

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.

AMENDATORY SECTION (Amending WSR 94-10-061, filed 5/3/94, effective 6/3/94)

**WAC 458-20-185 Tax on tobacco products. (1)**

**Introduction.** This (~~section~~) rule explains the tax liabilities of persons engaged in business as a retailer, distributor or subjobber of tobacco products. (~~It addresses only those taxes which apply exclusively to tobacco products.~~) The tax on tobacco products is in addition to all other taxes owed. For example, retailers, distributors, and subjobbers are liable for business and occupation tax on their retailing or wholesaling activities, use tax on tobacco products distributed as samples, and litter tax on the value of the tobacco products. See WAC 458-20-186 for tax liabilities associated with taxes which apply exclusively to cigarettes.

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

(a) "Tobacco products" means all tobacco products except cigarettes as defined in RCW 82.24.010. The term includes:

(i) Cigars, cheroots, stogies, and periques;

(ii) Granulated, plug cut, crimp cut, ready rubbed (~~or~~), and other smoking tobacco;

(iii) Snuff, snuff flour, cavendish, plug(~~or~~) and twist tobacco, fine-cut, (~~or~~) and other chewing tobaccos; and

(iv) Shorts, refuse scraps, clippings, cuttings(~~or~~) and sweepings of tobacco, (~~or~~) and other kinds (~~or~~) and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking.

(b) "Manufacturer" means a person who manufactures and sells tobacco products.

(c) "Distributor" means:

(i) Any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale(~~or~~);

(ii) Any person who makes, manufactures, or fabricates tobacco products in this state for sale in this state(~~or~~);

(iii) Any person engaged in the business of selling tobacco products without this state who ships or transports tobacco products to retailers in this state, to be sold by those retailers; or

(iv) Any person engaged in the business of selling tobacco products in this state who handles for sale any tobacco products that are within this state but upon which tax

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has not been imposed.

~~((+e))~~ (d) "Subjobber" means any person, other than a tobacco manufacturer or distributor, who buys tobacco products from a distributor and sells them to persons other than the ultimate consumers.

~~((+d))~~ (e) "Retailer" means any person engaged in the business of selling tobacco products to ultimate consumers.

(f) "Sale" means any transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, and includes and means all sales made by any person (~~for a consideration~~). It includes all gifts by persons engaged in the business of selling tobacco products, for advertising, as a means of evading the provisions of chapter 82.26 RCW, or for any other purposes whatsoever.

~~((+e))~~ (g) "Wholesale sales price" means the established (~~manufacturer's~~) price for which a manufacturer sells tobacco product to the distributor, exclusive of any discount or other reduction.

~~((+f))~~ (i) A wholesale sales price that is an established price must reflect the fair market value of the tobacco products. In the case of affiliated companies which buy and sell from each other, the wholesale sales price must be the fair market value rather than the manufacturer's price to its affiliate.

(ii) The phrase "discount or other reduction" includes any reduction from the established wholesale sales price made to a specific customer or class of customers.

(h) "Business" means any trade, occupation, activity, or enterprise engaged in for the purpose of selling or distributing tobacco products in this state.

(i) "Place of business" means any place where tobacco products are sold or where tobacco products are manufactured, stored, or kept for the purpose of sale or consumption, including any vessel, vehicle, airplane, train, or vending machine.

(j) "Retail outlet" means each place of business from which tobacco products are sold to consumers.

(k) "Department" means the department of revenue.

(l) "Person" means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, the state and its departments and institutions, political subdivision of the state of Washington, corporation, limited liability company, association, society, or any group of individuals acting as a unit, whether mutual, cooperative,

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fraternal, nonprofit, or otherwise. The term excludes any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country.

(m) "Indian country" means the same as defined in WAC 458-20-192.

(3) ~~((Nature))~~ **Rate and measure of tax.** The Washington state tobacco products tax is an excise tax levied on ~~((the value of))~~ the wholesale sales price on all tobacco products sold, used, consumed, handled, or distributed within the state~~((+)).((+))~~

The rate of tax is a combination of statutory percentage rates found in RCW 82.26.020 ~~((and))~~, 82.26.025, and 82.26.028. ~~((Charts with current rates are available from the special programs division at the department of revenue. The tax is to be paid by the distributor at the time the distributor brings or causes to be brought into this state from without the state tobacco products for sale. (4))~~ The total current rate of tax is shown on the current combined excise tax return.

(4) **Imposition of tax.** The tax is imposed once on all tobacco products sold, used, consumed, handled, or distributed within this state.

(a) **When tax is imposed.** The tax is imposed at the time the distributor:

(i) Brings, or causes to be brought, into this state from without the state tobacco products for sale; or

(ii) Makes, manufacturers, or fabricates tobacco products in this state for sale in this state; or

(iii) Ships or transports tobacco products to retailers in this state, to be sold by those retailers; or

(iv) Handles for sale any tobacco products that are within this state but upon which tax has not been imposed. For example, a retailer with a place of business in this state purchases for sale tobacco products from an enrolled tribal member of a federally recognized tribe located within Indian country. Because the tax was not imposed on the enrolled tribal member, the retailer must pay the tax.

(b) **Additional occasion when tax may be imposed.** Any retailer who fails to keep invoices as required under chapter 82.32 RCW and which invoices do not conform to the requirements set forth in subsection (5)(b) of this rule is liable for the tax on any uninvoiced tobacco product which that retailer handles for sale.

(c) **When an out-of-state person is a distributor who must**

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pay the tax. Except as provided in (c)(ii) below, a person located out-of-state who is selling tobacco products to Washington wholesalers from a stock of goods located outside this state is not a distributor and therefore is not liable for the tax.

(i) A person located out-of-state who is selling and shipping tobacco products to Washington retailers from an out-of-state stock of goods is a distributor and is subject to the tax. If the out-of-state person is not required to register and pay taxes in Washington, the retailers to whom it sells must pay the tax. However, such out-of-state persons may elect to register with the state and pay the tax.

(ii) A person located outside Washington must pay the tax when distributing samples into this state.

(5) Books and records. Since the tobacco products tax is paid on returns as computed by the taxpayer rather than by affixing of stamps or decals, the law contains stringent provisions requiring that accurate and complete records be maintained ~~((and preserved for five years for examination by the department of revenue))~~. The records must include all pertinent papers and documents relating to the purchase, sale, or disposition of tobacco products and must be kept for a period of at least five years after the date of the document or the date of the entry appearing in the records.

(a) Distributors. Distributors must keep at each registered place of business complete and accurate records for that place of business. The records to be kept by distributors include itemized invoices of tobacco products held, purchased, manufactured, brought in or caused to be brought in from without the state or shipped or transported to retailers in this state, and of all sales ~~((including customers' names and addresses))~~ of tobacco products except retail sales. ~~((All other pertinent papers and documents relating to purchase, sale, or disposition of tobacco products must be retained.))~~ The itemized invoice for each purchase or sale must be legible and must show the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts. Itemized invoices must be preserved for five years from the date of sale.

(b) Retailers and subjobbers. Retailers and subjobbers must secure ~~((and retain legible and))~~ itemized invoices of all tobacco products purchased ~~((, showing name and address of the seller and the date of purchase))~~. The itemized invoice for each purchase must be legible and must show the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts. Itemized invoices must

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be preserved for five years from the date of sale.

(c) **Warehouses.** Records of all deliveries or shipments (including ownership, quantities) of tobacco products from any public warehouse of first destination in this state must be kept by the warehouse.

~~((+5+))~~ **(6) Nonpayment of tax by retailers.** If the department finds that any nonpayment of tax by the retailer was willful, penalties and interest shall be assessed in accordance with chapter 82.32 RCW. In the case of a second or plural nonpayment of tax by the retailer, penalties and interest will be assessed in accordance with chapter 82.32 RCW without regard to willfulness.

(a) Example. In the course of an audit of Retailer, the department determines that on several occasions Retailer failed to pay the tax. The department does not find the nonpayment to be willful. Retailer owes the tax due on all occasions of nonpayment and the penalties and interest is assessed on all but the first occasion of nonpayment. A few years later Retailer is audited again. The department finds one occasion of nonpayment of tax. In addition to the tax due, penalties and interest will be assessed in accordance with chapter 82.32 RCW.

(b) Example. In the course of an audit of Retailer #2, the department determines that on several occasions Retailer #2 failed to pay the tax. The department determines that the nonpayment of tax was willful. In addition to the tax due on all occasions of nonpayment, Retailer #2 owes penalties and interest on all occasions.

**(7) Reports and returns.** The tax is reported on the combined excise tax return(~~(, Form REV 40-2406,)~~) to be filed according to the reporting frequency assigned by the department. Detailed instructions for preparation of these returns may be secured from the department.

Out-of-state wholesalers or distributors selling directly to retailers in Washington should apply for a certificate of registration, and the department will furnish returns for reporting the tax.

~~((+6+))~~ Retailers, distributors, and subjobbers may be required to file a report with the department in compliance with the provisions of the National Uniform Tobacco Settlement when purchasing tobacco products from certain manufacturers. Please see WAC 458-20-264 and chapter 70.157 RCW.

**(8) Interstate sales and sales to U.S.** The tax does not apply to tobacco products sold to federal government agencies, nor to deliveries to retailers or wholesalers outside the state for resale by such retailers or wholesalers, and a

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credit may be taken for the amount of tobacco products tax previously paid on such products. RCW 82.26.110. The credit is not available for sales made for delivery outside this state other than sales for resale to retailers or wholesalers. For example, no credit may be taken for a sale of tobacco products delivered to a consumer outside the state.

~~((+7+))~~ (9) Returned or destroyed goods. A credit may also be taken for tobacco products destroyed or returned to the manufacturer on which tax was previously paid(~~(, but returns on which such credits are claimed must be accompanied by)~~). Taxpayers must retain in their records appropriate affidavits or certificates conforming to those illustrated below:

(a) **Certificate of taxpayer.**

Claim for Credit on Tobacco Products  
Tax Merchandise Destroyed

The undersigned certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of his/her knowledge:

That he/she is (Title) of the (Business Name), a dealer in tobacco products; that the dealer has destroyed merchandise unfit for sale, said tobacco products having a wholesale sales price of \$ . . . . .; that tobacco tax had been paid on such tobacco products; that the tobacco products were destroyed in the following manner and in the presence of an authorized agent of the department of revenue:

.....  
(State date and manner of destruction)

.....  
.....

Attested to: By .....  
Date ..... Signature of Taxpayer or  
Authorized Representative.  
.....  
Position with Dealer  
.....  
Dealer  
.....  
Address of Dealer

APPROVED:  
.....  
Authorized Agent of  
Department of Revenue of the  
State of Washington.

(b) **Certificate of manufacturer.**

Claim for Credit on Tobacco Products

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Tax Merchandise Returned:

The undersigned certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of his/her knowledge:

That he/she is (Title) of the (Business Name), a manufacturer of tobacco products; that the manufacturer has received from (Dealer), (Address), a dealer in tobacco products within the State of Washington, certain tobacco products which were unfit for sale, the tobacco products having a wholesale sales price of \$.....; that the tobacco products were destroyed in the following manner:

.....  
(Indicate date and manner of destruction)

Credit issued on Memo No. ....  
credit approved by: Signature of Taxpayer or Authorized Representative

.....  
on behalf of the Department Name of Manufacturer  
of Revenue - State of  
Washington

.....  
Address

(10) Enforcement. Pursuant to RCW 82.26.121 and 66.44.010, enforcement officers of the liquor control board may enforce all provisions of the law with respect to the tax on tobacco products. Retailers, distributors, and subjobbers must allow department personnel and enforcement officers of the liquor control board free access to their premises at any time during regular business hours to inspect the tobacco products contained in the premises and to examine the books and records of the business. Failure to allow free access or to hinder or interfere with department personnel and/or enforcement officers of the liquor control board may result in the revocation of the business license.