

WSR 23-20-090

EXPEDITED RULES

DEPARTMENT OF REVENUE

[Filed October 2, 2023, 11:45 a.m.]

Title of Rule and Other Identifying Information: WAC 458-20-146 National and state banks, mutual savings banks, savings and loan associations and other financial institutions.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department of revenue intends to update and amend WAC 458-20-146 to recognize 2019 legislation (SHB 2167), which created an additional tax on specified financial institutions. The rule is also being updated to reinstate a deduction under SB 5166 (2023), effective July 1, 2023, and incorporate general updates, including the following: Formatting updates, addition of cross-references to other relevant rules, removal of statement regarding orders taken as agent for suppliers (which may be in conflict with RCW 82.08.0531, enacted in 2019), removal of statement regarding use tax reporting instructions for accrual periods (replaced by cross-reference to WAC 458-20-199).

Reasons Supporting Proposal: The Washington legislature enacted a statutory change to RCW 82.04.29004 in 2019 that necessitated an amendment to the rule to explain an additional tax on specified financial institutions. The rule is also being updated to reinstate a deduction under SB 5166 (2023), increase clarity, and to provide references.

Statutory Authority for Adoption: RCW 82.32.300, 82.01.060.

Statute Being Implemented: RCW 82.04.29004.

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: Melinda Mandell, 6400 Linderson Way S.W., Tumwater, WA 360-534-1584; Implementation and Enforcement: Heidi Geathers, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1615.

This notice meets the following criteria to use the expedited adoption process for these rules:

Adopts or incorporates by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating 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 Melinda Mandell, Department of Revenue, P.O. Box 47453, phone 360-534-1584, fax 360-534-1606, email MelindaM@dor.wa.gov, AND RECEIVED BY December 4, 2023.

October 2, 2023
Atif Aziz
Rules Coordinator

OTS-4988.1

AMENDATORY SECTION (Amending WSR 10-06-069, filed 2/25/10, effective 3/28/10)

WAC 458-20-146 National and state banks, mutual savings banks, savings and loan associations and other financial institutions.**(~~Business and Occupation Tax~~)**

~~The gross income of national banks, states banks, mutual savings banks, savings and loan associations, and certain other financial institutions is subject to the business and occupation tax according to the following general principles.~~

~~**Services and other activities.** Generally, the gross income from engaging in financial businesses is subject to the business and occupation tax under the classification service and other activities. Following are examples of the types of income taxable under this classification: Interest earned (including interest on loans made to nonresidents unless the financial institution has a business location in the state of the borrower's residence which rendered the banking service), commissions earned, dividends earned, fees and carrying charges, charges for bookkeeping or data processing, safety deposit box rentals. See WAC 458-20-14601 Financial institutions Income apportionment.~~

~~The term "gross income" is defined in the law as follows:~~

~~"Gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.~~

~~The law allows certain deductions from gross income to arrive at the taxable amount (the amount upon which the business and occupation tax is computed). Deductible gross income should be included in the gross amount reported on the excise tax return and should then be shown as a deduction and explained on the deduction schedules. The deductions generally applicable to financial businesses include the following:~~

~~(1) Dividends received by a parent from its subsidiary corporations (RCW 82.04.4281).~~

~~(2) Interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties. (See WAC 458-20-166 for definition of "transient.") (RCW 82.04.4292.)~~

~~(3) Interest received on obligations of the state of Washington, its political subdivisions, and municipal corporations organized pursuant to the laws thereof. (RCW 82.04.4291.) A deduction may also be taken for interest received on direct obligations of the federal government, but not for interest attributable to loans or other financial obligations on which the federal government is merely a guarantor or insurer.~~

~~(4) Gross proceeds from sales or rentals of real estate (RCW 82.04.390). These amounts may be entirely excluded from the gross income reported and need not be shown on the return as a deduction.~~

Retailing. Sales of tangible personal property and certain services are defined as "retail sales" and are subject to the business and occupation tax under the classification retailing. Such sales are also subject to the retail sales tax which the seller must collect and remit to the department of revenue (department). Transactions taxable as sales at retail are not subject to tax under service and other activities.

Following are examples of transactions subject to the retailing classification of the business and occupation tax and to the retail sales tax: Sales of meals or confections, sales of repossessed merchandise, sales of promotional material, leases of tangible personal property, sales of check registers, coin banks, personalized checks (note: When the financial institution is not the seller of these items but simply takes orders as agent for the supplier, the supplier is responsible for reporting as the retail seller. The financial institution has liability for reporting the retail sales tax on sales made as an agent only if the supplier is an out-of-state firm not registered with the department), escrow fees, casual sales (occasional sales of depreciated assets such as used furniture and office equipment subject to retail sales tax but deductible from the business and occupation tax; see WAC 458-20-106 Casual or isolated sales Business reorganizations).

Sales for resale. When a financial institution buys tangible personal property for resale to its customers without intervening use, the sales tax is not applicable. In this case the financial institution should give the vendor a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

Use Tax

The use tax complements the retail sales tax by imposing a tax of like amount on the use of tangible personal property purchased or acquired without payment of the retail sales tax. Thus, when office equipment or supplies are purchased or leased from an unregistered out-of-state vendor who does not collect the Washington state retail sales tax, the use tax must be paid directly to the department. Space for the reporting of this tax will be found on the excise tax return. (For more information, see WAC 458-20-178 Use tax.)

When tax liability arises. Tax should be reported during the reporting period in which the financial institution receives, becomes legally entitled to receive, or in accord with the system of accounting regularly employed enters the consideration as a charge against

the client, purchaser or borrower. Financial institutions may prepare excise tax returns to the department reporting income in periods which correspond to accounting methods employed by each institution for its normal accounting purposes in reporting to its supervisory authority.)

(1) **Introduction.** This rule explains how Washington's business and occupation (B&O) tax, retail sales tax, and use tax applies to banks, savings and loan associations, and other financial institutions. Readers may want to refer to other rules for additional information, including the following:

(a) WAC 458-20-19404 Financial institutions—Income apportionment - For periods beginning January 1, 2016.

(b) WAC 458-20-19404A Financial institutions—Income apportionment - For the period June 1, 2010, through December 31, 2015.

(c) WAC 458-20-19402 Single factor receipts apportionment—Generally.

(d) WAC 458-20-19401 Minimum nexus thresholds for apportionable activities and selling activities.

(e) WAC 458-20-106 Casual or isolated sales—Business reorganizations.

(f) WAC 458-20-102 Reseller permits.

(g) WAC 458-20-178 Use tax and the use of tangible personal property.

(h) WAC 458-20-199 Accounting methods.

(2) **Definitions.** The following definitions apply to this rule:

(a) "**Affiliated,**" for purposes of (e) of this subsection and subsection (3)(c) of this rule, means a person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person.

(b) "**Consolidated financial institution group**" means all financial institutions that are affiliated with each other, as that term is defined in RCW 82.04.29004.

(c) "**Consolidated financial statement**" means a consolidated financial institution group's consolidated reports of condition and income filed with the Federal Financial Institutions Examination Council, or successor agency.

(d) "**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.

(e) "**Financial institution**" has, for purposes of subsection (3)(c) of this rule, the same meaning as "financial institution" in RCW 82.04.29004:

(i) Any business entity chartered under Titles 30A, 30B, 31, 32, and 33 RCW, or registered under the Federal Bank Holding Company Act of 1956, as amended, or registered as a savings and loan holding company under the Federal National Housing Act, as amended;

(ii) A national bank organized and existing as a national bank association pursuant to the provisions of the National Bank Act, 12 U.S.C. Sec. 21 et seq.;

(iii) A savings association or federal savings bank as defined in the Federal Deposit Insurance Act, 12 U.S.C. Sec. 1813 (b)(1);

(iv) Any bank or thrift institution incorporated or organized under the laws of any state;

(v) Any corporation organized under the provisions of 12 U.S.C. Sec. 611 through 631;

(vi) Any agency or branch of a foreign depository as defined in 12 U.S.C. Sec. 3101 that is not exempt under RCW 82.04.315;

(vii) A production credit association organized under the Federal Farm Credit Act of 1933, all of whose stock held by the Federal Production Credit Corporation has been retired;

(viii) Any business entity that receives gross income taxable under RCW 82.04.290, the voting interests in which are more than 50 percent owned, directly or indirectly, by any person or business entity described in (e) (i) through (vii) of this subsection other than a company taxable under chapter 48.14 RCW;

(ix) (A) A business entity that receives more than 50 percent of its total gross income for federal income tax purposes from finance leases. For purposes of this subsection, a "finance lease" means a lease that meets two requirements:

(I) It is the type of lease permitted to be made by national banks (see 12 U.S.C. Sec. 24 (7) and (10), Comptroller of the Currency regulations, Part 23, leasing (added by 56 C.F.R. Sec. 28314, June 20, 1991, effective July 22, 1991), and Regulation Y of the Federal Reserve System 12 C.F.R. Part 225.25, as amended; and

(II) It is the economic equivalent of an extension of credit, i.e., the lease is treated by the lessor as a loan for federal income tax purposes. In no event does a lease qualify as an extension of credit where the lessor takes depreciation on such property for federal income tax purposes.

(B) For the definition in (e) (ix) of this subsection to apply, the average of the gross income in the current tax year and immediately preceding two tax years must satisfy the more than 50 percent requirement.

(x) Any other person, other than an insurance general agent taxable under RCW 82.04.280 (1) (e), an insurance business exempt from the business and occupation tax under RCW 82.04.320, a real estate broker taxable under RCW 82.04.255, a securities dealer or international investment management company taxable under RCW 82.04.290 (2), that receives more than 50 percent of its gross receipts from activities that a person described in (e) (ii) through (vii) and (ix) of this subsection is authorized to transact.

(f) "**Gross income**" has the same meaning as "gross income of the business" in RCW 82.04.080 and generally includes gross proceeds of sales, compensation for services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction for expenses or losses.

(g) "**Specified financial institution**" means a financial institution that is a member of a consolidated financial institution group that reported on its consolidated financial statement for the previous calendar year annual net income of at least \$1,000,000,000, not including net income attributable to noncontrolling interests, as the terms "net income" and "noncontrolling interest" are used in the consolidated financial statement. See RCW 82.04.29004.

(3) **B&O tax - Service and other activities.**

(a) **Gross income.** Generally, all gross income earned or received by a financial institution is subject to B&O tax under the service and other activities classification. By way of example, the following types of income are taxable under the service and other activities classification when earned or received by a financial institution: Interest; commissions; dividends; fees and carrying charges; charges for bookkeeping or data processing; safety deposit box rentals.

(b) **Deductions and exemptions.** The law allows certain deductions and exemptions from gross income to arrive at the taxable amount (the amount upon which the B&O tax is computed). Deductions that may apply to financial institutions include the following:

(i) Dividends received by a parent from its subsidiary corporations. See RCW 82.04.4281.

(ii) Interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties. See RCW 82.04.4292.

(iii) Interest received on obligations of the state of Washington, its political subdivisions, and municipal corporations organized pursuant to the laws thereof. See RCW 82.04.4293. A deduction may also be taken for interest received on direct obligations of the federal government, but not for interest attributable to loans or other financial obligations on which the federal government is merely a guarantor or insurer.

(iv) Gross proceeds from sales or rentals of real estate.

(v) Amounts received by a cooperative finance organization where the amounts are derived from loans to rural electric cooperatives or other nonprofit or governmental providers of utility services organized under the laws of this state. For this purpose, "cooperative finance organization" means a nonprofit organization with the primary purpose of providing, securing, or otherwise arranging financing for rural electric cooperatives; and "rural electric cooperative" means a nonprofit, customer-owned organization that provides utility services to rural areas. This deduction takes effect July 1, 2023, and expires January 1, 2034. See RCW 82.04.4276.

(c) **Additional tax.** Beginning January 1, 2020, in addition to other taxes imposed under chapter 82.04 RCW, an additional tax is imposed on specified financial institutions. The additional tax is equal to the gross income of the business taxable under the service and other B&O tax classification, multiplied by a rate of 1.2 percent. See RCW 82.04.29004.

(i) The department may require a person believed to be a specified financial institution to disclose whether it is a member of a consolidated financial institution group and, if so, to identify all other members of its consolidated financial institution group.

(ii) The legislature has mandated that a person failing to comply with the department's authority to require disclosure as described in (c)(i) of this subsection is deemed to have intended to evade tax payable to the state and is subject to the penalty in RCW 82.32.090(7) on any tax due under RCW 82.04.29004. For additional information, see RCW 82.04.29004(4).

(4) **B&O tax - Retailing activities.**

(a) **In general.** Sales of tangible personal property and certain services are defined as "retail sales" and are subject to B&O tax under the retailing classification. Such sales are also subject to the retail sales tax, which the seller must collect and remit to the department. Transactions taxable as sales at retail are not subject to B&O tax under the service and other activities classification.

(b) **Examples.** Following are examples of transactions subject to the retailing classification of the B&O tax and to the retail sales tax:

(i) Sales of meals or confections;

(ii) Sales of repossessed merchandise;

(iii) Sales of promotional material;

(iv) Leases of tangible personal property;

- (v) Sales of check registers;
- (vi) Sales of coin banks;
- (vii) Sales of personalized checks;
- (viii) Escrow fees; and

(ix) Casual sales (occasional sales of depreciated assets such as used furniture and office equipment, subject to retail sales tax but deductible from the business and occupation tax, see WAC 458-20-106).

(c) **Sales for resale.** When a financial institution buys tangible personal property for resale to its customers without intervening use, the sales tax is not applicable. In this case the financial institution should give the vendor a reseller permit to document the whole-sale nature of any sale as provided in WAC 458-20-102 (Reseller permits).

(5) **Use tax.** The use tax complements the retail sales tax by imposing a tax of like amount on the use of tangible personal property purchased or acquired without payment of the retail sales tax. Thus, when office equipment or supplies are purchased or leased from an unregistered out-of-state vendor who does not collect the Washington state retail sales tax, the use tax must be paid directly to the department. Space for the reporting of this tax will be found on the excise tax return. For more information, see WAC 458-20-178.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. WSR 10-06-069, § 458-20-146, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. WSR 83-07-032 (Order ET 83-15), § 458-20-146, filed 3/15/83; Order ET 70-3, § 458-20-146 (Rule 146), filed 5/29/70, effective 7/1/70.]