

WSR 22-08-111

PROPOSED RULES

DEPARTMENT OF REVENUE

[Filed April 6, 2022, 11:37 a.m.]

Continuance of WSR 21-16-050.

Preproposal statement of inquiry was filed as WSR 21-05-068.

Title of Rule and Other Identifying Information: WAC 458-20-290 (new rule) Workforce education investment surcharge—Select advanced computing businesses.

Hearing Location(s): On May 10, 2022, at 10:00 a.m. This meeting will be conducted over the internet/telephone. Contact Atif Aziz at AtifA@dor.wa.gov for login/dial-in information. The meeting information will also be announced via the department's excise tax listserv.

Date of Intended Adoption: June 2, 2022.

Submit Written Comments to: Leslie Mullin, P.O. Box 47453, Olympia, WA 98504-7453, email LeslieMu@dor.wa.gov, 360-534-1589.

Assistance for Persons with Disabilities: Contact Julie King or Renee Cosare, phone 360-704-5733 or 360-704-5734, TTY 800-833-6384.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of the proposed new rule is to reflect 2020 and 2022 legislation, ESSB 6492, SSB 5799, and ESB 5800, that imposed a surcharge on select advanced computing businesses as described in RCW 82.04.299.

Reasons Supporting Proposal: Businesses that engage in the activities subject to RCW 82.04.299 will find [that] the new rule provides additional clarification on the application of the surcharge.

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

Statute Being Implemented: RCW 82.04.299.

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: Leslie Mullin, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1589; Implementation and Enforcement: John Ryser, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1605.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. This rule is not a significant legislative rule as defined by RCW 34.05.328.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. This rule making does not impose any liability for taxes, reporting requirements, recordkeeping requirements, or compliance requirements not otherwise imposed by statute.

April 6, 2022

Atif Aziz

Rules Coordinator

OTS-3215.3

NEW SECTION

WAC 458-20-290 Workforce education investment surcharge—Select advanced computing businesses. (1) **Introduction.** This rule provides information about the taxability of and surcharge for select advanced computing businesses as described in RCW 82.04.299.

(2) **Examples.** This rule includes examples that identify a number of facts and then state a conclusion. These examples should only be used as a general guide. The tax results of other situations must be determined after a review of all the facts and circumstances.

(3) **Definitions.** The following definitions apply throughout this rule:

(a) **"Advanced computing"** means designing or developing computer software or computer hardware, whether directly or contracting with another person, including:

(i) Modifications to computer software or computer hardware;

(ii) Cloud computing services; or

(iii) Operating as a marketplace facilitator as defined by RCW 82.08.0531, an online search engine, or an online social networking platform.

(b) **"Advanced computing business"** means a business that derives income, including income from affiliates, from engaging in advanced computing.

(c) **"Affiliate"** and **"affiliated"** means a person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person.

(d) **"Affiliated group"** means a group of two or more persons that are affiliated with each other.

(e) **"Cloud computing services"** means on-demand delivery of computing resources, such as networks, servers, storage, applications, and services, over the internet.

(f) **"Control"** means the possession, directly or indirectly, of more than 50 percent of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise.

(g) **"Select advanced computing business"** means a person who is a member of an affiliated group with at least one member of the affiliated group engaging in the business of advanced computing, and the affiliated group had worldwide gross revenue of more than \$25,000,000,000 during the immediately preceding calendar year. A select advanced computing business does not include any of the following:

(i) A person primarily engaged within this state in the provision of commercial mobile service, as that term is defined in 47 U.S.C. Sec. 332 (d) (1);

(ii) A person primarily engaged in this state in the operation and provision of access to transmission facilities and infrastructure that the person owns or leases for the transmission of voice, data, text, sound, and video using wired telecommunications networks; or

(iii) A person primarily engaged in business as a "financial institution" as defined in RCW 82.04.29004, as that section existed on January 1, 2020.

For purposes of (g) of this subsection, "primarily" is determined based on the taxable income of the business, as defined in (h) of this subsection.

(h) **"Taxable income of the business"** means the gross income of the business, as defined in RCW 82.04.080, to which the tax rate in RCW 82.04.290(2) is applied to determine the business's tax liability under that B&O tax classification. In other words, it is the business's taxable income under the service and other activities B&O tax classification.

(i) **"Worldwide gross revenue"** means the annual sum of all sources of revenues, worldwide, prior to any subtractions, for all members of an affiliated group.

(4) **Select advanced computing businesses - Taxability.**

(a) **Service and other activities B&O tax.** A select advanced computing business is subject to the service and other activities B&O tax rate of 1.5 percent as required in RCW 82.04.290 (2) (a) (ii).

(b) **Workforce education investment surcharge.** Beginning with business activities occurring on or after April 1, 2020, a workforce education investment surcharge (surcharge) is imposed on select advanced computing businesses. This surcharge is in addition to the B&O taxes described in (a) of this subsection, plus any additional taxes that are due and payable to the department.

(i) Surcharge amount. For each select advanced computing business, the surcharge is equal to the taxable income of the business, multiplied by a rate of 1.22 percent. The combined annual surcharge paid by all members of an affiliated group may not exceed \$9,000,000.

(ii) Surcharge reporting. A select advanced computing business must report and pay the surcharge to the department on a quarterly basis, regardless of the tax reporting frequencies of the members in the select advanced computing business under RCW 82.32.045. The return and amount payable are due by the last day of the month immediately following the end of the quarter. This reporting requirement continues even if the combined annual surcharge paid by all members of an affiliated group reaches the \$9,000,000 annual maximum amount described in (b) (i) of this subsection.

(iii) Surcharge payment agreement. Members of an affiliated group of select advanced computing businesses may enter into an agreement with the department for facilitating the payment of the surcharge for all members of the group.

(iv) Disclosure obligations. The department may require persons believed to be engaging in advanced computing, or affiliated with a person believed to be engaging in advanced computing, to disclose whether they are a member of an affiliated group, and if so, to identify all other members of the affiliated group subject to the surcharge.

(v) Penalties. If the department establishes by clear, cogent, and convincing evidence, that one or more members of an affiliated group, with the intent to evade the surcharge, failed to fully comply with the department's disclosure request, as described in (b) (iv) of this subsection, that person, or those persons collectively, will be assessed a penalty equal to 50 percent of the amount of the total surcharge payable by all members of that affiliated group for the calendar year during which the person or persons failed to comply. This penalty is in lieu of, and not in addition to, the evasion penalty under RCW 82.32.090(7). However, additional penalties may still apply including, but not limited to, the penalty for late payment of tax due on a return. See RCW 82.32.090(1).

(vi) Hospital exemption. The surcharge described in (b) of this subsection does not apply to:

(A) A hospital as defined in RCW 70.41.020, including any hospital that comes within the scope of chapter 71.12 RCW if the hospital is also licensed under chapter 70.41 RCW; or

(B) A provider clinic offering primary care, multispecialty and surgical services, including behavioral health services, and any affiliate of the provider clinic if the affiliate is an organization that offers health care services or provides administrative support for a provider clinic, or is an independent practice association or accountable care organization. For purposes of (b) (vi) (B) of this subsection, "health care services" means services offered by health care providers relating to the prevention, cure, or treatment of illness, injury, or disease, and "primary care" means wellness and prevention services and the diagnosis and treatment of health conditions.

The exemptions under (b) (vi) (A) and (B) of this subsection do not apply to amounts received by any member of an affiliated group other than the businesses described in (b) (vi) (A) and (B) of this subsection.

(c) **Example 1.** Entity X, Entity Y, and Entity Z, an affiliated group, cumulatively had worldwide gross revenue of over \$25,000,000,000 in 2021. Entity X and Entity Y are engaged in advanced computing, and Entity Z is engaged in real estate and leases commercial property to Entity X and Entity Y. All three entities are registered with the department and file and pay taxes on a monthly basis. For the first quarter of 2022, the entities reported the following amounts as taxable income of the business, respectively: Entity X: \$800,000; Entity Y: \$100,000; and Entity Z: \$1,200,000.

The first step is to determine whether the taxable income subject to tax under the service and other activities B&O tax classification for each entity is subject to the 1.22 percent surcharge. Because Entities X, Y, and Z are all members of an affiliated group that had more than \$25,000,000,000 of worldwide gross revenue during the preceding calendar year (2021 in this example), and Entity X and Entity Y are engaged in the business of advanced computing. Entities X, Y, and Z are each considered a "select advanced computing business." Therefore, the taxable income of the business for each entity is subject to the 1.22 percent surcharge as follows:

Entity X: $\$800,000 * 1.22\% = \$9,760$

Entity Y: $\$100,000 * 1.22\% = \$1,220$

Entity Z: $\$1,200,000 * 1.22\% = \$14,640$

The total surcharge owed by this affiliated group of select advanced computing businesses for the first quarter of 2022 is \$25,620. This amount is due no later than April 30, 2022, and must be reported and paid by each select advanced computing business to the department.

The next step is to determine the service and other activities B&O tax rate in RCW 82.04.290(2) to apply to the taxable income reported by each entity. Because the three entities are subject to the 1.22 percent surcharge, the taxable income reported under RCW 82.04.290(2) by each entity will be subject to the B&O tax rate of 1.5 percent as required in RCW 82.04.290 (2) (a) (ii):

Entity X: $\$800,000 (*) 1.5\% (=) \$12,000$

Entity Y: $\$100,000 (*) 1.5\% (=) \$1,500$

Entity Z: $\$1,200,000 (*) 1.5\% (=) \$18,000$

Each entity will continue to file and pay any taxes due on a monthly basis.

(d) **Example 2.** Using the same facts as Example 1, beginning July 1, 2022, if Entity Z was operating a qualifying hospital or provider clinic, as described in (b) (vi) (A) and (B) of this subsection, it

would be exempt from the surcharge. However, Entity X and Entity Y would still be subject to the surcharge because neither is a business described in (b) (vi) (A) or (B) of this subsection.

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