

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 by February 22, 2006.

AMENDATORY SECTION (Amending WSR 05-03-051, filed 1/11/05, effective 7/1/05)

WAC 458-20-17803 Use tax on promotional material. (1) **Introduction.** Persons who distribute or cause to be distributed any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services, are subject to use tax on the value of the property. RCW 82.12.010, 82.12.020, and chapter 367, Laws of 2002. This (~~rule~~) section explains the use tax reporting responsibilities of consumers when such property is delivered directly to persons other than the consumer from outside Washington. For the purposes of this (~~rule~~) section, the term "promotional material" is used in describing such property where applicable.

This rule provides numerous examples that identify a number of facts and then state a conclusion. These examples should only be used as a general guide. Similar determinations for other situations can be made only after a review of all facts and circumstances. For purposes of these examples, presume the promotional material is delivered to persons within Washington.

Chapter 514, Laws of 2005, changed the taxability of delivery charges associated with direct mail. Refer to subsection (5) of this section for further information.

(2) **What is the use tax?** The use tax complements the retail sales tax by imposing a tax of a like amount when a consumer uses tangible personal property or certain retail services within this state. RCW 82.12.020. The tax does not apply to the use of any property or service if the present user, donor, or bailor previously paid retail sales tax under chapter 82.08 RCW with respect to the property used or the service obtained. See WAC 458-20-178 (Use tax) for an explanation of the use tax and use tax reporting requirements.

(3) **Who is liable for the use tax on promotional material?** The use tax is imposed on the consumer. Effective June 1, 2002, the law provides that with respect to promotional material distributed to persons within this state, the consumer is the person who distributes or causes the distribution of the promotional material. A consumer as defined in this rule is responsible for remitting use tax only if the consumer has nexus in Washington.

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(a) **Example 1.** Department Store contracts with Printer (~~in Idaho,~~) to print promotional material advertising sale merchandise available at Department Store's Washington locations. Printer (~~delivers~~) distributes promotional material to (~~Seattle Mailing Bureau, with whom Department Store has contracted to prepare the material for distribution to~~) Department Store's customers. Department Store is the consumer of the promotional material and is liable for use tax on promotional material distributed (~~within~~) into Washington. Neither Printer (~~, Seattle Mailing Bureau,~~) nor Department Store's customers are consumers of this promotional material.

(b) **Example 2.** Retailer contracts with Seattle Advertising Agency for advertising services. Advertising Agency makes a single charge for all services, which includes designing, printing, and distributing catalogs to potential customers. Advertising Agency contracts with California Printer to print and prepare for distribution promotional material advertising a new Washington location. Retailer is the consumer of the catalogs and is liable for use tax on the promotional material sent to Washington addresses. Neither Advertising Agency nor potential customers are consumers of this promotional material.

(4) **What is promotional material?** Promotional material is any article of tangible personal property, except newspapers, displayed or distributed in the state of Washington for the primary purpose of promoting the sale of products or services. Examples of promotional material include, but are not limited to, advertising literature, circulars, catalogs, brochures, inserts (but not newspaper inserts), flyers, applications, order forms, envelopes, folders, posters, coupons, displays, signs, free gifts, or samples (such as carpet or textile samples).

(a) **Is advertising contained on billing statements promotional material?** It is presumed that the primary purpose of billing statements and statements of account is to secure payment for goods or services previously purchased. Thus, unless the facts and circumstances indicate that the primary purpose of the property is to promote the sale of goods and services, billing statements and statements of account are not considered promotional material. Attaching, affixing, or otherwise incorporating property promoting the sale of goods or services does not alter the primary purpose of billing statements and statements of account. However, flyers, inserts, or other separate property enclosed with billing statements or statements of account that promote the sale of goods or services are promotional material and subject to use tax.

(i) **Example 1.** Richland Attorney contracts with Oregon

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Printer to print and prepare for distribution monthly billing statements and return remittance envelopes to Attorney's clients. The contract also includes printing and inserting flyers promoting Attorney's estate planning services. The primary purpose of the flyers is to solicit the sale of services. Consequently, the flyers are promotional material. The primary purpose of the billing statements is to secure payment for services rendered. The billing statements are not promotional material.

(ii) **Example 2.** Department Store prints the monthly billing statements for its store credit card in Atlanta, Georgia, and mails them to customers located in Washington. Although the billing statement includes three sentences noting an upcoming sale, this information does not alter the primary purpose of the billing statement, which is to secure payment for services rendered. The billing statements are not promotional material.

(iii) **Example 3.** The following month, Department Store's billing statement includes a detachable coupon for fifteen percent off selected items purchased during a specified period. Although the detachable coupon solicits the sale of goods or services, it does not alter the primary purpose of the billing statement, which is to secure payment for goods or services already purchased. The billing statement and detachable coupon are not promotional material.

(iv) **Example 4.** In the third month, Department Store lengthens the billing statement to include information promoting the grand opening of a location. Although the lengthened portion of the billing statement contains information promoting the sale of goods or services, it does not alter the primary purpose of the billing statement, which is to secure payment for goods or services already purchased. The lengthened billing statement is not promotional material.

(b) **When are envelopes considered promotional material?** Envelopes used solely to mail property to promote the sale of goods or services are considered promotional material and subject to use tax.

Envelopes used to mail nonpromotional material, such as billing statements and statements of account, are used to secure payment for goods purchased or services rendered. The same is true of return envelopes that are enclosed for submitting payment. Unless the facts and circumstances indicate otherwise, the presumption is that the primary purpose of envelopes used for mailing both promotional and nonpromotional material in the same envelope is not to promote the sale of goods and services.

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Thus, envelopes and return envelopes used for dual purposes are not subject to use tax, even though promotional material may be printed on or attached to the envelopes. Although the imprinted or attached material promotes the sale of goods or services, it does not alter the primary purpose of the envelopes.

(i) **Example 1.** Bank mails brochures, applications, and return envelopes from Atlanta, Georgia, to Washington addresses promoting Bank's credit card. The primary purpose of envelopes used to mail the brochures, applications, and return envelopes is to solicit the sale of services. The envelopes, brochures, and applications are promotional material.

(ii) **Example 2.** Telephone Company mails monthly billing statements to Washington customers from St. Louis, Missouri. Inserts promoting the sale of various telephone accessories are included. Return envelopes to be used in making payment of the statement amount are also enclosed. The primary purpose of the envelopes used to mail the billing statements and the return envelopes is to secure payment. Neither the mailing envelopes nor the return envelopes are promotional material.

(iii) **Example 3.** Mortgage Company mails monthly billing statements to Washington residents from its administrative offices in Nevada. The enclosed return envelope for customers to use in making payment includes an attachment promoting additional banking services. Although the attachment to the return envelopes contains advertising information, it does not alter the primary purpose of the envelope which is to obtain payment. Neither the mailing envelopes nor the return envelopes are promotional material.

(5) **What is the measure of tax?** The measure of the use tax is the value of the article used. For the purposes of computing the use tax due on promotional material, the measure of tax is the amount of consideration paid for the promotional material without deduction for the cost of materials, labor, or other service charges, even though such charges may be stated or shown separately on invoices. Except as noted below, it also includes the amount of any freight, delivery, or other like transportation charge paid or given by the consumer to the seller. The value of the promotional material also includes any tariffs or duties paid. If the total consideration paid does not represent the true value of the article used, the value must be determined as nearly as possible according to the retail selling price at place of use of similar materials of like quality and character. RCW 82.12.010.

A consumer who has paid retail sales or use tax that is due in another state with respect to promotional material that is

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subject to use tax in this state may take a credit for the amount of tax so paid. RCW 82.12.035. For further information, refer to WAC 458-20-178 (Use tax).

(a) ~~((Does the measure of tax include delivery charges?))~~
Delivery charges. Chapter 514, Laws of 2005, altered the measure of the use tax with respect to the value of delivery charges made for the delivery of direct mail.

(i) Delivery charges May 17, 2005, and after. Effective May 17, 2005, amounts derived from delivery charges for the delivery of direct mail may be deducted from the measure of use tax when the delivery charge is separately stated on an invoice or similar billing invoice provided to the buyer.

(ii) Delivery charges from June 1, 2002, through May 16, 2005. The measure of tax includes all delivery charges. Postage is a delivery charge and is therefore included in the measure of tax if the cost is part of the consideration paid by the consumer to the seller. RCW 82.08.010 and 82.12.010. It is immaterial if amounts charged for postage are stated or shown separately on invoices. Amounts charged for postage and other delivery costs are not included in the measure of tax only if the amounts are not part of the consideration paid. ~~((For discussion about when postage is and is not considered part of the consideration paid, please refer to WAC 458-20-141 (Duplicating industry and mailing bureaus).))~~

(A) When are delivery charges part of the consideration paid? Charges for postage or other delivery costs are considered part of the consideration paid if the permit to use precanceled stamps, a postage meter, or an imprint account for bulk mailings is in the name of the party contracted to provide and/or prepare promotional material for distribution. Such parties are liable to the post office for payment and the consumer's payment of such amounts represents a payment on the sale of tangible personal property or the services provided. For further information, refer to WAC 458-20-111 (Advances and reimbursements).

(B) When are delivery charges not part of the consideration paid? Charges for postage or other delivery costs are not considered part of the consideration paid if the permit to use precanceled stamps or a permit imprint account for bulk mailings is in the consumer's name. The consumer in these cases has primary or secondary liability for payment of the postage costs. (Refer to WAC 458-20-111 for information about advances and reimbursements.)

(iii) What is direct mail? "Direct mail" means printed material delivered or distributed by United States mail or other

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delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items is not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address. RCW 82.08.010 and chapter 514, Laws of 2005.

(iv) What are delivery charges? "Delivery charges" means charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing. RCW 82.08.010.

(b) What is the measure of tax when a consumer contracts with one ((party)) person for the promotional material and a ((third party)) separate person to prepare the material for distribution? ((The use tax is imposed on consumers of certain services rendered in respect to tangible personal property for use in this state when the retail sales tax has not been paid. RCW 82.12.020. These services generally include labor and services rendered in respect to altering, imprinting, or improving tangible personal property and include activities performed typically by mailing bureaus or houses, such as addressing, labeling, binding, folding, sealing, and tabbing.))

A consumer of promotional materials is subject to use tax on the value of the promotional material and the value of ((the)) certain services ((used. The value of the service used is the amount of consideration paid for the service and includes delivery charges such as postage. RCW 82.12.010 and 82.08.010)) rendered in respect to promotional material used in this state when the retail sales tax has not been paid.

The use tax is imposed on the value of the article used in this state. The tax is also imposed on the value of labor and services rendered in respect to altering, imprinting, or improving tangible personal property for use in this state when the retail sales tax has not been paid. RCW 82.12.020. With respect to promotional material, this includes activities typically performed by mailing bureaus or mail houses to prepare material for distribution, such as addressing, labeling, binding, folding, sealing, and tabbing.

(i) For discussion about activities performed by mailing bureaus, refer to WAC 458-20-141 (Duplicating activities and mailing bureaus).

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(ii) For discussion about activities performed by the printing industry, refer to WAC 458-20-144 (Printing industry).

(c) What is the measure of tax when a consumer manufactures its own promotional materials? The measure of use tax is the value of the promotional material. Refer to WAC 458-20-112 (Value of products). A consumer who manufactures its own promotional material may also be conducting manufacturing activities and should refer to WAC 458-20-134 (Commercial or industrial use) and WAC 458-20-136 (Manufacturing, processing for hire, fabricating).

(6) Determining the applicable local use tax rate. For purposes of determining the applicable rate of local use tax for promotional material, the following guidelines must be followed unless the consumer obtains prior written approval from the department to use an alternative method. Refer to (c) of this subsection for an explanation of the circumstances under which the department will consider approving alternate methods and how to obtain such approval.

(a) Operations directed from within Washington. The applicable local taxing jurisdiction and tax rate is the in-state location from where the consumer directs or manages its Washington operations.

(i) Example 1. Department Store operates ten locations in western Washington. Department Store's corporate headquarters, the location from where it manages its in-state operations, is in Seattle. The local use tax rate for Seattle is the applicable rate.

(ii) Example 2. Retailer, a national company with headquarters in Chicago, Illinois, operates multiple locations in Washington. Retailer manages its Washington operations from a location in Spokane. The local use tax rate for Spokane is the applicable rate.

(b) Operations directed from outside Washington. A consumer that manages or directs its Washington activities from outside the state must equally apportion the value of the promotional material among the local tax jurisdictions where the consumer conducts its business activities. Promotional material that is targeted to specific business locations of the consumer must be apportioned solely between those business locations. Targeted material is material specifically distributed to promote sales of products or services solely at a specific location(s) and at a different price(s) or terms than those offered at all other Washington locations.

(i) Example 1. Bank directs the operations of its four Washington branches from its headquarters in Sacramento,

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California. The branches are in Seattle, unincorporated King County, Tacoma, and Everett. For purposes of determining use tax liability, twenty-five percent of the value of the promotional material must be equally apportioned to Seattle, unincorporated King County, Tacoma, and Everett.

(ii) **Example 2.** Furniture Store, headquartered in Nevada, orders 100,000 flyers from a Portland, Oregon, printer to be mailed to Washington households announcing the opening of its new store in Spokane. Customers will receive a ten percent discount on all items purchased at the Spokane store. This discount will not apply to purchases made at Store C's other Washington locations. The local use tax rate for Spokane is the applicable rate.

(iii) **Example 3.** Restaurant manages the operations of its Washington locations from Portland, Oregon. Restaurant contracts to have coupon books printed and mailed to households in Clark and Cowlitz counties. The coupons are accepted only at the Vancouver and Longview locations. The value of the promotional material must be equally apportioned to both locations.

(iv) **Example 4.** Ohio Manufacturer has no offices, warehouses, or storefront locations in Washington. A salesperson operating from the person's Kent home solicits sales from Washington distributors for the manufacturer. Manufacturer mails promotional material to its distributors' customers in Washington. The local use tax rate for Kent is the applicable rate.

(v) **Example 5.** Michigan Wholesaler without offices, warehouses, or storefront locations in Washington sends salesperson into Washington to solicit sales. Wholesaler mails promotional material to potential customers in Washington. The applicable local use tax rate is a uniform statewide local rate of .005.

(c) **Are there alternative methods for determining the place of first use?** For purposes of reporting use tax on promotional material, the department may agree to allow a consumer to use another method of determining the applicable local use tax rate provided that the method proposed by the consumer results in an equal or more equitable distribution of the tax. A consumer may request written approval for the use of an alternative method by contacting the department's taxpayer services division at:

Department of Revenue
Taxpayer Services
P.O. Box 47478
Olympia, WA 98504-7478