "Software"
31 includes only those copies of such information, programs, or routines
32 intended for use by an end user and specifically excludes retained
33 rights in software and master copies of software. "Software" includes
34 the associated documentation that describes the code and its use,
35 operation, and maintenance and typically is delivered with the code to
36 the consumer. All software is classified as either canned or custom.

1 NEW SECTION. **Sec. 4.** A new section is added to chapter 82.04 RCW
2 to read as follows:

3 (1) The creation and distribution of custom software is a service
4 taxable under RCW 82.04.290(2). Duplication of the software for the
5 same person, or by the same person for its own use, does not change the
6 character of the software.

7 (2) The customization of canned software is a service taxable under
8 RCW 82.04.290(2).

9 **Sec. 5.** RCW 82.04.060 and 1996 c 148 s 3 are each amended to read
10 as follows:

11 "Sale at wholesale" or "wholesale sale" means: (1) Any sale of
12 tangible personal property((~~7~~)); (2) any sale of amusement or
13 recreation services as defined in RCW 82.04.050(3)(a)((~~7~~)); (3) any
14 sale of canned software; or (4) any sale of telephone service as
15 defined in RCW 82.04.065, which is not a sale at retail and means any
16 charge made for labor and services rendered for persons who are not
17 consumers, in respect to real or personal property, if such charge is
18 expressly defined as a retail sale by RCW 82.04.050 when rendered to or
19 for consumers: PROVIDED, That the term "real or personal property" as
20 used in this section shall not include any natural products named in
21 RCW 82.04.100.

22 **Sec. 6.** RCW 82.04.190 and 1996 c 173 s 2, 1996 c 148 s 4, and 1996
23 c 112 s 2 are each reenacted and amended to read as follows:

24 "Consumer" means the following:

25 (1) Any person who purchases, acquires, owns, holds, or uses any
26 article of tangible personal property irrespective of the nature of the
27 person's business and including, among others, without limiting the
28 scope hereof, persons who install, repair, clean, alter, improve,
29 construct, or decorate real or personal property of or for consumers
30 other than for the purpose (a) of resale as tangible personal property
31 in the regular course of business or (b) of incorporating such property
32 as an ingredient or component of real or personal property when
33 installing, repairing, cleaning, altering, imprinting, improving,
34 constructing, or decorating such real or personal property of or for
35 consumers or (c) of consuming such property in producing for sale a new
36 article of tangible personal property or a new substance, of which such
37 property becomes an ingredient or component or as a chemical used in

1 processing, when the primary purpose of such chemical is to create a
2 chemical reaction directly through contact with an ingredient of a new
3 article being produced for sale or (d) purchases for the purpose of
4 consuming the property purchased in producing ferrosilicon which is
5 subsequently used in producing magnesium for sale, if the primary
6 purpose of such property is to create a chemical reaction directly
7 through contact with an ingredient of ferrosilicon;

8 (2)(a) Any person engaged in any business activity taxable under
9 RCW 82.04.290; (b) any person who purchases, acquires, or uses any
10 telephone service as defined in RCW 82.04.065, other than for resale in
11 the regular course of business; ~~((and))~~ (c) any person who purchases,
12 acquires, or uses any amusement and recreation service defined in RCW
13 82.04.050(3)(a), other than for resale in the regular course of
14 business; and (d) any person who is an end user of software;

15 (3) Any person engaged in the business of contracting for the
16 building, repairing or improving of any street, place, road, highway,
17 easement, right of way, mass public transportation terminal or parking
18 facility, bridge, tunnel, or trestle which is owned by a municipal
19 corporation or political subdivision of the state of Washington or by
20 the United States and which is used or to be used primarily for foot or
21 vehicular traffic including mass transportation vehicles of any kind as
22 defined in RCW 82.04.280, in respect to tangible personal property when
23 such person incorporates such property as an ingredient or component of
24 such publicly owned street, place, road, highway, easement, right of
25 way, mass public transportation terminal or parking facility, bridge,
26 tunnel, or trestle by installing, placing or spreading the property in
27 or upon the right of way of such street, place, road, highway,
28 easement, bridge, tunnel, or trestle or in or upon the site of such
29 mass public transportation terminal or parking facility;

30 (4) Any person who is an owner, lessee or has the right of
31 possession to or an easement in real property which is being
32 constructed, repaired, decorated, improved, or otherwise altered by a
33 person engaged in business, excluding only (a) municipal corporations
34 or political subdivisions of the state in respect to labor and services
35 rendered to their real property which is used or held for public road
36 purposes, and (b) the United States, instrumentalities thereof, and
37 county and city housing authorities created pursuant to chapter 35.82
38 RCW in respect to labor and services rendered to their real property.

1 Nothing contained in this or any other subsection of this definition
2 shall be construed to modify any other definition of "consumer";

3 (5) Any person who is an owner, lessee, or has the right of
4 possession to personal property which is being constructed, repaired,
5 improved, cleaned, imprinted, or otherwise altered by a person engaged
6 in business;

7 (6) Any person engaged in the business of constructing, repairing,
8 decorating, or improving new or existing buildings or other structures
9 under, upon, or above real property of or for the United States, any
10 instrumentality thereof, or a county or city housing authority created
11 pursuant to chapter 35.82 RCW, including the installing or attaching of
12 any article of tangible personal property therein or thereto, whether
13 or not such personal property becomes a part of the realty by virtue of
14 installation; also, any person engaged in the business of clearing land
15 and moving earth of or for the United States, any instrumentality
16 thereof, or a county or city housing authority created pursuant to
17 chapter 35.82 RCW. Any such person shall be a consumer within the
18 meaning of this subsection in respect to tangible personal property
19 incorporated into, installed in, or attached to such building or other
20 structure by such person;

21 (7) Any person who is a lessor of machinery and equipment, the
22 rental of which is exempt from the tax imposed by RCW 82.08.020 under
23 RCW 82.08.02565, with respect to the sale of or charge made for
24 tangible personal property consumed in respect to repairing the
25 machinery and equipment, if the tangible personal property has a useful
26 life of less than one year; and

27 (8) Any person engaged in the business of cleaning up for the
28 United States, or its instrumentalities, radioactive waste and other
29 byproducts of weapons production and nuclear research and development.

30 Nothing contained in this or any other subsection of this
31 definition shall be construed to modify any other definition of
32 "consumer."

33 **Sec. 7.** RCW 82.12.020 and 1996 c 148 s 5 are each amended to read
34 as follows:

35 (1) There is hereby levied and there shall be collected from every
36 person in this state a tax or excise for the privilege of using within
37 this state as a consumer: (a) Any article of tangible personal
38 property purchased at retail, or acquired by lease, gift, repossession,

1 or bailment, or extracted or produced or manufactured by the person so
2 using the same, or otherwise furnished to a person engaged in any
3 business taxable under RCW 82.04.280 (2) or (7)((7)); (b) any canned
4 software, regardless of the method of delivery, but excluding canned
5 software that is either provided free of charge or is provided for
6 temporary use in viewing information, or both; or (c) any amusement or
7 recreation service defined as a retail sale in RCW 82.04.050(3)(a).

8 (2) This tax shall apply to the use of every service defined as a
9 retail sale in RCW 82.04.050(3)(a) and the use of every article of
10 tangible personal property, including property acquired at a casual or
11 isolated sale, and including byproducts used by the manufacturer
12 thereof, except as hereinafter provided, irrespective of whether the
13 article or similar articles are manufactured or are available for
14 purchase within this state.

15 (3) Except as provided in RCW 82.12.0252, payment by one purchaser
16 or user of tangible personal property or service of the tax imposed by
17 chapter 82.08 or 82.12 RCW shall not have the effect of exempting any
18 other purchaser or user of the same property or service from the taxes
19 imposed by such chapters.

20 (4) The tax shall be levied and collected in an amount equal to the
21 value of the article used by the taxpayer multiplied by the rate in
22 effect for the retail sales tax under RCW 82.08.020.

23 ****NEW SECTION. Sec. 8. A new section is added to chapter 82.04 RCW***
24 ***to read as follows:***

25 (1) ***A credit is authorized against the tax otherwise due under this***
26 ***chapter for persons engaged in the business of the creation,***
27 ***distribution, wholesaling, or warehousing of canned or custom software***
28 ***in accordance with the terms of this section.***

29 (2) ***To qualify for the credit, the principal place of business of***
30 ***the person must be located in a distressed county.***

31 (3) ***For taxes payable on income received in the first thirty-six***
32 ***months in which the person is engaged in business in the distressed***
33 ***county, the amount of the credit shall be equal to one hundred percent***
34 ***of the amount of tax otherwise due under this chapter. For taxes***
35 ***payable on income received after the first thirty-six months in which***
36 ***the person is engaged in business in the distressed county, the amount***
37 ***of the credit shall equal ninety percent of the amount of tax otherwise***
38 ***due under this chapter for persons engaged in the business of the***

1 *creation or distribution of canned or custom software and in the amount*
2 *of seventy percent of the amount of tax otherwise due under this*
3 *chapter for persons engaged in the business of the wholesaling or*
4 *warehousing of canned or custom software.*

5 *(4) This section does not apply to the retail distribution or sale*
6 *of canned or custom software.*

7 *(5) As used in this section, "distressed county" means any county*
8 *in which the average level of unemployment for the previous three years*
9 *exceeds the average state unemployment for those years by twenty*
10 *percent.*

11 **Sec. 8 was vetoed. See message at end of chapter.*

12 NEW SECTION. **Sec. 9.** This act takes effect July 1, 1998.

Passed the Senate March 12, 1998.

Passed the House March 12, 1998.

Approved by the Governor April 3, 1998, with the exception of
certain items that were vetoed.

Filed in Office of Secretary of State April 3, 1998.

1 Note: Governor's explanation of partial veto is as follows:

2 "I am returning herewith, without my approval as to section 8,
3 Engrossed Substitute Senate Bill No. 6470 entitled:

4 "AN ACT Relating to the tax treatment of canned and custom
5 software;"

6 Sections 1 through 7 of ESSB 6470 specify that the sale of custom
7 software is the provision of a service, as is the customization of
8 canned software, and is taxable under the service classification of the
9 business and occupation (B&O) tax.

10 Section 8 of this bill would provide a B&O tax credit for software
11 businesses that have their principal place of business in a distressed
12 county. However, the bill as written, would allow a qualifying
13 software company with headquarters in a distressed county to also
14 exempt from the B&O tax all its operations located in a non-distressed
15 county. This could lead to a business establishing only a small office
16 with few employees in the distressed county, defeating the purpose of
17 the legislation. While Section 8 was intended to provide an innovative
18 approach to rural economic development, this language results in a
19 significant tax loophole that will not benefit the citizens of rural
20 distressed counties.

21 I proposed several economic development packages for distressed
22 counties in the 1998 legislative session, and I strongly agree with the
23 concept presented in section 8 of this bill. However, section 8 of
24 this bill would have unintended consequences. I would support a more
25 finely crafted bill.

26 For these reasons, I have vetoed section 8 of Engrossed Substitute
27 Senate Bill No. 6470.

1 With the exception of section 8, Engrossed Substitute Senate Bill
2 No. 6470 is approved."