This rule was adopted on an emergency basis effective June 2, 2010. It may be used to determine tax liability until September 30, 2010, unless the Department adopts a permanent rule prior to this date.

NEW SECTION

WAC 458-20-19401 Minimum nexus thresholds for apportionable activities. (1)

Introduction.

(a) Business and occupation (B&O) taxes may not be imposed on a business unless that business has a substantial nexus with this state. The terms “nexus” and “substantial nexus” are used interchangeably in this rule.

Section 104, chapter 23, Laws of 2010 1st sp. sess. establishes, effective June 1, 2010, minimum nexus thresholds for the B&O taxation of apportionable activities. The minimum nexus thresholds are determined on a tax year basis. Generally, a tax year is the same as a calendar year. For the purposes of this rule, tax years will be referred to as calendar years. This means that if a taxpayer’s activities in Washington meet the minimum nexus thresholds in a calendar year, the taxpayer is subject to B&O taxes for the entire calendar year. For 2010, the minimum nexus thresholds are based on the entire 2010 calendar year, but taxes are only due under the new thresholds from June 1, 2010, forward. Whether a taxpayer had substantial nexus with Washington prior to June 1, 2010, is determined by a physical presence standard. See WAC 458-20-194 for more information.

(b) Taxpayers may also find helpful information in the following rules:

(1) WAC 458-20-193 Inbound and outbound interstate sales of tangible personal property.

(2) WAC 458-20-194 Doing business inside and outside the state. This rule describes separate accounting and cost apportionment and applies only to tax liability incurred from January 1, 2006 through May 31, 2010.

(c) Examples included in this rule identify a number of facts and then state a conclusion; they should be used only as a general guide. The tax results of all situations must be determined after a review of all the facts and circumstances.

(2) Definitions. Unless the context clearly requires otherwise, the definitions in this subsection apply throughout this rule.

(a) “Apportionable activities” include only those activities subject to business and occupation tax under the following classifications:

(i) Service and other activities,

(ii) Royalties (see WAC 458-20-19403 for apportionment of royalties),

(iii) Travel agents and tour operators,

(iv) International steamship agent, international customs house broker, international freight forwarder, vessel and/or cargo charter broker in foreign commerce, and/or international air cargo agent,

(v) Stevedoring and associated activities,

(vi) Disposing of low-level waste,

(vii) Title insurance producers, title insurance agents, or surplus line brokers,

(viii) Public or nonprofit hospitals,

(ix) Real estate brokers,

(x) Research and development performed by nonprofit corporations or associations,
(xi) Inspecting, testing, labeling, and storing canned salmon owned by another person,
(xii) Representing and performing services for fire or casualty insurance companies as an
independent resident managing general agent licensed under the provisions of chapter 48.17 RCW,
(xiii) Contests of chance,
(xiv) Horse races,
(xv) International investment management services,
(xvi) Room and domiciliary care to residents of a boarding home;
(xvii) Aerospace product development,
(xviii) Printing or publishing a newspaper (but only with respect to advertising income),
(xix) Printing materials other than newspapers and publishing periodicals or magazines (but only
with respect to advertising income), and
(xx) Cleaning up radioactive waste and other by-products of weapons production and nuclear
research and development, but only with respect to activities that would be taxable as an “apportionable
activity” under any of the tax classifications listed in (a)(i) through (xviii) of this subsection (2) if this
special tax classification did not exist.
(b) "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.
(c)(i) “Property” means tangible, intangible, and real property owned or rented and used in this
state during the calendar year, except as provided in (ii) of this subsection (2)(c).
(ii) Property does not include ownership of or rights in computer software, including computer
software used in providing a digital automated service; master copies of software; and digital goods or
digital codes residing on servers located in this state. Refer to RCW 82.04.192 and 82.04.215 for
definitions of the terms “computer software,” “digital automated services,” digital goods,” “digital
codes,” and “master copies.”
(d) “State” means a state of the United States, the District of Columbia, the Commonwealth of
Puerto Rico, any territory or possession of the United States, or any foreign country or political
subdivision of a foreign country.
(3) How is substantial nexus for apportionable activities determined? A person is deemed to
have substantial nexus for apportionable activities with this state in any calendar year if the person is:
(a) An individual and is a resident or domiciliary of this state during the calendar year;
(b) A business entity and is organized or commercially domiciled in this state during the calendar
year; or
(c) A nonresident individual or a business entity that is organized or commercially domiciled
outside this state, and in any calendar year the person has:
(i) More than fifty thousand dollars of property in this state;
(ii) More than fifty thousand dollars of payroll in this state;
(iii) More than two hundred fifty thousand dollars of receipts from this state; or
(iv) At least twenty-five percent of the person’s total property, total payroll, or total receipts in
this state.
(d) The Department will adjust the amounts listed in (c) of this subsection (3) based on changes
in the consumer price index as required by section 104(5), chapter 23, Laws of 2010 1st sp. sess.
(4) **How is the property threshold determined?**

(a) The value of property is determined by averaging the values at the beginning and ending of the calendar year; but the department may require the averaging of monthly values during the calendar year if reasonably required to properly reflect the average value of the taxpayer’s property in this state throughout the taxable period.

(b) What value is placed on property?

(i) Property the taxpayer owns and uses in this state, other than loans and credit card receivables, is valued at its original cost basis.

(ii) Loans and credit card receivables owned by the taxpayer are valued at their outstanding principal balance, without regard to any reserve for bad debts. However, if a loan or credit card receivable is charged off in whole or in part for federal income tax purposes, the portion of the loan or credit card receivable charged off is deducted from the outstanding principal balance.

(A) A loan is located in this state if:

(I) More than fifty percent (50%) of the fair market value of the real and/or personal property securing the loan is located in this state. The determination of whether the real or personal property securing a loan is located within this state must be made as of the time the original agreement was made, and any and all subsequent substitutions of collateral must be disregarded; or

(II) The borrower is located in this state, but only if a loan is:

- unsecured; or
- secured and there is no state where more than fifty percent (50%) of the fair market value of property securing the loan is located.

A borrower that is engaged in business is located in this state if the borrower’s commercial domicile is located in this state. A borrower who is not engaged in business is located in this state if the borrower’s billing address is located in this state.

(B) Credit card receivables are located in this state if the billing address of the card holder is located in this state.

(iii) Property the taxpayer rents and uses in this state is valued at eight times the net annual rental rate.

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

(i) “Credit card” means a card or device existing for the purpose of obtaining money, property, labor, or services on credit.

(ii) “Net annual rental rate” means the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(5) **How is the payroll threshold determined?** “Payroll” is the total compensation (wages, salaries, commissions, and any other form of remuneration defined as gross income under 26 U.S.C. Sec. 61 of the federal internal revenue code of 1986, as of June 1, 2010) paid during the calendar year to employees and non-employees (third-party representatives) who represent the taxpayer in interactions with the taxpayer’s clients and includes sales commissions.

(a) Employee compensation is paid in this state if the compensation is properly reportable to this state for unemployment compensation tax purposes, regardless of whether the compensation was actually reported to this state.

(b) Nonemployee compensation is paid in this state if the service performed by the representative third party occurs entirely or primarily within this state.

(6) **How is the receipts threshold determined?** The receipts threshold includes only the taxpayer’s gross income assigned to this state from engaging in apportionable activities. The gross
income of the business is attributed to this state if it is part of the numerator of the apportionment calculation as explained in WAC 458-20-19402, 19403, or 19404.

(7) **If an out-of-state taxpayer does not meet the $50,000 property, $50,000 payroll, or $250,000 receipts nexus thresholds, can it still have substantial nexus with Washington?** Yes. If twenty-five percent (25%) of an out-of-state taxpayer’s property, payroll, or receipts from apportionable activities is in Washington, then the taxpayer has substantial nexus with Washington. The twenty-five percent (25%) threshold is determined by dividing the value of property located in Washington by the total value of taxpayer’s property, payroll located in Washington by taxpayer’s total payroll, or the receipts attributed to Washington by total receipts.

(8) **Do the minimum nexus thresholds explained in this rule apply to local gross receipts business and occupations taxes?** No. Taxpayers must still comply with their local business and occupations tax nexus laws. This rule does not apply to the nexus requirements for local gross receipts business and occupation taxes.

(9) **Once established, how long does nexus continue?** A person who establishes substantial nexus with this state in any calendar year will be deemed to have a substantial nexus with this state for the following calendar year. This applies for all taxpayers, regardless of the business and occupation tax classification(s) they are subject to, e.g. service and other activities, retailing, or wholesaling.

(10) **Do the nexus thresholds in subsection (3) of this rule apply to non-apportionable activities?** No. The nexus thresholds in subsection (3) of this rule apply only with respect to apportionable activities.

(a) A person engaged in non-apportionable activities is subject to B&O tax on a non-apportionable activity only if the person has a physical presence in this state, which need only be demonstrably more than a slightest presence. This is true even if the person is engaged in apportionable activities in this state and has nexus under the thresholds in subsection (3) of this rule. A person is physically present in this state if the person has property or employees in this state. A person is also physically present in this state if the person, either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in this state.

(b) Non-apportionable activities include those activities taxed under the following B&O tax classifications: Retailing, wholesaling, manufacturing, processing for hire, extracting, extracting for hire, printing and publishing (except for advertising), government contracting, public road construction, the classifications in RCW 82.04.280 (2) and (6), and any other activity not specifically included in the definition of apportionable activities in subsection (3) of this rule.

(11) **Examples.** For each of the examples in this subsection (11), gross income received by the taxpayer is from engaging in apportionable activities. Also, the examples have no applicability to tax liability prior to June 1, 2010.

(a) **Example 1:** Company A is domiciled in State X. In a calendar year it has $150,000 in royalty receipts attributed to Washington per WAC 458-20-19403 and $150,000 in gross income from other apportionable activities attributed to Washington per WAC 458-20-19402. Company A has substantial nexus with Washington because it has a total of $300,000 in receipts attributed to Washington in a calendar year. It does not matter that the receipts were from apportionable activities that are subject to tax under different B&O tax classifications. Substantial nexus is determined by the totality of the taxpayer’s apportionable activities in Washington.

(b) **Example 2:** Company B is domiciled in state Y. In a calendar year it has $45,000 in property, $45,000 in payroll, and $240,000 in gross income attributed to Washington. Its total property
is valued at $200,000; its world-wide payroll is $200,000; and its total gross income is $2,000,000. Company B does not have substantial nexus with Washington during the calendar year based on the minimum thresholds listed in subsection (3) above.

(c) **Example 3:** Assume the same facts as Example 2 except world-wide payroll is $150,000. With the changed facts, Company B has substantial nexus with Washington because thirty percent (30%) of its payroll is located in Washington.

(d) **Example 4:** Company C is domiciled in Canada. It has $200,000 of gross income attributed to Washington and $300,000 of gross income attributed to Canada. Company C has no property or payroll located in Washington. Company C has substantial nexus with Washington because forty percent of its receipts are attributed to Washington.

(e) **Example 5:** Company D has no property located in Washington on January 1st and on December 31st of a calendar year. However, it brought $100,000 in property into Washington on January 15th and removed it from Washington on November 15th of that calendar year. The department may compute the value of Company D’s property on a monthly basis in this situation because it is required to properly reflect the average value of Company D’s property in Washington ($100,000 multiplied by ten divided by 12 which is $83,333). Company D has nexus with Washington based on the value of the property averaged over the calendar year.

(f) **Example 6:** Company E receives $100,000 in gross income attributed to Washington on each of March 15, 2010; July 12, 2010; and November 1, 2010. Company E has substantial nexus with Washington for the period June 1, 2010, through December 31, 2010, because it received $300,000 in gross income during 2010. Company E will also have substantial nexus with Washington for 2011 regardless of the amount of gross income attributed to Washington in 2011.