

THIS PROPOSED RULE IS SUBMITTED FOR PUBLIC COMMENTS AFTER INPUT FROM INTERESTED PARTIES AND IS TO BE USED SOLELY FOR DISCUSSION PURPOSES AT THE PUBLIC HEARING ON THE PROPOSED RULE. UNDER NO CIRCUMSTANCES IS THIS PROPOSED RULE TO BE USED TO DETERMINE TAX LIABILITY AND OR EXEMPTIONS.

NEW SECTION

WAC 458-20-10201 Application process and eligibility requirements for reseller permits.

Part I - General

(101) Introduction. Effective January 1, 2010, seller's permits issued by the department of revenue (department) replace resale certificates as the documentation necessary to substantiate the wholesale nature of a sales transaction pursuant to chapter 563, Laws of 2009 (the act). To reduce the potential for confusion, a "seller's permit" will be described as a "reseller permit." The act provides unique requirements and provisions for construction contractors. (See Part III of this section.) The act authorizes the department to accept applications for reseller permits, issue reseller permits, adopt rules, and take any other action before January 1, 2010, necessary to ensure the effective implementation of the act. This section explains the criteria under which the department will automatically issue a reseller permit, the application process for both construction contractors and taxpayers engaging in other business activities when the department does not automatically issue or renew a reseller permit, and the criteria that may result in the denial of an application for a reseller permit.

(102) What is a reseller permit? A reseller permit is the document issued to a taxpayer by the department, a copy of which the taxpayer provides to a seller to substantiate a wholesale purchase. A wholesale purchase is not subject to retail sales tax. See RCW 82.04.060; 82.08.020. Reseller permits are to be used for wholesale purchases made on and after January 1, 2010.

In addition to this section, information regarding the reseller permit is available at the following sources:

<http://apps.leg.wa.gov/billinfo/>, through which a copy of chapter 563, Laws of 2009 and background information about the legislation can be obtained;

<http://dor.wa.gov/resellerpermit>, which is the department's specific web page for information relating to reseller permits;

WAC 458-20-10202, which explains the process a taxpayer

uses when appealing the department's denial of an application for a reseller permit; and

WAC 458-20-102, which explains the taxpayer's responsibilities regarding the use of a reseller permit, the seller's responsibility for retaining a copy of a reseller permit, and the implications for a taxpayer not properly using a reseller permit and a seller not obtaining a copy of a reseller permit from the taxpayer.

Buyers and sellers should refer to the following for information regarding the resale certificate, which is the document used to substantiate the wholesale nature of a sales transaction occurring before January 1, 2010:

WAC 458-20-102A (Resale certificates), which explains the taxpayer's responsibilities regarding the use of a resale certificate, the seller's responsibility for retaining a resale certificate, and the implications for a taxpayer not properly using a certificate and a seller not obtaining a certificate from the taxpayer. It is important to note that sellers should retain resale certificates for five years from the date of last use (e.g., December 31, 2014, for sales made in 2009) as the certificates may be requested by the department to verify the wholesale nature of a sale made before January 1, 2010.

Part II - Businesses Other than Contractors

(201) Can any business obtain a reseller permit? No. This act was passed by the legislature to address the significant retail sales tax noncompliance problem resulting from both the intentional and unintentional misuse of resale certificates. The department will not issue a reseller permit unless the business can substantiate that the business is entitled to make wholesale purchases. Some businesses may not receive a reseller permit, and if they do make wholesale purchases, they will need to pay retail sales tax to the seller and then claim a "taxable amount for tax paid at source" deduction or request a refund from the department as discussed in subsection (206) of this section.

(202) How does a business obtain a reseller permit? The department will initially automatically issue a reseller permit to some businesses. These businesses will be notified in September 2009. Those businesses that do not receive an automatically issued reseller permit may apply to the department to obtain a reseller permit. Beginning in September 2009, applications will be available at: <http://dor.wa.gov/resellerpermit> or by calling 1-800-647-7706. Completed applications should be mailed or faxed to the department at:

Department of Revenue

Taxpayer Account Administration
P.O. Box 47476
Olympia, WA 98504-7476
Fax: 360-705-6733

(203) When does a business apply for a reseller permit? A business can apply for a reseller permit anytime after September 1, 2009. In order for approved applicants to receive their reseller permits by January 1, 2010, the department recommends that businesses submit their fully completed applications no later than October 15, 2009.

(204) What criteria will the department consider when making its decision whether a business will receive a reseller permit?

(a) Except as provided in (b) of this subsection, a business other than a construction contractor will receive a reseller permit if it satisfies the following criteria (construction contractors should refer to subsection (305) of this section for an explanation of the requirements unique to them):

(i) The business has an active tax reporting account with the department;

(ii) The business must have reported gross income on tax returns covering a monthly or quarterly period during the immediately preceding six months or, if the business reports on an annual basis, on the immediately preceding annual tax return; and

(iii) Five percent or more of the business's gross income reported during the applicable six- or twelve-month period described in (a)(ii) of this subsection was reported under a retailing, wholesaling, or manufacturing business and occupation (B&O) tax classification.

(b) Notwithstanding (a) of this subsection, the department may deny an application for a reseller permit if:

(i) The department determines that an applicant is not entitled to make purchases at wholesale based on the nature of the applicant's business;

(ii) The applicant has been assessed the penalty for the misuse of a resale certificate or a reseller permit; or

(iii) The department determines that denial of the application is in the best interest of collecting the taxes due under Title 82 RCW.

(c) For purposes of this subsection, "gross income" means gross proceeds of sales as defined in RCW 82.04.070 and value of products manufactured as determined under RCW 82.04.450.

(d) In the event that a business has reorganized, the new business resulting from the reorganization may be denied a reseller permit if the former business would not have qualified for a reseller permit under (a) or (b) of this subsection. For

purposes of this subsection, "reorganize" means:

(i) The transfer, however effected, of a majority of the assets of one business to another business where any of the persons having an interest in the ownership or management in the former business maintain an ownership or management interest in the new business, either directly or indirectly;

(ii) A mere change in identity or form of ownership, however effected; or

(iii) The new business is a mere continuation of the former business based on significant shared features such as owners, personnel, assets, or general business activity.

(205) What if I am a new business and don't have a past reporting history? New businesses will generally be issued permits if they indicate they will engage in activity taxable under a retailing, wholesaling, or manufacturing B&O tax classification.

(206) What if I don't get a reseller permit and some of my purchases do qualify as wholesale purchases? It is possible that some taxpayers that do not qualify for a reseller permit will make wholesale purchases. In these circumstances, the taxpayer must pay retail sales tax on these purchases and then claim a "taxable amount for tax paid at source" deduction on the taxpayer's excise tax return. Alternatively, the taxpayer may request a refund from the department of retail sales tax it paid on purchases that are later resold without being used (intervening use) by the taxpayer or for purchases that would otherwise have met the definition of wholesale sale if the taxpayer had provided the seller with a reseller permit or uniform exemption certificate as authorized in RCW 82.04.470. See also WAC 458-20-229 (Refunds). However, such a deduction in respect to the purchase of services is not permitted if the services are not of a type that can be sold at wholesale under the definition of wholesale sale in RCW 82.04.060.

Part III - Construction Contractors

(301) How does a contractor obtain a reseller permit? The act does not authorize the department to automatically issue a reseller permit to "contractors." Contractors must apply for a reseller permit and meet certain eligibility requirements.

(302) How do I determine whether I am a "contractor"? For purposes of the reseller permit:

(a) A "contractor" is any person engaging in the activities described by:

(i) RCW 82.04.050 (2)(b), which are activities generally referred to as "retail construction" when performed for consumers, "wholesale construction" when performed for a person other than a consumer (e.g., a prime contractor), and "speculative construction" or "speculative building" when the

taxpayer is constructing on land that it owns. See also WAC 458-20-170 (Constructing and repairing of new or existing buildings or other structures upon real property) for additional information;

(ii) RCW 82.04.050(8), which are activities often referred to as "public road construction." See also WAC 458-20-171 (Building, repairing or improving streets, roads, etc., which are owned by a municipal corporation or political subdivision of the state or by the United States and which are used primarily for foot or vehicular traffic) for additional information; and

(iii) RCW 82.04.050(10), which are activities often referred to as "U.S. government construction" or "government contracting." See also WAC 458-20-17001 (Government contracting--Construction, installations, or improvements to government real property) for additional information.

(b) "Retail construction" is defined as the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and it also includes the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in commercial farming or agriculture. Retail construction activity generally involves residential and commercial construction performed for others, including road construction for the state of Washington. It generally includes construction activities that are not specifically designated as speculative building, government contracting, public road construction, logging road construction, radioactive waste cleanup on federal lands, or designated hazardous site clean-up jobs.

(c) "Materials" is defined as tangible personal property that becomes incorporated into the real property being constructed, repaired, decorated, or improved. Materials are the type of tangible personal property that contractors on retail construction projects purchase at wholesale, such as lumber, concrete, paint, wiring, pipe, roofing materials, insulation, nails, screws, drywall, and flooring material. Materials do not include consumable supplies, tools, or equipment, whether purchased or rented, such as bulldozers. However, for purposes of the percentage discussed in subsection (305)(a)(iii) of this section, purchases of consumable supplies, tools, and equipment rentals may be included with material purchases if all such purchases are commingled in the applicant's records and it would be impractical to exclude such purchases.

(d) "Labor" is defined as the work of subcontractors (including personnel provided by temporary staffing companies)

hired by a contractor to perform a portion of the construction services in respect to real property owned by a third party. In the case of speculative builders, labor includes the work of any construction contractor hired by the speculative builder. Labor does not include the work of taxpayer's employees. Nor does the term include consultants, engineers, construction managers, or other independent contractors hired to oversee a project. However, for purposes of the percentage discussed in subsection (305)(a)(iii) of this section, purchases of labor may include the wages of taxpayer's employees and amounts paid to consultants, engineers, construction managers or other independent contractors hired to oversee a project if all such purchases are commingled in the applicant's records and it would be impractical to exclude such purchases.

(303) How does a contractor apply for a reseller permit? A contractor applies for a reseller permit in the same manner as noncontractor taxpayers apply as provided in subsection (202) of this section. Contractors who the department has determined may be eligible for a reseller permit will be notified in September 2009 and receive an application with their notification. The application identifies information specific to contractors that must be provided.

(304) When does a contractor apply for a reseller permit? The same guidelines for noncontractor applicants as provided in subsection (203) of this section also apply to contractor applicants.

(305) What are the criteria specific to contractors to receive a reseller permit?

(a) The department may issue a permit to a contractor that:

(i) Provides a completed application with no material misstatement as that term is defined in (c) of this subsection;

(ii) Demonstrates it is entitled to make purchases at wholesale; and

(iii) Reported on its application that more than twenty-five percent of its total dollar amount of material and labor purchases in the preceding twelve months were for retail construction activities performed by the contractor. The department may, however, approve an application not meeting this criterion if the department is satisfied that approval is unlikely to jeopardize collection of the taxes due under Title 82 RCW.

(b) If the criteria in (a) of this subsection are satisfied, the department will then consider the following factors when determining whether to issue a reseller permit to a contractor:

(i) Whether the contractor has an active tax reporting account with the department;

(ii) Whether the contractor has reported gross income on tax returns covering a monthly or quarterly period during the

immediately preceding six months or, if the contractor reports on an annual basis, on the immediately preceding annual tax return;

(iii) Whether the contractor has the appropriate certification and licensing with the Washington state department of labor and industries;

(iv) Whether the contractor has been assessed the penalty for the misuse of a resale certificate or a reseller permit; and

(v) Any other factor resulting in a determination by the department that denial of the contractor's application is in the best interest of collecting the taxes due under Title 82 RCW.

(c) For purposes of this subsection, a "material misstatement" is a false statement knowingly or purposefully made by the applicant with the intent to deceive or mislead the department. For example, a contractor who reports on its application that it had more than twenty-five percent of its purchases of materials and labor during the preceding twelve months for retail construction activity when it in fact did not have any purchases of materials and labor during the preceding twelve months for retail construction activity has made a "material misstatement."

(d) For purposes of this subsection, "gross income" means gross proceeds of sales as defined in RCW 82.04.070 and value of products manufactured as determined under RCW 82.04.450.

(e) The provisions of subsection (204)(d) of this section are equally applicable to contractors.

(306) What if a contractor does not obtain a reseller permit and some of its purchases do qualify as wholesale purchases? The provisions of subsection (206) of this section are equally applicable to contractors.

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