



RULE-MAKING ORDER

CR-103P (May 2009)
(Implements RCW 34.05.360)

Agency: Department of Revenue

Permanent Rule Only

Effective date of rule:

Permanent Rules

31 days after filing.

Other (specify) (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

Yes No If Yes, explain:

Purpose: WAC 458-20-107 (Rule 107) *Requirement to separately state sales tax—Advertised prices including sales tax* explains that retail sales tax must be separately stated from the selling price on sales invoices or other instruments of sale. Rule 107 has been revised to recognize *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wash.App. 197, 286 P.3d 417 (2012).

WAC 458-20-124 (Rule 124) *Restaurants, cocktail bars, taverns and similar businesses* explains the business and occupation tax and retail sales tax applications to sales by restaurants and similar businesses. Rule 124 has been revised to recognize *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wash.App. 197, 286 P.3d 417 (2012) mentioned above. The revision also includes an explanation of the sales and use tax exemptions for products sold to restaurants that impart flavor to food during the cooking process (Chapter 13, Laws of 2013 (ESSB 5882).)

Citation of existing rules affected by this order:

Repealed:

Amended: WAC 458-20-107 Requirement to separately state sales tax—Advertised prices including sales tax;
WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses.

Statutory authority for adoption: RCW 82.32.300 and 82.01.060(2)

Other authority : RCW 82.08.050 and chapter 13, Laws of 2013

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as **WSR 13-19-041** on **September 12, 2013**.

Describe any changes other than editing from proposed to adopted version: **None**.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting: **An analysis was not prepared.**

Date adopted:

December 12, 2013

NAME

Alan R. Lynn

SIGNATURE

TITLE

Assistant Director

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: December 12, 2013

TIME: 9:56 AM

WSR 14-01-050

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	Amended		Repealed
Federal rules or standards:	New	Amended		Repealed
Recently enacted state statutes:	New	Amended	1	Repealed

The number of sections adopted at the request of a nongovernmental entity:

	New	Amended		Repealed
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The number of sections adopted in the agency's own initiative:

	New	Amended	2	Repealed
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

	New	Amended		Repealed
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The number of sections adopted using:

Negotiated rule making:	New	Amended		Repealed
Pilot rule making:	New	Amended		Repealed
Other alternative rule making:	New	Amended	2	Repealed

This rule was adopted on December 12, 2013 and becomes effective January 12, 2014. It may be used to determine tax liability on and after the effective date, until the codified version is available from the code reviser's office.

AMENDATORY SECTION (Amending WSR 08-14-021, filed 6/20/08, effective 7/21/08)

WAC 458-20-107 Requirement to separately state sales tax-

Advertised prices including sales tax. (1) **Introduction.** Under the provisions of RCW 82.08.020 the retail sales tax is to be collected and paid upon retail sales, measured by the selling price.

(2) **Retail sales tax separately stated.** RCW 82.08.050 specifically requires that the retail sales tax must be stated separately from the selling price on any sales invoice or other instrument of sale, i.e., contracts, sales slips, and/or customer billing receipts. (For an exception covering (~~restaurant~~) food and beverage receipts (~~of Class H liquor licensees~~), see WAC 458-20-124, Restaurants, cocktail bars, taverns and similar businesses.) This is required even though the seller and buyer may know and agree that the price quoted is to include state and local taxes, including the retail sales tax.

(a) The law creates a "conclusive presumption" that, for purposes of collecting the tax and remitting it to the state, the selling price quoted does not include the retail sales tax. This presumption is not overcome or rebutted by any written or oral agreement between seller and buyer.

(b) Selling prices may be advertised as including the tax (~~or that the seller is paying the tax and~~), and in such cases, the advertised price (~~(must not be considered to be)~~) is not the taxable selling price (~~(under certain prescribed conditions explained in this section. Even when prices are advertised as including the sales tax, the actual sales invoices, receipts, contracts, or billing documents must list the retail sales tax as a separate charge. Failure to comply with this requirement may result in the retail sales tax due and payable to the state being computed on the gross amount charged even if it is claimed to already include all taxes due)~~).

(3) **Advertising prices including tax.**

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(a) (~~The law~~) RCW 82.08.055 provides that a seller may advertise prices as including the sales tax or that the seller is paying the sales tax under the following conditions:

(i) The words "tax included" are stated immediately following the advertised price in print size at least half as large as the advertised price print size, unless the advertised price is one in a listed series;

(ii) When advertised prices are listed in series, the words "tax included in all prices" are placed conspicuously at the head of the list in the same print size as the list;

(iii) If the price is advertised as including tax, the price listed on any price tag must be shown in the same way; and

(iv) All advertised prices and the words "tax included" are stated in the same medium, whether oral or visual, and if oral, in substantially the same inflection and volume.

(b) If these conditions are satisfied, as applicable, then price lists, reader boards, menus, and other price information mediums need not reflect the item price and separately show the actual amount of sales tax being collected on any or all items.

(c) The scope and intent of the foregoing is that buyers have the right to know whether retail sales tax is being included in advertised prices or not and that the tax is not to be used for the competitive advantage or disadvantage of retail sellers.

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AMENDATORY SECTION (Amending WSR 12-07-060, filed 3/19/12, effective 4/19/12)

WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses. (1) **Introduction.** This (~~section~~) rule explains Washington's business and occupation (B&O) tax and retail sales tax applications to sales by restaurants and similar businesses. It discusses the sales of meals, beverages, and foods at prices inclusive of the retail sales tax. This (~~section~~) rule also explains how discounted and promotional meals are taxed. Caterers and persons who merely manage the operations of a restaurant or similar business should refer to WAC 458-20-119 to determine their tax liability.

(a) **Restaurants, cocktail bars, and taverns.** The term "restaurants, cocktail bars, taverns, and similar businesses" means every place where prepared foods and beverages are sold and served to individuals, generally for consumption on the premises where sold.

(b) **Examples.** This (~~section~~) rule contains 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 facts and circumstances.

(c) **What other (~~sections~~) rules might apply?** In addition to information available on the department's web site pertaining to prepared food and beverage sales, the following (~~sections~~) rules may contain additional relevant information:

- WAC 458-20-107 Requirement to separately state sales tax—Advertised prices including sales tax.
- WAC 458-20-119 Sales by caterers and food service contractors.
- WAC 458-20-131 Gambling activities.
- WAC 458-20-183 Amusement, recreation, and physical fitness services.
- WAC 458-20-187 Coin operated vending machines, amusement devices and service machines.

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- WAC 458-20-189 Sales to and by the state of Washington, counties, cities, towns, school districts, and fire districts.
- WAC 458-20-190 Sales to and by the United States—Doing business on federal reservations—Sales to foreign governments.
- WAC 458-20-243 Litter tax.
- WAC 458-20-244 Food and food ingredients.

(2) **Retailing B&O and retail sales taxes.** Sales to consumers of meals and prepared foods by restaurants, cocktail bars, taverns and similar businesses are subject to the retailing tax classification and generally subject to retail sales tax. A retail sales tax exemption is available for the following sales of meals:

(a) Prepared meals sold under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040(6);

(b) Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW;

(c) Prepared meals sold to the federal government. (See WAC 458-20-190.) However, meals sold to federal employees are taxable, even if the federal employee will be reimbursed for the cost of the meals by the federal government;

(d) Effective July 1, 2011, (~~chapter 55 (SB 5501), Laws of 2011,~~) RCW 82.08.9995 exempts meals from retail sales tax when provided without specific charge to employees by a restaurant. (~~The legislation also exempts~~) Such meals also are exempt from B&O tax and use tax. (RCW 82.04.750 and 82.12.9995.) If any charge is made for meals to employees, retailing B&O tax and retail sales tax apply.

For the purposes of (d) of this subsection, the following definitions apply:

(i) "Meal" means one or more items of prepared food or beverages other than alcoholic beverages. For the purposes of (d) of this subsection, "alcoholic beverage" and "prepared food" have the same meanings as provided in RCW 82.08.0293.

(ii) "Restaurant" means any establishment having special space and accommodation where food and beverages are regularly sold to the public for immediate, but not necessarily on-site, consumption, but excluding grocery stores, mini-markets, and convenience stores. Res-

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restaurant includes, but is not limited to, lunch counters, diners, coffee shops, espresso shops or bars, concession stands or counters, delicatessens, and cafeterias. It also includes space and accommodations where food and beverages are sold to the public for immediate consumption that are located within:

- Hotels, motels, lodges, boarding houses, bed and breakfast facilities;
- Hospitals, office buildings, movie theaters; and
- Schools, colleges, or universities, if a separate charge is made for such food or beverages.

Restaurants also include:

- Mobile sales units that sell food or beverages for immediate consumption within a place, the entrance to which is subject to an admission charge; and
- Public and private carriers, such as trains and vessels, that sell food or beverages for immediate consumption if a separate charge is made for such food or beverages.

A restaurant is open to the public for purposes of this subsection if members of the public can be served as guests. "Restaurant" does not include businesses making sales through vending machines or through mobile sales units such as catering trucks or sidewalk vendors of food or beverage items.

(3) **Wholesaling B&O tax.** Persons making sales of prepared meals to persons who will be reselling the meals are subject to the wholesaling B&O tax classification. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers 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.

(4) **Service B&O tax.** Compensation received from owners of vending machines for allowing the placement of those machines at the restaurant, cocktail bar, tavern, or similar business is subject to the service and other business activities tax. Persons operating games of chance should refer to WAC 458-20-131.

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(5) **Exemptions.** Effective October 1, 2013, chapter 13 (ESSB 5882), Laws of 2013, provides retail sales tax and use tax exemptions for sales to restaurants of products that impart flavor to food during the cooking process; and

• Are completely or substantially consumed by combustion during the cooking process; or

• That support the food during the cooking process and are comprised entirely of wood.

The exemption includes products such as wood chips, charcoal, charcoal briquettes, grapevines, and cedar grilling planks. The exemptions do not apply to any type of gas fuel. For the purpose of these exemptions, "restaurant" has the same meaning as found in RCW 82.08.9995. These exemptions are scheduled to expire July 1, 2017.

(6) **Deferred sales or use tax.** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

(a) Purchases of dishes, kitchen utensils, linens, and items which do not become an ingredient of the meal, are subject to retail sales tax.

(b) Retail sales tax or use tax applies to purchases of equipment, repairs, appliances, and construction.

(c) The retail sales or use tax does not apply to purchases of food or beverage products which are ingredients of the meals being sold.

(d) Purchases of paper plates, paper cups, paper napkins, toothpicks, or any other articles which are furnished to customers, the first actual use of which renders such articles unfit for further use, are not subject to retail sales tax when purchased by restaurants and similar businesses making actual sales of meals.

~~((6))~~ (7) **Combination business.** Persons operating a combination of two kinds of food sales, of which one is the sale of prepared food (i.e., an establishment, such as a deli, selling food products ready for consumption and in bulk quantities), should refer to WAC 458-20-244 for taxability information.

~~((7))~~ (8) **Discounted meals, promotional meals, and meals given away.** Persons who sell meals on a "two for one" or similar basis are not giving away a free meal, but rather are selling two meals at a

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discounted price. Both the retailing B&O and retail sales taxes should be calculated on the reduced price actually received by the seller.

Persons who provide meals free of charge to persons other than employees are consumers of those meals. Persons operating restaurants or similar businesses are not required to report use tax on food and food ingredients given away, even if the food or food ingredients are part of prepared meals. For example, a restaurant providing meals to the homeless or hot dogs free of charge to a little league team will not incur a retail sales or use tax liability with respect to these items given away. A sale has not occurred, and the food and food ingredients exemption applies. Should the restaurant provide the little league team with soft drinks free of charge, the restaurant will incur a deferred retail sales or use tax liability with respect to those soft drinks. Soft drinks are excluded from the exemption for food and food ingredients. (See WAC 458-20-244.)

~~((8))~~ **(9) Sales of meals, beverages and food at prices including retail sales tax.** Persons may advertise and/or sell meals, beverages, or any kind of food product at prices including sales tax. Any person electing to advertise and/or make sales in this manner must clearly indicate this pricing method on the menus and other price information.

~~((If sales slips, sales invoices, or dinner checks are given to the customer, the sales tax must be separately stated on all such sales slips, sales invoices, or dinner checks. If not separately stated on the sales slips, sales invoices, or dinner checks, it will be presumed that retail sales tax was not collected. In such cases the measure of tax will be gross receipts. (See WAC 458-20-107.)~~

~~(9))~~ **(10) Spirits, beer, and wine restaurant licensees.** Restaurants operating under the authority of a license from the liquor control board to sell spirits, beer, and wine by the glass for on-premises consumption generally have both dining and cocktail lounge areas. Customers purchasing beverages or food in lounge areas are generally not given sales invoices, sales slips, or dinner checks, nor are they generally provided with menus.

(a) Many spirits, beer, and wine restaurant licensees elect to sell beverages or food at prices inclusive of the sales tax in the cocktail lounge area. If this pricing method is used, notification

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that retail sales tax is included in the price of the beverages or foods must be posted in the lounge area in a manner and location so that customers can see the notice without entering employee work areas. It will be presumed that no retail sales tax has been collected or is included in the gross receipts when a notice is not posted and the customer does not receive a sales slip or sales invoice separately stating the retail sales tax.

(b) The election to include retail sales tax in the selling price in one area of a location does not preclude the restaurant operator from selling beverages or food at a price exclusive of sales tax in another. For example, a spirits, beer, and wine restaurant licensee may elect to include the retail sales tax in the price charged for beverages in the lounge area, while the price charged in the dining area is exclusive of the sales tax.

(c) Spirits, beer, and wine restaurant licensees are not required to post actual drink prices in the cocktail lounge areas. However, if actual prices are posted, the advertising requirements expressed in WAC 458-20-107 must be met.

~~((10))~~ (11) **Gratuities.** Tips or gratuities representing donations or gifts by customers under circumstances which are clearly voluntary are not part of the selling price and not subject to tax. However, mandatory additions to the price by the seller, whether labeled service charges, tips, gratuities or otherwise must be included in the selling price and are subject to both the retailing B&O and retail sales taxes.

~~((11))~~ (12) **Examples.**

(a) XYZ Restaurant operates both a cocktail bar and a dining area. XYZ has elected to sell drinks and appetizers in the bar at prices including the retail sales tax while selling drinks and meals served in the dining area at prices exclusive of the sales tax. There is a sign posted in the bar area advising customers that all prices include retail sales tax. Customers in the dining area are given sales invoices which separately state the retail sales tax. As an example, a typical well drink purchased in the bar for \$2.50 inclusive of the sales tax, is sold for \$2.50 plus sales tax in the dining area. The pricing requirements have been satisfied and the drink and food totals are correctly reflected on the customers' dinner checks. XYZ may factor

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the retail sales tax out of the cocktail bar gross receipts when determining its retailing and retail sales tax liability.

(b) RBS Restaurant operates both a cocktail bar and a dining area. RBS has elected to sell drinks at prices inclusive of retail sales tax for all areas where drinks are served. It has a sign posted to inform customers in the bar area of this fact and a statement is also on the dinner menu indicating that any charges for drinks includes retail sales tax. Dinner checks are given to customers served in the dining area which state the price of the meal exclusive of sales tax, sales tax on the meal, and the drink price including retail sales tax. Because the business has met the sign posting requirement in the bar area and has indicated on the menu that sales tax is included in the price of the drinks, RBS may factor the sales tax out of the gross receipts received from its drink sales when determining its taxable retail sales.

(c) Z Tavern sells all foods and drinks at a price inclusive of the retail sales tax. However, there is no mention of this pricing structure on its menus or reader boards. The gross receipts from Z Tavern's food and drink sales are subject to the retailing and retail sales taxes. Z Tavern has failed to meet the conditions for selling foods and drinks at prices including tax. Z Tavern may not assume that the gross receipts include any sales tax and may not factor the retail sales tax out of the gross receipts.