

WSR 10-05-074
EXPEDITED RULES
DEPARTMENT OF REVENUE

[Filed February 12, 2010, 3:09 p.m.]

Title of Rule and Other Identifying Information: WAC 458-20-121 Sales of heat or steam—Including production by cogeneration, this rule provides tax reporting information for persons who sell heat and/or steam. It also provides information on the use tax liability of persons that produce fuel used to produce heat or steam.

WAC 458-20-134 Commercial or industrial use, this rule discusses the taxability of manufacturers and extractors that are consumers of products or by-products that they themselves have manufactured or extracted.

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 Pat Moses, Tax Policy Specialist, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, e-mail PatM@dor.wa.gov, AND RECEIVED BY April 19, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department proposes to amend these rules to recognize provisions of chapter 469, Laws of 2009 (ESSB 6170). These provisions provide a sales and use tax exemption for hog fuel sold or used to produce electricity, steam, heat, or biofuel.

The proposed amendment to WAC 458-20-134 also includes language providing information regarding the "value of article used" in the case of prototypes. RCW 82.12.010 (2)(e). This rule does not currently recognize these provisions.

Copies of draft rules are available for viewing and printing on our web site at <http://dor.wa.gov/content/FindALawOrRule/RuleMaking/agenda.aspx>.

Reasons Supporting Proposal: Rules 121 and 134 need to be updated to recognize 2009 legislation so that they do not conflict with current law.

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

Statute Being Implemented: RCW 82.04.100, [82.04].120, [82.04].130, [82.04].190, [82.04].210, [82.04].216, [82.04].290, 82.08.956, 82.12.010, and [82.12].020.

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: Pat Moses, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 902-7111; Implementation: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-

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February 12, 2010

Alan R. Lynn

Rules Coordinator

AMENDATORY SECTION (Amending WSR 94-13-033, filed 6/6/94, effective 7/7/94)

WAC 458-20-121 Sales of heat or steam—Including production by cogeneration. (1) **Introduction.** This section provides tax reporting information to persons who sell heat and/or steam. Because heat and steam are often the product of a cogeneration facility, this section also provides tax information for persons operating cogeneration facilities. Persons generating electrical power should also refer to WAC 458-20-179 (~~and 458-20-17901~~) (Public utility tax).

(2) **Sale of heat or steam - business and occupation (B&O) tax.** Persons engaging in the business of operating a plant for the production, extraction, or storage of heat or steam for distribution, for hire or sale, are taxable under the service and other business activities classification. This includes heat or steam produced by a biomass system, cogeneration, geothermal sources, fossil fuels, or any other method.

(3) **Sale or production of electricity - cogeneration.** The production of steam, heat, or electricity is not a manufacturing activity within the definition of RCW 82.04.120. Persons who operate a plant or system for the generation, production or distribution of electrical energy for hire or sale are subject to the provisions of the public utility tax under the light and power tax classification. Persons who generate electrical energy should refer to WAC 458-20-179 (Public utility tax). A deduction may be taken for:

(a) Power generated in Washington and delivered out-of-state. (See RCW 82.16.050(6).)

(b) Amounts derived from the sale of electricity to persons who are in the business of selling electricity and are purchasing the electricity for resale. (See RCW 82.16.050(2).)

(4) **Tax incentive programs - cogeneration.** There were tax incentive programs available for cogeneration projects begun before January 1, 1990. (~~See WAC 458-20-17901 for the requirements which applied.~~) Sales and use tax deferrals may apply under certain conditions for power generation facilities, even though the production of power is not specifically subject to a manufacturing tax. For example, if the cogeneration facilities are part of a manufacturing plant for the production of new articles of tangible personal property and the requirements for tax deferral are met, the business may apply for tax deferral programs. These incentive programs are discussed in WAC 458-20-240 (Manufacturer's new employee tax credits), 458-20-24001 (Sales and use tax deferral—Manufacturing and research/development activities in rural counties—Applications filed after March 31, 2004), and 458-20-24002 (Sales and use tax deferral—New manufacturing and research/development facilities).

(5) **Fuel.** Persons who produce their own fuel to generate heat, steam, or electricity are subject to the manufacturing B&O tax on the value of the fuel. This includes the value of fuel which is created at the same site as a by-product of another manufacturing process, such as production of hog

fuel. The taxable value should be determined based on comparable sales, or on the basis of all costs in the absence of comparable sales. Refer to WAC 458-20-112 (Value of products).

~~(The)~~ (a) Fuel does not become an ingredient or component of power, steam, or electricity. The sale of fuel to be used by the purchaser to generate heat, steam, or electricity is a retail sale. In most cases, the purchase of fuel for such purposes is subject to payment of retail sales tax to the supplier. (See (b) of this subsection for discussion of a sales and use tax exemption specific to hog fuel.)

In the event retail sales tax is not paid to the supplier, and no exemption from retail sales tax is available, deferred sales or use tax must be paid. However, the law provides a specific exemption from the use tax for fuel which is used in the same manufacturing plant which produced the fuel. For example, if a lumber manufacturer produces wood waste which is used in the same plant to produce heat for drying lumber and also electricity which is sold to a public utility district, the wood waste is not subject to use tax even though the manufacturing tax will apply. (See RCW 82.12.0263.)

(b) Effective July 1, 2009:

- Sales of hog fuel used to produce electricity, steam, heat, or biofuel are exempt from retail sales tax when the purchaser provides the seller with a properly filled out "buyer's retail sales tax exemption certificate." RCW 82.08.956.

- The use of hog fuel for production of electricity, steam, heat, or biofuel is exempt from use tax. RCW 82.12.956. For these exemptions, "hog fuel" means wood waste and other wood residuals including forest derived biomass, but not including firewood or wood pellets. "Biofuel" has the same meaning as provided in RCW 43.325.010.

(6) **Equipment and supplies.** Persons who are in the business of producing heat, steam, or electricity are required to pay retail sales tax to suppliers of all equipment and supplies. If the supplier fails to collect retail sales tax, deferred sales or use tax must be paid.

AMENDATORY SECTION (Amending Order 86-17, filed 9/23/86)

WAC 458-20-134 Commercial or industrial use. (1)

Introduction. "The term 'commercial or industrial use' means the following uses of products, including by-products, by the ~~((extractor)) same person that extracted~~ or ~~((manufacturer thereof)) manufactured them:~~

- (a) Any use as a consumer; and
- (b) The manufacturing of articles, substances or commodities." (RCW 82.04.130.)

(2) **Examples of commercial or industrial use.** The following are examples of commercial or industrial use:

- (a) The use of lumber by the manufacturer ~~((thereof)) of that lumber~~ to build a shed for its own use.
- (b) The use of a motor truck by the manufacturer ~~((thereof)) of that truck~~ as a service truck for itself.
- (c) The use by a boat manufacturer of patterns, jigs and dies which it has manufactured.
- (d) The use by a contractor building or improving a publicly owned road of crushed rock or pit run gravel which it has extracted.

(3) **Business and occupation tax.** Persons manufacturing or extracting tangible personal property for commercial or industrial use are subject to tax under the manufacturing or extracting B&O tax classifications (~~((manufacturing or extracting))~~), as the case may be. The tax is measured by the value of the product manufactured or extracted and used. (See WAC 458-20-112 for definition and explanation of value of products.)

(4) **Use tax.** Persons manufacturing or extracting tangible personal property for commercial or industrial use are subject to use tax on the value of the articles used, unless a specific exemption is provided. (See WAC 458-20-178 for further explanation of the use tax and definition of value of the article used.)

(5) **Exemptions.** The following uses of articles produced for commercial or industrial use are expressly exempt of use tax.

(a) RCW 82.12.0263 exempts from the use tax the use of fuel by the ~~((extractor)) same person that extracted~~ or ~~((manufacturer thereof)) manufactured that fuel~~ when it is used directly in the operation of the particular extractive operation or manufacturing plant which produced or manufactured the same. ~~((Example: The use of hog fuel to produce heat or power in the same plant which produced it.))~~

(b) ~~((Effective April 3, 1986, (chapter 231, Laws of 1986)))~~ Property produced for use in manufacturing ferrosilicon which is subsequently used to make magnesium for sale is exempt of use tax if the primary purpose is to create a chemical reaction directly through contact with an ingredient of ferrosilicon. (RCW 82.04.190(1).)

(c) Effective July 1, 2009, hog fuel used to produce electricity, steam, heat, or biofuel is exempt from use tax. RCW 82.12.956. For the purposes of this exemption, "hog fuel" means wood waste and other wood residuals including forest derived biomass, but not including firewood or wood pellets. "Biofuel" has the same meaning as provided in RCW 43.325.010.

(6) ~~((RCW 82.12.010 provides that in the case of articles manufactured for commercial or industrial use by manufacturers selling to the United States Department of Defense, the value of the articles used shall be determined according to the value of the ingredients of such articles, rather than the full value of the manufactured articles as is normally the case.))~~ **Special provisions regarding value of article used.** RCW 82.12.010 provides the following special valuation provisions to persons manufacturing products for commercial or industrial use:

(a) In the case of articles manufactured or produced by the user and used in the manufacture or production of products sold or to be sold to the United States Department of Defense, the value of the articles used is determined according to the value of the ingredients of those articles.

(b) In the case of an article manufactured or produced for purposes of serving as a prototype for the development of a new or improved product, the value of the article used is determined by:

- The retail selling price of such new or improved product when first offered for sale; or

• The value of materials incorporated into the prototype in cases in which the new or improved product is not offered for sale.

WSR 10-05-075
EXPEDITED RULES
DEPARTMENT OF REVENUE

[Filed February 12, 2010, 3:09 p.m.]

Title of Rule and Other Identifying Information: WAC 458-20-190 Sales to and by the United States—Doing business on federal reservations—Sales to foreign governments, explains the tax reporting responsibilities of persons:

- Making sales to the United States and to foreign governments;
- Engaging in business activities within federal reservations; and
- Cleaning up radioactive waste and other by-products of weapons production for the United States.

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 Bridget N. McBryde, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, e-mail BridgetM@dor.wa.gov, AND RECEIVED BY April 19, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department proposes to amend the rule to recognize ESSB 6170 (chapter 469, Laws of 2009). This legislation amended RCW 82.04.-263, which provides a preferential B&O tax rate for "cleaning up radioactive waste and other by-products of weapons production and nuclear research and development."

Copies of draft rules are available for viewing and printing on our web site at <http://dor.wa.gov/content/FindALawOrRule/RuleMaking/agenda.aspx>.

Reasons Supporting Proposal: To recognize provisions of ESSB 6170 (chapter 469, Laws of 2009).

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

Statute Being Implemented: RCW 82.04.263.

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: Bridget N. McBryde, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6117; Implementation: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6125; and Enforcement: Gilbert Brewer, 1025

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February 12, 2010

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AMENDATORY SECTION (Amending WSR 05-03-002, filed 1/5/05, effective 2/5/05)

WAC 458-20-190 Sales to and by the United States—Doing business on federal reservations—Sales to foreign governments. (1) **Introduction.** Federal law prohibits Washington from directly imposing taxes upon the United States. Persons doing business with the United States are nonetheless subject to the taxes imposed by the state of Washington, unless specifically exempt. This rule explains the tax reporting responsibilities of persons making sales to the United States and to foreign governments. The rule also explains the tax reporting responsibilities of persons engaging in business activities within federal reservations and cleaning up radioactive waste and other by-products of weapons production for the United States.

Persons engaged in construction, installation, or improvement to real property of or for the United States should also refer to WAC 458-20-17001 (Government contracting, etc.). Persons building, repairing, or improving streets, roads, and other transportation facilities, which are owned by the United States should also refer to WAC 458-20-171 (Building, repairing or improving streets, roads, etc.). Persons selling cigarettes to the United States or any other federal entity should also refer to WAC 458-20-186 (Tax on cigarettes).

(2) **"United States" defined.**

(a) For the purposes of this rule, the term "United States" means the federal government, including the executive, legislative, and judicial branches, its departments, and federal entities exempt from state or local taxation by reason of specific federal statutory exemption.

The mere fact that an entity is a federal entity, such as an instrumentality or a federal corporation, does not mean that the entity is immune from tax. The taxability of a federal entity and whether or not the entity is required to collect and remit retail sales/use tax depends on the benefits and immunities conferred upon it by Congress. Thus, to determine the current taxable status of federal entities, the relevant portion of the federal law should be examined.

(b) "United States" does not include entities associated with but not a part of the United States, such as the National Guard (an instrumentality of the state of Washington). Nor does it include entities contracting with the United States government to administer its programs.

(3) **Prohibition against taxing the United States.** The state of Washington is prohibited from imposing taxes directly upon the United States.

(a) This prohibition applies to taxes imposed for the privilege of engaging in business such as the business and occupation (chapter 82.04 RCW) and the public utility (chapter 82.16 RCW) taxes.

It also applies to taxes imposed on a buyer or user of goods or services, including, but not limited to, the:

(i) State and local retail sales and car rental taxes (chapters 82.08 and 82.14 RCW);

(ii) State and local use tax (chapters 82.12 and 82.14 RCW);

(iii) Solid waste collection tax (chapter 82.18 RCW); and

(iv) Local government taxes such as the special hotel/motel (chapter 67.28 RCW) and convention and trade center (chapter 67.40 RCW) taxes.

(b) The state is also prohibited from requiring the United States to collect taxes imposed on the buyer (e.g., the retail sales tax) as an agent for the state. However, buyers must pay use tax on retail purchases from the United States, unless specifically exempt by law.

(c) In addition, federal law exempts certain nongovernmental entities from state taxes (for which Congress has given specific federal statutory tax exemptions). These specific federal statutory exemptions given by Congress may not be absolute and may be limited to specific activities of an entity.

(d) The American Red Cross is an instrumentality of the United States. As a federal corporation providing aid and relief, it is exempt from retail sales, use, and business and occupation taxes under state law. RCW 82.08.0258, 82.12.-0259, and 82.04.380.

(4) Persons doing business with the United States. Persons selling goods or services to the United States are subject to taxes imposed on the seller, such as the business and occupation (B&O) and public utility taxes, unless a specific tax exemption applies. Persons receiving income from contracting with the United States government to administer its programs, either in whole or in part, are also subject to tax, unless a specific tax exemption applies.

(a) Certain invoiced amounts not included in gross income. Persons who contract with the United States may, for federal accounting purposes, be contractually required to invoice goods or services provided to the United States by third parties. The purpose of the invoices is to match the expenditures with the appropriate category of congressional funding. These amounts should be excluded from the person's gross income when reporting on the combined excise tax return if all of the following conditions exist with respect to the goods or services:

(i) The third party directly invoices the United States;

(ii) The United States directly pays the third party; and

(iii) The person has no liability, either primarily or secondarily, for making payment to the third party or for remitting payment to the third party.

(b) Tax obligation with respect to the use of tangible personal property. Persons performing services for the United States are also subject to the retail sales or use tax on property they use or consume when performing services for the United States, unless specifically exempt.

(i) Manufacturing articles for commercial or industrial use. In the case of products manufactured or produced by the person using the products as a consumer, the measure of the use tax is generally the value of the products as explained in WAC 458-20-112 (Value of products). However, if the articles manufactured or produced by the user are used in the manufacture or production of products sold or to be sold to the department of defense of the United States, the

value of articles used is the value of the ingredients of such articles. The manufacturing B&O tax also applies to the value of articles manufactured for commercial or industrial use.

(ii) Use of government provided property. When articles or goods used are acquired by bailment, the measure of the use tax to the bailee is the reasonable rental with the value to be determined as nearly as possible according to the rental price at the place of use of similar products of like quality and character. See WAC 458-20-211 (Leases or rental of tangible personal property, bailments). Thus, if a person has a contract to provide services for the United States and uses government supplied tangible personal property to perform the services, then the person must pay use tax on the fair market rental value of the government supplied tangible personal property.

Persons who incorporate government provided articles into construction projects or improvements made to real property of or for the United States should refer to WAC 458-20-17001 (Government contracting, etc.) for more specific tax-reporting information.

(c) Exemption for certain machinery and equipment. Manufacturers or processors for hire may be eligible for the retail sales or use tax exemption provided by RCW 82.08.-02565 and 82.12.02565 on machinery and equipment used directly in a manufacturing or research and development operation. See WAC 458-20-13601 (Manufacturers and processor for hire—Sales and use tax exemption for machinery and equipment).

(5) Documenting exempt sales to the United States. Only those sales made directly to the United States are exempt from retail sales tax or other tax imposed on the buyer. To be entitled to the exemption, the purchase must be paid for using a qualified U.S. government credit card, a check from the United States payable to the seller, a United States voucher, or with cash accompanied by the federal SF (Standard Form) 1165.

Sales to employees or representatives of the United States are subject to tax, even though the United States may reimburse the employee or representative for all or a part of the expense. Purchases by any other person, whether with federal funds or through a reimbursement arrangement, are subject to tax unless specifically exempt by law.

(a) Documenting tax-exempt sales. Sellers document the tax-exempt nature of sales made to the United States by keeping a copy of the United States credit card receipt, a copy of the check from the United States, a copy of the federal government voucher, or a signed copy of federal SF 1165.

(b) Payment occurring via government contracted credit card. Various United States government contracted credit cards are used to make payment for purchases of goods and services by or for the United States government. Sole responsibility for payment of these purchases may rest with the United States government or with the employee. The United States government's system of issuing government contracted credit cards is subject to change. For specific information about determining when payment is the direct responsibility of the United States government or the employee, contact the department's taxpayer services division at:

Department of Revenue
Taxpayer Services

P.O. Box 47478
Olympia, WA 98504-7478

or call the department's telephone information center at 1-800-647-7706 or visit the department's web site at <http://dor.wa.gov>.

(6) **Doing business on federal reservations.** The state of Washington has jurisdiction and authority to levy and collect taxes upon persons residing within, or with respect to business transactions conducted upon, federal reservations. 4 U.S.C. §§ 105-110. The term "federal reservation," as used in this rule, means any land or premises within the exterior boundaries of the state of Washington that are held or acquired by and for the use of the United States, its departments, institutions or entities. This means that a concessionaire operating within a federal reservation under a grant or permit issued by the United States or by a department or entity of the United States is taxable to the same extent as any private operator engaging in a similar business outside a federal reservation and without specific authority from the United States.

(a) **Sales tax collection requirements.** Persons making retail sales to members of the armed forces or others residing within or conducting business upon federal reservations are required to collect and remit retail sales tax from the buyer.

(b) **Cigarette tax stamps.** Washington cigarette tax stamps must generally be affixed to all cigarettes sold to persons residing within or conducting business upon federal reservations. However, such stamps need not be affixed to cigarettes sold to the United States or any of its entities including voluntary organizations of military personnel authorized by the Secretary of Defense or the Secretary of the Navy or by the United States or any of its entities to authorized purchasers, for use on such reservation. See WAC 458-20-186 (Tax on cigarettes).

(7) **Sales made to authorized purchasers of the United States.** As explained in subsection (3)(b) of this rule, while sales by the United States are exempt of retail sales tax the purchaser is generally responsible for remitting use tax directly to the department of revenue. Federal law prohibits the imposition of use tax on tangible personal property sold to authorized purchasers by the United States, its entities, or voluntary unincorporated organization of armed forces personnel. 4 U.S.C. § 107(a).

(a) **Who is an "authorized purchaser"?** A person is an "authorized purchaser" only with respect to purchases he or she is permitted to make from commissaries, ships' stores, or voluntary unincorporated organizations of personnel of any branch of the armed forces of the United States, under regulations promulgated by the departmental secretary having jurisdiction over such branch. 4 U.S.C. § 107(b).

(b) **What is a "voluntary unincorporated organization"?** "Voluntary unincorporated organizations" are those organizations comprised of armed forces personnel operated under regulations promulgated by the departmental secretary having jurisdiction over such branch. Examples of voluntary unincorporated organizations are post flying clubs, officers or noncommissioned officers open messes, and recreation associations.

(8) **Purchases by persons using federal funds.** Retail sales or use tax is applicable to retail purchases made by any

buyer, other than the United States, including the state of Washington and all of its political subdivisions, irrespective of whether or not the buyer uses or is reimbursed with federal funds.

(9) **Cleaning up radioactive waste and other by-products of weapons production and nuclear research and development.** RCW 82.04.263 provides a preferential tax rate for the gross income derived from cleaning up for the United States, or its instrumentalities, radioactive waste and other by-products of weapons production and nuclear research and development. This tax rate applies whether the person performing these activities is a general contractor or subcontractor.

(a) **What activities are entitled to the preferential tax rate?** Only those activities that meet the definition of "cleaning up radioactive waste and other by-products of weapons production and nuclear research and development" are entitled to the preferential tax rate. The statute defines "cleaning up radioactive waste and other by-products of weapons production and nuclear research and development" to mean:

(i) The handling, storing, treating, immobilizing, stabilizing, or disposing of radioactive waste, radioactive tank waste and capsules, nonradioactive hazardous solid and liquid wastes, or spent nuclear fuel;

(ii) Conditioning of spent nuclear fuel;

(iii) Removing contamination in soils and ground water;

(iv) Decontaminating and decommissioning of facilities;

and

(v) ~~((Performing activities integral and necessary to the direct performance of cleanup.~~

~~(b) **What does it mean to be integral and necessary to the direct performance of cleanup?** To be considered an activity integral and necessary to the direct performance of cleanup, the activity must be directly connected to and essential for the furtherance of activities described in subsection (9)(a)(i) through (iv) above. "Directly connected to and essential for" means that there is both a sequential relationship and a necessity relationship between activities eligible for the tax treatment under subsection (9)(a)(v) above and those activities described in subsection (9)(a)(i) through (iv) above.~~

~~(i) **Sequential relationship.** The sequential relationship means that the activity directly precedes, directly follows, or is concurrent with the activity in question.~~

~~(ii) **Necessity relationship.** The necessity relationship means that the activity under subsection (9)(a)(v) above must take place in order for the direct cleanup to take place. In other words, the activity under subsection (9)(a)(v) above must be more than just highly desirable; the activity under subsection (9)(a)(v) above must be indispensable to the direct cleanup. As used in this subsection (9)(b)(ii), the phrase "direct cleanup" refers to those activities described in subsection (9)(a)(i) through (iv) above.~~

~~(e)) Services supporting the performance of cleanup. A service supports the performance of cleanup if it:~~

~~(A) Is within the scope of work under a clean-up contract with the United States Department of Energy; or~~

~~(B) Assists in the accomplishment of a requirement of a clean-up project undertaken by the United States Department of Energy under a subcontract entered into with the prime~~

contractor or another subcontractor in furtherance of a clean-up contract between the United States Department of Energy and a prime contractor.

(b) When does a service not assist in the accomplishment of a requirement of a clean-up project? Subject to specific exceptions provided by law, a service does not assist in the accomplishment of a clean-up project when the same services are routinely provided to businesses not engaged in clean-up activities.

The following exceptions are always deemed to contribute to the accomplishment of a requirement of a clean-up project undertaken by the United States Department of Energy:

- Information technology and computer support services;
- Services rendered in respect to infrastructure; and
- Security, safety, and health services.

(c) Guideline examples. The following examples are to be used as a guideline when determining whether a service is "routinely provided to businesses not engaged in clean-up activities."

(i) Accounting services. The classification does not apply to general accounting services but does apply to performance audits performed for persons cleaning up radioactive waste.

(ii) Legal services. The classification does not apply to general legal services but does apply to those legal services that assist in the accomplishment of a requirement of a clean-up project undertaken by the United States Department of Energy. Thus, legal services provided to contest any local, state, or federal tax liability or to defend a company against worker's compensation claim arising from a worksite injury do not qualify for the classification. However, legal services related to the resolution of contractual dispute between the parties to a clean-up contract between the United States Department of Energy and a prime contractor do qualify.

(iii) General office janitorial. General office janitorial services do not qualify for the radioactive waste clean-up classification, but the specialized cleaning of equipment exposed to radioactive waste does qualify.

(d) Clean-up examples. The examples in this subsection identify a number of facts and then state a conclusion. These examples should only be used as a general guide. Similar determinations for other situations can be made only after a review of all facts and circumstances.

(i) Company C is a land excavation contractor who contracts with Prime Contractor to dig trenches where waste will be reburied after processing. Company C's contract for digging trenches qualifies for the preferential tax rate under RCW 82.04.263 because the activity of digging trenches is one of the physical acts of cleaning up. ~~(Later Company C contracts with Prime Contractor to grade land for a general-purpose road that is not used for any cleanup purposes. The contract to grade the road does not qualify for the rate under RCW 82.04.263 because road grading is not an activity involving the physical act of cleaning up.)~~

(ii) Company D contracts with Company C from the previous example to provide payroll and accounting services. Company D's activity does not qualify for the preferential tax rate under RCW 82.04.263 because the activity of general accounting is not an activity involving the physical act of

cleaning up, nor is it ~~((directly connected to and essential for any of the cleanup activities listed in subsection (9)(a)(i) through (iv) above))~~ a service supporting the performance of cleanup as defined in (a)(v) of this subsection.

(iii) Company E is an environmental engineering company which contracts with Prime Contractor to develop a plan on how best to decontaminate the soil at a tank farm and will monitor the cleanup/decontamination as it progresses. Company E's activities qualify for the preferential tax rate under RCW 82.04.263 because the activities are ~~((directly connected to and essential for removing contamination in soils))~~ services supporting the performance of cleanup.

(iv) Company F is a security company that contracts with Prime Contractor to provide overall security to the federal reservation, including providing security at clean-up sites. Security services at clean-up sites are ~~((directly connected to and essential for clean-up services. If the attribution of income to security services performed at the clean-up sites was negotiated and reflected in Company F's contract with the Prime Contractor, before the provision of those services, that income is eligible for the preferential tax rate under RCW 82.04.263. If Company F cannot identify in the contract the income attributable to security services performed at the clean-up sites, but can substantiate that security services performed at clean-up sites is the predominant activity/services performed under the contract, the income attributable to the entire contract qualifies for the preferential tax rate))~~ services that support the performance of cleanup.

~~((4))~~ **(e) Taxability of tangible personal property used or consumed in cleaning up radioactive waste and other by-products of weapons production and nuclear research and development.** Persons cleaning up radioactive waste and other by-products of weapons production and nuclear research and development for the United States, or its instrumentalities, are consumers of any property they use or consume when performing these services. RCW 82.04.190. Therefore, tangible personal property used or consumed in the cleanup is subject to retail sales or use tax. If the seller does not collect retail sales tax on a retail sale, the buyer is required to pay the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department, unless specifically exempt by law. The "combined excise tax return" does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's combined excise tax return. Refer to WAC 458-20-178 for detailed information regarding use tax.

(10) Sales to foreign governments or foreign diplomats. For specific details concerning the taxability of sales of goods and services to foreign missions and diplomats, contact the department's taxpayer services division at:

Department of Revenue
Taxpayer Services
P.O. Box 47478
Olympia, WA 98504-7478

or call the department's telephone information center at 1-800-647-7706 or visit the department's web site at <http://dor.wa.gov>.

WSR 10-05-094
EXPEDITED RULES
HORSE RACING COMMISSION

[Filed February 16, 2010, 10:00 a.m.]

Title of Rule and Other Identifying Information: WAC 260-40-065 Coupled and multiple entries, removes the criteria which requires coupling of entries with common ownership.

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 Douglas L. Moore, Washington Horse Racing Commission (WHRC), 6326 Martin Way, Suite 209, Olympia, WA 98516-5578, (360) 459-6462, doug.moore@whrc.state.wa.us, AND RECEIVED BY April 19, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The WHRC is attempting to assist the associations and provide the betting public with better field size by allowing the uncoupling of common ownership entries.

Reasons Supporting Proposal: Purses are derived from the mutuel handle and it is documented that increased handle and field size are directly connected.

Statutory Authority for Adoption: RCW 67.16.020.

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

Name of Agency Personnel Responsible for Drafting: Douglas L. Moore, 6326 Martin Way, Suite 209, Olympia, WA 98516-5578, (360) 459-6462; Implementation and Enforcement: Robert J. Lopez, 6326 Martin Way, Suite 209, Olympia, WA 98516-5578, (360) 459-6462.

February 16, 2010

Douglas L. Moore
 Deputy Secretary

AMENDATORY SECTION (Amending WSR 07-07-010, filed 3/8/07, effective 4/8/07)

WAC 260-40-065 (~~Coupled and~~) Multiple entries.
~~((1) Two or more horses owned or leased in whole or part by the same owner must be joined as a coupled entry and single betting interest when entered in the same race. Coupled entries may be uncoupled in stakes races. Common ownership entries may be uncoupled in stakes races with the approval of the board of stewards.~~

~~(2) A coupled entry may not exclude a single entry, except in a race where the conditions are specific as to preference.~~

~~(3) At the time of making a same ownership entry, the trainer, owner, or authorized agent must select which horse will run in the event the coupled entry is not allowed.~~

~~(4)) A trainer, owner, or authorized agent may not enter and start more than two horses of the same or separate ownership in a purse race or overnight event, except under the following conditions:~~

~~((a)) (1) Stake races;~~

~~((b)) (2) Races in which there are fees required to nominate or enter; and~~

~~((c)) (3) Allowance/optional claiming or maiden special weight races. In these races a trainer may not enter more than three horses.~~

~~(4) The third entry may not exclude a single entry, or be allowed if there are less than seven entries received prior to the entry of the trainer's third horse.~~

WSR 10-05-110
EXPEDITED RULES
DEPARTMENT OF REVENUE

[Filed February 17, 2010, 9:54 a.m.]

Title of Rule and Other Identifying Information: WAC 458-20-267 (Rule 267) Annual reports for certain tax adjustments, in order to take certain tax exemptions, credits, and rates ("tax adjustments"), taxpayers must file an annual report with the department of revenue detailing employment, wages, and employer-provided health and retirement benefits per job at the manufacturing site.

Rule 267 explains how to file reports and what information must be included in the reports by persons claiming tax adjustments for the following:

- Aerospace manufacturing;
- Electrolytic processing;
- Solar electric manufacturing; and
- The aluminum smelter industry.

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 Bridget N. McBryde, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, e-mail BridgetM@dor.wa.gov, AND RECEIVED BY April 19, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department proposes to amend the rule to recognize provisions of SSB 6828 (chapter 81, Laws of 2008). These provisions include requiring that an annual report be filed FAR 145 Part certified repair stations claiming the tax adjustment provided in RCW 82.04.250(3). FAR 145 Part certified repair stations were previously required to file an annual survey (WAC 458-20-268). This legislation also authorized persons manufacturing commercial airplanes or components of such airplanes to

report required information on a per manufacturing job site basis.

Copies of draft rules are available for viewing and printing on our web site at <http://dor.wa.gov/content/FindALawOrRule/RuleMaking/agenda.aspx>.

Reasons Supporting Proposal: To recognize provisions of SSB 6828 (chapter 81, Laws 2008).

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

Statute Being Implemented: RCW 82.32.545, 82.32.-590, and 82.32.600.

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: Bridget N. McBryde, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6117; Implementation: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6125; and Enforcement: Gilbert Brewer, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6147.

February 17, 2010
Alan R. Lynn
Rules Coordinator

AMENDATORY SECTION (Amending WSR 06-20-004, filed 9/21/06, effective 10/22/06)

WAC 458-20-267 Annual reports for certain tax adjustments. (1) **Introduction.** In order to take certain tax exemptions, credits, and rates ("tax adjustments"), taxpayers must file an annual report with the department of revenue (the "department") detailing employment, wages, and employer-provided health and retirement benefits (~~(per job at the manufacturing site)~~). This section explains the reporting requirements for tax adjustments provided to the aerospace manufacturing, aluminum manufacturing, electrolytic processing, and solar electric manufacturing industries. This section explains who is required to file annual reports, how to file reports, and what information must be included in the reports.

This section contains a number of examples. These examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The results of other situations must be determined after a review of all of the facts and circumstances.

(2) **Who is required to file the report?** A recipient of the benefit of the following tax adjustments must complete and file an annual report with the department:

(a) **Tax adjustments for the aerospace manufacturing industry:**

(i) The B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes (~~(and)~~) component parts, and tooling specially designed for use in manufacturing commercial airplanes or components of such airplanes;

(ii) The B&O tax credit provided by RCW 82.04.4461 for qualified (~~(preproduction)~~) development expenditures (~~(for manufacturers and processors for hire of commercial airplanes and component parts)~~);

(iii) The B&O tax rate for FAR 145 Part certified repair stations under RCW 82.04.250(3);

(iv) The retail sales and use tax exemption provided by RCW 82.08.980 and 82.12.980 for constructing new buildings for manufacturing superefficient airplanes;

~~((iv))~~ (v) The leasehold excise tax exemption provided by RCW 82.29A.137 for facilities used for manufacturing superefficient airplanes;

~~((v))~~ (vi) The property tax exemption provided by RCW 84.36.655 for property used for manufacturing superefficient airplanes; and

~~((vi))~~ (vii) The B&O tax credit for property taxes and leasehold excise taxes paid on property used for manufacturing of commercial airplanes as provided by RCW 82.04.4463 (~~(for manufacturers and processors for hire of commercial airplanes and component parts)~~).

(viii) An annual report must be filed with the department for any person who takes any of the above tax adjustments of this subsection for employment positions in Washington; however, persons engaged in manufacturing commercial airplanes or components of such airplanes may report per manufacturing job site.

(b) **Tax adjustments for the aluminum smelter industry:**

(i) The B&O tax rate provided by RCW 82.04.2909 for aluminum smelters;

(ii) The B&O tax credit for property taxes provided by RCW 82.04.4481 for aluminum smelter property;

(iii) The retail sales and use tax exemption provided by RCW 82.08.805 and 82.12.805 for property used at aluminum smelters; and

(iv) The use tax exemption provided by RCW 82.12.-022(5) for the use of natural gas;

(c) **Tax adjustment for the electrolytic processing industry.** The public utility tax exemption provided by RCW 82.16.0421 for sales of electricity to electrolytic processing businesses.

(d) **Tax adjustment for the solar electric manufacturing industry.** The B&O tax rate for manufacturers of solar energy systems using photovoltaic modules, or silicon components of such systems provided by RCW 82.04.294.

(3) **How to file annual reports.**

(a) ~~((Forms and formats. A person must use forms or the on-line filing format developed by the department to complete the annual report unless a person obtains prior approval from the department to file the annual report in an alternative format. The department has developed a form that taxpayers may use to complete the report. Report forms may be obtained by downloading from the department's web site (www.dor.wa.gov). A report form may also be obtained at department district offices, by telephoning the telephone information center (800-647-7706), or by contacting the department's special programs division at:~~

Department of Revenue
Special Programs Division
Post Office Box 47477
Olympia, WA 98504-7477
Fax: 360-586-2163))

Required form. The department has developed a report form that must be used to complete the annual report unless a person obtains prior written approval from the department to file the annual report in an alternative format.

(b) **Electronic filing.** A report is filed electronically when the department receives the report in an electronic format. The department may waive the electronic filing requirement for good cause shown. Any person not statutorily required to electronically file the report has the option of filing the annual report electronically. Persons that claim the following tax adjustments must file the report electronically with the department: Tax adjustments for the aerospace manufacturing industry under RCW 82.04.260(11), 82.04.4461, 82.04.250(3), 82.04.290, 82.08.980, 82.12.980, 82.29A.137, 84.36.655, and 82.04.4463 (subsection (2)(a) of this section).

(c) **How to obtain the form.** The form may be filed electronically on-line or obtained by downloading it from the department's web site (www.dor.wa.gov). It may also be obtained from the department's district offices, by telephoning the telephone information center (800-647-7706), or by contacting the department's special programs division at:

Department of Revenue
Special Programs Division
Post Office Box 47477
Olympia, WA 98504-7477
Fax: 360-586-2163

(d) **First report.** The first report filed under this subsection must also include employment, wage, and benefit information for the twelve-month period immediately before first use of a tax adjustment, unless a report covering this twelve-month period as filed as required by a statute repealed by chapter 81, Laws of 2008. In order to meet this requirement, a person must complete a report for the calendar year immediately preceding the first use of a tax adjustment.

((e)) (e) **Due date.** The report must be filed by March 31st following any calendar year in which any tax adjustment is taken against taxes due.

((f)) (f) **Examples.**

(i) An aerospace firm begins taking the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts on October 1, 2005. By March 31, 2006, the aerospace firm must provide two annual reports, one covering calendar year 2004 and another covering calendar year 2005. If the aerospace firm continues to take the B&O tax rate provided by RCW 82.04.260(11) during calendar year 2006, a single annual report is due on March 31, 2007, covering calendar year 2006.

(ii) An aluminum smelter begins taking the B&O tax rate provided by RCW 82.04.2909 for aluminum smelters on July 1, 2004. By March 31, 2005, the aluminum smelter must provide two annual reports, one covering calendar year 2003 and another covering calendar year 2004. If the aluminum smelter continues to take the B&O tax rate provided by RCW 82.04.2909 during calendar year 2005, a single annual report is due on March 31, 2006, covering calendar year 2005.

(4) **What manufacturing site(s) are included in the annual report?**

(a) There must be a separate annual report filed for each manufacturing site at which activities are conducted that qualifies for a tax adjustments in the aluminum smelter industry per RCW 82.04.2909, electrolytic processing industry per RCW 82.16.0421, and the solar electric manufacturing industry per RCW 82.04.294.

(b) For tax adjustments involving the aerospace manufacturing industry, an annual report must be filed for employment positions in Washington; however, the annual report may be filed per job at the manufacturing site for persons engaged in manufacturing commercial airplanes or their components as described in this section.

((b)) (c) **What is a "manufacturing site"?** For purposes of the annual report, a "manufacturing site" is one or more immediately adjacent parcels of real property located in Washington state on which manufacturing occurs that support activities qualifying for a tax adjustment. Adjacent parcels of real property separated only by a public road comprise a single site. A manufacturing site may include real property that supports nonqualifying activities such as administration offices, test facilities, warehouses, design facilities, and shipping and receiving facilities.

(i) **If the person files per job at the manufacturing site, which manufacturing site is included in the annual report for the aerospace manufacturing industry tax adjustments?** The location(s) where a person is manufacturing commercial airplanes or components of such airplanes within this state is the manufacturing site(s) included in the annual report. A "commercial airplane" has its ordinary meaning, which is an airplane certified by the Federal Aviation Administration ("FAA") for transporting persons or property, and any military derivative of such an airplane. A "component" means a part or system certified by the FAA for installation or assembly into a commercial airplane.

(ii) **Which manufacturing site is included in the annual report for the aluminum industry tax adjustments?** The location(s) where a person who is an aluminum smelter engaging in the business of manufacturing aluminum within this state is the manufacturing site(s) included in the annual report. An "aluminum smelter" means the manufacturing facility of any direct service industrial customer that processes alumina into aluminum. A "direct service industrial customer" means a person who is an industrial customer that contracts for the purchase of power from the Bonneville Power Administration for direct consumption as of May 8, 2001. "Direct service industrial customer" includes a person who is a subsidiary that is more than 50% owned by a direct service industrial customer and who receives power from the Bonneville Power Administration pursuant to the parent's contract for power.

(iii) **Which manufacturing site is included in the annual report for the electrolytic processing industry tax adjustments?** The location(s) where a person is engaged in a chlor-alkali electrolytic processing business or a sodium chlorate electrolytic processing business for the electrolytic process within this state is the manufacturing site(s) included in the annual report. A "chlor-alkali electrolytic processing business" means a person who is engaged in a business that

uses more than ten average megawatts of electricity per month in a chlor-alkali electrolytic process to split the electrochemical bonds of sodium chloride and water to make chlorine and sodium hydroxide. A "sodium chlorate electrolytic processing business" means a person who is engaged in a business that uses more than ten average megawatts of electricity per month in a sodium chlorate electrolytic process to split the electrochemical bonds of sodium chloride and water to make sodium chlorate and hydrogen. A "chlor-alkali electrolytic processing business" and "sodium chlorate electrolytic processing business" do not include direct service industrial customers or their subsidiaries that contract for the purchase of power from the Bonneville Power Administration as of June 10, 2004.

(iv) **Which manufacturing site is included in the annual report for the solar electric manufacturing industry tax adjustments?** The location(s) where a person who is manufacturing solar energy systems using photovoltaic modules, or silicon components of such systems, within this state is the manufacturing site(s) included in the annual report. A "solar energy system" means any device or combination of devices or elements that rely upon direct sunlight as an energy source for use in the generation of electricity. A "photovoltaic cell" means a device that converts light directly into electricity without moving parts. A "module" means the smallest nondivisible self-contained physical structure housing interconnected photovoltaic cells and providing a single direct current electrical output. A "silicon component" is an ingredient or component part comprised of fifty percent or more solar grade silicon that is used in a solar energy system using photovoltaic modules.

~~((e))~~ (d) **Are there alternative methods for reporting separately for each manufacturing site?** For purposes of completing the annual report, the department may agree to allow a person whose manufacturing sites are within close geographic proximity to consolidate its manufacturing sites onto a single annual report provided that the jobs located at the manufacturing sites have equivalent employment positions, wages, and employer-provided health and retirement benefits. A person may request written approval to consolidate manufacturing sites by contacting the department's special programs division at:

Department of Revenue
Special Programs Division
Post Office Box 47477
Olympia, WA 98504-7477
Fax: 360-586-2163

~~((e))~~ (e) **Examples.**

(i) ABC Airplanes, a company manufacturing FAA certified airplane landing gear, conducts activities at three locations in Washington state. ABC Airplanes is reporting tax under the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts. In Seattle, WA, ABC Airplanes maintains its corporate headquarters and administrative offices. In Spokane, WA, ABC Airplanes manufactures the brake systems for the landing gear. In Vancouver, WA, ABC Airplanes assembles the landing gear using the components manufactured in Spokane, WA. If filing per manufacturing

site, ABC Airplanes must file separate annual reports for employment positions at its manufacturing sites in Spokane and Vancouver because these are the Washington state locations in which manufacturing occurs that supports activities qualifying for a tax adjustment.

(ii) Acme Engines, a company manufacturing engine parts, conducts manufacturing in five locations in Washington state. Acme Engines is reporting tax under the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts. It manufactures FAA certified engine parts at its Puyallup, WA location. Acme Engines' four other locations manufacture non-FAA certified engine parts. When filing per manufacturing site, Acme Engines must file an annual report for employment positions at its manufacturing site in Puyallup because it is the only location in Washington state in which manufacturing occurs that supports activities qualifying for a tax adjustment.

(iii) Tacoma Rivets, located in Tacoma, WA, manufactures rivets used in manufacturing airplanes. Half of the rivets Tacoma Rivets manufactures are FAA certified to be used on commercial airplanes. The remaining rivets Tacoma Rivets manufactures are not FAA certified and are used on military airplanes. Tacoma Rivets is reporting tax on its sales of FAA certified rivets under the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts. Tacoma Rivets must file an annual report for employment positions at its manufacturing site in Tacoma because it is the location in Washington state in which manufacturing occurs that supports activities qualifying for a tax adjustment.

(iv) Dynamic Aerospace Composites is a company that only manufactures FAA certified airplane fuselage materials. Dynamic Aerospace Composites conducts activities at three separate locations within Kent, WA. Dynamic Aerospace Composites is reporting tax under the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts. Dynamic Aerospace Composites must file separate annual reports for each of its three manufacturing sites. ~~((Dynamic Aerospace Composites can make a request to the department to consolidate its employment positions into a single annual report if the jobs located at the three manufacturing sites have equivalent employment, wages, and employer-provided health and retirement benefits.))~~

(v) Worldwide Aerospace, an aerospace company, manufactures wing systems for commercial airplanes in twenty locations around the world, but none located in Washington state. Worldwide Aerospace manufactures wing surfaces in San Diego, CA. Worldwide Aerospace sells the wing systems to an airplane manufacturer located in Moses Lake, WA and is reporting tax on these sales under the B&O tax rate provided by RCW 82.04.260(11) for sales, at retail or wholesale, of commercial airplanes, or components of such airplanes, manufactured by that person. ~~((Because))~~ Worldwide Aerospace ~~((has no manufacturing sites in Washington state, it))~~ is ~~((not))~~ required to complete the annual report for any employment positions in Washington that are directly related to the qualifying activity.

(5) What jobs are included in the annual report?

(a) The annual report covers all full-time, part-time, and temporary jobs at the manufacturing site as of December 31st of the calendar year for which an applicable tax adjustment is claimed. Jobs that support nonqualifying activities or support both nonqualifying and qualifying activities for a tax adjustment are included in the report if the job is located at the manufacturing site, or in the case of tax adjustment for the aerospace industry, in the state of Washington.

(b) Examples.

(i) XYZ Aluminum, an aluminum smelter company, manufactures aluminum in Tacoma, WA. The company is reporting tax under the B&O tax rate provided by RCW 82.04.2909 for aluminum smelters. Its management and human resources divisions are located in an administrative office across the street from its Tacoma, WA aluminum smelter. XYZ Aluminum's annual report for its Tacoma, WA location will include the employment positions in its administrative offices because those jobs are located at the Tacoma, WA manufacturing site.

(ii) AAA Tire Company manufactures tires at one manufacturing site located in Centralia, WA. The company is reporting tax under the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts. FAA certified tires comprise only 20% of the products it manufactures and are manufactured in a separate building at the manufacturing site. AAA Tire Company must report all jobs at the manufacturing site, including the jobs engaged in the nonqualifying activities of manufacturing non-FAA certified tires.

(6) How is employment detailed in the annual report?

The annual report is organized by employee occupational groups, consistent with the United States Department of Labor's Standard Occupation Codes (SOC) System. The SOC System is a universal occupational classification system used by government agencies and private industries to produce comparable occupational data. The SOC classifies occupations at four levels of aggregation:

- (a) Major group;
- (b) Minor group;
- (c) Broad occupation; and
- (d) Detailed occupation.

All occupations are clustered into one of twenty-three major groups. The annual report uses the SOC major groups to detail the levels of employment, wages, and employer-provided health and retirement benefits at the manufacturing site. A detailed description of the SOC System is available by contacting the department's special programs division or by consulting the United States Department of Labor, Bureau of Labor Statistics online at www.bls.gov/soc. The annual report does not require names of employees.

(7) What is total employment at the manufacturing site? The annual report must state the total number of employees for each SOC major group that are currently employed on December 31st of the calendar year for which an applicable tax adjustment is taken. Total employment includes employees who are on authorized leaves of absences such as sick leave, vacation, disability leave, jury duty, military leave, regardless of whether those employees are receiving wages. Leaves of absences do not include separations of

employment such as layoffs or reductions in force. Vacant positions are not included in total employment.

(8) What are full-time, part-time and temporary employment positions? An employer must provide information on the number of employees, as a percentage of total employment in the SOC major group, that are employed in full-time, part-time or temporary employment positions on December 31st of the calendar year for which an applicable tax adjustment is claimed. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(a) Full-time and part-time employment positions. In order for a position to be treated as full time or part time, the employer must intend for the position to be filled for at least fifty-two consecutive weeks or twelve consecutive months. A full-time position is a position that satisfies any one of the following minimum thresholds:

- (i) Works thirty-five hours per week for fifty-two consecutive weeks;
- (ii) Works four hundred fifty-five hours, excluding overtime, each quarter for four consecutive quarters; or
- (iii) Works one thousand eight hundred twenty hours, excluding overtime, during a period of twelve consecutive months.

A part-time position is a position in which the employee works less than the hours required for a full-time position. In some instances, an employee may not be required to work the hours required for full-time employment because of paid rest and meal breaks, health and safety laws, disability laws, shift differentials, or collective bargaining agreements, but receives wages equivalent to a full-time job. If, in the absence of these factors, the employee would be required to work the number of hours for a full-time position to receive full-time wages, the position should be reported as a full-time employment position.

(b) Temporary positions. A temporary position is a position that is intended to be filled for period of less than twelve consecutive months. Positions in seasonal employment are temporary positions. Temporary positions include workers furnished by staffing companies regardless of the duration of the placement with the person required to file the annual report.

(c) Examples. Assume these facts for the following examples. National Airplane Inc. manufactures FAA certified navigation systems at a manufacturing site located in Tacoma, WA. National Airplane Inc. is claiming all the tax adjustments available for manufacturers and processors for hire of commercial airplanes and component parts. National Airplane Inc. employs one hundred people. Seventy-five of the employees work directly in the manufacturing operation and are classified as SOC Production Occupations. Five employees work in the engineering and design division and are classified as SOC Architect and Engineering Occupations. Five employees are sales representatives and are classified as SOC Sales and Related Occupations. Five employees are service technicians and are classified as SOC Installation, Maintenance, and Repair Occupations. Five employees are administrative assistants and are classified as SOC Office and Administrative Support. Five executives are classified as SOC Management Occupations.

(i) Through a college work-study program, National Airplane Inc. employs six interns from September through June in its engineering department. The interns work twenty hours a week. The six interns are reported as temporary employees, and not as part-time employees, because the intern positions are intended to be filled for a period of less than twelve consecutive months. Assuming the five employees classified as SOC Architect and Engineering Occupations are full-time employees, National Airplane Inc. will report a total of eleven employment positions in SOC Architect and Engineering Occupations with 45% in full-time employment positions and 55% in temporary employment positions.

(ii) National Airplane Inc. manufactures navigation systems in two shifts of production. The first shift works eight hours from 8:00 a.m. to 5:00 p.m. Monday thru Friday. The second shift works six hours from 6:00 p.m. to midnight Monday thru Friday. The second shift works fewer hours per week (thirty hours) than the first shift (forty hours) as a pay differential for working in the evening. If a second shift employee transferred to the first shift, the employee would be required to work forty hours with no overall increase in wages. The second shift employees should be reported as full-time employment positions, rather than part-time employment positions.

(iii) On December 1st, ten National Airplane Inc. full-time employees classified as SOC Production Occupations take family and medical leave for twelve weeks. National Airplane Inc. hires five people to perform the work of the employees on leave. Because the ten employees classified as SOC Production Occupations are on authorized leave, National Airplane Inc. will include those employees in the annual report as full-time employment positions. The five people hired to replace the absent employees classified as SOC Production Occupations will be included in the report as temporary employees. National Airplane Inc. will report a total of eighty employment positions in SOC Production Occupations with 93.8% in full-time employment positions and 6.2% in temporary employment positions.

(iv) On December 1st, one full-time employee classified as SOC Sales and Related Occupations resigns from her position. National Airplane Inc. contracts with Jane Smith d/b/a Creative Enterprises, Inc. to finish an advertising project assigned to the employee who resigned. Because Jane Smith is an independent contractor, National Airplane Inc. will not include her employment in the annual report. Because the resignation has resulted in a vacant position, the total number of employment positions National Airplane Inc. will report in SOC Sales and Related Occupations is reduced to four employment positions.

(v) All National Airplane Inc. employees classified as SOC Office and Administrative Support Occupations work forty hours a week, fifty-two weeks a year. On November 1st, one employee must limit the number of hours worked to thirty hours each week to accommodate a disability. The employee receives wages based on the actual hours worked each week. Because the employee works less than thirty-five hours a week and is not paid a wage equivalent to a full-time position, the employee's position is a part-time employment position. National Airplane Inc. will report a total of five employment positions in SOC Office and Administrative

Support Occupations with 80% in full-time employment positions and 20% in part-time employment positions.

(9) **What are wages?** For the purposes of the annual report, "wages" means the base compensation paid to an individual for personal services rendered to an employer, whether denominated as wages, salary, commission, or otherwise. Compensation in the form of overtime, tips, bonuses, benefits (insurance, paid leave, meals, etc.), stock options, and severance pay are not "wages." For employees that earn an annual salary, hourly wages are determined by dividing annual salary by 2080. If an employee is paid by commission, hourly wages are determined by dividing the total amount of commissions paid during the calendar year by 2080.

(10) **How are wages detailed for the annual report?**

(a) An employer must provide information on the number of employees, as a percentage of the total employment in the SOC major group, paid a wage within the following five hourly wage bands:

- Up to \$10.00 an hour;
- \$10.01 an hour to \$15.00 an hour;
- \$15.01 an hour to \$20.00 an hour;
- \$20.01 an hour to \$30.00 an hour; and
- \$30.01 an hour or more.

Percentages should be rounded to the nearest 1/10th of 1% (XX.X%). For purposes of the annual report, wages are measured on December 31st of the calendar year for which an applicable tax adjustment is claimed.

(b) **Examples.** Assume these facts for the following examples. Washington Airplane Inc. manufactures FAA certified navigation systems at a manufacturing site located in Tacoma, WA. Washington Airplane Inc. is claiming all the tax adjustments available for manufacturers and processors for hire of commercial airplanes and component parts. Washington Airplane Inc. employs five hundred people at the manufacturing site. Four hundred employees engage in activities that are classified as SOC Production Occupations. Fifty employees engage in activities that are classified as SOC Architect and Engineer Occupations. Twenty-five employees are engaged in activities classified as SOC Management Occupations. Twenty employees are engaged in activities classified as SOC Office and Administrative Support Occupations. Five employees are engaged in activities classified as SOC Sales and Related Occupations.

(i) One hundred employees classified as SOC Production Occupations are paid \$12.00 an hour. Two hundred employees classified as SOC Production Occupations are paid \$17.00 an hour. One hundred employees classified as SOC Production Occupations are paid \$25.00 an hour. For SOC Production Occupations, Washington Airplane Inc. will report 25% of employment positions are paid \$10.01 an hour to \$15.00 an hour; 50% are paid \$15.01 an hour to \$20.00 an hour; and 25% are paid \$20.01 an hour to \$30.00 an hour.

(ii) Ten employees classified as SOC Architect and Engineering Occupations are paid an annual salary of \$42,000; another ten employees are paid \$50,000 annually; and the remaining employees are all paid over \$70,000 annually. In order to report wages, the annual salaries must be converted to hourly amounts by dividing the annual salary by 2080 hours. For SOC Architect and Engineering Occupations, Washington Airplane Inc. will report 40% of employ-

ment positions are paid \$20.01 an hour to \$30.00 an hour and 60% are paid \$30.00 an hour or more.

(iii) All the employees classified as SOC Sales and Related Occupations are sales representatives that are paid on commission. They receive \$10.00 commission for each navigation system sold. Three sales representatives sell 2,500 navigation systems during the calendar year. Two sales representatives sell 3,500 navigation systems during the calendar year and receive a \$10,000 bonus for exceeding company's sales goals. In order to report wages, the employee's commissions must be converted to hourly amounts by dividing the total commissions by 2080 hours. Washington Airplane Inc. will report that 60% of employment positions classified as SOC Sales and Related Occupations are paid \$10.01 an hour to \$15.00 an hour. Because bonuses are not included in wages, Washington Airplane Inc. will report 40% of employment positions classified as SOC Sales and Related Occupations are paid \$15.01 an hour to \$20.00 an hour.

(iv) Ten of the employees classified as SOC Office and Administrative Support Occupations earn \$9.50 an hour. The remaining ten employees classified as SOC Office and Administrative Support Occupations earn wages between \$10.01 an hour to \$15.00 an hour. On December 1st, Washington Airplane Inc. announces that effective December 15th, all employees classified as SOC Office and Administrative Support Occupations will earn wages of at least \$10.50 an hour, but no more than \$15.00 an hour. Because wages are measured on December 31st, Washington Airplane Inc. will report 100% of employment positions classified as SOC Office and Administrative Support Occupations Sales and Related Occupations are paid \$10.01 an hour to \$15.00 an hour.

(11) Reporting workers furnished by staffing companies. For temporary positions filled by workers that are furnished by staffing companies, the person filling out the annual report must provide the following information:

(a) Total number of staffing company employees furnished by staffing companies;

(b) Top three occupational codes of all staffing company employees; and

(c) Average duration of all staffing company employees.

(12) What are employer-provided health benefits? For purposes of the annual report, "health benefits" means compensation, not paid as wages, in the form of a health plan offered by an employer to its employees. A health plan that is equally available to employees and the general public is not an "employer-provided" health benefit.

(a) "Dental care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease of human teeth, alveolar process, gums, or jaw.

(b) "Dental care plan" means a health plan for the purpose of providing for its employees or their beneficiaries' dental care services.

(c) "Health plan" means any plan, fund, or program established, maintained, or funded by an employer for the purpose of providing for its employees or their beneficiaries, through the purchase of insurance or otherwise, medical care and dental care services. Health plans include any "employee welfare benefit plan" as defined by the Employee Retirement

Income Security Act (ERISA), any "health plan" or "health benefit plan" as defined in RCW 48.43.005, any self-funded multiple employer welfare arrangement as defined in RCW 48.125.010, any "qualified health insurance" as defined in Section 35 of the Internal Revenue Code, an "Archer MSA" as defined in Section 220 of the Internal Revenue Code, a "health savings plan" as defined in Section 223 of the Internal Revenue Code, any "health plan" qualifying under Section 213 of the Internal Revenue Code, governmental plans, and church plans.

(d) "Medical care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease.

(e) "Medical care plan" means a health plan for the purpose of providing for its employees or their beneficiaries' medical care services.

(13) How are employer-provided health benefits detailed in the annual report? The annual report is organized by SOC major group and by type of health plan offered to or with enrolled employees on December 31st of the calendar year for which an applicable tax adjustment is claimed.

(a) **Detail by SOC major group.** For each SOC major group, report the number of employees, as a percentage of total employment in the SOC major group, eligible to participate in an employer-provided medical care plan. An employee is "eligible" if the employee can currently participate in a medical care plan provided by the employer. Waiting periods, tenure requirements, minimum work hour requirements, preexisting conditions, and other limitations may prevent an employee from being eligible for coverage in an employer's medical care plan. If an employer provides multiple medical care plans, an employee is "eligible" if the employee can currently participate in one of the medical care plans. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(b) **Examples.**

(i) On December 31st, Acme Engines has one hundred employees classified as SOC Production Occupations. It offers these employees two medical care plans. Plan A is available to all employees at the time of hire. Plan B is available to employees after working ninety days. For SOC Production Occupations, Acme Engines will report 100% of its employees are eligible for employer-provided medical benefits because all of its employees are eligible for at least one medical care plan offered by Acme Engines.

(ii) Apex Aluminum has fifty employees classified as SOC Transportation and Material Moving Occupations, all of whom have worked for Apex Aluminum for over five years. Apex Aluminum offers one medical care plan to its employees. Employees must work for Apex Aluminum for six months to participate in the medical care plan. On October 1st, Apex Aluminum hires ten new employees classified as SOC Transportation and Material Moving Occupations. For SOC Transportation and Material Moving Occupations, Apex Aluminum will report 83.3% of its employees are eligible for employer-provided medical benefits.

(c) **Detail by type of health plan.** The report also requires detailed information about the types of health plans the employer provides. If an employer has more than one

type of health plan, it must report each health plan separately. If a person offers more than one of the same type of health plan as described in (c)(i) of this subsection, the person may consolidate the detail required in (c) through (e) of this subsection by using ranges to describe the information. The details include:

(i) A description of the type of plan in general terms such as self-insured, fee for service, preferred provider organization, health maintenance organization, health savings account, or other general description. The report does not require a person to disclose the name(s) of their health insurance carrier(s).

(ii) The number of employees eligible to participate in the health plan, as a percentage of total employment at the manufacturing site or as otherwise reported. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iii) The number of employees enrolled in the health plan, as a percentage of employees eligible to participate in the health plan at the manufacturing site or as otherwise reported. An employee is "enrolled" if the employee is currently covered by or participating in an employer-provided health plan. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iv) The average percentage of premium paid by employees enrolled in the health plan. "Premium" means the cost incurred by the employer to provide a health plan or the continuance of a health plan, such as amounts paid to health carriers or costs incurred by employers to self-insure. Employers are generally legally responsible for payment of the entire cost of the premium for enrolled employees, but may require enrolled employees to share in the cost of the premium to obtain coverage. State the amount of premium, as a percentage, employees must pay to maintain enrollment under the health plan. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(v) If necessary, the average monthly contribution to enrolled employees. In some instances, employers may make contributions to an employee health plan, but may not be aware of the percentage of premium cost borne by the employee. For example, employers may contribute to a health plan sponsored by an employee organization, or may sponsor a medical savings account or health savings account. In those instances where the employee's contribution to the health plan is unknown, an employer must report its average monthly contribution to the health plan by dividing the employer's total monthly costs for the health plan by the total number of employees enrolled in the health plan.

(vi) Whether legal spouses, state registered domestic partners, and unmarried (~~(dependant)~~) dependent children can obtain coverage under the health plan and if there is an additional premium for such coverage.

(vii) Whether part-time employees are eligible to participate in the health plan.

(d) **Medical care plans.** In addition to the detailed information required for each health plan, report the amount of enrolled employee point of service cost-sharing for hospital services, prescription drug benefits, and primary care physician services for each medical care plan. If differences exist within a medical care plan, the lowest cost option to the enrolled employee must be stated in the report. For example,

if employee point of service cost-sharing is less if an enrolled employee uses a network of preferred providers, report the amount of point of service cost-sharing using a preferred provider. Employee point of service cost-sharing is generally stated as a percentage of cost, a specific dollar amount, or both.

(i) "Employee point of service cost-sharing" means amounts paid to health carriers directly providing medical care services, health care providers, or health care facilities by enrolled employees in the form of copayments, co-insurance, or deductibles. Copayments and co-insurance mean an amount specified in a medical care plan which is an obligation of enrolled employees for a specific medical care service which is not fully prepaid. A deductible means the amount an enrolled employee is responsible to pay before the medical care plan begins to pay the costs associated with treatment.

(ii) "Hospital services" means covered in-patient medical care services performed in a hospital licensed under chapter 70.41 RCW.

(iii) "Prescription drug benefit" means coverage to purchase a thirty-day or less supply of generic prescription drugs from a retail pharmacy.

(iv) "Primary care provider services" means non-emergency medical care services provided in an office setting by the employee's primary care provider.

(e) **Dental care plans.** In addition to the health plan information required for each dental care plan, the annual maximum benefit for each dental care plan must be stated in the report. Most dental care plans have an annual dollar maximum benefit. This is the maximum dollar amount a dental care plan will pay toward the cost of dental care services within a specific benefit period, generally one year. The enrolled employee is personally responsible for paying costs above the annual maximum.

(f) **Examples.**

(i) Assume the following facts for the following examples. Mosaic Aerospace employs one hundred employees and offers two medical care plans as health benefits to employees at the time of hire. Plan A is a managed care plan (HMO). Plan B is a fee for service medical care plan.

(A) Forty Mosaic Aerospace employees are enrolled in Plan A. It costs Mosaic Aerospace \$750 a month for each employee covered by Plan A. Enrolled employees must pay \$150 each month to participate in Plan A. If an enrolled employee uses its network of physicians, Plan A will cover 100% of the cost of primary care provider services with employees paying a \$10.00 copayment per visit. If an enrolled employee uses its network of hospitals, Plan A will cover 100% of the cost of hospital services with employees paying a \$200 deductible. If an enrolled employee does not use a network provider, Plan A will cover only 50% of the cost of any service with a \$500 employee deductible. An enrolled employee must use a network of retail pharmacies to receive any prescription drug benefit. Plan A will cover the cost of prescription drugs with enrolled employees paying a \$10.00 copayment. If an enrolled employee uses the mail-order pharmacy option offered by Plan A, copayment for prescription drug benefits is not required.

Mosaic Aerospace will report Plan A separately as a managed care plan. One hundred percent of its employees are

eligible to participate in Plan A. The percentage of eligible employees enrolled in Plan A is 40%. The percentage of premium paid by an employee is 20%. Mosaic Aerospace will also report that employees have a \$10.00 copayment for primary care provider services and a \$200 deductible for hospital services because this is the lowest cost option within Plan A. Mosaic Aerospace will report that employees have a \$10.00 copayment for prescription drug benefit. Mosaic Aerospace cannot report that employees do not have a prescription drug benefit copayment because "prescription drug benefit" is defined as coverage to purchase a thirty-day or less supply of generic prescription drugs from a retail pharmacy, not a mail-order pharmacy.

(B) Fifty Mosaic Aerospace employees are enrolled in Plan B. It costs Mosaic Aerospace \$1,000 a month for each employee covered by Plan B. Enrolled employees must pay \$300 a month to participate in Plan B. Plan B covers 100% of the cost of primary care provider services and 100% of the cost of prescription drugs with employees paying a \$200 annual deductible for each covered service. Plan B covers 80% of the cost of hospital services with employees paying a \$250 annual deductible.

Mosaic Aerospace will report Plan B separately as a fee for service medical care plan. One hundred percent of its employees are eligible to participate in Plan B. The percentage of eligible employees enrolled in Plan B is 50%. The percentage of premium paid by an employee is 30%. Mosaic Aerospace will also report that employees have a \$200 annual deductible for both primary care provider services and prescription drug benefits. Hospital services have a \$250 annual deductible and 20% co-insurance obligation.

(C) On December 1st, Mosaic Aerospace acquires General Aircraft Inc., a company claiming all the tax adjustments available for manufacturers and processors for hire of commercial airplanes and component parts. General Aircraft Inc. had fifty employees, all of whom were retained by Mosaic Aerospace. At General Aircraft Inc., employees were offered one managed care plan (HMO) as a benefit. The former General Aircraft Inc. employees will retain their current managed care plan until the following June when employees would be offered Mosaic Aerospace benefits. On December 31st, Mosaic Aerospace is offering employees two managed care plans. Mosaic Aerospace may report each managed care plan separately or may consolidate the detail required in (c) through (e) of this subsection for this type of medical care plan by using ranges to report the information.

(ii) Aero Turbines employs one hundred employees. It offers employees health savings accounts as a benefit to employees who have worked for the company for six months. Aero Turbines established the employee health savings accounts with a local bank and makes available to employees a high deductible medical care plan to be used in conjunction with the account. Aero Turbines deposits \$500 a month into each employee's health savings account. Employees deposit a portion of their pretax earnings into a health savings account to cover the cost of primary care provider services, prescription drug purchases, and the high deductible medical care plan for hospital services. The high deductible medical care plan has an annual deductible of \$2,000 and covers 75% of the cost of hospital services. Sixty-six employees open health

savings accounts. Four employees have not worked for Aero Turbines for six months.

Aero Turbines will report the medical care plan as a health savings account. Ninety-six percent of employees are eligible to participate in health savings accounts. The percentage of eligible employees enrolled in health savings accounts is 68.8%. Because the amount of employee deposits into their health savings accounts will vary, Aero Turbines will report the average monthly contribution of \$500 rather than the percentage of premium paid by enrolled employees. Because employees are responsible for covering their primary care provider services and prescription drugs costs, Aero Turbines will report that this health plan does not include these services. Because the high deductible medical care plan covers the costs of hospital services, Aero Turbines will report that the medical care plan has an annual deductible of \$2,000 and employees have 25% co-insurance obligation.

(14) What are employer-provided retirement benefits? For purposes of the annual report, "retirement benefits" mean compensation, not paid as wages, in the form of a retirement plan offered by an employer to its employees. A "retirement plan" means any plan, account, deposit, annuity, or benefit, other than a life insurance policy, that provides for retirement income or deferred income to employees for periods extending to the termination of employment or beyond. Retirement plans include pensions, annuities, stock bonus plans, employee stock ownership plans, profit sharing plans, self-employed retirement plans, individual retirement accounts, individual retirement annuities, and retirement bonds, as well as any other plan or program, without regard to its source of funding, and without regard to whether the retirement plan is a qualified plan meeting the guidelines established in the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code. A retirement plan that is equally available to employees and the general public is not an "employer-provided" retirement benefit.

(15) How are employer-provided retirement benefits detailed in the annual report? The annual report is organized by SOC major group and by type of retirement plans offered to employees or with enrolled employees on December 31st of the calendar year for which an applicable tax adjustment is claimed. Inactive or terminated retirement plans are excluded from the annual report. An inactive retirement plan is a plan that is not offered to new employees, but has enrolled employees, and neither enrolled employees nor the employer are making contributions to the retirement plan.

(a) Detail by SOC major group. For each SOC major group, report the number of employees, as a percentage of total employment in the SOC major group, eligible to participate in an employer-provided retirement plan. An employee is "eligible" if the employee can currently participate in a retirement plan provided by the employer. Waiting periods, tenure requirements, minimum work hour requirements, and other limitations may prevent an employee from being eligible for coverage in an employer's retirement plan. If an employer provides multiple retirement plans, an employee is "eligible" if the employee can currently participate in one of the retirement plans. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(b) Examples.

(i) Lincoln Airplane has one hundred employees classified as SOC Production Occupations. Fifty employees were enrolled in defined benefit pension at the time of hire. All employees are eligible to participate in a 401(k) Plan. For SOC Production Occupations, Lincoln Airplane will report 100% of its employees are eligible for employer-provided retirement benefits because all of its employees are eligible for at least one retirement plan offered by Lincoln Airplane.

(ii) Fly-Rite Airplanes has fifty employees classified in SOC Computer and Mathematical Occupations. Fly-Rite Airplane offers a SIMPLE IRA to its employees after working for the company one year. Forty-five employees classified in SOC Computer and Mathematical Occupations have worked for the company more than one year. For SOC Computer and Mathematical Occupations, Fly-Rite Airplanes will report 90% of its employees are eligible for retirement benefits.

(c) Detail by retirement plan. The report also requires detailed information about the types of retirement plans an employer offers employees. If an employer offers multiple retirement plans, it must report each type of retirement plan separately. If an employer offers more than one of the same type of retirement plan, but with different levels of employer contributions, it may consolidate the detail required in (i) through (iv) of this subsection by using ranges to describe the information. The report includes:

(i) The type of plan in general terms such as 401(k) Plan, SEP IRA, SIMPLE IRA, cash balance pension, or defined benefit plan.

(ii) The number of employees eligible to participate in the retirement plan, as a percentage of total employment at the manufacturing site, or as otherwise reported. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iii) The number of employees enrolled in the retirement plan, as a percentage of employees eligible to participate in the retirement plan at the manufacturing site. An employee is "enrolled" if the employee currently participates in an employer-provided retirement plan, regardless of whether the employee has a vested benefit. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iv) The maximum benefit the employer will contribute into the retirement plan for enrolled employees. The maximum benefit an employer will contribute is generally stated as a percentage of salary, specific dollar amount, or both. This information is not required for a defined benefit plan meeting the qualification requirements of Employee Retirement Income Security Act (ERISA) that provides benefits according to a flat benefit, career-average, or final pay formula.

(d) Examples.

(i) General Airspace is a manufacturer of airplane components located in Centralia, WA. General Airspace employs one hundred employees. Fifty employees are eligible for and enrolled in a defined benefit pension with a flat benefit at the time of retirement. Twenty-five employees are eligible for and enrolled in a cash balance pension with General Airspace contributing 7% of an employee's annual compensation with a maximum annual contribution of \$10,000. All General Airspace employees can participate in a 401(k) Plan. Sixty-five employees are participating in the 401(k) Plan. General Air-

space does not make any contributions into the 401(k) Plan. Five employees are former employees of United Skyways, a company General Airspace acquired. United Skyways employees were enrolled in a cash balance pension at the time of hire. When General Airspace acquired United Skyways, it did not terminate or liquidate the United Skyways cash balance plan. Rather, General Airspace maintains cash balance plan only for former United Skyways employees, allowing only interest to accrue to the plan.

(A) General Airspace will report that it offers three retirement plans - A defined benefit pension, a cash-balance pension, and a 401(k) Plan. General Airspace will not report the inactive cash balance pension it maintains for former United Skyways employees.

(B) For the defined benefit pension, General Airspace will report 50% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 100% are enrolled.

(C) For the cash-balance pension, General Airspace will report 25% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 100% are enrolled. General Airspace will report a maximum contribution of \$10,000 or 7% of an employee's annual compensation.

(D) For the 401(k) Plan, General Airspace will report 100% of its total employment positions are eligible to participate in the retirement plan. Of the employment positions eligible to participate, 65% are enrolled. General Airspace will report that it does not make any contributions into the 401(k) Plan.

(ii) Washington Alloys is an aluminum smelter located in Grandview, WA. Washington Alloys employs two hundred employees. Washington Alloys offers a 401(k) Plan to its employees after one year of hire. One hundred seventy-five employees have worked for Washington Alloys for one year or more. Of that amount, seventy-five have worked more than five years. Washington Alloys will match employee contributions up to a maximum 3% of annual compensation. If an employee has worked for Washington Alloys for more than five years, Washington Alloys will contribute 5% of annual compensation regardless of the employee's contribution. One hundred employees receive a 3% matching contribution from Washington Alloys. Fifty employees receive a contribution of 5% of annual compensation.

(A) Washington Alloys can report each 401(k) Plan separately - A 401(k) Plan with a maximum employer contribution of 3% of annual compensation and a 401(k) Plan with a maximum employer contribution to 5% of annual compensation. Alternatively, Washington Alloys can report that it offers a 401(k) Plan with a maximum employer contribution ranging from 3% to 5% of annual compensation.

(B)(I) If Washington Alloys reports each 401(k) Plan separately, for the 401(k) Plan with a maximum employer contribution of 3% of annual compensation, Washington Alloys will report 50% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 100% are enrolled.

For the 401(k) Plan with a maximum employer contribution of 5% of annual compensation, Washington Alloys will report 37.5% of its total employment positions are eligible to

participate. Of the employment positions eligible to participate, 66.6% are enrolled.

(II) If Washington Alloys consolidates its detailed information about its 401(k) Plans, it will report that 87.5% of its total employment positions are eligible to participate in 401(k) Plans. Of the employment positions eligible to participate in the 401(k) Plans, 85.7% are enrolled.

(16) Additional reporting for aluminum smelters and electrolytic processing businesses. Annual reports must include data for actual levels of employment for each quarter of the calendar year covered by the report. In addition, the report must identify the number of jobs affected by any employment reductions that have been publicly announced within sixty days of the date the report is submitted to the department. For an aluminum smelter, the annual report must indicate the quantity of aluminum smelted at the plant during the time period covered by the report. For an electrolytic processing business, the annual report must indicate the quantity of product produced at the plant during the time period covered by the report.

(17) Are annual reports confidential? Annual reports are not subject to the confidentiality provisions of RCW 82.32.330 and may be disclosed to the public upon request.

(18) What are the consequences for failing to file a complete annual report?

(a) If a person fails to submit a complete annual report by March 31st, the department will declare the amount of taxes against which the tax adjustment was taken during the previous calendar year to be immediately due and payable. Interest, but not penalties, will be assessed retroactively to the date the tax adjustment was taken and accrues until taxes for which the tax adjustment was taken are repaid. Interest will be assessed at the rate provided for delinquent excise taxes as provided under chapter 82.32 RCW.

(b) **Complete annual report.** An annual report is complete if:

(i) The annual report is filed on the form required by this section; and

(ii) The person makes a good faith effort to substantially respond to all report questions required by this section.

The answer "varied," "various," or "please contact for information" is not a good faith response to a question.

WSR 10-05-111

EXPEDITED RULES

DEPARTMENT OF REVENUE

[Filed February 17, 2010, 10:01 a.m.]

Title of Rule and Other Identifying Information: In order to take certain tax credits, deferrals, and exemptions ("tax adjustments"), taxpayers must file an annual survey with the department of revenue (the "department") containing information about their business activities and employment. This rule explains the survey requirements for the various tax adjustments. This rule also explains who is required to file an annual survey, how to file a survey, and what information must be included in the survey.

WAC 458-20-268 (Rule 268) currently explains that an annual survey must be completed by a person claiming the following tax adjustments:

- B&O tax credit for research and development spending under RCW 82.04.4452,
- Rural counties sales and use tax deferral under chapter 82.60 RCW,
- High technology sales and use tax deferral under chapter 82.63 RCW,
- Sales and use tax deferral for biotechnology product manufacturing under chapter 82.75 RCW,
- Sales and use tax deferral for dairy product manufacturing, seafood product manufacturing, and fresh fruit and vegetable processing under chapter 82.74 RCW,
- B&O tax exemption for dairy products under RCW 82.04.4268, seafood products under RCW 82.04.-4269, and fruits and vegetables under RCW 82.04.-4266,
- B&O tax credit for aerospace preproduction development under RCW 82.04.4487,
- Reduced B&O tax rate for certain FAR part 145 certificated repair stations under RCW 82.04.250(3),
- B&O tax credit for customized employment training under RCW 82.04.449, and
- Reduced B&O tax rates for timber products under RCW 82.04.260(12).

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 Bridget N. McBryde, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, e-mail BridgetM@dor.wa.gov, AND RECEIVED BY April 19, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department proposes to amend the rule to recognize SSB 6828 (chapter 81, Laws of 2008). This legislation provides that persons claiming tax adjustments for FAR 145 part repair stations now file an annual report (WAC 458-20-267). These persons were previously required to file an annual survey.

Copies of draft rules are available for viewing and printing on our web site at <http://dor.wa.gov/content/FindALawOrRule/RuleMaking/agenda.aspx>.

Reasons Supporting Proposal: To recognize provisions of SSB 6828 (chapter 81, Laws 2008).

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

Statute Being Implemented: RCW 82.32.545, 82.32.-590, and 82.32.600.

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: Bridget N. McBryde, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6117; Implementation: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6125; and Enforcement: Gilbert Brewer, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6147.

February 17, 2010
Alan R. Lynn
Rules Coordinator

AMENDATORY SECTION (Amending WSR 07-02-074, filed 12/29/06, effective 1/29/07)

WAC 458-20-268 Annual surveys for certain tax adjustments. (1) **Introduction.** In order to take certain tax credits, deferrals, and exemptions ("tax adjustments"), taxpayers must file an annual survey with the department of revenue (the "department") containing information about their business activities and employment. This section explains the survey requirements for the various tax adjustments. This section also explains who is required to file an annual survey, how to file a survey, and what information must be included in the survey.

Refer to WAC 458-20-267 (Annual reports for certain tax adjustments) for more information on the annual report requirements for certain tax incentive programs.

This section provides 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 of the facts and circumstances.

(2) **Who is required to file the annual survey?** The following persons must file an annual survey:

(a) A person claiming the B&O tax credit provided by RCW 82.04.4452 for engaging in qualified research and development. A separate annual survey must be filed for each tax reporting account. If the person has assigned its entire B&O tax credit provided by RCW 82.04.4452 to another person, the assignor is not required to file an annual survey. In such an instance, the assignee of the B&O tax credit is required to file an annual survey. If the person has assigned a portion of its B&O tax credit to another person, both the assignor and the assignee are required to file an annual survey. Refer to WAC 458-20-24003 (Tax incentives for high technology businesses) for more specific information about this tax adjustment.

(b) An applicant for deferral of taxes under chapter 82.60 RCW for sales and use taxes on an eligible investment project in rural counties. Refer to WAC 458-20-24001 (Sales and use tax deferral—Manufacturing and research/development activities in rural counties—Applications filed after March 31, 2004) for more specific information about this tax adjustment.

(c) An applicant for deferral of taxes under chapter 82.63 RCW for sales and use taxes on an eligible investment project in high technology. Refer to WAC 458-20-24003 (Tax incen-

tives for high technology businesses) for more specific information about this tax adjustment.

(d) An applicant for deferral of taxes under chapter 82.75 RCW for sales and use taxes on an eligible investment project in biotechnology products.

(e) A lessee of an eligible investment project under chapters 82.60, 82.63, and 82.75 RCW (as defined in RCW 82.60.020 (4)(b)(ii), 82.63.010 (7)(b), or 82.75.010 (5)(b)(ii)) who receives the economic benefit of the deferral and agrees in writing with the department to complete the annual survey. A lessor, by written contract, must agree to pass the economic benefit of the deferral to its lessee. The economic benefit of the deferral to the lessee must be no less than the amount of tax deferred by the lessor as evidenced by written documentation of any type, whether by payment, credit, or other financial arrangement between the lessor or owner of the qualified building and the lessee. An applicant who is a lessor of an eligible investment project that received a deferral of taxes under chapters 82.60, 82.63, and 82.75 RCW and who meets these requirements is not required to complete and file an annual survey.

(f) A person claiming the B&O tax exemption provided by RCW 82.04.4268 for dairy products, RCW 82.04.4269 for seafood products, and RCW 82.04.4266 for fruits and vegetables.

The first survey filed under this subsection must also include employment, wage, and benefit information for the twelve-month period immediately before first use of the B&O tax exemption. In order to meet this requirement, a person must complete a survey for the calendar year immediately preceding the first use of the B&O tax exemption.

(g) An applicant for deferral of taxes under chapter 82.74 RCW for sales and use taxes on an eligible investment project for dairy product manufacturing, seafood product manufacturing, or fresh fruit and vegetable processing. This tax adjustment is effective July 1, 2007.

(h) A lessee of an eligible investment project under chapters 82.74 RCW (as defined in RCW 82.74.010 (4)(b)) who receives the economic benefit of the deferral and agrees in writing with the department to complete the annual survey. A lessor, by written contract, must agree to pass the economic benefit of the deferral to its lessee. The economic benefit of the deferral to the lessee must be no less than the amount of tax deferred by the lessor as evidenced by written documentation of any type, whether by payment, credit, or other financial arrangement between the lessor or owner of the qualified building and the lessee. An applicant who is a lessor of an eligible investment project that received a deferral of taxes under chapter 82.74 RCW and who meets these requirements is not required to complete and file an annual survey. This tax adjustment is effective July 1, 2007.

~~(i) ((A person claiming the B&O tax credit provided by RCW 82.04.4487 for persons engaged in qualified preproduction development in the field of aeronautics. A separate annual survey must be filed for each tax reporting account. If the person has assigned its entire B&O tax credit provided by RCW 82.04.4487 to another person, the assignor is not required to file an annual survey. In such an instance, the assignee of the B&O tax credit is required to file an annual survey. If the person has assigned a portion of its B&O tax~~

credit to another person, both the assignor and the assignee are required to file an annual survey.

~~(j) A person claiming the B&O tax rate provided by RCW 82.04.250(3) for FAR part 145 certificated repair stations.~~

~~(k))~~ A person claiming the B&O tax credit provided by RCW 82.04.449 for customized employment training.

The first survey filed under this subsection must also include employment, wage, and benefit information for the twelve-month period immediately before first use of the B&O tax credit. In order to meet this requirement, a person must complete a survey for the calendar year immediately preceding the first use of the B&O tax credit.

~~((H))~~ (j) A person claiming the B&O tax rate provided by RCW 82.04.260(12) for timber products.

The first survey filed under this subsection must also include employment, wage, and benefit information for the twelve-month period immediately before first use of the B&O tax rate. In order to meet this requirement, a person must complete a survey for the calendar year immediately preceding the first use of the B&O tax rate.

(3) How to file annual surveys.

(a) **Required form.** The department has developed a survey form that must be used to complete the annual survey unless a person obtains prior written approval from the department to file the annual survey in an alternative format.

(b) **Electronic filing.** A survey is filed electronically when the department receives the survey in an electronic format. The department may waive the electronic filing requirement for good cause shown. Any person not statutorily required to electronically file the survey has the option of filing the annual survey electronically.

Persons that claim the following tax adjustments must file the survey electronically with the department:

(i) B&O tax credit for qualified research and development under RCW 82.04.4452 (subsection (2)(a) of this section);

(ii) B&O tax exemptions for dairy products, seafood products or fruits and vegetables under RCW 82.04.4268, 82.04.4269, and 82.04.4266 (subsection (2)(f) of this section);

(iii) Sales and use tax deferral for dairy product manufacturing, seafood product manufacturing, or fresh fruit and vegetable processing under chapter 82.74 RCW (subsection (2)(g) and (h) of this section);

~~(iv) ((B&O tax credit for qualified preproduction development in the field of aeronautics under RCW 82.04.4487 (subsection (2)(i) of this section);~~

~~(v) B&O tax rate for FAR part 145 certificated repair stations under RCW 82.04.250(3) (subsection (2)(j) of this section); and~~

~~(vi))~~ B&O tax rate for timber products under RCW 82.04.260(12) (subsection (2)((H)) (j) of this section).

(c) **How to obtain the form.** The form may be filed electronically online or obtained by downloading it from the department's web site (www.dor.wa.gov). It may also be obtained from the department's district offices, by telephoning the telephone information center (800-647-7706), or by contacting the department's special programs division at:

Department of Revenue
Special Programs Division
Post Office Box 47477
Olympia, WA 98504-7477
Fax: 360-586-2163

(d) **Due date.** For persons claiming any B&O tax credit, tax exemption, or tax rate listed under this section, the survey must be filed or postmarked by March 31st following any calendar year in which the tax credit, tax exemption, or tax rate is claimed.

For applicants of any sales tax deferrals listed under this section, the survey must be filed or postmarked by March 31st of the year following the calendar year in which an eligible investment project is certified by the department as being operationally complete and each of the seven succeeding calendar years.

(e) Examples.

(i) Advanced Computing, Inc. qualifies for the B&O tax credit provided by RCW 82.04.4452 and applied it against taxes due in calendar year 2006. Advanced Computing, Inc. must electronically file an annual survey with the department by March 31, 2007.

(ii) In 1999, Biotechnology, Inc. applied for and received a sales and use tax deferral under chapter 82.63 RCW for an eligible investment project in qualified research and development. The investment project was certified by the department as being operationally complete in 2001. Biotechnology, Inc. must file its annual survey with the department for the 2005 calendar year by March 31, 2006. A survey is due from Biotechnology, Inc. by March 31st each following year, with its last survey due March 31, 2008.

(iii) Advanced Materials, Inc. has been conducting manufacturing activities in a building leased from Property Management Services since 2002. Property Management Services is a recipient of a deferral under chapter 82.60 RCW, and the building was certified by the department as operationally complete in 2002. In order to pass on the entire economic benefit of the deferral, Property Management Services charges Advanced Materials, Inc. \$5,000 less in rent each year. Prior to the 2004 calendar year, Advanced Materials, Inc. is not required under chapter 82.60 RCW to file an annual survey. Advanced Materials, Inc., however, must file its annual survey with the department for the 2004 calendar year by March 31, 2005, assuming all the requirements of RCW 82.60.020 (4)(b)(ii) are met. A survey is due from Advanced Materials, Inc. by March 31st each following year, with its last survey due by March 31, 2009.

(iv) Fruit Canning, Inc. claims the B&O tax exemption provided in RCW 82.04.4266 for the gross proceeds of sales derived from the canning of fruit for the first time in 2006. Fruit Canning, Inc. must file two annual surveys with the department by March 31, 2007, one covering calendar year 2005 and one covering calendar year 2006. If Fruit Canning, Inc. claims the B&O tax exemption during subsequent years, it must file an annual survey for each of those years by March 31 of each following year.

(4) **What information does the annual survey require?** The annual survey requests information about the following:

(a) Amount of tax deferred, the amount of B&O tax exempted, the amount of B&O tax credit taken, or the amount of B&O tax reduced under the preferential rate;

(b) The number of new products or research projects by general classification;

(c) The number of trademarks, patents, and copyrights associated with activities at the investment project.

(d) The following information for employment positions in Washington:

(i) The total number of employment positions;

(ii) Full-time, part-time, and temporary employment positions as a percent of total employment. Refer to subsection (7) of this section for information about full-time, part-time, and temporary employment positions;

(iii) The number of employment positions according to the wage bands of less than \$30,000; \$30,000 or greater, but less than \$60,000; and \$60,000 or greater. A wage band containing fewer than three individuals may be combined with the next lowest wage band; and

(iv) The number of employment positions that have employer-provided medical, dental, and retirement benefits, by each of the wage bands; and

(e) Additional information the department requests that is necessary to measure the results of the tax adjustments.

(i) The department is required to report to the state legislature summary descriptive statistics by category and the effectiveness of the tax adjustments, such as job creation, company growth, and such other factors as the department selects or as the statutes identify. The department has included questions related to measuring these effects.

(ii) In addition, the department has included questions related to:

(A) The person's use of the sales and use tax exemption for machinery and equipment used in manufacturing provided in RCW 82.08.02565 and 82.12.02565; and

(B) The Unified Business Identifier used with the Washington state employment security department and all employment security department reference numbers used on quarterly tax reports that cover the employment positions reported in the annual survey.

(5) What is total employment in the annual survey?

(a) The annual survey requires information on all full-time, part-time, and temporary employment positions located in Washington state on December 31st of the calendar year covered by the ~~((report))~~ survey. Total employment includes persons who are on leaves of absence such as sick leave, vacation, disability leave, jury duty, military leave, and workers compensation leave, regardless of whether those persons are receiving wages. Total employment does not include separation from employment such as layoffs or reductions in force. Vacant positions are not included in total employment.

(b) **Examples.** Assume these facts for the following examples. National Construction Equipment (NCE) manufactures bulldozers, cranes, and other earth-moving equipment in Ridgefield, WA and Kennewick, WA. NCE received a deferral of taxes under chapter 82.60 RCW for sales and use taxes on its new manufacturing site in Kennewick, WA.

(i) NCE employs two hundred workers in Ridgefield manufacturing construction cranes. NCE employs two hundred fifty workers in Kennewick manufacturing bulldozers

and other earth-moving equipment. Although NCE's facility in Ridgefield does not qualify for any tax adjustments, NCE's annual survey must report a total of four hundred fifty employment positions. The annual survey includes all Washington state employment positions, which includes employment positions engaged in activities that do not qualify for tax adjustments.

(ii) On November 20th, NCE lays off seventy-five workers. NCE notifies ten of the laid off workers on December 20th that they will be rehired and begin work on January 2nd. The seventy-five employment positions are excluded from NCE's annual survey, because a separation of employment has occurred. Although NCE intends to rehire ten employees, those employment positions are vacant on December 31st.

(iii) On December 31st, NCE has one hundred employees on vacation leave, five employees on sick leave, two employees on military leave, one employee who is scheduled to retire as of January 1st, and three vacant employment positions. The employment positions of employees on vacation, sick leave, and military leave must be included in NCE's annual survey. The one employee scheduled to retire must be included in the annual survey because the employment position is filled on December 31st. The three vacant positions are not included in the annual survey.

(iv) In June, NCE hires two employees from a local college to intern in its engineering department. When the academic year begins in September, one employee ends the internship. The other employee's internship continues until the following June. NCE must report one employment position on the annual survey, representing the one intern employed on December 31st.

(6) When is an employment position located in Washington state? The annual survey seeks information about Washington employment positions only. An employment position is located in Washington state if:

(a) The service of the employee is performed entirely within the state;

(b) The service of the employee is performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state;

(c) The service of the employee is performed both within and without the state, and the employee's base of operations is within the state;

(d) The service of the employee is performed both within and without the state, but the service is directed or controlled in this state; or

(e) The service of the employee is performed both within and without the state and the service is not directed or controlled in this state, but the employee's individual residence is in this state.

(f) **Examples.** Assume these facts for the following examples. Acme Computer, Inc. develops computer software and claims the B&O tax credit provided by RCW 82.04.4452 for its research and development spending. Acme Computer, headquartered in California, has employees working at four locations in Washington state. Acme Computer also has offices in Oregon and Texas.

(i) Ed is a software engineer in Acme Computer's Vancouver office. Ed occasionally works at Acme Computer's Portland, Oregon office when other software engineers are on

leave. Ed's position must be included in the number of total employment in Washington state that Acme Computer reports on the annual survey. Ed performs services both within and without the state, but the services performed without the state are incidental to the employee services within Washington state.

(ii) John is an Acme Computer salesperson. John travels throughout Washington, Oregon, and Idaho promoting sales of new Acme Computer products. John's activities are directed by his manager in Acme Computer's Spokane office. John's position must be included in the number of total employment in Washington state that Acme Computer reports on the annual survey. John performs services both within and without the state, but the services are directed or controlled in Washington state.

(iii) Jane, vice-president for product development, works in Acme Computer's Portland, Oregon office. Jane regularly travels to Seattle to review the progress of research and development projects conducted in Washington state. Jane's position must not be included in the number of total employment in Washington state that Acme Computer reports on the annual survey. Although Jane regularly performs services within Washington state, her activities are directed or controlled in Oregon.

(iv) Roberta, a service technician, travels throughout the United States servicing Acme Computer products. Her activities are directed from Acme Computer's corporate offices in California, but she works from her home office in Tacoma. Roberta's position must be included in the number of total employment in Washington state that Acme Computer reports on the annual survey. Roberta performs services both within and without the state and the service is not directed or controlled in this state, but her residence is in Washington state.

(7) What are full-time, part-time and temporary employment positions? The survey must separately identify the number of full-time, part-time, and temporary employment positions as a percent of total employment.

(a) Full-time and part-time employment positions. A position is considered full-time or part-time if the employer intends for the position to be filled for at least fifty-two consecutive weeks or twelve consecutive months, excluding any leaves of absence.

(i) A full-time position is a position that requires the employee to work, excluding overtime hours, thirty-five hours per week for fifty-two consecutive weeks, four hundred fifty-five hours a quarter for four consecutive quarters, or one thousand eight hundred twenty hours during a period of twelve consecutive months.

(ii) A part-time position is a position in which the employee may work less than the hours required for a full-time position.

(iii) In some instances, an employee may not be required to work the hours required for full-time employment because of paid rest and meal breaks, health and safety laws, disability laws, shift differentials, or collective bargaining agreements. If, in the absence of these factors, the employee would be required to work the number of hours for a full-time position to receive their current wage, the position must be reported as a full-time employment position.

(b) Temporary positions. There are two types of temporary positions.

(i) **Employees of the person required to complete the survey.** In the case of a temporary employee directly employed by the person required to complete the survey, a temporary position is a position intended to be filled for a period of less than fifty-two consecutive weeks or twelve consecutive months. For example, seasonal employment positions are temporary positions. These temporary positions must be included in the information required in subsections (5), (8), and (9) of this section.

(ii) **Workers furnished by staffing companies.** A temporary position also includes a position filled by a worker furnished by a staffing company, regardless of the duration of the placement. These temporary positions must be included in the information required in subsections (5), (8), and (9) of this section. In addition, the person filling out the annual survey must provide the following additional information:

(A) Total number of staffing company employees furnished by staffing companies;

(B) Top three occupational codes of all staffing company employees; and

(C) Average duration of all staffing company employees.

(c) Examples. Assume these facts for the following examples. Worldwide Materials, Inc. is a developer of materials used in manufacturing electronic devices at a facility located in Everett, WA. Worldwide Materials claims the B&O tax credit provided by RCW 82.04.4452 for its research and development spending. Worldwide Materials has one hundred employees.

(i) On December 31st, Worldwide Materials has five employees on workers' compensation leave. At the time of the work-related injuries, the employees worked forty hours a week and were expected to work for fifty-two consecutive weeks. Worldwide Materials must report these employees as being employed in a full-time position. Although the five employees are not currently working, they are on workers' compensation leave and Worldwide Materials had intended for the full-time positions to be filled for at least fifty-two consecutive weeks.

(ii) In September, Worldwide Materials hires two employees on a full-time basis for a two-year project to design composite materials to be used in a new airplane model. Because the position is intended to be filled for a period exceeding twelve consecutive months, Worldwide Materials must report these positions as two full-time positions.

(iii) Worldwide Materials has two employees who clean laboratories during the evenings. The employees regularly work 5:00 p.m. to 11:00 p.m., Monday through Friday, fifty-two weeks a year. Because the employees work less than thirty-five hours a week, the employment positions are reported as part-time positions.

(iv) On November 1st, a Worldwide Materials engineer begins twelve weeks of family and medical leave. The engineer was expected to work forty hours a week for fifty-two consecutive weeks. While the engineer is on leave, Worldwide Materials hires a staffing company to furnish a worker to complete the engineer's projects. Worldwide Materials must report the engineer as a full-time position on the annual

((report)) survey. Worldwide Materials must also report the worker furnished by the staffing company as a temporary employment position and include the information as required in (b) of this subsection.

(v) Worldwide Materials allows three of its research employees to work on specific projects with a flexible schedule. These employees are not required to work a set amount of hours each week, but are expected to work twelve consecutive months. The three research employees are paid a comparable wage as other research employees who are required to work a set schedule of forty hours a week. Although the three research employees may work fewer hours, they are receiving comparable wages as other research employees working forty hours a week. Worldwide Materials must report these positions as full-time employment positions, because each position is equivalent to a full-time employment position.

(vi) Worldwide Materials has a large order to fulfill and hires ten employees for the months of June and July. Five of the employees leave at the end of July. Worldwide Materials decides to have the remaining five employees work on an on-call basis for the remainder of the year. As of December 31st, three of the employees are working for Worldwide Materials on an on-call basis. Worldwide Materials must report three temporary employment positions on the annual survey and include these positions in the information required in subsections (5), (8), and (9) of this section.

(8) **What are wages?** For the purposes of the annual survey, "wages" means compensation paid to an individual for personal services, whether denominated as wages, salary, commission, or otherwise as reported on the W-2 forms of employees. Stock options granted as compensation to employees are wages to the extent they are reported on the W-2 forms of the employees and are taken as a deduction for federal income tax purposes by the employer. The compensation of a proprietor or a partner is determined in one of two ways:

(a) If there is net income for federal income tax purposes, the amount reported subject to self-employment tax is the compensation.

(b) If there is no net income for federal income tax purposes, reasonable cash withdrawals or cash advances is the compensation.

(9) **What are employer-provided benefits?** The annual survey requires persons to report the number of employees that have employer-provided medical, dental, and retirement benefits, by each of the wage bands. An employee has employer-provided medical, dental, and retirement benefits if the employee is currently eligible to participate or receive the benefit. A benefit is "employer-provided" if the medical, dental, and retirement benefit is dependent on the employer's establishment or administration of the benefit. A benefit that is equally available to employees and the general public is not an "employer-provided" benefit.

(a) **What are medical benefits?** "Medical benefits" means compensation, not paid as wages, in the form of a health plan offered by an employer to its employees. A "health plan" means any plan, fund, or program established, maintained, or funded by an employer for the purpose of providing for its employees or their beneficiaries, through the

purchase of insurance or otherwise, medical and/or dental care services.

(i) Health plans include any:

(A) "Employee welfare benefit plan" as defined by the Employee Retirement Income Security Act (ERISA);

(B) "Health plan" or "health benefit plan" as defined in RCW 48.43.005;

(C) Self-funded multiple employer welfare arrangement as defined in RCW 48.125.010;

(D) "Qualified health insurance" as defined in Section 35 of the Internal Revenue Code;

(E) "Archer MSA" as defined in Section 220 of the Internal Revenue Code;

(F) "Health savings plan" as defined in Section 223 of the Internal Revenue Code;

(G) "Health plan" qualifying under Section 213 of the Internal Revenue Code;

(H) Governmental plans; and

(I) Church plans.

(ii) "Health care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease.

(b) **What are dental benefits?** "Dental benefits" means a dental health plan offered by an employer as a benefit to its employees. "Dental health plan" has the same meaning as "health plan" in (a) of this subsection, but is for the purpose of providing for employees or their beneficiaries, through the purchase of insurance or otherwise, dental care services. "Dental care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease of human teeth, alveolar process, gums, or jaw.

(c) **What are retirement benefits?** "Retirement benefits" means compensation, not paid as wages, in the form of a retirement plan offered by an employer to its employees. An employer contribution to the retirement plan is not required for a retirement plan to be employer-provided. A "retirement plan" means any plan, account, deposit, annuity, or benefit, other than a life insurance policy, that provides for retirement income or deferred income to employees for periods after employment is terminated. The term includes pensions, annuities, stock bonus plans, employee stock ownership plans, profit sharing plans, self-employed retirement plans, individual retirement accounts, individual retirement annuities, and retirement bonds, as well as any other plan or program, without regard to its source of funding, and without regard to whether the retirement plan is a qualified plan meeting the guidelines established in the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code.

(d) **Examples.** Assume these facts for the following examples. Medical Resource, Inc. is a pharmaceutical manufacturer located in Spokane, WA. Medical Resource, Inc. claims the B&O tax credit provided by RCW 82.04.4452 for its research and development spending. It employs two hundred full-time employees and fifty part-time employees. Medical Resource, Inc. also hires a staffing company to furnish seventy-five workers.

(i) Medical Resource, Inc. offers its employees two different health plans as a medical benefit. Plan A is available at no cost to full-time employees. Employees are not eligible to participate in Plan A until completing thirty days of employment. Plan B costs employees \$200 each month. Full-time and part-time employees are eligible for Plan B after six months of employment. One hundred full-time employees are enrolled in Plan A. One hundred full-time and part-time employees are enrolled in Plan B. Forty full-time and part-time employees chose not to enroll in either plan. Ten part-time employees are not yet eligible for either Plan A or Plan B. Medical Resource, Inc. must report two hundred employees as having employer-provided medical benefits, because this is the number of employees enrolled in the health plans it offers.

(ii) Medical Resource, Inc. does not offer medical benefits to the employees of the staffing company. However, twenty-five of these workers have enrolled in a health plan through the staffing company. Medical Resource, Inc. must report these twenty-five employment positions as having employer-provided medical benefits.

(iii) Medical Resource, Inc. does not offer its employees dental insurance, but has arranged with a group of dental providers to provide all employees with a 30% discount on any dental care service. No action, other than Medical Resource, Inc. employment, is required by employees to receive this benefit. Unlike the medical benefit, employees are eligible for the dental benefit as of the first day of employment. This benefit is not provided to the workers furnished by the staffing company. Medical Resource, Inc. must report two hundred and fifty employment positions as having dental benefits, because this is the number of employees enrolled in this dental plan.

(iv) Medical Resource, Inc. offers a 401(k) Plan to its full-time and part-time employees after six months of employment. Medical Resource, Inc. makes matching contributions to an employee's 401(k) Plan after two years of employment. On December 31st, two hundred and twenty-five workers are eligible to participate in the 401(k) Plan. Two hundred workers are enrolled in the 401(k) Plan. One hundred of these workers receive matching contributions. Medical Resource, Inc. must report two hundred employment positions as having employer-provided retirement benefits, because this is the number of employees enrolled in the 401(k) Plan.

(v) Medical Resource, Inc. coordinates with a bank to insert information in employee paycheck envelopes on the bank's Individual Retirement Account (IRA) options offered to bank customers. Employees who open an IRA with the bank can arrange to have their contributions directly deposited from their paychecks into their accounts. Fifty employees open IRAs with the bank. Medical Resource, Inc. cannot report that these fifty employees have employer-provided retirement benefits. IRAs are not an employer-provided benefit because the ability to establish the IRA is not dependent on Medical Resource, Inc.'s participation or sponsorship of the benefit.

(10) **Is the annual survey confidential?** The annual survey is subject to the confidentiality provisions of RCW 82.32.330. However, information on the amount of tax

adjustment taken is not subject to the confidentiality provisions of RCW 82.32.330 and may be disclosed to the public upon request. More confidentiality provisions in regards to the annual surveys are as follows:

(a) **Failure to timely file a complete annual survey subject to disclosure.** If the following taxpayers fail to timely file a complete annual survey for claiming the tax adjustment, then the fact that such taxpayers fail to timely file a complete annual survey is not confidential:

(i) Persons receiving deferral of taxes under chapter 82.75 RCW on an eligible investment project in biotechnology products (RCW 82.32.645(6));

(ii) Persons claiming the B&O tax exemption provided by RCW 82.04.4266 for fruits and vegetables, RCW 82.04.-4268 for dairy products, and RCW 82.04.4269 for seafood products (RCW 82.32.610(5)); and

(iii) Persons claiming the B&O tax credit provided by RCW 82.04.449 for customized employment training (RCW 82.32.650(5)).

(b) **Amount reported in annual survey is different from the amount claimed or allowed.** If the following taxpayers report a tax adjustment amount on the annual survey that is different than the amount actually claimed on the taxpayers' tax returns or otherwise allowed by the department, then the amount actually claimed or allowed may be disclosed:

(i) Persons claiming the high technology B&O tax credit provided by RCW 82.04.4452 (RCW 82.04.4452 (6)(d)(i));

(ii) ~~(Persons claiming the B&O tax credit provided by RCW 82.04.4487 for engaging in qualified preproduction development in the field of aeronautics (RCW 82.32.635 (2)(e));~~

~~(iii) Persons claiming the B&O tax rate provided by RCW 82.04.250(3) for FAR part 145 certificated repair stations (RCW 82.32.640 (2)(e)); and~~

~~(iv))~~ Persons claiming the B&O tax rate provided by RCW 82.04.260(12) for timber products (RCW 82.32.630 (2)(d)).

(c) **Tax adjustment is less than ten thousand dollars.** If the tax adjustment of the following taxpayers is less than ten thousand dollars during the period covered by the annual survey, then such taxpayers may request the department to treat the tax adjustment as confidential under RCW 82.32.-330. The request must be made for each survey in writing, dated and signed by the owner, corporate officer, partner, guardian, executor, receiver, administrator, or trustee of the business, and filed with the department's special programs division at the address provided above in subsection (3) of this section.

(i) Persons claiming the high technology B&O tax credit provided by RCW 82.04.4452 (RCW 82.04.4452 (6)(d)(ii)); and

(ii) Persons claiming the B&O tax credit provided by RCW 82.04.4487 for engaging in qualified preproduction development in the field of aeronautics (RCW 82.32.635 (2)(d))(;

~~(iii) Persons claiming the B&O tax rate provided by RCW 82.04.250(3) for FAR part 145 certificated repair stations (RCW 82.32.640 (2)(d)); and~~

~~(iv) Persons claiming the B&O tax rate provided by RCW 82.04.260(12) for timber products (RCW 82.32.630 (2)(e)))).~~

(11) What are the consequences for failing to timely file a complete annual survey?

(a) What is a "complete annual survey"? An annual survey is complete if:

(i) The annual survey is filed on the form required by this section or in an electronic format as required by law; and

(ii) The person makes a good faith effort to substantially respond to all survey questions required by this section.

Responses such as "varied," "various," or "please contact for information" are not good faith responses to a question.

(b) High technology business and occupation (B&O) tax credit. If a person claiming the B&O tax credit provided by RCW 82.04.4452 for persons engaged in qualified research and development fails to timely file a complete annual survey by the date due, the person is not eligible to take or assign the credit in the year the person failed to timely complete the annual survey. See RCW 82.04.4452. For example, if a person claims the credit in 2006 but fails to file a complete annual survey by March 31, 2007, then the person is not eligible to take or assign the credit in 2007. If a person claims the B&O tax credit during this period of ineligibility, the department will declare the amount of taxes for which the credit was claimed during the period of ineligibility to be immediately due and payable with interest ~~((and penalties))~~, as provided in chapter 82.32 RCW.

If a person fails to file the survey by the due date as the result of circumstances beyond the control of the taxpayer, the person may request a thirty-day extension of the due date. See WAC 458-20-228 for more information on circumstances beyond the control of the taxpayer. The request must be made in writing before the due date to the address provided in subsection (3)(c) of this section.

(c) Tax deferrals for investment projects in rural counties. If a recipient of the deferral fails to timely file a complete annual survey required under RCW 82.60.070 by the date due, 12.5% of the total deferred tax is immediately due. See RCW 82.60.070. If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.60.020 (4), the lessee is responsible for payment to the extent the lessee has received the economic benefit. No penalties or interest will be assessed on the deferred sales/use tax; however, all other penalties and interest applicable to excise tax assessment may be assessed and imposed. For example, if a person fails to file a complete annual survey by March 31, 2007, then 12.5% of the total deferred tax is immediately due, with applicable penalties and interest beginning to accrue on the due date.

(d) Tax deferrals for investment projects for high technology businesses. If a recipient of the deferral fails to timely file a complete annual survey required under RCW 82.63.020 by the date due, 12.5% of the total deferred tax is immediately due with interest, but not penalties, as provided in chapter 82.32 RCW. See RCW 82.63.045. Interest is computed retroactively to the date the tax deferral was claimed and accrues until the liability is paid in full. If the economic benefits of the deferral are passed to a lessee as provided in

RCW 82.63.010(7), the lessee is responsible for payment to the extent the lessee has received the economic benefit.

(e) Business and occupation (B&O) tax exemption for fruit and vegetable, dairy product, and seafood product businesses. If a person fails to timely file a complete annual survey for the B&O tax exemption under RCW 82.04.4266, 82.04.4268, or 82.04.4269 by the due date, the amount of taxes exempted for the previous calendar year is immediately due and payable. See RCW 82.32.610. Interest, but not penalties, applies to the amounts due under this subsection. The amount due must be calculated using a rate of 0.138%. Interest is computed retroactively to the date the tax exemption was claimed and accrues until the liability is paid in full.

If a person fails to file the survey by the due date as the result of circumstances beyond the control of the taxpayer, the person may request a thirty-day extension of the due date. See WAC 458-20-228 for more information on circumstances beyond the control of the taxpayer. The request must be made in writing before the due date to the address provided in subsection (3)(c) of this section.

(f) Tax deferrals for investment projects for fruit and vegetable, dairy product, and seafood product businesses. If a recipient of the deferral fails to file a complete annual survey required under RCW 82.74.040 by the date due, 12.5% of the total deferred tax is immediately due with interest, but not penalties, as provided in chapter 82.32 RCW. See RCW 82.74.040. Interest begins to accrue on the due date and accrues until the liability is paid in full. If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.74.010(4), the lessee must be responsible for payment to the extent the lessee has received the economic benefit.

If a person fails to file the survey by the due date as the result of circumstances beyond the control of the taxpayer, the person may request a thirty-day extension of the due date. See WAC 458-20-228 for more information on circumstances beyond the control of the taxpayer. The request must be made in writing before the due date to the address provided in subsection (3)(c) of this section.

(g) Tax deferrals for investment projects for biotechnology products. If a recipient of the deferral fails to file a complete annual survey required under RCW 82.32.645 by the due date, 12.5% of the total deferred tax is immediately due with interest, but not penalties, as provided in chapter 82.32 RCW. See RCW 82.32.645. Interest begins to accrue on the due date and accrues until the liability is paid in full.

~~(h) ((**Business and occupation (B&O) tax credit for qualified preproduction development in the field of aeronautics under RCW 82.04.4487.** If a person fails to timely file a complete annual survey for the B&O tax credit under RCW 82.04.4487 by the due date, the amount of tax credit claimed for the previous calendar year is immediately due and payable. See RCW 82.32.635. Interest, but not penalties, applies to the amounts due under this subsection. Interest is computed retroactively to the date the tax credit was claimed and accrues until the liability is paid in full.~~

~~If a person fails to file the survey by the due date as the result of circumstances beyond the control of the taxpayer, the person may request a thirty-day extension of the due date. See WAC 458-20-228 for more information on circumstances beyond the control of the taxpayer. The request must~~

be made in writing before the due date to the address provided in subsection (3)(c) of this section.

A person is not required to file a complete annual survey under this subsection if the person is required to and timely files the annual report under RCW 82.32.545.

~~(i) **Reduced business and occupation (B&O) tax rate for FAR part 145 certificated repair stations.**~~ If a person fails to timely file a complete annual survey for the reduced B&O tax rate under RCW 82.04.250(3) by the due date, the amount of tax reduced for the previous calendar year is immediately due and payable. See RCW 82.32.640. Interest, but not penalties, applies to the amounts due under this subsection. Interest is computed retroactively to the date the reduced taxes were due and accrues until the liability is paid in full.

~~If a person fails to file the survey by due date as the result of circumstances beyond the control of the taxpayer, the person may request a thirty-day extension of the due date. See WAC 458-20-228 for more information on circumstances beyond the control of the taxpayer. The request must be made in writing before the due date to the address provided in subsection (3)(c) of this section.~~

~~(j)) **Business and occupation (B&O) tax credit for customized employment training.**~~ If a person fails to timely file a complete annual survey for the B&O tax credit under RCW 82.04.449 by the due date, the amount of tax credit claimed for the previous calendar year is immediately due and payable. See RCW 82.32.650. Interest, but not penalties, applies to the amounts due under this subsection. Interest is computed retroactively to the date the tax credit was claimed and accrues until the liability is paid in full.

If a person fails to file the survey by the due date as the result of circumstances beyond the control of the taxpayer, the person may request a thirty-day extension of the due date. See WAC 458-20-228 for more information on circumstances beyond the control of the taxpayer. The request must be made in writing before the due date to the address provided in subsection (3)(c) of this section.

~~((k)) (i) **Reduced business and occupation (B&O) tax credit for timber products.**~~ If a person fails to timely file a complete annual survey for the reduced B&O tax rate under RCW 82.04.260(12) by the due date, the amount of tax reduced for the previous calendar year is immediately due and payable. See RCW 82.32.630. Interest, but not penalties, applies to the amounts due under this subsection. Interest is computed retroactively to the date the reduced taxes were due and accrues until the liability is paid in full.

If a person fails to file the survey by the due date as the result of circumstances beyond the control of the taxpayer, the person may request a thirty-day extension of the due date. See WAC 458-20-228 for more information on circumstances beyond the control of the taxpayer. The request must be made in writing before the due date to the address provided in subsection (3)(c) of this section.

WSR 10-05-112
EXPEDITED RULES
DEPARTMENT OF REVENUE
[Filed February 17, 2010, 10:14 a.m.]

Title of Rule and Other Identifying Information: WAC 458-20-185 Tax on tobacco products, explains the tax liabilities of persons engaged in business as retailers or distributors of tobacco products other than cigarettes.

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 Bridget N. McBryde, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, e-mail BridgetM@dor.wa.gov, AND RECEIVED BY April 19, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department proposes to amend the rule to recognize SHB 1435 (chapter 154, Laws of 2009); which provides authority for the Washington state liquor control board to issue and enforce the licensing requirements under RCW 82.26.060, 82.26.150, 82.26.180, 82.26.190, 82.26.210, and 82.26.220.

Copies of draft rules are available for viewing and printing on our web site at <http://dor.wa.gov/content/FindALawOrRule/RuleMaking/agenda.aspx>.

Reasons Supporting Proposal: To recognize provisions of SHB 1435 (chapter 154, Laws [of] 2009).

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

Statute Being Implemented: RCW 82.26.060, 82.26.150, 82.26.180, 82.26.190, 82.26.210, and 82.26.220.

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: Bridget N. McBryde, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6117; Implementation: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6125; and Enforcement: Gilbert Brewer, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6147.

February 17, 2010
Alan R. Lynn
Rules Coordinator

AMENDATORY SECTION (Amending WSR 07-04-119, filed 2/7/07, effective 3/10/07)

WAC 458-20-185 Tax on tobacco products. (1) Introduction. This rule explains the tax liabilities of persons engaged in business as retailers or distributors of tobacco

products other than cigarettes. The tax on tobacco products (also called "other tobacco products tax," "tobacco tax," or "OTP tax") is in addition to all other taxes owed, such as retailing or wholesaling business and occupation tax, sales tax, and litter tax. See WAC 458-20-186 for tax liabilities associated with taxes that apply exclusively to cigarettes.

(2) **Licensing requirements and responsibilities.** The Washington state liquor control board assumed the licensing responsibilities for cigarettes on July 1, 2009. Please see chapters 314-33 and 314-34 WAC.

(3) **Organization of rule.** The information provided in this rule is divided into five parts:

(a) Part I provides definitions and explains the tax liabilities of persons engaged in the business of selling or distributing tobacco products (excluding cigarettes) in this state.

(b) ~~(Part II explains the licensing requirements and responsibilities for persons making wholesale or retail sales of tobacco products in this state.~~

~~(c))~~ Part ~~(II)~~ II explains the requirements and responsibilities for persons transporting tobacco products in Washington.

~~(d))~~ ~~(c)~~ Part ~~(IV)~~ III explains the recordkeeping requirements and enforcement of the tobacco tax.

~~(e))~~ ~~(d)~~ Part ~~(V)~~ IV describes the credits for tax paid and the procedures that must be followed to qualify for credit.

Part I - Tax on Tobacco Products (excluding Cigarettes)

(101) **In general.** The Washington state tobacco products tax is due and payable by the first distributor who possesses tobacco products in this state. The measure of the tax in most instances is based on the actual price paid by the distributor for the tobacco product, unless the distributor is affiliated with the seller.

(102) **Definitions.** For the purposes of this rule, the following definitions apply:

(a) **"Actual price"** means the total amount of consideration for which tobacco products are sold, valued in money, whether received in money or otherwise, including any charges by the seller necessary to complete the sale such as charges for delivery, freight, transportation, or handling.

(b) **"Affiliated"** means related in any way by virtue of any form or amount of common ownership, control, operation, or management.

(c) **"Board"** means the liquor control board.

(d) **"Business"** means any trade, occupation, activity, or enterprise engaged in for the purpose of selling or distributing tobacco products in this state.

(e) **"Cigar"** means a roll for smoking that is of any size or shape and that is made wholly or in part of tobacco, irrespective of whether the tobacco is pure or flavored, adulterated or mixed with any other ingredient, if the roll has a wrapper made wholly or in greater part of tobacco. "Cigar" does not include a cigarette.

(f) **"Cigarette"** has the same meaning as in RCW 82.24.010.

(g) **"Department"** means the department of revenue.

(h) **"Distributor"** means:

(i) Any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale;

(ii) Any person who makes, manufactures, fabricates, or stores tobacco products in this state for sale in this state;

(iii) Any person engaged in the business of selling tobacco products from outside this state who ships or transports tobacco products to retailers in this state, to be sold by those retailers;

(iv) Any person engaged in the business of selling tobacco products in this state who handles for sale any tobacco products that are within this state but upon which tax has not been imposed. RCW 82.26.010 (3)(a) through (d). (For example, Sunshine Tobacco Shop ("Sunshine") buys cigars from an out-of-state manufacturer for resale to consumers in this state. The cigars are shipped to Sunshine via common carrier. In this instance, Sunshine is a distributor, must have both a retailer's and a distributor's license, and must pay the tobacco products tax on the products it brings into the state. However, if Sunshine bought its merchandise exclusively from in-state distributors that have paid the tobacco products tax on that merchandise, Sunshine would not be considered a distributor, and would need only a retailer's license.)

(i) **"Indian," "Indian country,"** and **"Indian tribe"** have the same meaning as defined in chapter 82.24 RCW and WAC 458-20-192.

(j) **"Manufacture"** means the production, assembly, or creation of new tobacco products. For the purposes of this rule, "manufacture" does not necessarily have the same meaning as provided in RCW 82.04.120.

(k) **"Manufacturer"** means a person who manufactures and sells tobacco products.

(l) **"Manufacturer's representative"** means a person hired by a manufacturer to sell or distribute the manufacturer's tobacco products, and includes employees and independent contractors.

(m) **"Person"** means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, the state and its departments and institutions, political subdivision of the state of Washington, corporation, limited liability company, association, society, any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise. The term excludes any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country.

(n) **"Place of business"** means any place where tobacco products are sold or where tobacco products are manufactured, stored, or kept for the purpose of sale, including any vessel, vehicle, airplane, train, or vending machine.

(o) **"Retailer"** means any person engaged in the business of selling tobacco products to ultimate consumers.

(p) **"Retail outlet"** means each place of business from which tobacco products are sold to consumers.

(q) **"Sale"** means:

(i) Any transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, and includes and means all sales made by any person.

(ii) The term "sale" includes a gift by a person engaged in the business of selling tobacco products, for advertising,

promoting, or as a means of evading the provisions of this chapter.

(r) **"Sample"** and **"sampling"** have the same meaning as in RCW 70.155.010.

(s) **"Store," "stores,"** or **"storing"** means the holding of tobacco products for later sale or delivery inside or outside this state. For example:

(i) Wilderness Enterprises ships products from out-of-state to its Kent warehouse. All products are intended for future sale to Alaska. Wilderness Enterprises is a distributor that stores tobacco products in this state. Wilderness Enterprises is liable for tobacco products tax on the products stored in this state. (However, see subsection (501) of this section for credits that may be available to Wilderness Enterprises for out-of-state sales.)

(ii) Cooper Enterprises brings tobacco products into this state for sale. It rents storage space from a third party, Easy Storage. Cooper Enterprises (the distributor), not Easy Storage, is responsible for the tax and reporting requirements on the stored tobacco products.

(t) **"Taxable sales price"** means:

(i) In the case of a taxpayer that is not affiliated with the manufacturer, distributor, or other person from whom the taxpayer purchased tobacco products, the actual price for which the taxpayer purchased the tobacco products. For purposes of this subsection, "person" includes both persons as defined in (m) of this subsection and any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country;

(ii) In the case of a taxpayer that purchases tobacco products from an affiliated manufacturer, affiliated distributor, or other affiliated person, and that sells those tobacco products to unaffiliated distributors, unaffiliated retailers, or ultimate consumers, the actual price for which that taxpayer sells those tobacco products to unaffiliated distributors, unaffiliated retailers, or ultimate consumers.

For purposes of this subsection, "person" includes both persons as defined in (m) of this subsection and any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country;

(iii) In the case of a taxpayer that sells tobacco products only to affiliated distributors or affiliated retailers, the price, determined as nearly as possible according to the actual price for which other distributors sell similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers;

(iv) In the case of a taxpayer that is a manufacturer selling tobacco products directly to ultimate consumers, the actual price for which the taxpayer sells those tobacco products to ultimate consumers;

(v) In the case of a taxpayer that has acquired tobacco products under a sale as defined in (q)(ii) of this subsection, the price, determined as nearly as possible according to the actual price for which the taxpayer or other distributors sell the same tobacco products or similar tobacco products of like

quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers; or

(vi) In any case where (t)(i) through (v) of this subsection do not apply, the price, determined as nearly as possible according to the actual price for which the taxpayer or other distributors sell the same tobacco products or similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers.

(u) **"Taxpayer"** means a person liable for the tax imposed by chapter 82.26 RCW.

(v) **"Tobacco products"** means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, including wrapping papers or tubes that contain any amount of tobacco (such as "blunts"), prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking, but shall not include cigarettes as defined in RCW 82.24.010.

(w) **"Unaffiliated distributor"** means a distributor that is not affiliated with the manufacturer, distributor, or other person from whom the distributor has purchased tobacco products.

(x) **"Unaffiliated retailer"** means a retailer that is not affiliated with the manufacturer, distributor, or other person from whom the retailer has purchased tobacco products.

(103) **Imposition of tax.** RCW 82.26.030 as amended effective July 1, 2005, states: "It is the further intent and purpose of this chapter that the distributor who first possesses the tobacco product in this state shall be the distributor liable for the tax and that in most instances the tax will be based on the actual price that the distributor paid for the tobacco product, unless the distributor is affiliated with the seller." The tax is imposed at the time the first distributor possesses the product in this state for sale. RCW 82.26.020(2).

Examples. The following examples, while not exhaustive, illustrate some of the circumstances in which the tax is imposed. These examples should be used only as a general guide. The status of each situation must be determined after a review of all of the facts and circumstances.

(a) BET Wholesalers sells and ships tobacco products from Kentucky via common carrier to Surprise Enterprises in Washington. The tax is due from Surprise Enterprises a licensed distributor, because it is the first possessor in Washington that holds the product for sale. However, BET Distributors must give the liquor control board (LCB) notice of its intent to ship tobacco products into this state.

(b) BET Wholesalers sells and ships tobacco products in its own trucks from Kentucky to Jamie's Enterprises, a licensed distributor in Washington. The tax is due from BET Wholesalers, because it is the first possessor in Washington that holds the product for sale.

(c) Garden State Cigars is located in New Jersey. It ships its products to Washington retailers via National Common Carrier. The retailers must be licensed as distributors and are liable for the tax. However, Garden State Cigars must give the liquor control board (LCB) notice of its intent to ship tobacco products into this state.

(104) **Rates.** The Washington state tobacco tax is an excise tax levied on the taxable sales price as defined in RCW 82.26.010. The rate is a combination of statutory rates found in RCW 82.26.020.

(105) **Promotions.**

(a) Tobacco products sold, provided at a reduced cost, or given away for advertising or any other purpose are taxed in the same manner as if they were sold, used, consumed, handled, possessed, or distributed in this state. RCW 82.26.010 (5)(b). The taxable sales price for the tobacco products is the actual price for which the taxpayer or other distributors sell the same tobacco products, or a maximum of 67 cents each for cigars. RCW 82.26.010(18).

For example, Etta's (an out-of-state manufacturer) gives Joe's Distributing 500 cigars and 200 cans of snuff as a promotion. Etta's and Joe's Distributing are unaffiliated. Joe's Distributing normally sells this brand of cigars for \$1.00 each and the snuff for \$2.50 each to unaffiliated distributors and/or retailers. Joe's Distributing owes tobacco products tax on this merchandise. Because Joe's Distributing normally sells each cigar for more than 67 cents, the tobacco products tax is calculated on the cigars at 50 cents each ($500 \times 0.50 = \$250$). The tobacco products tax on the snuff is calculated at 75% of Joe's normal selling price to unaffiliated buyers ($200 \times \$2.50 = \$500 \times 75\% = \$375$) for a total tobacco products tax of \$625.

(b) If a product is purchased or sold at a discount in a promotion characterized as a "2 for 1" or similar sale, the tax is calculated on the actual prorated consideration the buyer paid to the unaffiliated distributor, or a maximum of 67 cents a cigar.

For example:

(i) Duke Distributing (an out-of-state wholesaler) ships tobacco products via common carrier to Lem's Tobacco Shop (an unaffiliated Washington retailer). Duke invoices Lem's for \$1,500. The sale includes 200 cigars priced "buy one for \$2 and get one free"; the balance of the sale is chewing tobacco priced at \$1,300. Lem's Tobacco Shop is liable for the tax. The tax on the chewing tobacco is \$975 ($\$1,300 \times 75\%$). Each cigar costs Lem's Tobacco Shop \$1 ($\$200/200$ cigars = \$1 per cigar). Because each cigar costs more than 67 cents, the tax on the cigars is capped at \$0.50 each. The tax on the cigars is \$100 (200 cigars \times $\$0.50 = \100). Total tobacco tax due on the invoice is \$1,075.

(ii) Shasta Distributing (an out-of-state wholesaler) ships OTP in its own trucks to Lem's Tobacco Shop (an unaffiliated Washington retailer). Shasta invoices Lem's for \$1,500. The sale includes 200 cigars priced "buy one for \$2 and get one free"; the balance of the sale is chewing tobacco priced at \$1,300. Shasta Distributing owes the tax. Shasta originally purchased the products from an unaffiliated manufacturer for \$300 (\$100 for the cigars and \$200 for the chewing tobacco). The tax on the chewing tobacco is \$150 ($\$200 \times 75\%$). The tax on the cigars is \$75 ($\$100 \times 75\% = \75), because the cigars cost less than 67 cents each ($\$100/200$ cigars = 50 cents per cigar). Total tobacco tax due on the invoice is \$225.

(iii) Wind Blown Distributing (an out-of-state wholesaler) ships tobacco products in its own trucks to Lem's Tobacco Shop (an unaffiliated retailer located in this state). Wind Blown invoices Lem's for \$1,500. The sale includes

200 cigars priced "buy one for \$2 and get one free"; the balance of the sale is chewing tobacco priced at \$1,300. Wind Blown Distributing owes the tax. Wind Blown originally purchased the products from an affiliated manufacturer for \$100 (\$25 for the cigars and \$75 for the chewing tobacco). The measure of the tax is the actual price for which Wind Blown sells these products to unaffiliated buyers, i.e., Lem's. The tax due on the chewing tobacco is \$975 ($\$1,300 \times 75\%$). The tax on the cigars is \$100 (200 cigars \times 50 cents). The tax on the cigars is capped at \$0.50 each, because each cigar costs more than 67 cents ($\$200/200$ cigars = \$1 per cigar). Total tobacco tax due on the invoice is \$1,075.

~~((Part II—Wholesale and Retail Tobacco Products Vendor Licensing Requirements and Responsibilities~~

~~(201) **License required.** No person may engage in the retail or wholesale distribution of tobacco products in this state without a license.~~

~~(202) **Distributor's license.** Prior to selling or distributing tobacco products from a stock of goods in Washington or to retailers in Washington, each distributor must first obtain a tobacco distributor's license from the department of licensing.~~

~~(a) **Background check.** Each distributor must undergo a criminal background check before a license will be issued. Chapter 82.26 RCW. The background check must be completed to the satisfaction of the liquor control board and the department. Failure to provide information sufficient to complete the background check may result in denial of the license. A background check will not be required if the applicant has had a background check for a license issued under chapter 66.24 or 82.24 RCW.~~

~~(b) **Application.** Application for license or renewal of license is made on forms supplied by the department of licensing and must be accompanied by the annual license fee as provided in chapter 82.26 RCW. A distributor's license is valid for one year from the date it is issued. The annual fees will not apply if the licensee pays the corresponding annual distributor cigarette fees under RCW 82.24.510.~~

~~(c) **Multiple locations.** If the distributor sells, intends to sell, or stores tobacco products at more than one place of business, whether temporary or permanent, a separate license with a license fee as provided in chapter 82.26 RCW is required for each additional place of business. Each license must be exhibited in the place of business for which it is issued.~~

~~(203) **Duties and responsibilities of licensed distributors.**~~

~~(a) **Sales restricted.** Wholesalers selling tobacco products in this state may sell tobacco products only to Washington retailers or wholesalers who have a current tobacco license, to other licensed wholesalers, the federal government or its instrumentalities, or to Indian tribal entities authorized to possess untaxed tobacco products.~~

~~(b) **Manufacturer's representatives.** Manufacturers selling tobacco products through manufacturer's representatives must provide the department a current list of the names, addresses and telephone numbers of all such representatives. The list is mailed to: Washington State Department of Revenue, P.O. Box 47477, Olympia, WA 98504. The manufac-~~

turer must have a distributor's license and its representatives must carry a copy of the manufacturer's distributor license at all times when selling or distributing the manufacturer's tobacco products.

~~(204) **Retail license.** Prior to the retail sale or distribution of tobacco products, each retailer must first be issued a retail tobacco license from the department of licensing. A license is required for each location at which tobacco products are sold at retail. Each license must be exhibited at the place of business for which it is issued.~~

~~**Application.** Applications for license or renewals of license are made on forms supplied by the department of licensing and must be accompanied by the annual license fee as provided in chapter 82.26 RCW. A retail tobacco license is valid for one year from the date it is issued. The annual fees will not apply if the licensee pays the corresponding annual retailer cigarette fees under RCW 82.24.510.~~

~~(205) **Duties and responsibilities of retailers.** A retailer that obtains tobacco products from an unlicensed distributor or any other person that is not licensed under this chapter must be licensed both as a retailer and a distributor and is liable for the tax imposed under RCW 82.26.020 with respect to the tobacco products acquired from the unlicensed person that are held for sale, handling, or distribution in this state. For example, if a retailer buys tobacco products from an Indian smoke shop or an out-of-state wholesaler who does not have a tobacco distributor license, the retailer must obtain a distributor license and pay the tobacco tax due.~~

~~(206) **Suspension or revocation of wholesale or retail tobacco licenses.**~~

~~(a) The department has full power and authority to suspend or revoke the license of any wholesale or retail tobacco dealer in the state upon sufficient showing that the license holder has violated the provisions of chapter 82.26 RCW or this rule. See RCW 82.26.220 and WAC 458-20-10001 for information on the procedures pertaining to suspension or revocation of cigarette licenses.~~

~~(b) Any person possessing both a tobacco products license and a cigarette license is subject to suspension and revocation of both licenses for violation of either chapter 82.24 or 82.26 RCW. For example, if a person has both a cigarette license and a tobacco license, revocation of the tobacco license will also result in revocation of the cigarette license.~~

~~(c) A person whose license has been suspended or revoked must not sell or permit the sale of tobacco products or cigarettes on premises occupied or controlled by that person during the period of the suspension or revocation.~~

~~(d) Any person whose license has been revoked must wait one year following the date of revocation before requesting a hearing for reinstatement. Reinstatement hearings are held pursuant to WAC 458-20-10001.)~~

Part ((H)) II - Transporting Tobacco Products in Washington

~~((301)) (201) **Transportation of tobacco products restricted.**~~

~~(a) Only licensed distributors or retailers in their own vehicles, or manufacturer's representatives authorized to sell or distribute tobacco products in this state, can transport tobacco products in this state. Individuals transporting the~~

product must have a copy of a valid retailer's or distributor's license in their possession and evidence that they are representatives of the licensees. Individuals transporting tobacco products for sale must also have in their possession invoices or delivery tickets for the tobacco products that show the name and address of the consignor or seller, the name and address of the consignee or purchaser, and the quantity and brands of the tobacco products being transported. It is the duty of the distributor, retailer, or manufacturer responsible for the delivery or transportation of the tobacco products to ensure that all drivers, agents, representatives, or employees have the delivery tickets or invoices in their possession for all such shipments.

(b) All other persons must give notice to the board in advance of transporting or causing tobacco products to be transported in this state for sale. This includes those transporting tobacco products in this state via common carrier. For example: Peg's Primo Cigars (PPC), a small out-of-state distributor, sells tobacco products to retailers in Washington. PPC ships the products via National Common Carrier. Before placing the product in shipment to Washington, PPC must give notice to the board of the pending shipment. The notice must include the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the tobacco products being transported, and the shipment date.

Part ((IV)) III - Recordkeeping and Enforcement

~~((401)) (301) **Books and records.** An accurate set of records showing all transactions related to the purchase, sale, or distribution of tobacco products must be retained. RCW 82.26.060, 82.26.070 and 82.26.080. All records must be preserved for five years from the date of the transaction.~~

(a) **Distributors.** Distributors must keep at each place of business complete and accurate records for that place of business. The records to be kept by distributors include itemized invoices of tobacco products held, purchased, manufactured, brought in or caused to be brought in from without the state or shipped or transported to retailers in this state, and of all sales of tobacco products. The itemized invoice for each purchase or sale must be legible and must show the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts. Itemized invoices must be preserved for five years from the date of sale.

(b) **Retailers.** Retailers must secure itemized invoices of all tobacco products purchased. The itemized invoice for each purchase must be legible and must show the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts. Itemized invoices must be preserved for five years from the date of sale. Retailers are responsible for the tax on any tobacco products for which they do not have invoices.

~~((402)) (302) **Reports and returns.** The department may require any person dealing in tobacco products in this state to complete and return forms, as furnished by the department, setting forth sales, inventory, shipments, and other data required by the department to maintain control over trade in tobacco.~~

(a) **Tax returns.** The tax is reported on the combined excise tax return that must be filed according to the reporting

frequency assigned by the department. Detailed instructions for preparation of these returns may be obtained from the department.

(b) **Reports.** Retailers and distributors may be required to file a report with the department in compliance with the provisions of the National Uniform Tobacco Settlement when purchasing tobacco products (e.g., "roll your own tobacco") from certain manufacturers. Please see WAC 458-20-264 and chapter 70.157 RCW.

(c) Access to premises and records. Retailers and distributors must allow department personnel free access to their premises to inspect the tobacco products on the premises and to examine the books and records for the business. For further details, please see subsection (305) of this section.

((403)) (303) Criminal provisions. Chapter 82.26 RCW prohibits certain activities with respect to tobacco products. Persons handling tobacco within this state must refer to these statutes.

((404)) (304) Search, seizure, and forfeiture. Any tobacco products in the possession of a person selling tobacco in this state without a license or transporting tobacco products without the proper invoices or delivery tickets may be seized without a warrant by any agent of the department, agent of the board, or law enforcement officer of this state. In addition, all conveyances, including aircraft, vehicles, or vessels used to transport the illegal tobacco product may be seized and forfeited.

((405)) (305) Enforcement. Pursuant to RCW 82.26.121 and 66.44.010, enforcement officers of the liquor control board may enforce all provisions of the law with respect to the tax on tobacco products. Retailers and distributors must allow department personnel and enforcement officers of the liquor control board free access to their premises to inspect the tobacco products on the premises and to examine the books and records of the business. If a retailer fails to allow free access, or hinders, or interferes with department personnel and/or enforcement officers of the liquor control board, that retailer's registration certificate issued under RCW 82.32.030 is subject to revocation. Additionally, any licenses issued under chapter 82.26 or 82.24 RCW are subject to suspension or revocation by the department or board.

((406)) (306) Penalties. Penalties and interest may be assessed in accordance with chapter 82.32 RCW for nonpayment of tobacco tax.

Part ((V)) IV - Credits

((501)) (401) Credits.

(a) **Interstate and foreign sales.** A credit is available to distributors for tobacco products sold to retailers and wholesalers outside the state for resale. This credit may be taken only for the amount of tobacco products tax reported and previously paid on such products. RCW 82.26.110. No credit may be taken for a sale of tobacco products from a stock of goods in this state to a consumer outside the state.

(b) **Returned or destroyed goods.** A credit may be taken for tax previously paid when tobacco products are destroyed or returned to the manufacturer. Credits claimed against tax owed or as a refund of tax paid, must be supported by documentation.

(c) **Documentation.** Credits claimed against tax owed or as a refund of tax paid, must be supported by documentation. Affidavits or certificates are required, and must substantially conform to those illustrated below. The affidavits or certificates must be completed by the taxpayer prior to claiming the credit, and must be retained with the taxpayer's records as set forth in Part VI of this rule.

Claim for Credit on Tobacco Products Sold for Resale Outside Washington

The undersigned distributor under penalty of perjury under the laws of the state of Washington certifies that the following is true and correct to the best of his/her knowledge:

(Business name), (tax reporting number), purchased the tobacco products specified below for resale outside this state. Tobacco products tax has been paid on such tobacco products as set forth below.

Products were purchased from: (name of business)

.....
Date

Products were sold to: (name of out-of-state buyer)

.....
Address
.....
Date

Product	Taxable sales price	Quantity	Tax paid
Cigars exceeding \$0.67 per cigar	N/A		
Cigars not exceeding \$0.67 per cigar		N/A	
All tobacco products that are not cigars		N/A	

Signature of Taxpayer or Authorized Representative:.....

.....
Name

Title:

Claim for Credit on Tobacco Products Destroyed Merchandise

(i) Certificate of taxpayer.

Product	Taxable sales price	Quantity	Tax paid
Cigars exceeding \$0.67 per cigar	N/A		
Cigars not exceeding \$0.67 per cigar		N/A	

Product	Taxable sales price	Quantity	Tax paid
All tobacco products that are not cigars		N/A	

The undersigned certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of his/her knowledge:

(Business name), (tax reporting number), a dealer in tobacco products, has destroyed tobacco products unfit for sale. Tobacco tax has been paid on such tobacco products as set forth above. The tobacco products were destroyed in the manner set forth below. The destruction occurred either:
 (A) In the presence of an authorized agent of the department of revenue; or

(B) With prior authorization from the department to destroy the product without an agent of the department present.

Date, manner, and place of destruction:

Signature of Taxpayer or Authorized Representative:

Name:

Title:

Witnessed or approved:

Authorized Agent, Department of Revenue

Claim for Credit on Tobacco Products Returned Merchandise

(ii) Certificate of manufacturer.

Product	Taxable sales price	Quantity	Tax paid
Cigars exceeding \$0.67 per cigar	N/A		
Cigars not exceeding \$0.67 per cigar		N/A	
All tobacco products that are not cigars		N/A	

The undersigned certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of his/her knowledge:

(Business name), (tax reporting number), a dealer in tobacco products, has returned merchandise unfit for sale. Tobacco tax has been paid on such tobacco products as set forth above.

Returned to:

Date:

Method of transport:

Manufacturer's credit issued on:

Credit memo number:

Signature of Taxpayer or Authorized Representative:

Name:

Title:

**WSR 10-05-113
 EXPEDITED RULES
 DEPARTMENT OF REVENUE**

[Filed February 17, 2010, 10:14 a.m.]

Title of Rule and Other Identifying Information: WAC 458-20-186 Tax on cigarettes, explains the tax liabilities of persons engaged in business as retailers or distributors of cigarettes.

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 Bridget N. McBryde, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, e-mail BridgetM@dor.wa.gov, AND RECEIVED BY April 19, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department proposes to amend the rule to recognize HB 2542 (chapter 226, Laws of 2008); which amends the quantity which is unlawful to possess or transport from six thousand unstamped cigarettes to ten thousand unstamped cigarettes, and SHB 1435 (chapter 154, Laws of 2009); which provides for the Washington state liquor control board authority to issue and enforce the licensing requirements under RCW 82.24.510 and 82.24.550.

Copies of draft rules are available for viewing and printing on our web site at <http://dor.wa.gov/content/FindALawOrRule/RuleMaking/agenda.aspx>.

Reasons Supporting Proposal: To recognize provisions of HB 2542 (chapter 226, Laws [of] 2008) and SHB 1435 (chapter 154, Laws of 2009).

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

Statute Being Implemented: RCW 82.24.510, 82.24.550, and 82.24.110.

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: Bridget N. McBryde, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6117; Implementation: Alan R.

Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6125; and Enforcement: Gilbert Brewer, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6147.

February 17, 2010

Alan R. Lynn

Rules Coordinator

AMENDATORY SECTION (Amending WSR 07-04-119, filed 2/7/07, effective 3/10/07)

WAC 458-20-186 Tax on cigarettes. (1) Introduction.

This rule addresses those taxes (~~(and licensing)~~) activities that apply exclusively to cigarettes as defined by RCW 82.24.010. See WAC 458-20-185 for tax liabilities (~~(and registration requirements)~~) associated with tobacco products other than cigarettes. The tax on cigarettes is in addition to all other taxes owed. For example, retailers and wholesalers are liable for business and occupation tax on their retailing or wholesaling activities, and must collect and remit sales tax on retail sales of cigarettes. Consumers pay the cigarette tax in addition to sales or use tax on purchases of cigarettes for consumption within this state. (Wholesalers not licensed in the state of Washington who are making sales of cigarettes to Indians in accordance with a cigarette tax contract authorized by RCW 43.06.455 must comply with the specific terms of their individual contracts. See also WAC 458-20-192 regarding sales in Indian country.)

(2) Licensing requirements and responsibilities. The Washington state liquor control board assumed the licensing responsibilities for cigarettes on July 1, 2009. Please see chapters 314-33 and 314-34 WAC.

(3) Organization of rule. The information provided in this rule is divided into (~~(seven))~~ six parts:

(a) Part I explains the tax liabilities of persons who sell, use, consume, handle, possess, or distribute cigarettes in this state.

(b) (~~Part II explains the licensing requirements and responsibilities for persons making wholesale or retail sales of cigarettes in this state.~~)

(~~e))~~ Part (~~(H))~~ II explains the stamping requirements and how the cigarette tax rates are calculated.

(~~(d))~~ (~~(c))~~ Part (~~(F))~~ III describes the exemptions from the tax and the procedures that must be followed to qualify for exemption.

(~~(e))~~ (~~(d))~~ Part (~~(V))~~ IV explains the requirements and responsibilities for persons transporting cigarettes in Washington.

(~~(f))~~ (~~(e))~~ Part (~~(VI))~~ V explains the requirements and responsibilities for persons engaged in making delivery sales of cigarettes into this state.

(~~(g))~~ (~~(f))~~ Part (~~(VII))~~ VI explains the enforcement and administration of the cigarette tax.

Part I - Tax on Cigarettes

(101) **In general.** The Washington state cigarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses, or distributes the cigarettes in this state.

(a) **Possession.** For the purpose of this rule, a "possessor" of cigarettes is anyone who personally or through an agent, employee, or designee, has possession of cigarettes in this state.

(b) **Payment.** Payment of the cigarette tax is made through the purchase of stamps from banks authorized by the department of revenue (department) to sell the stamps. Only licensed wholesalers may purchase or obtain cigarette stamps. Except as specifically provided in Part (~~(IV))~~ III of this rule, it is unlawful for any person other than a licensed wholesaler to possess unstamped cigarettes in this state. However, as explained in subsection (102)(b) of this rule, certain consumers may possess unstamped cigarettes for personal consumption if they pay the tax as provided in this rule.

(c) **Imposition of tax.** Ordinarily, the tax obligation is imposed on and collected from the first possessor of unstamped cigarettes. However, failure of an exempt entity with an obligation to collect and remit the tax does not relieve a subsequent nonexempt possessor of unstamped cigarettes from liability for the tax.

(d) **Promotions.** Cigarettes given away for advertising or any other purpose are taxed in the same manner as if they were sold, used, consumed, handled, possessed, or distributed in this state, but are not required to have the stamp affixed. Instead, the manufacturer of the cigarettes must pay the tax on a monthly return filed with the department. See subsection (~~((702))~~) (602) of this rule.

(102) Possession of cigarettes in Washington state.

(a) Every person who is (i) in possession of unstamped cigarettes in this state, and (ii) is not specifically exempt by law, is liable for payment of the cigarette tax as provided in chapter 82.24 RCW and this rule.

(b) Consumers who buy unstamped cigarettes or who purchase cigarettes from sources other than licensed retailers in this state must pay the cigarette tax as provided in subsection (~~((702))~~) (602) of this rule when they first bring the cigarettes into this state or first possess them in this state. This requirement includes, but is not limited to, delivery sales as described in Part VI of this rule.

(c) **Cigarettes purchased from Indian retailers.** Special rules apply to cigarettes purchased from Indian retailers.

(i) Indians purchasing cigarettes in Indian country are exempt from the state cigarette tax; however, these sales must comply with WAC 458-20-192. Other consumers may purchase cigarettes for their personal consumption from "qualified Indian retailers" without incurring liability for state cigarette tax. A "qualified Indian retailer" is one who is subject to the terms of a valid cigarette tax contract with the state pursuant to RCW 43.06.455.

(ii) Consumers who purchase cigarettes from Indian retailers who are not subject to a cigarette tax contract with the state must comply with the reporting requirements and remit the cigarette tax as explained in subsection (~~((702))~~) (602) of this rule. These consumers are also liable for the use tax on their purchases. See WAC 458-20-178.

(iii) It is the duty of the consumer in each instance to ascertain his or her responsibilities with respect to such purchases.

(d) **Cigarettes purchased on military reservations.** Active duty or retired military personnel, and their depen-

dants, may purchase cigarettes for their own consumption on military reservations without paying the state tax (see Part ((IV)) III). However, such persons are not permitted to give or resell those cigarettes to others.

(e) **Counterfeit cigarettes.** It is unlawful for any person to manufacture, sell, or possess counterfeit cigarettes. A cigarette is counterfeit if (i) it or its packaging bears any logo or marking used by a manufacturer to identify its own cigarettes, and (ii) the cigarette was not manufactured by the owner of that logo or trademark or by any authorized licensee of the manufacturer. RCW 82.24.570.

(f) Possession of unstamped and untaxed cigarettes, and possession of counterfeit cigarettes, are criminal offenses in this state. See Part ((VH)) VI.

((Part II – Wholesale and Retail Cigarette Vendor Licensing Requirements and Responsibilities

(201) **License required.** No person, other than a government instrumentality or an Indian retailer as set forth in Part IV of this rule, may engage in the retail or wholesale distribution of cigarettes in this state without a license. No person may engage in the business of sampling within this state unless that person has first obtained a sampler's license. Failure to obtain the required license prior to sampling or selling cigarettes at wholesale or retail is a criminal act. RCW 70.155.050.

(202) **Definitions.** For the purposes of this rule, the following definitions apply:

(a) **"Place of business"** means any location where business is transacted with, or sales are made to, customers. The term includes, but is not limited to, any vehicle, truck, vessel, or the like at which sales are made.

(b) **"Retailer"** means every person, other than a wholesaler, who purchases, sells, offers for sale, or distributes cigarettes, regardless of quantity or amount, or the number of sales, and all persons operating under a retailer's registration certificate.

(c) **"Retail selling price"** means the ordinary, customary, or usual price paid by the consumer for each package of cigarettes, less the tax levied by the state.

(d) **"Sample"** and **"sampling"** have the same meaning as in RCW 70.155.010.

(e) **"Wholesaler"** means every person who purchases, sells, or distributes cigarettes, as defined in chapter 82.24 RCW, to retailers for the purpose of resale only.

(203) **Wholesale license.** Prior to the sale or distribution of cigarettes at wholesale, each wholesaler must first obtain a wholesale cigarette license from the department of licensing.

(a) **Background check.** Each wholesaler must undergo a criminal background check before a license will be issued. RCW 82.24.510. The background check must be completed to the satisfaction of the liquor control board and the department. Failure to provide information sufficient to complete the background check may, in the department's discretion, result in denial of the license.

(b) **Application.** Application for license or renewal of license is made on forms supplied by the department of licensing and must be accompanied by the annual license fee as provided in chapter 82.24 RCW. A wholesale cigarette license is valid for one year from the date it is issued.

(e) **Multiple locations.** If the wholesaler sells, or intends to sell, cigarettes at more than one place of business, whether temporary or permanent, a separate license with a license fee as provided in chapter 82.24 RCW is required for each additional place of business. Each license must be exhibited in the place of business for which it is issued.

(d) **Bond required.** Each licensed wholesaler must file a bond with the department in an amount determined by the department, but not less than \$5,000.00. The bond must be executed by the wholesaler as principal, and by a corporation approved by the department of licensing and authorized to engage in business as a surety company in this state, as surety. The bond must run concurrently with the wholesaler's license.

(204) Duties and responsibilities of licensed wholesalers:

(a) **Stamps.** Only licensed wholesalers may purchase or obtain cigarette stamps. Wholesalers are prohibited by law from selling or providing stamps to any other wholesaler or person.

(b) **Numbering.** Each roll of stamps, or group of sheets, has a separate serial number. The department keeps records of which wholesaler purchases each roll or group of sheets. Wholesalers are prohibited from possessing stamps other than those specifically issued to them.

(c) **Sales restricted.** Wholesalers selling cigarettes in this state may sell cigarettes only to Washington retailers who have a current retail cigarette license, to other licensed wholesalers, or to Indian tribal entities authorized to possess cigarettes that are not taxed by the state.

(d) **Unstamped cigarettes.** Except as explained in Part IV of this rule, no person other than a licensed wholesaler may possess unstamped cigarettes in this state. (For the purpose of this rule, the term "unstamped cigarette" means any cigarette that does not bear a Washington state cigarette stamp as described in Part III of this rule.) Licensed wholesalers may possess unstamped cigarettes in this state only in the following circumstances:

(i) Licensed wholesalers may possess unstamped cigarettes for up to 72 hours after receipt; however, the cigarettes must be stamped on or before sale or transfer to any other party other than another licensed wholesaler. Licensed wholesalers may possess unstamped cigarettes for more than 72 hours after receipt if they receive prior written permission from the department to do so.

(ii) Licensed wholesalers who have furnished a surety bond in an amount determined by the department may set aside, without stamping, that portion of their stock reasonably necessary for conducting sales to persons outside this state or to instrumentalities of the federal government. All unstamped stock must be kept separate and apart from stamped stock.

(e) **Transfers.** Wholesalers in possession of unstamped cigarettes under subsection (204)(d) of this rule that are transferred by the wholesaler to another facility within this state must be transferred in compliance with RCW 82.24.250.

(205) **Retail license.** Prior to the retail sale or distribution of cigarettes, each retailer must first be issued a retail cigarette license from the department of licensing. A license is required for each location at which cigarettes are sold at

retail. Each license must be exhibited at the place of business for which it is issued.

~~(a) **Application.** Applications for license or renewal of license are made on forms supplied by the department of licensing and must be accompanied by the annual license fee as provided in chapter 82.24 RCW. A retail cigarette license is valid for one year from the date it is issued.~~

~~(b) **Vending machines.** Retailers operating cigarette vending machines are required to pay an additional annual fee as set forth in chapter 82.24 RCW for each vending machine.~~

~~(206) **Duties and responsibilities of retailers.**~~

~~(a) No retailer in this state may possess unstamped cigarettes unless he or she is also a licensed wholesaler.~~

~~(b) Retailers may obtain cigarettes only from cigarette wholesalers licensed by this state.~~

~~(207) **Additional requirements for manufacturers, wholesalers, retailers, and samplers.** Persons making wholesale or retail sales or engaged in the business of sampling of cigarettes in this state must comply with all the provisions of chapters 70.155 and 70.158 RCW. All cigarettes sold, delivered, or attempted to be delivered, in violation of RCW 70.155.105 are subject to seizure and forfeiture. RCW 82.24.130.~~

~~(208) **Suspension or revocation of wholesale or retail cigarette licenses.**~~

~~(a) The department has full power and authority to revoke or suspend the license of any wholesale or retail cigarette dealer in the state upon sufficient showing that the license holder has violated the provisions of chapter 82.24 RCW or this rule. See RCW 82.24.550 and WAC 458-20-10001 for information on the procedures pertaining to suspension or revocation of cigarette licenses.~~

~~(b) Any person possessing both a cigarette license and a tobacco products license is subject to suspension and revocation of both licenses for violation of either chapter 82.24 or 82.26 RCW. For example, if a person has both a cigarette license and a tobacco license, revocation of the cigarette license will also result in revocation of the tobacco license.~~

~~(c) A person whose license has been suspended or revoked must not sell or permit the sale of cigarettes or tobacco products on premises occupied or controlled by that person during the period of the suspension or revocation.~~

~~(d) For the purposes of this rule, "tobacco products" has the same meaning as in RCW 82.26.010.~~

~~(e) Any person whose license has been revoked must wait one year following the date of revocation before requesting a hearing for reinstatement. Reinstatement hearings are held pursuant to WAC 458-20-10001.)~~

Part ((HH)) II - Stamping and Rates

~~((301)) (201) **Cigarette stamps.**~~

~~(a) Stamps indicating payment of the cigarette tax must be affixed prior to any sale, use, consumption, handling, possession, or distribution of all cigarettes other than those specifically exempted as explained in Part ((IV)) III of this rule. The stamp must be applied to the smallest container or package, unless the department, in its sole discretion, determines that it is impractical to do so. Stamps must be of the type authorized by the department and affixed in such a manner~~

that they cannot be removed from the package or container without being mutilated or destroyed.

~~(b) Licensed wholesalers may purchase state-approved cigarette stamps from authorized banks. Payment for stamps must be made at the time of purchase unless the wholesaler has prior approval of the department to defer payment and furnishes a surety bond equal to the proposed monthly credit limit. Payments under a deferred plan are due within thirty days following purchase. Licensed wholesalers are compensated for affixing the stamps at the rate of \$6.00 per thousand stamps affixed ("stamping allowance"). ~~((The stamping allowance is subject to business and occupation tax under the service and other business activities classification.)~~~~

~~(302)) (202) **Rates.**~~

~~(a) The Washington state cigarette tax is imposed on a per cigarette basis. The rate of the tax is a combination of statutory rates found in RCW 82.24.020, 82.24.027, and 82.24.028.~~

~~(b) When the rate of tax increases, the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed cigarettes after the rate increase is liable for the additional tax.~~

~~((303)) (203) **Refunds.** Any person may request a refund of the face value of the stamps when the tax is not applicable and the stamps are returned to the department. Documentation supporting the claim must be provided at the time the claim for refund is made.~~

~~(a) Refunds for stamped untaxed cigarettes sold to Indian tribal members or tribal entities in the full value of the stamps affixed will be approved by an agent of the department.~~

~~(b) Refunds for stamped cigarettes will not include the stamping allowance if the stamps are:~~

~~(i) Damaged, or unfit for sale, and as a result are destroyed or returned to the manufacturer or distributor; or~~

~~(ii) Improperly or partially affixed through burns, jams, double stamps, stamped on carton flaps, or improperly removed from the stamp roll.~~

~~(c) The claim for refund must be filed on a form provided by the department. An affidavit or a certificate from the manufacturer for stamped cigarettes returned to the manufacturer for destruction or by an agent of the department verifying the voiding of stamps and authorizing the refund must accompany the claim for refund.~~

Part ((IV)) III - Exemptions

~~((401)) (301) **In general.** There are limited exemptions from the cigarette tax provided by law. This part discusses exemptions and the procedures that must be followed to qualify for an exemption.~~

~~((402)) (302) **Government sales.** The cigarette tax does not apply to the sale of cigarettes to:~~

~~(a) The United States Army, Navy, Air Force, Marine Corps, or Coast Guard exchanges and commissaries and Navy or Coast Guard ships' stores;~~

~~(b) The United States Veteran's Administration; or~~

~~(c) Any person authorized to purchase from the federal instrumentalities named in (a) or (b) above, if the cigarettes are purchased from the instrumentality for personal consumption.~~

~~((403))~~ (303) **Sales in Indian country.**

(a) The definitions of "Indian," "Indian country," and "Indian tribe," in WAC 458-20-192 apply to this rule. "Cigarette contract" means an agreement under RCW 43.06.450 through 43.06.460.

(b) The cigarette tax does not apply to cigarettes taxed by an Indian tribe in accordance with a cigarette contract under RCW 43.06.450 through 43.06.460.

(c) The cigarette tax does not apply to cigarettes sold to an Indian in Indian country for personal consumption; however, those sales must comply with the allocation provisions of WAC 458-20-192. Sales made by an Indian cigarette outlet to nontribal members are subject to the tax, except as provided in (b) above.

(d) See WAC 458-20-192 for information on making wholesale sales of cigarettes to Indians and Indian tribes.

~~((404))~~ (304) **Interstate commerce.** The cigarette tax does not apply to cigarettes sold to persons licensed as cigarette distributors in other states when, as a condition of the sale, the seller either delivers the cigarettes to the buyer at a point outside this state, or delivers the same to a common carrier with the shipment consigned by the seller to the buyer at a location outside this state. Any person engaged in making sales to licensed distributors in other states or making export sales or in making sales to the federal government must furnish a surety bond in a sum equal to twice the amount of tax that would be affixed to the cigarettes that are set aside for the conduct of such business without affixing cigarette stamps. The unstamped stock must be kept separate and apart from any stamped stock.

~~(V)~~ IV - **Transporting Cigarettes in Washington**~~((501))~~ (401) **Transportation of cigarettes restricted.**

No person other than a licensed wholesaler may transport unstamped cigarettes in this state except as specifically set forth in RCW 82.24.250 and this rule, or as may be allowed under a cigarette tax contract subject to the provisions of RCW 43.06.455. Licensed wholesalers transporting unstamped cigarettes in this state must do so only in their own vehicles unless they have given prior notice to the liquor control board of their intent to transport unstamped cigarettes in a vehicle belonging to another person.

~~((502))~~ (402) **Notice required.** Persons other than licensed wholesalers intending to transport unstamped cigarettes in this state must first give notice to the liquor control board of their intent to do so.

~~((503))~~ (403) **Transportation of unstamped cigarettes.** All persons transporting unstamped cigarettes must have in their actual possession invoices or delivery tickets for such cigarettes. The invoices or delivery tickets must show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes transported. It is the duty of the person responsible for the delivery or transport of the cigarettes to ensure that all drivers, agents, or employees have the delivery tickets or invoices in their actual possession for all such shipments.

~~((504))~~ (404) **Consignment.** If the cigarettes transported pursuant to subsection ~~((501), (502),)~~ (401), (402), or ~~((503))~~ (403) of this rule are consigned to or purchased

by any person in this state, that purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state.

~~((505))~~ (405) **Out-of-state shipments.** Licensed wholesalers shipping cigarettes to a point outside Washington or to a federal instrumentality must, at the time of shipping or delivery, report the transaction to the department. The report must show both (a) complete details of the sale or delivery, and (b) whether stamps have been affixed to the cigarettes.

The report may be made either by submitting a duplicate invoice or by completing a form provided by the department, and must be filed with the department as set forth in subsection ~~((702))~~ (602) of this rule.

~~((506))~~ (406) **Compliance required.** No person may possess or transport cigarettes in this state unless the cigarettes have been properly stamped or that person has fully complied with the requirements of RCW 82.24.250 and this rule. Failure to comply with the requirements of RCW 82.24.250 is a criminal act. Cigarettes in the possession of persons who have failed to comply are deemed contraband and are subject to seizure and forfeiture under RCW 82.24.-130.

~~(VI)~~ V - **Delivery Sales of Cigarettes**

~~((601))~~ (501) **Definitions.** The definitions in this subsection apply throughout this rule.

(a) **"Delivery sale"** means any sale of cigarettes to a consumer in the state where either: (i) The purchaser submits an order for a sale by means of a telephonic or other method of voice transmission, mail delivery, any other delivery service, or the internet or other online service; or (ii) the cigarettes are delivered by use of mail delivery or any other delivery service. A sale of cigarettes made in this manner is a delivery sale regardless of whether the seller is located within or outside the state. (For example, "Royal Tax-free Smokes," located in the state of Vermont, offers sales via the internet and a toll-free telephone number, and ships its products to consumers in this state. These transactions are delivery sales.) A sale of cigarettes not for personal consumption to a person who is a wholesaler licensed under chapter 82.24 RCW or a retailer licensed under chapter 82.24 RCW is not a delivery sale.

(b) **"Delivery service"** means any private carrier engaged in the commercial delivery of letters, packages, or other containers, that requires the recipient of that letter, package, or container to sign to accept delivery.

~~((602))~~ (502) **Tax liability.** Cigarettes delivered in this state pursuant to a delivery sale are subject to tax as provided in Part I of this rule. Persons making delivery sales in this state are required to provide prospective consumers with notice that the sales are subject to tax pursuant to chapters 82.24 and 82.12 RCW, with an explanation of how the tax has been or is to be paid with respect to such sales.

~~((603))~~ (503) **Additional requirements.** Persons making delivery sales of cigarettes in this state must comply with all the provisions of chapter 70.155 RCW. All cigarettes sold, delivered, or attempted to be delivered, in violation of RCW 70.155.105 are subject to seizure and forfeiture. RCW 82.24.130.

Part ~~(VH)~~ VI - Enforcement and Administration

~~((701))~~ **(601) Books and records.** An accurate set of records showing all transactions related to the purchase, sale, or distribution of cigarettes must be retained. RCW 82.24.-090. These records may be combined with those required in connection with the tobacco products tax (see WAC 458-20-185), if there is a segregation therein of the amounts involved. All records must be preserved for five years from the date of the transaction.

~~((702))~~ **(602) Reports and returns.** The department may require any person dealing with cigarettes in this state to complete and return forms, as furnished by the department, setting forth sales, inventory, and other data required by the department to maintain control over trade in cigarettes.

(a) Manufacturers and wholesalers selling stamped, unstamped, or untaxed cigarettes must submit a complete record of sales of cigarettes in this state monthly. This report is due no later than the fifteenth day of the calendar month and must include all transactions occurring in the previous month.

(b) Persons making sales of tax-exempt cigarettes to Indian tribes or Indian retailers pursuant to WAC 458-20-192 (9)(a) must transmit a copy of the invoice for each such sale to the special programs division of the department prior to shipment.

(c) Wholesalers selling stamped cigarettes manufactured by nonparticipating manufacturers as defined in WAC 458-20-264 must report all such sales to the special programs division no later than the twenty-fifth day of the calendar month and must include all transactions occurring in the previous month.

(d) Persons making sales of cigarettes into this state to other than a licensed wholesaler or retailer must file a report as required under Title 15, Chapter 10A, section 376 of the U.S. Code (commonly referred to as the "Jenkins Act" report). This report is due no later than the 10th day of each calendar month and must include all transactions occurring in the previous month.

(e) Persons shipping or delivering any cigarettes to a point outside of this state must submit a report showing full and complete details of the interstate sale or delivery as set forth in Part V of this rule. This report is due no later than the fifteenth day of the calendar month immediately following the shipment or delivery.

(f) Persons giving away unstamped cigarettes for advertising, promotional, or any other purpose, must report and pay the tax on the number of cigarettes distributed in this state.

(g) Consumers who buy unstamped cigarettes or who purchase cigarettes from sources other than licensed retailers in this state must pay the tax when they first bring the cigarettes into this state or first possess them in this state. The tax is paid with a "Tax Declaration for Cigarettes," which may be obtained from the department.

~~((703))~~ **(603) Criminal provisions.** Chapter 82.24 RCW prohibits certain activities with respect to cigarettes. Persons handling cigarettes within this state must refer to these statutes. The prohibited activities include, but are not limited to, the following:

(a) **Transportation ~~((of))~~, possession ~~((of 60,000))~~, or receiving 10,000 or fewer cigarettes.** Transportation ~~((of))~~, possession ~~((of 60,000))~~ or receiving 10,000 or fewer unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a gross misdemeanor. RCW 82.24.110 (1)~~((m))~~ (n).

(b) **Transportation ~~((of))~~, possession ~~((of))~~, or receiving more than ~~((60,000))~~ 10,000 cigarettes.** Transportation ~~((of))~~, possession ~~((of))~~, or receiving more than ~~((60,000))~~ 10,000 unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a felony. RCW 82.24.110(2).

(c) **Forgery or counterfeiting of stamps.** Alteration, fabrication, forgery, and counterfeiting of stamps are felonies. RCW 82.24.100.

(d) **Counterfeit cigarettes.** The manufacture, sale, or possession of counterfeit cigarettes in this state is a felony. RCW 82.24.570.

~~((704))~~ **(604) Search, seizure, and forfeiture.** The department or the liquor control board may search for, seize, and subsequently dispose of unstamped cigarette packages and containers, counterfeit cigarettes, conveyances of all kinds (including aircraft, vehicles, and vessels) used for the transportation of unstamped and/or counterfeit cigarettes, and vending machines used for the sale of unstamped and/or counterfeit cigarettes. See RCW 82.24.130, et seq., for provisions relating to search, seizure, and forfeiture of property, possible redemption of property, and for treatment of such property in the absence of redemption.

~~((705))~~ **(605) Penalties.** RCW 82.24.120 provides a penalty for failure to affix the cigarette stamps or to cause the stamps to be affixed as required, or to pay any tax due under chapter 82.24 RCW. In addition to the tax deemed due, a penalty equal to the greater of \$10.00 per package of unstamped cigarettes or \$250.00 will be assessed. Interest is also assessed on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment. The department may, in its sole discretion, cancel all or part of the penalty for good cause.