

WSR 14-17-050
EXPEDITED RULES
OFFICE OF

INSURANCE COMMISSIONER

[Insurance Commissioner Matter No. R 2014-10—Filed August 14, 2014,
 4:50 p.m.]

Title of Rule and Other Identifying Information: Typographical error correction to network access rule.

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 Kate Reynolds, Office of the Insurance Commissioner, P.O. Box 40258, Olympia, WA 98504-0258, e-mail rulescoordinator@oic.wa.gov, AND RECEIVED BY October 21, 2014.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposed rule corrects typographical errors without changing the effect of the rule. WAC 284-43-221 and 284-43-222 reference an incorrect WAC 284-43-130 definitional section.

Reasons Supporting Proposal: Correction of typographical error in accordance with RCW 34.05.353 (1)(c) is important to ensure correct interpretation and application of the rule.

Statutory Authority for Adoption: RCW 48.02.060, 48.44.050, 48.46.200.

Statute Being Implemented: RCW 48.20.450, 48.43.515, 48.44.020, 48.44.080, 48.46.030, 45 C.F.R. 156.230, 45 C.F.R. 156.235, 45 C.F.R. 156.245.

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

Name of Proponent: Mike Kreidler, insurance commissioner, governmental.

Name of Agency Personnel Responsible for Drafting: Kate Reynolds, P.O. Box 40258, Olympia, WA 98504-0258, (360) 725-7170; Implementation: Molly Nollette, P.O. Box 40258, Olympia, WA 98504-0258, (360) 725-7117; and Enforcement: AnnaLisa Gellerman, P.O. Box 40258, Olympia, WA 98504-0258, (360) 725-7050.

August 14, 2014

Mike Kreidler
 Insurance Commissioner

AMENDATORY SECTION (Amending WSR 14-10-017, filed 4/25/14, effective 5/26/14)

WAC 284-43-221 Essential community providers for exchange plans—Definition. "Essential community provider" means providers listed on the Centers for Medicare and Medicaid Services Non-Exhaustive List of Essential Community Providers. This list includes providers and facilities that have demonstrated service to medicaid, low-

income, and medically underserved populations in addition to those that meet the federal minimum standard, which includes:

- (1) Hospitals and providers who participate in the federal 340B Drug Pricing Program;
- (2) Disproportionate share hospitals, as designated annually;
- (3) Those eligible for Section 1927 Nominal Drug Pricing;
- (4) Those whose patient mix is at least thirty percent medicaid or medicaid expansion patients who have approved applications for the Electronic Medical Record Incentive Program;
- (5) State licensed community clinics or health centers or community clinics exempt from licensure;
- (6) Indian health care providers as defined in WAC 284-43-130((47)) (16);
- (7) Long-term care facilities in which the average residency rate is fifty percent or more eligible for medicaid during the preceding calendar year;
- (8) School-based health centers as referenced for funding in Sec. 4101 of Title IV of ACA;
- (9) Providers identified as essential community providers by the U.S. Department of Health and Human Services through subregulatory guidance or bulletins;
- (10) Facilities or providers who waive charges or charge for services on a sliding scale based on income and that do not restrict access or services because of a client's financial limitations;
- (11) Title X Family Planning Clinics and Title X look-alike Family Planning Clinics;
- (12) Rural based or free health centers as identified on the Rural Health Clinic and the Washington Free Clinic Association web sites; and
- (13) Federal qualified health centers (FQHC) or FQHC look-alikes.

AMENDATORY SECTION (Amending WSR 14-10-017, filed 4/25/14, effective 5/26/14)

WAC 284-43-222 Essential community providers for exchange plans—Network access. (1) An issuer must include essential community providers in its provider network for qualified health plans and qualified stand-alone dental plans in compliance with this section and as defined in WAC 284-43-221.

(2) An issuer must include a sufficient number and type of essential community providers in its provider network to provide reasonable access to the medically underserved or low-income in the service area, unless the issuer can provide substantial evidence of good faith efforts on its part to contract with the providers or facilities in the service area. Such evidence of good faith efforts to contract will include documentation about the efforts to contract but not the substantive contract terms offered by either the issuer or the provider.

(3) The following minimum standards apply to establish adequate qualified health plan inclusion of essential community providers:

- (a) Each issuer must demonstrate that at least thirty percent of available primary care providers, pediatricians, and

hospitals that meet the definition of an essential community provider in each plan's service area participate in the provider network;

(b) The issuer's provider network must include access to one hundred percent of Indian health care providers in a service area, as defined in WAC 284-43-130(~~(+7)~~) (16), such that qualified enrollees obtain all covered services at no greater cost than if the service was obtained from network providers or facilities;

(c) Within a service area, fifty percent of rural health clinics located outside an area defined as urban by the 2010 Census must be included in the issuer's provider network;

(d) For essential community provider categories of which only one or two exist in the state, an issuer must demonstrate a good faith effort to contract with that provider or providers for inclusion in its network, which will include documentation about the efforts to contract but not the substantive contract terms offered by either the issuer or the provider;

(e) For qualified health plans that include pediatric oral services or qualified dental plans, thirty percent of essential community providers in the service area for pediatric oral services must be included in each issuer's provider network;

(f) Ninety percent of all federally qualified health centers and FQHC look-alike facilities in the service area must be included in each issuer's provider network;

(g) At least one essential community provider hospital per county in the service area must be included in each issuer's provider network;

(h) At least fifteen percent of all providers participating in the 340B program in the service area, balanced between hospital and nonhospital entities, must be included in the issuer's provider network;

(i) By 2016, at least seventy-five percent of all school-based health centers in the service area must be included in the issuer's network.

(4) An issuer must, at the request of a school-based health center or group of school-based health centers, offer to contract with such a center or centers to reimburse covered health care services delivered to enrollees under an issuer's health plan.

(a) If a contract is not entered into, the issuer must provide substantial evidence of good faith efforts on its part to contract with a school-based health center or group of school-based health centers. Such evidence of good faith efforts to contract will include documentation about the efforts to contract but not the substantive contract terms offered by either the issuer or the provider.

(b) "School-based health center" means a school-based location for the delivery of health services, often operated as a partnership of schools and community health organizations, which can include issuers, which provide on-site medical and mental health services through a team of medical and mental health professionals to school-aged children and adolescents.

(5) An issuer must, at the request of an Indian health care provider, offer to contract with such a provider to reimburse covered health care services delivered to qualified enrollees under an issuer's health plan.

(a) Issuers are encouraged to use the current version of the Washington State Indian Health Care Provider Adden-

dum, as posted on <http://www.aihc-wa.com>, to supplement the existing provider contracts when contracting with an Indian health care provider.

(b) If an Indian health care provider requests a contract and a contract is not entered into, the issuer must provide substantial evidence of good faith efforts on its part to contract with the Indian health care provider. Such evidence of good faith efforts to contract will include documentation about the efforts to contract but not the substantive contract terms offered by either the issuer or the provider.

(6) These requirements do not apply to integrated delivery systems pursuant to RCW 43.71.065.

WSR 14-17-125

EXPEDITED RULES

DEPARTMENT OF REVENUE

[Filed August 20, 2014, 10:08 a.m.]

Title of Rule and Other Identifying Information: WAC 458-20-217 (Rule 217) Lien for taxes, describes the administrative collection remedies and procedures available to the department of revenue (department) to collect unpaid and overdue tax liabilities. This rule explains tax liens and the personal liability of persons in control of collected but unpaid retail sales tax and spirits taxes. Most of the department's collection actions for unpaid taxes are enforced through the administrative collection remedies discussed in this rule.

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 Mark E. Bohe, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, e-mail markbohe@dor.wa.gov, AND RECEIVED BY Monday, October 20, 2014.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Rule 217 will be amended to recognize:

- 2ESSB 6143, Part VIII (chapter 23, Laws of 2010), which changed personal liability provisions for collected, but unremitted, retail sales and spirits taxes;
- HB 2758 (chapter 39, Laws of 2012) that amended RCW 82.32.145 to clarify that all spirits taxes under RCW 82.08.150 are trust fund taxes that subject certain responsible individuals to personal liability for such taxes and related penalties and interest; and
- HB 1239 (chapter 131, Laws of 2011) that provides in lieu of filing a tax warrant with a superior court, the department may in some circumstances issue a notice of lien against any real property in which the taxpayer has any ownership interest.

Copies of draft rules are available for viewing and printing on our web site at Rules Agenda.

Reasons Supporting Proposal: To update the rule to include legislative changes described above.

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

Statute Being Implemented: RCW 82.08.050, 82.08.150, 82.32.145, 82.32.210, and 82.32.212.

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: Mark Bohe, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 534-1574; Implementation: Dylan Waits, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 534-1583; and Enforcement: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 534-1599.

August 20, 2014
Dylan Waits
Rules Coordinator

AMENDATORY SECTION (Amending WSR 08-16-073, filed 7/31/08, effective 8/31/08)

WAC 458-20-217 Lien for taxes. (1) Introduction.

This rule provides an overview of the administrative collection remedies and procedures available to the department of revenue (department) to collect unpaid and overdue tax liabilities. It discusses tax liens and the liens that apply to probate, insolvency, assignments for the benefit of creditors, bankruptcy and public improvement contracts. The rule also explains the personal liability of persons in control of collected but unpaid sales tax. Although the department may use judicial remedies to collect unpaid tax, most of the department's collection actions are enforced through the administrative collection remedies discussed in this rule.

(2) **Tax liens.** The department is not required to obtain a judgment in court to have a tax lien. A tax lien is created when a warrant issued under RCW 82.32.210 is filed with a superior court clerk who enters it into the judgment docket. A copy of the warrant may be filed in any county in this state in which the department believes the taxpayer has real and/or personal property. The department is not required to give a taxpayer notice prior to filing a tax warrant. *Peters v Sjoholm*, 95 Wn.2d 871, 877, 631 P.2d 937 (1981) *appeal dismissed, cert. denied* 455 U.S. 914 (1982). The tax lien is an encumbrance on property. The department may enforce a tax lien by administrative levy, seizure or through judicial collection remedies.

(a) **Attachment of lien.** The filed warrant becomes a specific lien upon all personal property used in the conduct of the business and a general lien against all other real and personal property owned by the taxpayer against whom the warrant was issued.

(i) The specific lien attaches to all goods, wares, merchandise, fixtures, equipment or other personal property used in the conduct of the business of the taxpayer. Other personal property includes both tangible and intangible property. For example, the specific lien attaches to business assets such as

accounts receivable, chattel paper, royalties, licenses and franchises. The specific lien also attaches to property used in the business which is owned by persons other than the taxpayer who have a beneficial interest, direct or indirect, in the operation of the business. (See subsection (3) of this (~~section~~) rule for what constitutes a beneficial interest.) The lien is perfected on the date it is filed with the superior court clerk. The lien does not attach to property used in the business that was transferred prior to the filing of the warrant. It does attach to all property existing at the time the warrant is filed as well as property acquired after the filing of the warrant. No sale or transfer of such personal property affects the lien.

(ii) The general lien attaches to all real and personal non-business property such as the taxpayer's home and non-exempt personal vehicles.

(b) **Lien priorities.** The department does not need to levy or seize property to perfect its lien. The lien is perfected when the warrant is filed. The tax lien is superior to liens that vest after the warrant is filed.

(i) The lien for taxes is superior to bona fide interests of third persons that vested prior to the filing of the warrant if such persons have a beneficial interest in the business.

(ii) The lien for taxes is also superior to any interest of third persons that vested prior to the warrant if the interest is a mortgage of real or personal property or any other credit transaction that results in the mortgagee or the holder of the security acting as the trustee for unsecured creditors of the taxpayer mentioned in the warrant.

(iii) In most cases, to have a vested or perfected security interest in personal property, the secured party must file a UCC financing statement indicating its security interest. RCW 62A.9-301. See RCW 62A.9-302 for the exceptions to this general rule. The financing statement must be filed prior to the filing of the tax warrant for the lien to be superior to the department's lien.

(c) **Period of lien.** A filed tax warrant creates a lien that is enforceable for the same period as a judgment in a civil case that is docketed with the clerk of the superior court. RCW 82.32.210(4). A judgment lien expires ten years from the date of filing. RCW 4.56.310. The department may extend the lien for an additional ten years by filing a petition for an order extending the judgment with the clerk of the superior court. The petition must be filed within ninety days of the expiration of the original ten-year period. RCW 6.17.020.

(3) **Persons who have a beneficial interest in a business.** A third party who receives part of the profit, a benefit, or an advantage resulting from a contract or lease with the business has a beneficial interest in the operation of the business. A party whose only interest in the business is securing the payment of debt or receiving regular rental payments on equipment does not have a beneficial interest. Also, the mere loaning of money by a financial institution to a business and securing that debt with a UCC filing does not constitute a beneficial interest in the business. Rather, a party who owns property used by a delinquent taxpayer must also have a beneficial interest in the operation of that business before the lien will attach to the party's property. The definition of the term "beneficial interest" for purposes of determining lien priori-

ties is not the same as the definition used for tax free transfers described in WAC 458-20-106.

(a) **Third party.** A third party is simply a party other than the taxpayer. For example, if the taxpayer is a corporation, an officer or shareholder of that corporation is a "third party" with a beneficial interest in the operation of the business. If the corporate insider has a security interest in property used by the business, the tax lien will be superior even if the corporate insider's lien was filed before the department's lien.

(b) **Beneficial interest of lessor.** In some cases a lessor or franchisor will have a beneficial interest in the leased or franchised business. For example, an oil company that leases a gas station and other equipment to an operator and requires the operator to sell its products is a third party with a beneficial interest in the business. Factors which support a finding of a beneficial interest in a business include the following:

(i) The business operator is required to pay the lessor or franchisor a percentage of gross receipts as rent;

(ii) The lessor or franchisor requires the business operator to use its trade name and restricts the type of business that may be operated on the premises;

(iii) The lease places restrictions on advertising and hours of operation; and/or

(iv) The lease requires the operator to sell the lessor's products.

(c) A third party who has a beneficial interest in a business with a filed lien is not personally liable for the amounts owing. Instead, the amount of tax, interest and penalties as reflected in the warrant becomes a specific lien upon the third party's property that is used in the business.

(4) **Notice and order to withhold and deliver.** A tax lien is sufficient to support the issuance of a writ of garnishment authorized by chapter 6.27 RCW. RCW 82.32.210(4). A tax lien also allows the department to issue a notice and order to withhold and deliver. A notice and order to withhold and deliver (order) is an administrative garnishment used by the department to obtain property of a taxpayer from a third party such as a bank or employer. See RCW 82.32.235. The department may issue an order when it has reason to believe that a party is in the possession of property that is or shall become due, owing or belonging to any taxpayer against whom a warrant has been filed.

(a) **Service of order.** The department may serve an order to withhold and deliver to any person, or to any political subdivision or department of the state. The order may be served by the sheriff or deputy sheriff of the county where service is made, by any authorized representative of the department, or by certified mail.

(b) **Requirement to answer order.** A person upon whom service has been made is required to answer the order in writing within twenty days of service of the order. The date of mailing or date of personal service is not included when calculating the due date of the answer. All answers must be true and made under oath. If an answer states that it cannot presently be ascertained whether any property is or shall become due, owing, or belonging to such taxpayer, the person served must answer when such fact can be ascertained. RCW 82.32.235.

(i) If the person served with an order possesses property of the taxpayer subject to the claim of the department, the party must deliver the property to the department or its duly authorized representative upon demand. If the indebtedness involved has not been finally determined, the department will hold the property in trust to apply to the indebtedness involved or for return without interest in accordance with the final determination of liability or nonliability. In the alternative, the department must be furnished a satisfactory bond conditioned upon final determination of liability. RCW 82.32.235.

(ii) If the party upon whom service has been made fails to answer an order to withhold and deliver within the time prescribed, the court may enter a default judgment against the party for the full amount claimed owing in the order plus costs. RCW 82.32.235.

(c) **Continuing levy.** A notice and order to withhold and deliver constitutes a continuing levy until released by the department. RCW 82.32.237.

(d) **Assets that may be attached.** Both tangible assets, as a vehicle, and intangible assets may be attached. Examples of intangible assets that may be attached by an order to withhold and deliver include, but are not limited to, checking or savings accounts; accounts receivable; refunds or deposits; contract payments; wages and commissions, including bonuses; liquor license deposits; rental income; dealer reserve accounts held by service stations or auto dealers; and funds held in escrow pending sale of a business. Certain insurance proceeds are subject to attachment such as the cash surrender value of a policy. The department may attach funds in a joint account that are owned by the delinquent taxpayer. Funds in a joint account with the right of survivorship are owned by the depositors in proportion to the amount deposited by each. RCW 30.22.090. The joint tenants have the burden to prove the separate ownership.

(e) **Assets exempt from attachment.** Examples of assets which are not attachable include Social Security, railroad retirement, welfare, and unemployment benefits payable by the federal or state government.

(5) **Levy upon real and/or personal property.** The department may issue an order of execution, pursuant to a filed warrant, directing the sheriff of the county in which the warrant was filed to levy upon and sell the real and/or personal property of the taxpayer in that county. RCW 82.32.-220. If the department has reason to believe that a taxpayer has personal property in the taxpayer's possession that is not otherwise exempt from process or execution, the department may obtain a warrant to search for and seize the property. A search warrant is obtained from a superior or district court judge in the county in which the property is located. See RCW 82.32.245.

(6) **Probate, insolvency, assignment for the benefit of creditors or bankruptcy.** In all of these cases or conditions, the claim of the state for unpaid taxes and increases and penalties thereon, is a lien upon all real and personal property of the taxpayer. RCW 82.32.240. All administrators, executors, guardians, receivers, trustees in bankruptcy, or assignees for the benefit of creditors are required to notify the department of such administration, receivership, or assignment within sixty days from the date of their appointment and qualifica-

tion. In cases of insolvency, this includes the duty of the person who is winding down the business to notify the department.

(a) The state does not have to take any action to perfect its lien. The lien attaches the date of the assignment for the benefit of creditors or of the initiation of the probate or bankruptcy. In cases of insolvency, the lien attaches at the time the business becomes insolvent. The lien, however, does not affect the validity or priority of any earlier lien that may have attached in favor of the state under any other provision of the Revenue Act.

(b) Any administrator, executor, guardian, receiver, or assignee for the benefit of creditors who does not notify the department as provided above is personally liable for payment of the taxes and all increases and penalties thereon. The personal liability is limited to the value of the property subject to administration that otherwise would have been available to pay the unpaid liability.

(c) In probate cases in which a surviving spouse or surviving domestic partner is separately liable for unpaid taxes and increases and penalties thereon, the department does not need to file a probate claim to protect the state's interest against the surviving spouse or surviving domestic partner. The department may collect from the separate property of the surviving spouse or surviving domestic partner and any assets formerly community property or property of the domestic partnership which become the property of the surviving spouse or the surviving domestic partner. If the deceased spouse or deceased domestic partner and/or the community or domestic partnership also was liable for the tax debt, the claim also could be asserted in the administration of the estate of the deceased spouse or deceased domestic partner.

(7) Lien on retained percentage of public improvement contracts. Every public entity engaging a contractor under a public improvement project of ~~((twenty))~~ thirty-five thousand dollars or more, shall retain five percent of the total contract price, including all change orders, modifications, etc. This retainage is a trust fund held for the benefit of the department and other statutory claimants. In lieu of contract retainage, the public entity may require a bond. All taxes, increases, and penalties due or to become due under Title 82 RCW from a contractor or the contractor's successors or assignees with respect to a public improvement contract of ~~((twenty))~~ thirty-five thousand dollars or more shall be a lien upon the amount of the retained percentage withheld by the disbursing officer under such contract. RCW 60.28.040.

(a) **Priorities.** The employees of a contractor or the contractor's successors or assignees who have not been paid the prevailing wage under the public improvement contract have a first priority lien against the bond or retainage. The department's lien for taxes, increases, and penalties due or to become due under such contract is prior to all other liens. The amount of all other taxes, increases and penalties due from the contractor is a lien upon the balance of the retained percentage after all other statutory lien claims have been paid. RCW 60.28.040.

(b) **Release of funds.** Upon final acceptance by the public entity or completion of the contract, the disbursing officer shall contact the department for its consent to release the

funds. The officer cannot make any payment from the retained percentage until the department has certified that all taxes, increases, and penalties due have been paid or are readily collectible without recourse to the state's lien on the retained percentage. RCW 60.28.050 and 60.28.051.

(8) Personal liability for unpaid trust funds. ~~The retail sales tax ((is)) and all spirits taxes under RCW 82.08.150 are to be held in trust. RCW 82.08.050. As a trust fund, the retail sales tax ((is)) and spirits taxes are not to be used to pay other corporate or personal debts. ((RCW 82.32.145 imposes personal liability on any responsible person who willfully fails to pay or cause to be paid any collected but unpaid retail sales tax. Collection authority and procedures prescribed in chapter 82.32 RCW apply to the collection of trust fund liability assessments.~~

~~(a) **Responsible person.** A responsible person is any officer, member, manager, or other person having control or supervision of retail sales tax funds collected and held in trust or who has the responsibility for filing returns or paying the collected retail sales tax.~~

~~(i) A responsible person may have "control and supervision" of collected retail sales tax or the responsibility to report the tax under corporate bylaws, job description, or other proper delegation of authority. The delegation of authority may be established by written documentation or by conduct.~~

~~(ii) A responsible person must have significant but not necessarily exclusive control or supervision of the trust funds. Neither a sales clerk who only collects the tax from the customer nor an employee who only deposits the funds in the bank has significant supervision or control of the retail sales tax. An employee who has the responsibility to collect, account for, and deposit trust funds does have significant supervision or control of the tax.~~

~~(iii) A person is not required to be a corporate officer or have a proprietary interest in the business to be a responsible person.~~

~~(iv) A member of the board of directors, a shareholder, or an officer may have trust fund liability if that person has the authority and discretion to determine which corporate debts should be paid and approves the payment of corporate debts out of the collected retail sales trust funds.~~

~~(v) More than one person may have personal liability for the trust funds if the requirements for liability are present for each person.~~

~~(b) **Requirements for liability.** In order for a responsible person to be held personally liable for collected and unpaid retail sales tax:~~

~~(i) The tax must be the liability of a corporate or limited liability business;~~

~~(ii) The corporation must be terminated, dissolved, or abandoned;~~

~~(iii) The failure to pay must be willful; and~~

~~(iv) The department must not have a reasonable means of collecting the tax from the corporation.~~

~~(c) **Willful failure to pay.** A willful failure to pay means that the failure was an intentional, conscious, and voluntary course of action. An intent to defraud or a bad motive is not required. For example, using collected retail sales tax to pay~~

other corporate obligations is a willful failure to pay the trust funds to the state.

(i) A responsible person depositing retail sales tax funds in a bank account knowing that the bank might use the funds to off-set amounts owing to it is engaging in a voluntary course of action. It is a willful failure to pay if the bank does exercise its right of set-off which results in insufficient funds to pay the corporate retail sales tax that was collected and deposited in the account. To avoid personal liability in such a case, the responsible party can set aside the collected retail sales tax and not commingle it with other funds that are subject to attachment or set-off.

(ii) If the failure to pay the trust funds to the state was due to reasons beyond that person's control, the failure to pay is not willful. For example, if the person responsible for remitting the tax provides evidence that the trust funds were unknowingly stolen or embezzled by another employee, the failure to pay is not considered willful. To find that a failure to pay the trust funds to the state was due to reasons beyond that person's control, the facts must show both that the circumstances caused the failure to pay the tax and that the circumstances were beyond the person's control.

(iii) If a responsible person instructs an employee or hires a third party to remit the collected sales tax, the responsible person is not relieved of personal liability for the tax if the tax is not paid.

(d)) Whenever the department has issued a warrant under RCW 82.32.210 for the collection of unpaid retail sales tax funds or spirits taxes funds collected and held in trust under RCW 82.08.050 from a limited liability business entity and that entity is terminated, dissolved, abandoned, or insolvent, RCW 82.32.145 authorizes the department to impose personal liability against any or all of the responsible individuals. For a responsible individual who is the current or a former chief executive or chief financial officer, personal liability may be imposed regardless of fault or whether the individual was or should have been aware of the unpaid retail sales tax or spirits taxes liability. Collection authority and procedures prescribed in chapter 82.32 RCW apply to the collection of personal liability assessments.

(a) Responsible individual.

(i) A responsible individual includes any current or former officer, manager, member, partner, or trustee of a limited liability business entity with an unpaid tax warrant issued by the department.

(A) "Officer" means any officer or assistant officer of a corporation, including the president, vice-president, secretary, and treasurer.

(B) "Manager" has the same meaning as in RCW 25.15.-005.

(C) "Member" has the same meaning as in RCW 25.15.-005, except that the term only includes members of member-managed limited liability companies.

(ii) "Responsible individual" also includes any current or former employee or other individual, but only if the individual had the responsibility or duty to remit payment of the limited liability business entity's unpaid sales tax liability reflected in a tax warrant issued by the department.

(A) A responsible individual may have "control and supervision" of collected retail sales tax or spirits taxes or the

responsibility to report the tax under corporate bylaws, job description, or other proper delegation of authority. The delegation of authority may be established by written documentation or by conduct.

(B) Except for the current or a former chief executive or chief financial officer of a limited liability business entity, a responsible individual must have significant but not necessarily exclusive control or supervision of the trust funds. Neither a sales clerk who only collects the tax from the customer nor an employee who only deposits the funds in the bank has significant supervision or control of the retail sales tax or spirits taxes. An employee who has the responsibility to collect, account for, and deposit trust funds does have significant supervision or control of the tax.

(C) A person is not required to be a corporate officer or have a proprietary interest in the business to be a responsible individual.

(D) A member of the board of directors, a shareholder, or an officer may have trust fund liability if that person has the authority and discretion to determine which corporate debts should be paid and approves the payment of corporate debts out of the collected retail sales or spirits taxes trust funds.

(E) More than one person may have personal liability for the trust funds if the requirements for liability are present for each person.

(ii) Whenever a limited liability business entity with an unpaid tax warrant issued against it by the department has one or more limited liability business entities as a member, manager, or partner, "responsible individual" also includes any current and former officers, members, or managers of the limited liability business entity or entities or of any other limited liability business entity involved directly in the management of the limited liability business entity with an unpaid tax warrant issued against it by the department.

(b) Chief executive or chief financial officer.

(i) For a responsible individual who is the current or a former chief executive or chief financial officer of a limited liability business entity, liability under this rule applies regardless of fault or whether the individual was or should have been aware of the unpaid retail sales tax or spirits taxes liability of the limited liability business entity. There is no "willfully fails to pay" requirement for chief executive officers and chief financial officers.

(ii) A responsible individual who is the current or a former chief executive or chief financial officer is liable under this rule only for retail sales tax or spirits taxes liability accrued during the period that he or she was the chief executive or chief financial officer. However, if the responsible individual had the responsibility or duty to remit payment of the limited liability business entity's retail sales tax or spirits taxes to the department during any period of time that the person was not the chief executive or chief financial officer, that individual is also liable for retail sales tax or spirits taxes liability that became due during the period that he or she had the duty to remit payment of the limited liability business entity's taxes to the department but was not the chief executive or chief financial officer.

(iii) "Chief executive" means: The president of a corporation; or for other entities or organizations other than corporations or if a corporation does not have a president as one of

its officers, the highest ranking executive manager or administrator in charge of the management of the company or organization.

(iv) "Chief financial officer" means: The treasurer of a corporation; or for entities or organizations other than corporations or if a corporation does not have a treasurer as one of its officers, the highest senior manager who is responsible for overseeing the financial activities of the entire company or organization.

(c) Other responsible individuals.

(i) For any other responsible individual, liability under this rule applies only if he or she willfully fails to pay or to cause to be paid to the department the retail sales tax or spirits taxes due from the limited liability business entity.

(A) "Willfully fails to pay or to cause to be paid" means that the failure was the result of an intentional, conscious, and voluntary course of action. Intent to defraud or bad motive is not required. For example, using collected retail sales tax or spirits taxes to pay other corporate obligations is a willful failure to pay the trust funds to the state.

(B) Depositing retail sales tax or spirits taxes funds in a bank account knowing that the bank might use the funds to off-set amounts owing to it is engaging in a voluntary course of action. It is a willful failure to pay if the bank exercises its right of set-off which results in insufficient funds to pay the corporate retail sales tax or spirits taxes that were collected and deposited in the account. To avoid personal liability in such a case, the responsible individual can set aside the collected retail sales tax or spirits taxes and not commingle it with other funds that are subject to attachment or set-off.

(C) If the failure to pay the trust funds to the state was due to reasons beyond an individual's control, the failure to pay is not willful. For example, if evidence is provided that the trust funds were unknowingly stolen or embezzled by another employee, the failure to pay is not considered willful. To find that a failure to pay the trust funds to the state was due to reasons beyond an individual's control, the facts must show both that the circumstances caused the failure to pay the tax and that the circumstances were beyond the individual's control.

(D) If a responsible individual instructs an employee or hires a third party to remit the collected retail sales tax or spirits taxes, the responsible individual is not relieved of personal liability for the tax if the tax is not paid.

(ii) Responsible individuals other than a current or former chief executive or chief financial officer of the limited liability business entity are liable under this rule only for retail sales tax or spirits taxes liability that became due during the period he or she had the responsibility or duty to remit payment of the limited liability business entity's taxes to the department.

(d) Limited liability business entity.

(i) A "limited liability business entity" is a type of business entity that generally shields its owners from personal liability for the debts, obligations, and liabilities of the entity, or a business entity that is managed or owned in whole or in part by an entity that generally shields its owners from personal liability for the debts, obligations, and liabilities of the entity. Limited liability business entities include corporations, limited liability companies, limited liability partnerships, trusts,

general partnerships and joint ventures in which one or more of the partners or parties are also limited liability business entities, and limited partnerships in which one or more of the general partners are also limited liability business entities.

(ii) Whenever the department has issued a warrant under RCW 82.32.210 for the collection of unpaid retail sales tax or spirits taxes funds collected and held in trust under RCW 82.08.050 from a limited liability business entity and that business entity has been terminated, dissolved, or abandoned, or is insolvent, the department may pursue collection of the entity's unpaid state and local sales taxes, including penalties and interest on those taxes, against any or all of the responsible individuals.

(e) Requirements for liability. In order for a responsible individual to be held personally liable for collected and unpaid retail sales tax or spirits taxes:

(i) The tax must be the liability of a limited liability business entity.

(ii) The limited liability business entity must be terminated, dissolved, abandoned, or insolvent. Insolvent means the condition that results when the sum of the entity's debts exceeds the fair market value of its assets. The department may presume that an entity is insolvent if the entity refuses to disclose to the department the nature of its assets and liabilities.

(f) Extent of liability. Trust fund liability includes the collected but unpaid retail sales tax or spirits taxes as well as the interest and penalties due on the tax.

~~((i) An individual is only liable for trust funds collected during the period he or she had the requisite control, supervision, responsibility, or duty to remit the tax, plus interest and penalties on those taxes. RCW 82.32.145(2).~~

~~(ii) Any retail sales taxes that were paid to the department but not collected may be deducted from the retail sales taxes collected but not paid.~~

~~(e) **No reasonable means of collection.** The department has "no reasonable means of collection" if the costs of collection would be more than the amount that could be collected; if the amount that might be recovered through a levy, foreclosure or other collection action would be negligible; or if the only means of collection is against a successor corporation.~~

~~(f)) (g) Except for the current or a former chief executive or chief financial officer of a limited liability business entity, an individual is only liable for trust funds collected during the period he or she had the requisite control, supervision, responsibility, or duty to remit the tax, plus interest and penalties on those taxes.~~

(h) Appeal of personal liability assessment. Any person who receives a personal liability assessment is encouraged to request a supervisory conference if the person disagrees with the assessment. The request for the conference should be made to the department representative that issued the assessment or the representative's supervisor at the department's field office. A supervisory conference provides an opportunity to resolve issues with the assessment without further action. If unable to resolve the issue, the person receiving the assessment is entitled to administrative and judicial appeal procedures. RCW 82.32.145(4). See also RCW 82.32.160, 82.32.170, 82.32.180, 82.32.190, and 82.32.200.

While encouraged to request a supervisory conference, any person receiving a personal liability assessment may elect to forego the supervisory conference and proceed directly with an appeal of the assessment. Refer to WAC 458-20-100 for information about the department's administrative appeal procedures, including how to timely file a petition for appeal.

(9) Notice of lien. Under RCW 82.32.212, the department may issue a notice of lien to secure payment of a tax warrant issued under RCW 82.32.210. The notice of lien is an alternative to filing a lien under RCW 82.32.210. The notice of lien is against any real property in which the taxpayer has an ownership interest.

(a) To file a notice of lien the amount of the tax warrant at issue must exceed twenty-five thousand dollars. The department must determine that issuing the notice of tax lien would best protect the state's interest in collecting the amount due on the warrant.

(b) The notice of tax lien is recorded with a county auditor in lieu of filing a warrant with the clerk of a county superior court. A general lien authorized in RCW 82.32.210 can be filed (or refiled) if the department determines that filing or refiled the warrant is in the best interest of collecting the amount due on the tax warrant, or the warrant remains unpaid six months after the notice of lien is issued.

WSR 14-17-133

EXPEDITED RULES

DEPARTMENT OF REVENUE

[Filed August 20, 2014, 10:45 a.m.]

Title of Rule and Other Identifying Information: WAC 458-12-165 Listing of property—Public lands—Purchase by state, county or city.

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 Jay M. Jetter, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, e-mail JayJ@dor.wa.gov, AND RECEIVED BY October 20, 2014.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: This rule currently provides an incorrect citation to and incorporates language from repealed statute RCW 84.60.060. The department is proposing to delete this outdated language from the rule.

Copies of draft rules are available for viewing and printing on our web site at Rules Agenda.

Reasons Supporting Proposal: To delete outdated language.

Statutory Authority for Adoption: RCW 84.08.010 and 84.08.070.

Statute Being Implemented: RCW 84.60.050 and 84.60.-070.

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: Jay Jetter, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 534-1575; Implementation: Dylan Waits, 1025 Union Avenue S.E., Suite #200, Olympia, WA, (360) 534-1583; and Enforcement: Kathy Beith, 1025 Union Avenue S.E., Suite #200, Olympia, WA, (360) 534-1403.

August 20, 2014
Dylan Waits
Rules Coordinator

AMENDATORY SECTION (Amending Order PT 68-6, filed 4/29/68)

WAC 458-12-165 Listing of property—Public lands—Purchase by state, county or city. Real property acquired either by purchase or condemnation by the state, county, city or any exempt political subdivision shall remain liable for any tax liens existing on the realty at the time the conveyance is completed. (RCW 84.60.050) ~~((If the taxes are not delinquent at the time of the purchase or condemnation, the date of completion of the sale shall be noted. If the transfer was before February 15 of the taxable year, there shall be no tax payable. If the transfer is between February 15 and April 30, one-half of the tax shall be payable. If the transfer is after April 30, the full amount of tax shall be payable. (RCW 84.60.060)))~~ Whenever only part of a parcel of property is purchased or condemned, the assessor is authorized to segregate the taxes according to the provision of RCW 84.60.070.