



# PROPOSED RULE MAKING

## CR-102 (December 2017) (Implements RCW 34.05.320)

Do NOT use for expedited rule making

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STATE OF WASHINGTON  
FILED

DATE: December 16, 2020

TIME: 9:30 AM

WSR 21-01-131

Agency: Department of Revenue

Original Notice

Supplemental Notice to WSR \_\_\_\_\_

Continuance of WSR \_\_\_\_\_

Preproposal Statement of Inquiry was filed as WSR 20-22-092 ; or

Expedited Rule Making--Proposed notice was filed as WSR \_\_\_\_\_; or

Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or

Proposal is exempt under RCW \_\_\_\_\_.

Title of rule and other identifying information: (describe subject) WAC 458-20-211 – Leases or rentals of tangible personal property, bailments.

### Hearing location(s):

| Date:                     | Time:    | Location: (be specific)   | Comment:  |
|---------------------------|----------|---|---|
| Tuesday, February 2, 2021 | 10:00 am | This meeting will be conducted over the internet/over telephone | Contact Keith Dacus at KeithD@dor.wa.gov for login/dial-in information. |

Date of intended adoption: February 26, 2021 (Note: This is NOT the effective date)

### Submit written comments to:

Name: Brenton Madison

Address: PO Box 47453, Olympia, WA 98504-7453

Email: [BrentonM@dor.wa.gov](mailto:BrentonM@dor.wa.gov)

Fax: 360-534-1583

Other:

By (date) Tuesday, February 9, 2021

### Assistance for persons with disabilities:

Contact Julie King or Renee Cosare

Phone: (360)704-5733 or (360) 704-5734

Fax:

TTY: 800-833-6384

Email:

Other:

By (date) January 26, 2021

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:** The Department issued an interim guidance statement in August 2019 regarding the taxation of stand-alone concrete pumping services, which went into effect April 1, 2020. The Department is proposing amendments to WAC 458-20-211 to incorporate some of the clarification provided in the interim guidance statement and to clarify its policies by example. Specifically, the Department's proposed amendments address the issue of distinguishing concrete pumping services that are rentals of equipment with an operator from sales of construction services and/or construction materials.

The Department is also proposing amendments that reformat and modernize the rule.

**Reasons supporting proposal:** Clarifies the Department's policy for sales which include a provision of concrete pumping equipment with an operator.

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

**Statute being implemented:** 82.04.040(3) and 82.04.050(9).

**Is rule necessary because of a:**

Federal Law?  Yes  No  
Federal Court Decision?  Yes  No  
State Court Decision?  Yes  No

If yes, CITATION:

**Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:** None

**Name of proponent:** (person or organization) Department of Revenue

Private  
 Public  
 Governmental

**Name of agency personnel responsible for:**

|                 | Name            | Office Location                     | Phone          |
|-----------------|-----------------|-------------------------------------|----------------|
| Drafting:       | Brenton Madison | 6400 Linderson Way SW, Tumwater, WA | (360) 534-1583 |
| Implementation: | John Ryser      | 6400 Linderson Way SW, Tumwater, WA | (360) 534-1605 |
| Enforcement:    | John Ryser      | 6400 Linderson Way SW, Tumwater, WA | (360) 534-1605 |

**Is a school district fiscal impact statement required under RCW 28A.305.135?**

Yes  No

If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

**Is a cost-benefit analysis required under RCW 34.05.328?**

Yes: A preliminary cost-benefit analysis may be obtained by contacting:

Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

No: Please explain: This rule is not a significant legislative rule as defined by RCW 34.05.328.

**Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement:**

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see chapter 19.85 RCW). Please check the box for any applicable exemption(s):

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.

Citation and description:

This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule.

This rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(3). Check all that apply:

- RCW 34.05.310 (4)(b) (Internal government operations)
- RCW 34.05.310 (4)(c) (Incorporation by reference)
- RCW 34.05.310 (4)(d) (Correct or clarify language)
- RCW 34.05.310 (4)(e) (Dictated by statute)
- RCW 34.05.310 (4)(f) (Set or adjust fees)
- RCW 34.05.310 (4)(g) ((i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit)

This rule proposal, or portions of the proposal, is exempt under RCW \_\_\_\_.

Explanation of exemptions, if necessary:

**COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES**

If the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

No Briefly summarize the agency's analysis showing how costs were calculated. The proposed rule amendments do not impose more than a minor cost on businesses as they do not impose any new fees, filing requirements, or recordkeeping guidelines that have not already been established by statute or by the Department of Revenue in the administration of excise taxes.

Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses, and a small business economic impact statement is required. Insert statement here:

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

- Name:
- Address:
- Phone:
- Fax:
- TTY:
- Email:
- Other:

**Date:** December 16, 2020

**Name:** Atif Aziz

**Title:** Rules Coordinator

**Signature:**



AMENDATORY SECTION (Amending WSR 10-06-070, filed 2/25/10, effective 3/28/10)

**WAC 458-20-211 Leases or rentals of tangible personal property, bailments.** (1) **Introduction.** This section explains how persons are taxable who rent or lease tangible personal property or rent equipment with an operator. It explains that some activities performed by operated equipment may be taxable under classifications other than retail sales if the operator and equipment perform activities as a prime contractor or subcontractor and these activities are specifically classified under other tax classifications by the revenue act. Readers may want to refer to rules in the following list:

(a) WAC 458-20-102 Reseller permits.

(b) WAC 458-20-13501 Timber harvest operations.

(c) WAC 458-20-170 Constructing and repairing of new or existing buildings or other structures upon real property.

(d) WAC 458-20-17001 Government contracting—Construction, installations, or improvements to government real property.

(e) 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.

(f) WAC 458-20-180 Motor carriers.

(g) WAC 458-20-198 Installment sales, method of reporting.

(h) WAC 458-20-209 Farming for hire and horticultural services performed for farmers.

(2) **Definitions.**

(a) The terms "leasing" and "renting" are used interchangeably and refer generally to the act of granting to another the right of possession to and use of tangible personal property for a consideration. When "lease," "leasing," "lessee," or "lessor" are used in this section, these terms are intended to include rentals as well, even if not specifically stated.

Persons may not claim to be leasing or renting equipment to themselves since they are not granting to another the right of possession.

(b) The term "bailment" refers to the act of granting to another the temporary right of possession to and use of tangible personal property for a stated purpose without consideration to the grantor.

(c) The term "subcontractor" refers to a person who has entered into a contract for the performance of an act with the person who has already contracted for its performance. A subcontractor is generally responsible for performing the work to contract specification and determines how the work will be performed. In purchasing subcontract services, the customer is primarily purchasing the knowledge, skills, and expertise of the contractor to perform the task, as distinguished from the operation of the equipment.

(d) The term "rental of equipment with operator" means the provision of equipment with an operator to a lessee to perform work under the specific direction of the lessee. In such cases the lessor is generally not responsible for performing work to contract specification and does not determine how the work will be performed. ((~~Though not controlling, persons who rent equipment with an operator typically bill on the basis of the amount of time the equipment was used.~~))

(e) (i) The term "true object test" as it relates to this section means the analysis of a transaction involving the rental of equipment

((and)) with an operator, to determine if the lessee is simply purchasing the use of the equipment or purchasing the knowledge, skills, and expertise of the operator beyond those needed to operate the equipment. Even if it is determined that the customer is purchasing the knowledge, skills, and expertise of the operator, the transaction may still be a retail sale if the activity is specifically included by statute within the definition of a retail sale. This test can also be applied to rentals of tangible personal property ~~((when the seller))~~ without an operator, where the lessor performs some service in connection with the rental property. See examples 5 and 6.

(ii) The "true object test" described in this section is distinguished from the "true object test" described in RCW 82.08.190 for bundled transactions of two or more products. See example 15.

(iii) The "true object test" described in this section is also distinguished from transactions involving two or more products where one or more of the products is real property or a service to real property. See example 10.

(f) The term "true lease" (often referred to as an "operating lease") refers to the act of leasing property to another for consideration with the property under the dominion and control of the lessee for the term of the lease with the intent that the property will revert back to the lessor at the conclusion of the lease.

(g) The term "financing lease" (often referred to as a "capital lease") typically involves the lease of property for a stated period of time with ownership transferring to the "lessee" at the conclusion of the lease for a nominal or minimal payment. The transaction is structured as a lease, but retains some elements of an installment sale. Financing leases will generally be taxed as if they are installment sales. The presence of some or all of the following factors indicates a financing lease with the transaction treated as an installment sale:

(i) The lessee is given an option to purchase the equipment, and, if so, the option price is nominal (sometimes referred to as a "bargain purchase option");

(ii) The lessee acquires equity in the equipment;

(iii) The lessee is required to bear the entire risk of loss;

(iv) The lessee pays all the charges and taxes imposed on ownership;

(v) There is a provision for acceleration of rent payments; and

(vi) The property was purchased specifically for lease to this lessee.

(3) A true lease, rental, or bailment of personal property does not arise unless the lessee or bailee, or employees or independent operators hired by the lessee or bailee actually takes possession of the property and exercises dominion and control over it. Where the owner/lessor of the equipment or the owner's/lessor's employees or agents maintain dominion and control over the personal property and actually operate it, the owner/lessor has not generally relinquished sufficient control over the property to give rise to a true lease, rental, or bailment of the property.

(4) (a) RCW 82.04.050 excludes from the definition "retail sale" any purchases for the purpose of resale, "as tangible personal property." Persons who use equipment in performing services either as prime contractors or as subcontractors are not purchasing the equipment for purposes of reselling the equipment as tangible personal property. These contractors must pay retail sales tax or use tax at the time the equipment is acquired ~~((. Generally persons who rent equipment with an~~

~~operator are not purchasing the equipment for resale as tangible personal property and must pay retail sales or use tax at the time the equipment is acquired)) and are not eligible to use a reseller permit for the purchase.~~

~~(b) Persons renting operated equipment to others may purchase the equipment without payment of retail sales tax only when the equipment is rented as tangible personal property. This can be demonstrated only when:~~

~~((a)) (i) The agreement between the parties is designated as an outright lease or rental, without reservations; and~~

~~((b)) (ii) The lessee acquires the right of possession, dominion, and control of the equipment, even to the exclusion of the lessor.~~

~~This last requirement is a factual question and the burden of proof is upon the owner/operator of the equipment to establish that the degree of control has been relinquished necessary to constitute a lessor-lessee relationship. Weight will be given to such factors as who has physical, operating control of the equipment; who is responsible for its maintenance, fueling, repair, storage, insurance (risk of loss or damage), safety and security of operation, and whether the operator is a loaned employee. If control of these factors is left with the owner/operator, then as a matter of fact, there has not been a relinquishing of control of the equipment to the degree necessary to create a lessor-lessee relationship for the rental of tangible personal property. This is true, even though the customer exercises some constructive control over such matters as when and where the equipment is used in connection with the construction work being performed, i.e., the contractor controls the job site.~~

~~(5) **Business and occupation (B&O) tax.**~~

~~(a) Outright rentals of bare (unoperated) equipment or other tangible personal property as well as leases of operated equipment are generally subject to the retailing ((classification of the business and occupation)) B&O tax.~~

~~(i) When a lessor purchases equipment for bare rental or lease, the seller of the equipment is making a wholesale sale to the lessor and is required to obtain a ((resale certificate for sales made before January 1, 2010, or a)) reseller permit ((for sales made on or after January 1, 2010,)) from the lessor 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.))~~

~~(ii) Under unique circumstances when equipment is rented ((for rent by the lessee,)) by a lessee for use as a rental to other lessees without intervening use, ((then)) the original rental is subject to ((the wholesaling classification of tax)) wholesaling B&O tax and the subsequent rental is subject to the retailing ((classification)) B&O tax. The original seller is required to obtain ((a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or)) a reseller permit (WAC 458-20-102) ((for sales made on or after January 1, 2010, for these wholesale sales)) to substantiate the wholesale nature of the transaction.~~

~~(iii) Persons who purchase equipment for use as prime contractors or subcontractors are considered ((to be the)) consumers of ((these purchases. They are the consumers because they are not specifically reselling the tangible personal property. Persons selling equipment to~~

~~these persons are retailers and))~~ the equipment, as the contractor, not their customers, actually use the equipment. Sales of equipment and tools to prime contractors and subcontractors are generally subject to ((the)) retailing B&O tax, unless purchased for resale without any use on the part of the purchaser.

(b) Persons who provide equipment or other tangible personal property and, in addition, operate the equipment or supply an employee to operate the same for a charge, without relinquishing substantial dominion and control to the customer, are providing a service that is classified as a retail sale unless the nature of the activity is specifically classified under another tax classification. Where a specific tax classification applies to the activity, the income is subject to ~~((the business and occupation))~~ B&O tax (or public utility tax (PUT)) according to the classification of the activities performed by the equipment ~~((and))~~ operator. In the case of building construction, it ~~((will be))~~ is presumed that the rental of equipment with an operator to a contractor is a retail sale unless the operator ~~((has responsibility))~~ is responsible for performing construction to contract specifications and assumes control over how the work will be performed.

(c) Under some circumstances, the ~~((leasing or renting))~~ rental or lease of tangible personal property ~~((can be))~~ is subject to the ~~((special))~~ "retailing of interstate transportation equipment" B&O tax classification. This classification applies if the sale is exempt from retail sales tax because of the specific tax exemptions ~~((of))~~ provided in RCW 82.08.0261, 82.08.0262, or 82.08.0263. These exemptions apply primarily to sales to private or common carriers who are engaged in interstate or foreign commerce.

~~((d))~~ The following examples show how the tax would be applied to certain situations.

~~(i) The charge made by a subcontractor to a prime construction contractor for use of equipment with an operator used in the paving of a parking lot as part of the construction of a building would be taxable under wholesaling other when the subcontractor has the responsibility to perform the work to contract specification and determines how the work will be performed.~~

~~(ii) A contractor performing work to contract specification making a charge to a city for use of equipment and operator in the construction of a publicly owned road would be taxable under public road construction.~~

~~(iii) Income for loading of a vessel using equipment with an operator is taxable under the stevedoring classification.~~

~~(iv) Income from transporting persons or property for hire by motor vehicle, including leasing or renting motor carrier equipment with driver, is generally taxable under either motor transportation or urban transportation.~~

~~(v) A customer rents scaffolding and the seller is responsible for a technician to setup, move, and dismantle it. This is the rental of tangible personal property since the true object of the transaction is having the scaffolding available for use by the customer. The customer also assumes dominion or control over the scaffolding by determining who will use the scaffolding and by controlling the use of the scaffolding.~~

~~(vi) Income from transporting persons or property for hire by vessel is not a retail equipment rental with operator.)~~

(6) **Retail sales tax.** Persons who rent or lease tangible personal property to ~~((users or))~~ consumers are required to collect ~~((from their lessees the))~~ retail sales tax measured by ~~((gross income from))~~ the selling price of the rentals as of the time the rental payments ~~((fall))~~ become due. See RCW 82.08.010.

(a) RCW 82.04.050 excludes from the definition of the term "retail sale," purchases for the purpose of resale in the regular course of business without intervening use "as tangible personal property." Thus, the retail sales tax does not apply ~~((upon))~~ to sales of tangible personal property to persons who purchase the same solely for the purpose of renting or leasing such property without operators in the regular course of business. However, the retail sales tax applies upon sales to persons who provide such property with operators for a charge, without relinquishing substantial dominion and control, or who intend to make some use of the property other than or in addition to renting or leasing it.

(b) For state tax purposes, financing leases are treated ~~((for state tax purposes))~~ as installment sales. The retail sales tax applies to the full selling price. Refer to WAC 458-20-198.

~~((c))~~ The retail sales tax does not apply to lease payments made by a seller/lessee under a sale/leaseback agreement in respect to property, equipment, and components used by the seller/lessee primarily in the business of canning, preserving, freezing, or dehydrating fresh fruits, vegetables, and fish. Nor does the sales tax apply to the purchase amount paid by the lessee pursuant to an option to purchase this specific kind of processing equipment at the end of the lease term. (See RCW 82.08.0295.) In both situations the availability of this special sales tax exemption is contingent upon the seller/lessee having paid retail sales tax or use tax at the time of acquisition of such special processing property, equipment, and components. The use tax will also not apply if the sales tax does not apply.)

(7) **Use tax ~~((and/or))~~ or deferred retail sales tax.** Consumers who rent or lease tangible personal property from others and who have not paid ~~((the))~~ retail sales tax to their lessors are liable for ~~((the))~~ retail sales tax or use tax on the amount of the rental payments as of the time the payments fall due unless an exemption from the tax applies. ~~((However, if the))~~ In cases where rental payments do not represent a reasonable rental value for the article, the taxable value shall be determined according to the rental charges made by other sellers of similar articles of like quality and character. This ~~((can))~~ may include using the rate of return as a percentage of the capitalized value that lessors of the particular type of property are generally using in rate setting.

In some cases, lessors may lease articles wherein the lease payments do not include property taxes or insurance. These leases are often referred to as "net leases" with the insurance and property taxes paid directly by the lessee. If the lessor is the party insured and the party legally liable for payment of the taxes, the payments made directly by the lessee must be treated as additional consideration to the lessor and subject to ~~((the))~~ retailing B&O tax and retail sales tax.

(a) Bailment. The value of tangible personal property held or used under bailment is subject to use tax if the property was purchased or acquired under conditions whereby the retail sales tax was not paid by the bailor. Tax liability is that of the bailor, or of the bailee if the bailor has not paid the tax. The measure of the use tax to the bailor is the fair market value of the article at the time the



article was first put to use in Washington. The measure of the use tax to the bailee for articles acquired by bailment is the reasonable rental ~~((with the))~~ value ~~((to be))~~, determined as nearly as possible according to the rental price at the place of use of similar products of like quality and character. In the absence of rental prices for similar products, the reasonable rental value may be computed by prorating the retail selling price over the period of possession ~~((had))~~ by a bailee and payable in monthly installments. No further use tax is due upon property acquired by bailment after use tax has been paid by the bailee or any previous bailee upon the full original value of the article.

(b) Use tax does not apply to use by a bailee of any article of tangible personal property which is entirely consumed in the course of research, development, experimental, and testing activities conducted by the user, providing the acquisition or use of such articles by the bailor are exempt from retail sales tax or use tax. (RCW 82.12.0265.)

(8) **Examples.** The following examples 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 of the facts and circumstances. In some situations it may be difficult to determine if the transaction is a retail equipment rental with operator. If in doubt as to whether a particular rental with an operator is a retail sale, taxpayers should contact the department for a ~~((specific))~~ tax ruling.

~~((a))~~ **Example 1.** ABC Contracting, Inc. (prime contractor) is hired by XYZ Property Rentals, Inc. (end consumer) to construct a retail shopping complex, including construction of an on-site parking lot adjacent to the shopping complex. ABC hires DEF Subcontracting, Inc. (subcontractor) to pave the parking lot. DEF will use its own equipment to complete the project, including equipment to pour, roll, and level the asphalt. As part of its contract with ABC, DEF is liable for meeting the contractual specifications set by XYZ (end consumer). At the time of purchase, ABC provides DEF with a reseller permit in lieu of paying retail sales tax.

In this scenario, DEF's business activity is classified as a construction service, rather than a rental of equipment with an operator, the charges for which are subject to wholesaling B&O tax, as construction services are eligible for resale in this case. This conclusion is supported by the fact that DEF is responsible for the actual performance of the construction activities, not merely the provision of equipment with an operator, which might also include services limited solely to the operation of the equipment.

**Example 2.** ABC Contracting, Inc. (prime contractor) enters into a contract with the city of Olympia, Washington, to construct a publicly owned road to specification. The contract includes separately stated charges for ABC's use of its own equipment and equipment operators to construct the publicly owned road. ABC's activities are assumed to meet the requirements of the public road construction B&O tax classification.

In this scenario, ABC's business activity is classified as a public road construction service, the charges for which, including charges for equipment and operators, are subject to the public road construction B&O tax. Additionally, ABC may be subject to deferred retail sales or use tax, if it has not previously reported and paid retail sales or use tax on its purchase of the equipment used to provide the public road construction services at issue in this scenario.

**Example 3.** GHI Crane Operators, Inc. is hired by UVW Terminal, Inc. to load storage containers onto a vessel. Under the terms of its contract with UVW, GHI will use its own crane and operator to load the storage containers onto the vessel. Additionally, GHI will use its own discretion in properly loading the vessel according to its experience in stevedoring. GHI's activities are assumed to meet the requirements of the stevedoring B&O tax classification.

In this scenario, GHI's business activity is classified as a stevedoring service, the charges for which are subject to stevedoring B&O tax. Additionally, GHI may be subject to deferred retail sales tax or use tax, if it has not previously reported and paid tax on its purchase of the crane used to provide stevedoring services.

**Example 4.** JKL Trucking, Inc. contracts with MNO Builders, Inc. to lease to MNO several motor carrier vehicles that are operated by JKL employees. The vehicles are used to haul construction materials from MNO's headquarters in Yakima, Washington, to a construction site in Vancouver, Washington, over state highways. JKL's activities are assumed to meet the requirements of the motor transportation PUT classification.

In this scenario, JKL's business activity is classified as a motor transportation service, the charges for which are subject to motor transportation PUT.

**Example 5.** ZYX Construction Co. contracts with WVU Rental Co. for the rental of scaffolding. WVU's technicians set up, move, and dismantle the equipment. After assembly, ZYX assumes dominion and control over the use of the scaffolding until it is dismantled by WVU upon conclusion of the construction project.

In this scenario, WVU's business activity is classified as a rental of tangible personal property without an operator, the charges for which are subject to retailing B&O and retail sales tax. As the consumer of the scaffolding, ZYX is not eligible to use a reseller permit in lieu of paying retail sales tax.

**Example 6.** ABC Crane Co. is hired by DEF Builders Co. to supply a crane and operator to lift air conditioning equipment from the ground and hold it in place on the roof of a six-story building while ((the prime construction contractor)) DEF employees bolt((s)) the unit down. ((ABC Crane's)) ABC's operator will retain control over the crane. ABC ((Crane)) has no responsibility to attach wiring, plumbing, or otherwise make the unit operational.

((ABC Crane is renting)) In this scenario, ABC's business activity is classified as a rental of equipment with an operator ((since it has no responsibility to perform actual construction to contract specification. The activity of renting a crane with an operator is a service included within the definition of a retail sale and is not otherwise tax classified elsewhere within the revenue act. The purchase of the crane by ABC is also a retail transaction because ABC retained control over the crane and is not renting the crane as tangible personal property.

((b-)), the charges for which are subject to retailing B&O and retail sales tax. RCW 82.04.050(9). This is demonstrated by the fact that ABC is not responsible for the performance of any services, other than those necessary to operate the crane.

Additionally, ABC may be subject to retail sales tax or use tax on its use of the crane, if it has not already paid the tax at the time ABC initially acquired or used the crane in Washington.

**Example 7.** ABC Crane Co. (ABC) is hired by ((a prime contractor)) DEF Builders Co. (DEF), the prime contractor, to install a neon sign

on the side of a new six-story building ((which is being constructed)) DEF is constructing. At the time of purchase, DEF provides ABC with a reseller permit in lieu of paying retail sales tax. ABC is responsible for making certain that the sign is correctly fastened to the side of the building and ((for installation of the electrical connections and meets the proper building codes. ABC is directly involved in construction and performs work to contract specification. Since the work is being done for the prime contractor for further resale, this is a wholesale sale, provided a resale certificate (WAC 458-20-102A) is obtained for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010. Had ABC only been hired to hold the sign in place while the prime contractor fastened it, this would have been a retail rental of equipment with operator.

(c) XYZ Concrete Pumping is hired by a prime contractor to supply a concrete pump and operator to pump concrete from a premix concrete delivery truck to the location of the forms. XYZ has no responsibility to build forms, do the concrete finishing, or otherwise see that the concrete meets or is placed according to contract specifications. In short, the pump functions similarly to a wheelbarrow, but in a more efficient manner. XYZ is not a subcontractor and is making a retail rental of equipment with an operator.

(d) ABC Company purchases a crane which it rents to others as a bare rental. It periodically rents the crane to lessees on this basis for two years. Beginning in the third year of ownership of this crane, ABC decides to start providing these customers with an employee to operate the crane. The employee will operate under the direction of ABC with ABC retaining dominion and control over the crane. Does ABC owe use tax on the crane, and if so, what is the measure of the use tax?

ABC owes use tax upon the first use of the crane as a consumer. This occurred in the third year of ownership when ABC began supplying an operator. The measure of the tax is the retail market value of the crane at the time it is put to use by ABC.

(e-)) in accordance with the contract specifications established between DEF and the property owner.

In this scenario, ABC's business activity is classified as a construction service, the charges for which are generally subject to retailing B&O and retail sales tax. RCW 82.04.050(2). However, in this scenario the charges are subject to wholesaling B&O tax, as construction services are eligible for resale, and ABC received a reseller permit from DEF, who is reselling construction services to the property owner.

**Example 8.** ABC Crane Co. is an Oregon business. ABC purchases a crane in Oregon for \$75,000, which it will rent to customers. ABC's employees will operate the crane and ABC will retain dominion and control over the crane at all times. In the first two years following ABC's purchase of the crane, all rentals occur in Oregon. In the third year, ABC moves its operations to Washington, and begins renting the crane with an operator to Washington customers.

In this scenario, ABC owes use tax upon its first use of the crane as a consumer. This occurred in the third year of ownership when ABC first used the crane as a consumer in Washington. The measure of the tax is the retail market value of the crane at the time ABC puts it to use. At that time, the comparable retail value of the crane is determined to be \$50,000, which is the measure of the use tax.

**Example 9.** DEF Builders Co. (prime contractor) is hired to construct an apartment complex. DEF is performing a significant portion

of the construction services associated with the project on its own behalf, including construction of the building's foundation. After constructing forms for the apartment's foundation, DEF contracts with XYZ Concrete Co. to pump premixed concrete from a ready mix truck (located at the construction site) into the forms. XYZ operates its own pumping equipment, however, DEF controls the flow and placement of the concrete, directing XYZ's operator to start and stop the pump. The premixed concrete is not provided by XYZ. DEF is responsible for finishing the concrete.

In this scenario, XYZ is providing stand-alone concrete pumping services, and its business activity is classified as a rental of equipment with an operator, the charges for which are subject to re-tailing B&O and retail sales tax. Additionally, XYZ's activity is not eligible for resale, as DEF is considered the consumer of the operated rental equipment.

**Example 10.** DEF Builders Co. (prime contractor) is hired to construct an apartment complex. DEF is performing a significant portion of the construction services associated with the project on its own behalf, including construction of the building's foundation. After constructing forms for the apartment's foundation, DEF contracts with XYZ Concrete Co. to provide premixed concrete and to pump for the pour. XYZ operates its own pumping equipment, however, DEF controls the flow and placement of the concrete, directing XYZ's operator to start and stop the pump. At the time of its purchase, DEF provides XYZ with a reseller permit in lieu of paying retail sales tax.

In this scenario, where the taxpayer is providing both the concrete materials and the concrete pumping equipment and pumping services, XYZ's activity is classified according to subsection (2)(e)(iii) of this rule. In this case, the transaction's true object (or primary purpose) is the sale of premixed concrete. The sale of tangible personal property (concrete) for resale is subject to wholesaling B&O tax.

**Example 11.** DEF Builders Co. (prime contractor) is hired to construct an apartment complex. DEF hires subcontractors to perform a significant portion of the construction services associated with the project, including construction of the building's foundation. DEF contracts with XYZ Concrete Co. to pour and finish the building's concrete foundation, including construction of forms to pour the foundation. XYZ operates its own pumping equipment, in addition to providing on-site contractors who will manage the flow and placement of the pumped concrete. After the pour, XYZ is responsible for finishing the concrete. XYZ's contract with DEF requires the finished foundation meet the contract specifications entered into between DEF and its customer, the building owner.

In this scenario, XYZ's business activity is classified as the sale of subcontracted construction services, the charges for which are subject to wholesaling B&O tax, provided XYZ received a reseller permit from DEF.

**Example 12.** Farm Services, Inc. specializes in the cutting and baling of hay for farmers. Farm Services contracts with PQR Farms, Inc. (farmer) to cut and bale PQR's hay. The hay, after being cut and baled, is sold by ((the farmer)) PQR.

((Farm Services is not making a retail rental of equipment with operator, but is engaged in a farming for hire activity which is taxable under the)) In this instance, Farm Services' business activity is a farming for hire service, the proceeds from which are subject to

service and other business activities B&O tax ((classification)). See WAC 458-20-209.

((f)) **Example 13.** Helicopter, Inc. contracts with Logs, Inc. to move logs from where they have been cut in the woods to a landing approximately one mile away where the logs will be sorted, loaded on trucks, and transported to a mill. Total control over the helicopter operation rests with Helicopter, Inc.

In this scenario, Helicopter, Inc.'s business activity is classified as an extracting for hire service, the proceeds from which are subject to extracting for hire B&O tax. This is not a rental of equipment with an operator, nor is it considered as an air transportation service((. This)) as the activity is directly part of the timber extracting and harvesting activity ((and is taxable as extracting for hire)). See WAC 458-20-13501.

((g)) **Example 14.** ABC Sound Productions ((provides)) Co. contracts with DEF Entertainers, Inc. (entertainment promoter) to provide lighting, amplifying equipment, and speakers ((as part of the services it sells to entertainment promoters. ABC also provides several operators of the equipment. This is a rental of equipment with operator.)) for a performance run and operated by DEF. As part of its contract with DEF, ABC's employees operate all of the equipment provided. DEF will oversee and direct the operators as to the specific use of the equipment.

In this scenario, ABC's business activity is classified as a rental of equipment with an operator, the proceeds from which are subject to retailing B&O tax and retail sales tax. In applying the true object test, ((the promoter)) DEF is primarily purchasing the use of ((the)) lighting and sound equipment. ((The performer or promoter could be expected to)) DEF maintains the authority to specify the color, location, and degree of lighting and ((may)) also ((request)) changes and modifications to the level of sound amplification during the performance. ABC's services are solely limited to the operation of the equipment itself.

**Example 15.** Fun Snacks, LLC is in the business of renting popcorn and cotton candy machines with an operator. Fun Snacks does not sell cotton candy or popcorn to individual customers attending an event, but rather charges a flat rate to event organizers in which attendees of the event consume either product for no additional charge. Fun Snacks is hired by Little Farm, Inc. to provide a cotton candy machine with an operator for a fall festival organized and operated by Little Farm. Little Farm staff will operate concessions at the event and will oversee the flavor and quantity of cotton candy made by the operator of the machine. Fun Snacks charges a flat rate of \$500 to Little Farm which includes the rental equipment, operator, and cotton candy ingredients and supplies.

In this scenario, Fun Snacks is selling a bundled transaction, subject to the "true object test" contemplated in RCW 82.08.190. Because one or more of the products included in the transaction are subject to retail sales tax, the rental of equipment with an operator and cotton candy ingredients and supplies, the total charge of \$500 is subject to retailing B&O tax and retail sales tax.

((h)) **Example 16.** John Doe ((purchased)) purchases a vessel ((which will be rented)) that he will rent to others as a bare boat rental. The rentals will be arranged through an agent at ((a marina. The marina)) GHI Marina. GHI receives a commission based on any usage of the vessel, including usage by ((the owner)) John Doe. The rental of the boat is a retail sale when the boat is rented to others. The

Under no circumstances is this proposed rule to be used to determine tax liability and/or exemptions.

usage of the boat by John Doe is not a rental. Since John Doe will be using the boat at times for his own use, he may not purchase the boat for resale. As a result, John Doe is subject to retail sales tax or use tax on his initial acquisition or use of the vessel in Washington.

DRAFT