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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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SPRINT SPECTRUM, LP,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellant.

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

Since 1955, the Legislature has imposed use tax on businesses that distribute or display any item of tangible personal property, other than newspapers, when the primary purpose of doing so “is to promote the sale of products or services.” Laws of 1955, ch. 389, § 24; *see* RCW 82.12.010(6) (2002).<sup>1</sup> In 2009, this Court applied this provision as a matter of law to a retailer providing free cell phones to customers who agreed to enter into a contract for an extended period of cellular telephone service. *Activate, Inc. v. Dep’t of Revenue*, 150 Wn. App. 807, 209 P.3d 524 (2009). “Activate distributes articles of tangible personal property (phones), the purpose of which is to promote the sale of products or services (AT&T service contracts); it is a ‘consumer’ under this provision[.]” *Id.* at 816. For the same reason, Sprint Spectrum, LP, was subject to use tax: Sprint distributed articles of tangible personal property (phones), the purpose of which was to promote the sale of services (wireless service contracts).

In light of *Activate*, this case should have been simple for the Board of Tax Appeals. Instead, the Board was distracted by what it viewed as the “economic reality” of Sprint’s transactions with customers receiving free phones. As a result of this misplaced focus, the Board made

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<sup>1</sup> This brief cites the 2002 version of RCW Title 82, unless otherwise indicated. The tax period in this case is July 1999 through December 2002.

findings directly contrary to the stipulated evidence. The Board also erroneously interpreted or applied the law, including statutory definitions of “consumer,” other applicable statutes, and this Court’s decision in *Activate*. The Board’s decision should be reversed.<sup>2</sup>

## II. ARGUMENT

Whether Sprint owed use tax on the cell phones it provided to customers in “free phone” promotions turns on whether Sprint was a “consumer” of those phones under statutory definitions. *See* RCW 82.12.020(1); RCW 82.12.010(3)(a). During the tax period, the statutes provided more than a dozen ways for a taxpayer to qualify as a “consumer.” *See* RCW 82.04.190; RCW 82.12.010(6).

In *Activate*, the undisputed evidence demonstrated the taxpayer fell within three statutory definitions of “consumer.” *Activate*, 150 Wn. App. at 815-16. Here, the stipulated evidence demonstrates Sprint fell within two of the same “consumer” definitions. Sprint was a “consumer” under RCW 82.12.010(6) because it distributed free cell phones to customers for the purpose of promoting its sales of wireless service. Sprint also was a “consumer” under RCW 82.04.190(1). Because Sprint did not “sell” the free cell phones “as tangible personal property” and without “intervening

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<sup>2</sup> The Department’s opening brief also assigned error to the Board’s ruling on an unrelated issue. *See* Br. Appellant at 2 (Assignment of Error No. 1). That issue has been dismissed from this appeal as part of a settlement.

use,” Sprint’s purchase of them was a purchase “at retail,” rendering Sprint liable for use tax. RCW 82.12.020(1).

**A. The Board’s Key “Findings” Are Not Supported By Substantial Evidence.**

An agency’s findings of fact must be supported by evidence that is substantial when viewed in light of the whole record. RCW 34.05.570(3)(e). The parties agree that substantial evidence is evidence sufficient to convince a fair-minded person that the declared premise is true. *Vancouver Sch. Dist. 37 v. Serv. Employees Int’l Union, Local 92*, 79 Wn. App. 905, 927, 906 P.2d 946 (1995). When the record fails to support an agency’s findings and the conclusions drawn from them, the decision should be reversed. *See Department of Revenue v. Nord Nw. Corp.*, 164 Wn. App. 215, 232-33, 264 P.3d 259 (2011) (affirming reversal of Board of Tax Appeals decision where Board found that cash contributions by LLC members were “loans” to the taxpayer contrary to evidence in the record), *review denied*, 173 Wn.2d 1019 (2012).

The Board incorporated by reference at least eight pages of its description of the evidence into Finding of Fact No. 5, making discussion of its “findings” more complicated than it should have been. *See* RCW 34.05.461(3). The Department assigned error to several of these “findings,” whether labeled as such or contained within the eight pages of

narrative, and demonstrated how they are not supported by substantial evidence. *See* Br. Appellant at 2, 25-36. Several of the challenged “findings” are actually erroneous conclusions of law, but because of the way the Board characterized them, the Department addresses both the lack of evidentiary support and the legal errors.

In response, Sprint has largely declined to discuss the actual evidence, relying instead on the Board’s narrative, conclusions about economic reality, and legal argument. Br. Resp’t at 10-24. But the record is clear: No substantial evidence supports these “findings.”

**1. No evidence supports the “finding” that customers paid Sprint “directly” for the free cell phones in zero-down installment sales.**

It is undisputed that when customers received a cell phone in a promotion offering a “free” handset, Sprint gave customers a receipt for the phone with a price of \$0.00. AR 1003, 1011, 1026, 1036, 1045 (Ex. S2). Nonetheless, in both Finding of Fact No. 6 and elsewhere in its decision, the Board essentially “found” that Sprint sold the free cell phones in zero-down installment sales, with customers’ monthly payments on the wireless service contract constituting payments for the cell phone:

- “Sprint receives money *directly* from the retail consumer for the ‘free phones’ *via its monthly service contract payments* and pays retail sales tax on that money.” Finding of Fact No. 6, AR 97 (emphasis added).

- “[T]he phones were resold by Sprint in installments with a zero down payment, upon which sales tax was collected and paid to the Department.” AR 75.

*See also* AR 84-85 (similar statements).

The stipulated facts and exhibits documenting Sprint’s actual transactions with customers in the free phone deals are contrary to these “findings.” None of the transaction documents contains any indication that customers had an obligation to make payments to Sprint for the free cell phones, either at the time of transfer or later. Br. Appellant at 26-30 (discussing cash register receipts, wireless service contract, standard terms and conditions, and monthly invoices for wireless service); *see* AR 104-21; AR 1001-1055. Sprint’s witness, Anthony Whalen, admitted that customers did not buy the free cell phones over time. RP at 67-68.

Sprint did not offer any evidence showing customers actually purchased the free cell phones with payments over time because none existed. So Sprint has recharacterized the issue and argues that the Board provided “substantial detail” that Sprint sold the phones in a “package,” like “two for one” sales. Br. Resp’t at 10, 15, 19. Instead of citing evidence, Sprint quotes statements the Board made, several of which are among the disputed “findings.” Sprint also highlights the Board’s “finding” that Sprint recovers the cost of its “free phone” promotions in its charges to customers under the wireless service contract. Br. Resp’t at 15.

Sprint's recovery of its cost of providing free cell phones in the wireless service rates it charges is something it would need to do to remain profitable, just as it would need to recoup the cost of cell phone towers and other operating costs. *See* RP at 61 (agreeing that monthly charges are also set to recover cost of cell phone towers). Cost recovery does not create a zero-down installment sale. *See Indiana Bell Tel. Co. v. Indiana Dep't of State Revenue*, 627 N.E.2d 1386, 1388-89 (Ind. 1994) (no "resale" of telephone directories provided to customers without charge and cost recovered in monthly telephone service charges).

In addition, the contract documents did not reflect a legal installment sale. *See* RCW 63.14.020 (retail installment contract must be contained in single document); RCW 63.14.040 (retail installment contract must include "sale price" of each item, balance due, and schedule of payments or statement of the number, amount, and due date of installment payments). The record also is devoid of any evidence that Sprint remitted retail sales tax on the "full selling price" at the time of these transfers, as required for installment sales of tangible personal property. RCW 82.08.090; WAC 458-20-198(2). In sum, no fair-minded person could find that customers paid Sprint "directly" for the free phones in zero-down installment sales. Finding of Fact No. 6 and similar statements are not supported by substantial evidence.

**2. The evidence and statutes determine taxability in this case, not Sprint's theory of "economic reality."**

Because Sprint cannot dispute that all the transactional documents in the record contradict the Board's installment contract "findings," Sprint asks this Court to disregard the documents in favor of what it calls "economic reality." Sprint argues that viewing the evidence otherwise elevates form over substance. Br. Resp't at 22-23.

The Supreme Court has expressed doubt whether taxpayers may invoke a "substance over form" argument to disregard the terms of their own contracts. *Rho Co. v. Dep't of Revenue*, 113 Wn.2d 561, 569, 782 P.2d 986 (1989).<sup>3</sup> Here, the "substance," "form," and "economic reality" are one and the same. When Sprint gave customers a free cell phone, the cash register receipt for the phone said \$0.00, but Sprint charged no more in monthly wireless service fees or other fees than when a customer did not receive a free phone. AR 842; RP at 66-67. Sprint's new request that the documents be disregarded should be rejected.<sup>4</sup>

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<sup>3</sup> Many courts agree that as a general rule, a government may bind a taxpayer to the form the taxpayer has used to cast a transaction. See, e.g., *United Parcel Serv. Gen. Servs. Co. v. Dir., Div. of Taxation*, 25 N.J. Tax 1, 23 (2009); *Sisters of Providence in Wash., Inc. v. Municipality of Anchorage*, 672 P.2d 446, 448 (Alaska 1983). Allowing taxpayers to disown their contracts creates post-transactional tax planning, unwarranted litigation, and administrative burdens and proof problems. *United Parcel*, 25 N.J. Tax at 23 (quoting *In re Steen*, 509 F.2d 1398, 1402-03 n.4 (9th Cir. 1975)).

<sup>4</sup> Sprint's current argument that the transactional documents do not reflect "economic reality" is inconsistent with its position at the Board. Sprint stipulated before the hearing to admission of cash register receipts, copies of the Sprint PCS Advantage Agreements, and related monthly invoices as part of Exhibit S2. AR 842, AR 1001-1055.

Moreover, Sprint's "economic reality" theory is contrary to tax law – specifically, the statutory distinction between transfers of tangible personal property and sales of services qualifying as a "retail sale." The Board concluded Sprint was not liable for use tax because "the phones were resold by Sprint in installments with a zero down payment." AR 75; *see also* Finding of Fact No. 6, AR 97; AR 84, 85. Central to the Board's finding that Sprint "resold" the free cell phones were that wireless services are taxed as retail sales and Sprint priced its wireless services to recover the cost of cell phones it distributed for free. *See* AR 75, 81, 84, 85, AR 97 (Sprint "pays retail sales tax" on the monthly service contract payments). In other words, the Board equated the retail sales tax Sprint collected on its sales of wireless services with retail sales tax on the free cell phones.

They are not the same. Sprint's wireless service customers owed retail sales tax, which Sprint collected and remitted to the Department, on the monthly charges for "network telephone service" they received under their wireless service contracts. RCW 82.04.050(5); RCW 82.04.065(2). In contrast, the sale of a cell phone (above \$0.00) triggered a separate tax

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During the hearing, Sprint also moved for admission of the standard terms and conditions, admitted as Exhibits A-2 & A-3. AR 104-21; RP 47, 50, 141-43. Furthermore, Sprint offered testimony about the transactional documents and cited them in its briefing before the Board. RP 44-47, 50-52; AR 297.

liability at the point of sale as a sale of tangible personal property under RCW 82.04.050(1). *Id.*

In addition, unlike sales of tangible personal property, Sprint's sales of wireless services are not treated as single transactions for tax purposes, but contracts for a series of transactions. *See Gandy v. State*, 57 Wn.2d 690, 695, 359 P.2d 302 (1961). Sprint's customers received the capabilities of Sprint's wireless service each month in exchange for payment of the monthly recurring fees. AR 1012-14 (sample invoice). Therefore, each monthly payment was a separate sale of network telephone service for sales tax purposes, and Sprint invoiced customers for retail sales tax accordingly. AR 1014. In sum, the same tax may be applicable to both sales, but the statutes treat them as separate transactions (as indeed Sprint's documents do). Thus, the Board erred in concluding that the retail sales tax Sprint collected in its monthly wireless service billings represented in part sales tax on the free cell phones Sprint gave to its customers.

**3. Sprint provided free cell phones to promote its wireless service business.**

The Board "found" that "[c]ell phones are 'not used to promote the business.'" AR 84. Any fair-minded person reviewing the evidence in this case would have to conclude the contrary – that Sprint offered free

cell phones in promotions in order to encourage the sale of its wireless services. This is a mixed question of fact and law, for purposes of applying the definition of “consumer” in RCW 82.12.010(6). The factual inquiry is why Sprint offered free cell phones to customers.<sup>5</sup>

The sole evidence supporting the Board’s “finding” is Mr. Whalen’s testimony at the hearing that he did not consider cell phones to be promotional items because they were integral to the business instead of ancillary. RP at 55. Arrayed against Mr. Whalen’s opinion of what constitutes a promotional item, a matter controlled by statute, is the evidence in the record demonstrating that Sprint used the free cell phone deals to promote the sale of its principal business, wireless services:

- Sprint provided free phones *only* to customers who qualified by agreeing to purchase wireless services from Sprint for a term of one or two years. AR 842, ¶ 36; AR 1001-02, 1009-10, 1024-25, 1032-33, 1043-44; AR 1079 (trans. at 34).
- Neither the monthly wireless service rates Sprint charged to customers, nor the early termination fee, nor the activation fee varied depending upon whether a customer received a full price phone, a partially discounted phone, or a free phone. AR 842, ¶ 37, AR 1094 (trans. at 94); RP 60, 66-67.

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<sup>5</sup> In its brief to this Court, Sprint argues initially that the question should be treated as a conclusion of law. Br. Resp’t at 24 n.9. A few pages later, however, Sprint argues that the Board’s decision that the cell phones were “not promotional” was based on its “*factual findings* that the cell phones were not free and *not distributed ‘primarily for promotional purposes’* . . . . *Those findings were supported by sufficient evidence.*” Br. Resp’t at 27 (emphasis added). Sprint fails to cite any evidence in the record to support this argument. Thus, Sprint has failed to offer a basis to uphold the Board’s finding about Sprint’s purpose in offering “free” cell phones.

- Sprint reported in its Form 10-K to the SEC that “as a part of Sprint Spectrum’s marketing plans, handsets are normally sold at prices below Sprint Spectrum’s cost.” AR 1153
- Sprint’s marketing approach was to subsidize, or lose money, on cell phones. Sprint lost approximately \$100 per cell phone on average. RP 15, 27-28; AR 1103, 1105.

*See also* AR 1107; AR 1118 (Sprint offered free phones in “promotions” during “promotional windows”); AR 1092 (trans. at 87); AR 1118 (free phone deals have been part of Sprint’s marketing for many years); AR 1092 (trans. at 86) (Sprint offered free phone deals in multi-media advertising); RP 68 (Mr. Whalen not denying that Sprint used promotions with free cell phones to sell wireless service).

Sprint declined to admit that it used the free cell phones to promote the sale of its wireless services, but the evidence is as clear as footprints in the snow. As the superior court concluded: “[T]he evidence demonstrates the only reason Sprint offered free phones was to entice customers to enter into wireless service contracts with Sprint.” CP 205.

**4. Substantial evidence does not support additional findings regarding cell phone and wireless service purchases and transaction documents.**

The Department also challenges findings addressing the relationship of cell phone transfers and wireless service purchases, and the records of those transactions, which the Board mischaracterized in several instances. *See* Br. Appellant at 2, 30-33. Sprint agrees that the

Department is “technically correct” as to one “finding.” Br. Resp’t at 16 n.6. Sprint dismisses the remaining challenges as attempts to have the Court improperly substitute its judgment for the Board’s, extending this accusation to all of the Department’s challenges to the Board’s findings. *Id.* at 23.

Contrary to Sprint’s argument, the Department does not ask this Court to substitute its judgment for the Board’s in assessing “the weight to be given reasonable but competing inferences.” *University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). The evidence in the record does not give rise to a “reasonable inference” that Sprint sold the free cell phones to customers in installments. Furthermore, the evidence gives rise to a single reason why Sprint offered free cell phone promotions – to promote the sale of its wireless services. The same is true for the remaining challenged findings, for all the reasons discussed here and in the Department’s opening brief.

**B. Just As In *Activate*, Sprint Owed Use Tax On Cell Phones It Distributed To Promote The Sale Of Wireless Services.**

Given the evidence in this record, this Court’s decision in *Activate*, and the definition of “consumer” in RCW 82.12.010(6), the Board should have concluded that Sprint was properly assessed use tax on the free cell phones because it distributed them to customers for the primary purpose of

promoting the sale of wireless services.<sup>6</sup> See Br. Appellant at 40-41, 43-45 (the undisputed material facts are the same as they were in *Activate* for purposes of this statutory definition), 42-43 (showing how the Board erred in concluding that this definition of “consumer” does not apply to “core merchandise items”), 45-46 (showing how Board erred in treating Sprint’s transfer of the free phones as part of a “package” sale subject to retail sales tax, rather than a deal triggering two different tax liabilities on different taxpayers); see also Part A.1.-A.3, above. Sprint’s arguments in response lack merit and mix issues related to different definitions of “consumer.” Br. Resp’t at 18-22, 24-33. Under any applicable definition, Sprint’s arguments should be rejected.

**1. Under RCW 82.12.010(6), promotional items subject to use tax can include “any tangible personal property” except newspapers.**

Before the Board, Sprint argued that the definition of “consumer” in RCW 82.12.010(6) did not apply to items a taxpayer typically sold in its business, or “core merchandise items.” The Board agreed. AR 91, 95. Sprint avoids the words “core merchandise items,” but continues to argue that a business should not have to pay use tax on items the business provides to customers for free (or at “a discount of 100%”) if the items are

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<sup>6</sup> RCW 82.12.010(6) provides in pertinent part that a “consumer” includes “any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services.”

of a type the business normally sells, or if customers are required to make purchases of goods or services to receive the items. Br. Resp't at 21-22; 25-26. Sprint cites WAC 458-20-17803, which lists as examples of "promotional material" "advertising literature, circulars, catalogs," and other materials Sprint characterizes as of little or no value to customers. Br. Resp't at 21, 25.

This Court already considered and rejected a similar argument in *Activate*. RCW 82.12.010(6) applies to the promotional use of "any article of tangible personal property, except newspapers." Similarly, the definition of "promotional material" in Rule 17803 starts with the following: "Promotional material is any article of tangible personal property, except newspapers, . . ." WAC 458-20-17803(4). The definition goes on to provide specific examples, but states that promotional materials "are not limited to" those examples. *Id.*

Sprint falsely accuses the Department of applying an "expansive interpretation" of what items of tangible personal property can qualify under RCW 82.12.010(6). Br. Resp't at 24. To the contrary, Sprint uses certain items listed as examples in Rule 17803(4) to *limit* the scope of "any article of tangible personal property" in RCW 82.12.010(6). As this Court concluded, however, interpreting the rule in this manner is inconsistent with the statute. *Activate*, 150 Wn. App. at 816 n.9.

The plain language of RCW 82.12.010(6) does not restrict “consumers” to persons that distribute items of little or no value to consumers (advertising brochures, etc.). It does not exclude “core merchandise” or items a business might regularly sell, and it does not exclude the distribution of items for a promotional purpose when customers must purchase services to obtain the “free” items. The Board’s conclusions and Sprint’s arguments are in conflict with the statute.

**2. Sprint “distributed” the cell phones it provided to customers for \$0.00, and did not sell them in “buy one, get one free” transactions.**

The “consumer” definition in RCW 82.12.010(6) applies to persons who “distribute or display” tangible personal property for the purpose of promoting the sales of products or services. Sprint argues that it did not “distribute” the free cell phones because the Board made a “factual finding that the phones were sold,” and that finding is dispositive. Br. Resp’t at 24-25. This argument should be rejected.

Whether Sprint made “retail sales” of the free phones is primarily a legal question. *See* Part C, below. To the extent the statutes depend on facts, the undisputed evidence here contradicts Sprint’s argument and the Board’s “finding” that the phones were sold. In promotions offering “free” phones, Sprint gave customers a receipt identifying the phone they received, and the price they paid for it, \$0.00. AR 1003, 1011, 1026,

1036, 1045. And the Board’s “finding” that Sprint received payments “directly” from customers in zero-down installment sales is entirely without evidentiary support. *See* Part A.1, above. Customers paid nothing for the free cell phones when they received them from Sprint in the store or later. Accordingly, Sprint “distributed,” rather than sold, the phones to these customers.

Because the record lacks evidence that customers paid Sprint for the free cell phones, Sprint argues instead that the free cell phone deals are the equivalent of “two for one” and “buy one, get one free” deals. Br. Resp’t at 19, 25-26. The Board also erroneously equated Sprint’s free cell phone promotions with a “buy one, get one free” sale. AR 95. The Board reasoned that the sale was a “total package” that was “subject to retail sales tax.” *Id.* The Board and Sprint misapply the evidence and the law.

The free cell phone deals Sprint promoted here are not the equivalent of “two-for-one” or “buy one, get one free” promotions *from a tax perspective*, although they may seem similar from a marketing perspective. In a “buy one, get one free” promotion of the type Sprint references, the customer typically is purchasing two items of tangible personal property, effectively for the price of one. Sprint is correct that the Department treats these transactions as sales of two items at a discounted price. *See* WAC 458-20-124(6) (two-for-one meals); *see also*

WAC 458-20-116(3)(b). The Department recognizes such sales as “resales” by the retailer and does not impose use tax on the retailer for either item. These deals amount to volume discounts on the items.

The problem for Sprint is that treating a sale as “two for one” or “buy one, get one free” necessarily means both items have been sold (at a discounted price). In this case, there was no retail sale of either wireless services or cell phones at the point customers received a free cell phone. Sprint had not yet provided any wireless services. Sprint billed for “network telephone services” on a monthly basis and collected retail sales taxes on them accordingly. RCW 82.04.065; *see* Part A.2., above. As for the cell phones, there is no evidence that customers paid anything for the phones when they received them or later. Accordingly, the evidence also fails to allow treatment of Sprint’s free cell phone deals as “two for one” or “buy one, get one free” sales.<sup>7</sup>

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<sup>7</sup> Sprint argues that the transactions here should be considered “bundled” or “single” transactions because the Federal Communications Commission in 1992 began allowing cellular service providers to “bundle” the sale of cell phones and cellular service. Br. Resp’t at 18 & App. A. This case is not a challenge to the legality of Sprint’s sales of cell phones or sales promotions, and the FCC’s decision to allow such sales has no bearing on the application of Washington’s tax statutes. More significant is that after the tax period in this case, the Legislature addressed the application of retail sales tax to “bundled transactions.” *See* Laws of 2007, ch. 6, §§ 1401-02 (codified in RCW 82.08.190 & .195 (2010)). The transactions at issue here would not fall within the definition of a “bundled transaction” under RCW 82.08.190 because the price Sprint charged for wireless service did not vary depending upon whether a customer received a free phone. *See* RCW 82.08.190(2)(b) (2010) (regarding products provided free of charge with the required purchase of another product); RCW 82.32.023 (2010) (“product” includes services).

For all the foregoing reasons, the Department properly imposed use tax on Sprint as a “consumer” under RCW 82.12.010(6) of the cell phones it distributed to customers in “free” phone promotions.

**C. Sprint Purchased The Cell Phones “At Retail” Because It Did Not Resell Them As Tangible Personal Property Without Intervening Use.**

Just as in *Activate*, an additional definition of “consumer” applies to render Sprint liable for the free phones it distributed during the tax period. “Consumer” under RCW 82.04.190(1) includes “[a]ny person who purchases, acquires, owns, holds, or uses any article of tangible personal property,” regardless of the person’s business, other than for the purpose of “resale as tangible personal property in the regular course of business.” If an item is not acquired exclusively for the purpose of resale, it is purchased “at retail” and subject to retail sales tax or use tax. *See* RCW 82.04.050(1)(a); RCW 82.12.020(1).

Sprint bears the burden of proving it qualifies for the resale exemption. *Activate*, 150 Wn. App. at 818. It did not do so before the Board, and the Board erred in concluding otherwise. *See* AR 99 (“RCW 82.04.190 does not apply to Sprint”). Under RCW 82.04.050(1)(a), the exception to the “consumer” definition in RCW 82.04.190(1) applies only to persons who purchase “for the purpose of *resale as tangible personal*

*property* in the regular course of business *without intervening use* by such person . . . .” RCW 82.04.050(1)(a) (emphasis added).

As in *Activate*, a transfer of tangible personal property without charge is not a “resale” under RCW 82.04.050(1)(a). In addition, because Sprint distributed the cell phones in promotions to sell wireless service, Sprint made “intervening use” of the cell phones, further disqualifying it from the resale exemption. *See Activate*, 150 Wn. App. at 818-19 (denying resale exemption because “Activate made intervening use of these phones by using them as part of the marketing promotion to attract consumer business.”)

Sprint argues that its customers provided “valuable consideration” directly to Sprint by entering into a wireless service contract with Sprint, giving rise to a “sale” of the free cell phones where none existed in *Activate*. Br. Resp’t at 29-30; *Activate*, 150 Wn. App. at 816-18. The resale exemption remains inapplicable, however, because Sprint made “intervening use” of the phones and there was no resale “as tangible personal property.”

The only taxable sales to Sprint’s customers reflected in the record are Sprint’s monthly sales of *network telephone service*, on which Sprint collected retail sales tax and remitted it to the Department. AR 1014 (portion of invoice); *see* Part A.2., above. Sprint stipulated that its

monthly wireless service rates did not differ when customers received a free cell phone from when Sprint sold a full-price or partially discounted phone. AR 842 ¶ 37. This proves that what Sprint actually sold its free phone customers was wireless service, not tangible personal property.

The Washington Supreme Court has recognized this distinction, denying the resale exemption when the alleged “resale” to a customer was not “as tangible personal property” and instead was the sale of a taxable service. For instance, the Court denied the exemption to a taxpayer who leased a ship for use as a floating hotel. *Black v. State*, 67 Wn.2d 97, 406 P.2d 761 (1965). As in this case, the transactions raised different taxing incidents:

There is no exemption from sales tax in the levy for one who purchases (rents) tangible personal property for the purpose of using the same in the rendering of services. Also note that RCW 82.04.050(e) imposes a retail sales tax on the *lodging* offered by hotels. Thus, we simply have two different taxing incidents here: (1) leasing of the ship, and (2) offering of lodging and allied hotel services.

*Id.* at 103 (emphasis in original); *see also* AGO 59-60 No. 94 (exemption does not apply when taxable incident is the rendering of services); *Mayflower Park Hotel, Inc. v. Dep’t of Revenue*, 123 Wn. App. 628, 631-32, 98 P.3d 534 (2004) (distinguishing hotel’s purchase of guestroom items and hotel’s sale of lodging to guests).

Sprint did not “resell” free cell phones to customers “as tangible personal property.” What it sold those customers was a service, network telephone service. RCW 82.04.050(5); RCW 82.04.065. It did not qualify for the resale exemption and was a “consumer” and subject to use tax under RCW 82.04.190(1) and RCW 82.12.020(1).<sup>8</sup>

**D. Washington’s Tax Statutes Are Sensible, and No Double Taxation Results.**

Sprint incorrectly argues that imposing use tax for the free cell phones is duplicative of the sales tax Sprint collected from wireless customers. Br. Resp’t at 10, 22, 31. Sprint was assessed use tax because it used the cell phones it gave to customers without charge to promote the sale of its wireless services. RCW 82.12.020; RCW 82.12.010(6).

Sprint’s customers, on the other hand, owed retail sales tax on charges for network telephone services under their wireless contracts, which Sprint collected from them. RCW 82.04.050(5); RCW 82.04.065. Sprint paid only one tax, for use of tangible personal property, and Sprint’s customers

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<sup>8</sup> The Court should decline to consider a New York advisory opinion Sprint relies on. Br. Resp’t at 32-33 (citing TSB-A-97(84)S, 1997 WL 82339 (1997)). Under New York law, the advisory opinion is not precedential and is binding on the commissioner only as to the person to which it is issued. N.Y. Tax Law § 171.24; N.Y. Comp. Codes R. & Regs. Tit. 20, § 2376.4 (2012). In addition, the advisory opinion reaches a result contrary to the controlling statute and decisions rendered under it. See N.Y. Tax Law § 1101(b)(4)(i); *In re Petition of US Telecom, Inc.*, 2006 WL 3739387 (N.Y. Tax App. Trib. 2006) (purchase of plastic cards for taxpayer’s prepaid telephone service did not qualify for resale exemption); *Matter of Helmsly Enterprises, Inc. v. Tax Appeals Tribunal*, 592 N.Y.S.2d 851, 854 (N.Y. App. Div. 1993) (hotel guestroom furnishings and amenities not purchased for resale “as such”).

have been subjected to only one tax, for their purchase of wireless services. Sprint's recovery of the expense of the free phones through its pricing for wireless services does not make either tax duplicative of the other. *Gandy v. State*, 57 Wn.2d 690, 698, 359 P.2d 302 (1961) (rejecting double taxation argument); *Mayflower Park Hotel*, 123 Wn. App. at 633-34 (same).

Sprint's argument that there is no "principled" way to distinguish transactions involving partially discounted phones from transactions involving free phones also should be rejected. *See* Br. Resp't at 26-27. In the first type of transaction, Sprint must collect retail sales tax from customers at the point of sale for the discounted cell phone, and collect retail sales tax on a monthly basis for the wireless services. Sprint would owe no use tax. In the second type of transaction, Sprint must collect retail sales tax from customers on the monthly service charges for the wireless services, and Sprint must pay use tax on the free phone, because Sprint did not resell the phone.

There is nothing unprincipled about the tax assessment here. The Legislature defined "use" and "consumer" very broadly, and those definitions were applied here in a straightforward manner. The retail sales tax is measured by the "selling price" of the item or service sold. RCW 82.08.020. The "selling price" is "the consideration, whether money,

credits, rights, or other property . . . expressed in the terms of money paid or delivered by a buyer to a seller” without deductions for the seller’s costs. RCW 82.08.010(1). Regardless of whether customers who purchased cell phones received a discount for signing a wireless service contract, or what the amount of the discount was, the retail sales tax would be based on that “selling price,” even if the discounted price of a phone was \$1.00.

Unlike some states, Washington does not impose additional tax on retailers for the difference between their discounted sales price and the normal retail sales price for a phone. *See* B. Madison & P. Zinn, *Cellular Phone ‘Deals’ Create New Sales And Use Tax*, 1 St. & Loc. Tax Law 41, 42 (1996). Under Washington’s approach, a retailer that charges customers \$1 for cell phones that cost the retailer \$100 at wholesale owes no use tax and makes “resales” of the phones for \$1.00, while a retailer like Sprint that gives telephones to customers for no charge owes use tax on the \$100 value of the item.<sup>9</sup>

This result is dictated in part by the definition of “selling price” in the retail sales tax statute, RCW 82.08.010, which does not give the Department the same authority in determining the true value of an item

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<sup>9</sup> Most states with a sales tax have followed a similar approach. *See* J. Sedon, *Sales and Use Tax Consequences of Cellular Phone Transactions*, 45 St. Tax Notes 287, 289-90, 293-94 (2007).

sold as the use tax statutes do. *Compare* RCW 82.12.010(1)(a) (definition of “value of the article used” allows Department to determine the value as nearly as possible according to the retail selling price of similar products under rules prescribed by the Department). Because RCW 82.08.010 requires the Department to draw lines, the resulting tax liabilities in a \$1.00 sale and a transfer for no charge may seem incongruous, but a taxing system imposing relative parity between these two scenarios also would place additional recordkeeping and tax reporting burdens on taxpayers (because of the additional taxes that would be owed in the \$1.00 sale) and administrative burdens on the Department.<sup>10</sup>

Similar problems would arise from treating as “retail sales” Sprint’s transfers of phones to customers in free cell phone deals with receipts showing a price paid of \$0.00. Sprint would need to collect and remit retail sales tax on the “selling price.” There would be no simple way to determine what was the “consideration, . . . expressed in terms of the money paid.” Determining the “selling price” would be burdensome to taxpayers and the Department.

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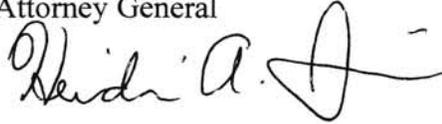
<sup>10</sup>Although Sprint complains about inconsistency, it may not prefer the alternative. In California, for instance, tax regulations require cell phone retailers to pay sales tax on the normal retail selling price of a discounted or free phone in transactions requiring the purchase of wireless services. *Bower v. AT&T Mobility, LLC*, 196 Cal. App. 4th 1545, 1553, 127 Cal. Rptr. 3d 569 (2011) (discussing California regulation in context of consumer protection complaint). Sprint would owe far more in taxes under that system than in Washington.

### III. CONCLUSION

For all the foregoing reasons, this Court should affirm the trial court's order reversing the Board's decision on the application of use tax.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of April, 2012.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "Heidi A. Irvin", written over a horizontal line.

HEIDI A. IRVIN, WSBA No. 17500  
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**PROOF OF SERVICE**

I certify that I served a copy of this document, via U.S. Mail, postage prepaid, through Consolidated Mail Services, and electronically by email, on the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11<sup>th</sup> day of April, 2012, at Tumwater, WA.

APR 11 2012  
12:00 PM  
TUMWATER, WA  
K

Carrie A. Parker  
Carrie A. Parker, Legal Assistant

**APPENDIX**  
**2002 STATUTES**

- 82.04.4296 Deductions—Reimbursement for accommodation expenditures by funeral homes.
- 82.04.4297 Deductions—Compensation from public entities for health or social welfare services—Exception.
- 82.04.4298 Deductions—Repair, maintenance, replacement, etc., of residential structures and commonly held property—Eligible organizations.
- 82.04.431 "Health or social welfare organization" defined for RCW 82.04.4297—Conditions for exemption—"Health or social welfare services" defined.
- 82.04.4311 Deductions—Compensation received under the federal medicare program by certain nonprofit and municipal hospitals.
- 82.04.432 Deductions—Municipal sewer service fees or charges.
- 82.04.4322 Deductions—Artistic or cultural organization—Compensation from United States, state, etc., for artistic or cultural exhibitions, performances, or programs.
- 82.04.4324 Deductions—Artistic or cultural organization—Deduction for tax under RCW 82.04.240—Value of articles for use in displaying art objects or presenting artistic or cultural exhibitions, performances, or programs.
- 82.04.4326 Deductions—Artistic or cultural organizations—Tuition charges for attending artistic or cultural education programs.
- 82.04.4327 Deductions—Artistic and cultural organizations—Income from business activities.
- 82.04.4328 "Artistic or cultural organization" defined.
- 82.04.4329 Deductions—Health insurance pool members—Deficit assessments.
- 82.04.433 Deductions—Sales of fuel for consumption outside United States' waters by vessels in foreign commerce—Construction.
- 82.04.4331 Deductions—Insurance claims for state health care coverage.
- 82.04.4332 Deductions—Tuition fees of foreign degree-granting institutions.
- 82.04.4333 Credit—Job training services—Approval.
- 82.04.434 Credit—Public safety standards and testing.
- 82.04.440 Persons taxable on multiple activities—Credits.
- 82.04.4451 Credit against tax due—Maximum credit—Table.
- 82.04.4452 Credit—Research and development spending—Assessment report.
- 82.04.44525 Credit—New employment for international service activities in eligible areas—Designation of census tracts for eligibility—Records—Tax due upon ineligibility—Interest assessment—Information from employment security department.
- 82.04.4453 Credit—Ride-sharing, public transportation, or nonmotorized commuting incentives—Penalty—Report to legislature.
- 82.04.4454 Credit—Ride-sharing, public transportation, or nonmotorized commuting incentives—Ceiling.
- 82.04.4456 Credit—Software programming or manufacturing in rural counties—Eligibility—Annual report.
- 82.04.4457 Credit—Information technology help desk services conducted from rural county—Annual report.
- 82.04.4459 Credit—Field burning reduction costs.
- 82.04.447 Credit—Natural or manufactured gas purchased by direct service industrial customers—Reports.
- 82.04.450 Value of products, how determined.
- 82.04.460 Business within and without state—Apportionment.
- 82.04.470 Resale certificate—Burden of proof—Tax liability—Rules—Resale certificate defined.
- 82.04.480 Sales in own name—Sales as agent.
- 82.04.500 Tax part of operating overhead.
- 82.04.510 General administrative provisions invoked.
- 82.04.520 Administrative provisions for motor vehicle sales by courtesy dealers.
- 82.04.530 Gross proceeds of sales calculation for telephone business.
- 82.04.535 Gross proceeds of sales calculation for mobile telecommunications service provider.
- 82.04.600 Exemptions—Materials printed in county, city, town, school district, educational service district, library or library district.
- 82.04.900 Construction—1961 c 15.

*Admission tax**cities: RCW 35.21.280.**counties: Chapter 36.38 RCW.**Business and occupation tax credits for cogeneration facilities: Chapter 82.35 RCW.**Commute trip reduction incentives: Chapter 82.67 RCW.**Housing authorities, tax exemption: Chapter 35.82 RCW.**Public utility districts, privilege taxes: Chapter 54.28 RCW.*

**82.04.010 Introductory.** Unless the context clearly requires otherwise, the definitions set forth in the sections preceding RCW 82.04.220 apply throughout this chapter. [1996 c 93 § 4; 1961 c 15 § 82.04.010. Prior: 1955 c 389 § 2; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

**82.04.020 "Tax year," "taxable year." "Tax year" or "taxable year"** means either the calendar year, or the taxpayer's fiscal year when permission is obtained from the department of revenue to use a fiscal year in lieu of the calendar year. [1975 1st ex.s. c 278 § 39; 1961 c 15 § 82.04.020. Prior: 1955 c 389 § 3; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5; Rem. Supp. 1949 § 8370-5, part.]

**Construction—Severability—1975 1st ex.s. c 278:** See notes following RCW 11.08.160.

**82.04.030 "Person," "company." "Person" or "company,"** herein used interchangeably, 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, 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, fraternal, nonprofit, or otherwise and the United States or any instrumentality thereof. [1995 c 318 § 1; 1963 ex.s. c 28 § 1; 1961 c 15 § 82.04.030. Prior: 1955 c 389 § 4; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

**Effective date—1995 c 318:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 11, 1995]." [1995 c 318 § 12.]

**Effective date—1963 ex.s. c 28:** "This act shall take effect on July 1, 1963." [1963 ex.s. c 28 § 17.]

**82.04.035 "Plantation Christmas trees." "Plantation Christmas trees"** means Christmas trees which are exempt from the timber excise tax under RCW 84.33.170. [1987 c 23 § 1.]

**82.04.040 "Sale," "casual or isolated sale." "Sale"** means any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.04.050. It includes renting or leasing,

conditional sale contracts, leases with option to purchase, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It also includes the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.

"Casual or isolated sale" means a sale made by a person who is not engaged in the business of selling the type of property involved. [1961 c 15 § 82.04.040. Prior: 1959 ex.s. c 5 § 1; 1959 ex.s. c 3 § 1; 1955 c 389 § 5; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

**82.04.050** "Sale at retail," "retail sale." (1) "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who presents a resale certificate under RCW 82.04.470 and who:

(a) Purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, but a purchase for the purpose of resale by a regional transit authority under RCW 81.112.300 is not a sale for resale; or

(b) Installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property without intervening use by such person; or

(c) Purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale; or

(d) Purchases for the purpose of consuming the property purchased in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose of such property is to create a chemical reaction directly through contact with an ingredient of ferrosilicon; or

(e) Purchases for the purpose of providing the property to consumers as part of competitive telephone service, as defined in RCW 82.04.065. The term shall include every sale of tangible personal property which is used or consumed or to be used or consumed in the performance of any activity classified as a "sale at retail" or "retail sale" even though such property is resold or utilized as provided in (a), (b), (c), (d), or (e) of this subsection following such use. The term also means every sale of tangible personal property to persons engaged in any business which is taxable under RCW 82.04.280 (2) and (7) and 82.04.290.

(2) The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following:

(a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, including charges made for the mere use of facilities in respect thereto, but excluding charges made for the use of coin-operated laundry facilities when such facilities are situated in an apartment house, rooming house, or mobile home park for the exclusive use of the tenants thereof, and also excluding sales of laundry service to non-profit health care facilities, and excluding services rendered in respect to live animals, birds and insects;

(b) The constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in commercial farming or agriculture;

(c) The charge for labor and services rendered in respect to constructing, repairing, or improving any structure upon, above, or under any real property owned by an owner who conveys the property by title, possession, or any other means to the person performing such construction, repair, or improvement for the purpose of performing such construction, repair, or improvement and the property is then reconveyed by title, possession, or any other means to the original owner;

(d) The sale of or charge made for labor and services rendered in respect to the cleaning, fumigating, razing or moving of existing buildings or structures, but shall not include the charge made for janitorial services; and for purposes of this section the term "janitorial services" shall mean those cleaning and caretaking services ordinarily performed by commercial janitor service businesses including, but not limited to, wall and window washing, floor cleaning and waxing, and the cleaning in place of rugs, drapes and upholstery. The term "janitorial services" does not include painting, papering, repairing, furnace or septic tank cleaning, snow removal or sandblasting;

(e) The sale of or charge made for labor and services rendered in respect to automobile towing and similar automotive transportation services, but not in respect to those required to report and pay taxes under chapter 82.16 RCW;

(f) The sale of and charge made for the furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same. For the purposes of this subsection, it shall be presumed that the sale of and charge made for the furnishing of lodging for a continuous period of one month or more to a person is a rental or lease of real property and not a mere license to enjoy the same;

(g) The sale of or charge made for tangible personal property, labor and services to persons taxable under (a), (b), (c), (d), (e), and (f) of this subsection when such sales or charges are for property, labor and services which are used

or consumed in whole or in part by such persons in the performance of any activity defined as a "sale at retail" or "retail sale" even though such property, labor and services may be resold after such use or consumption. Nothing contained in this subsection shall be construed to modify subsection (1) of this section and nothing contained in subsection (1) of this section shall be construed to modify this subsection.

(3) The term "sale at retail" or "retail sale" shall include the sale of or charge made for personal, business, or professional services including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities:

(a) Amusement and recreation services including but not limited to golf, pool, billiards, skating, bowling, ski lifts and tows, day trips for sightseeing purposes, and others, when provided to consumers;

(b) Abstract, title insurance, and escrow services;

(c) Credit bureau services;

(d) Automobile parking and storage garage services;

(e) Landscape maintenance and horticultural services but excluding (i) horticultural services provided to farmers and (ii) pruning, trimming, repairing, removing, and clearing of trees and brush near electric transmission or distribution lines or equipment, if performed by or at the direction of an electric utility;

(f) Service charges associated with tickets to professional sporting events; and

(g) The following personal services: Physical fitness services, tanning salon services, tattoo parlor services, steam bath services, turkish bath services, escort services, and dating services.

(4) The term shall also include the renting or leasing of tangible personal property to consumers and the rental of equipment with an operator.

(5) The term shall also include the providing of telephone service, as defined in RCW 82.04.065, to consumers.

(6) The term shall also include the sale of canned software other than a sale to a person who presents a resale certificate under RCW 82.04.470, regardless of the method of delivery to the end user, but shall not include custom software or the customization of canned software.

(7) The term shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind.

(8) The term shall also not include sales of chemical sprays or washes to persons for the purpose of postharvest treatment of fruit for the prevention of scald, fungus, mold, or decay, nor shall it include sales of feed, seed, seedlings, fertilizer, agents for enhanced pollination including insects such as bees, and spray materials to: (a) Persons who participate in the federal conservation reserve program, the environmental quality incentives program, the wetlands reserve program, and the wildlife habitat incentives program, or their successors administered by the United States depart-

ment of agriculture; (b) farmers for the purpose of producing for sale any agricultural product; and (c) farmers acting under cooperative habitat development or access contracts with an organization exempt from federal income tax under 26 U.S.C. Sec. 501(c)(3) or the Washington state department of fish and wildlife to produce or improve wildlife habitat on land that the farmer owns or leases.

(9) The term shall not include the sale of or charge made for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing, or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation. Nor shall the term include the sale of services or charges made for the clearing of land and the moving of earth of or for the United States, any instrumentality thereof, or a county or city housing authority. Nor shall the term include the sale of services or charges made for cleaning up for the United States, or its instrumentalities, radioactive waste and other byproducts of weapons production and nuclear research and development.

(10) Until July 1, 2003, the term shall not include the sale of or charge made for labor and services rendered for environmental remedial action as defined in RCW 82.04.2635(2). [2002 c 178 § 1; 2000 2nd sp.s. c 4 § 23. Prior: 1998 c 332 § 2; 1998 c 315 § 1; 1998 c 308 § 1; 1998 c 275 § 1; 1997 c 127 § 1; prior: 1996 c 148 § 1; 1996 c 112 § 1; 1995 1st sp.s. c 12 § 2; 1995 c 39 § 2; 1993 sp.s. c 25 § 301; 1988 c 253 § 1; prior: 1987 c 285 § 1; 1987 c 23 § 2; 1986 c 231 § 1; 1983 2nd ex.s. c 3 § 25; 1981 c 144 § 3; 1975 1st ex.s. c 291 § 5; 1975 1st ex.s. c 90 § 1; 1973 1st ex.s. c 145 § 1; 1971 ex.s. c 299 § 3; 1971 ex.s. c 281 § 1; 1970 ex.s. c 8 § 1; prior: 1969 ex.s. c 262 § 30; 1969 ex.s. c 255 § 3; 1967 ex.s. c 149 § 4; 1965 ex.s. c 173 § 1; 1963 c 7 § 1; prior: 1961 ex.s. c 24 § 1; 1961 c 293 § 1; 1961 c 15 § 82.04.050; prior: 1959 ex.s. c 5 § 2; 1957 c 279 § 1; 1955 c 389 § 6; 1953 c 91 § 3; 1951 2nd ex.s. c 28 § 3; 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

**Retroactive application—Effective date—2002 c 178:** See notes following RCW 67.28.180.

**Findings—Construction—2000 2nd sp.s. c 4 §§ 18-30:** See notes following RCW 81.112.300.

**Findings—Intent—Effective date—1998 c 332:** See notes following RCW 82.04.29001.

**Effective dates—1998 c 308:** "(1) Sections 1 through 4 of this act take effect July 1, 1998.

(2) Section 5 of this act takes effect July 1, 2003." [1998 c 308 § 6.]

**Effective date—1998 c 275:** "This act takes effect July 1, 1998." [1998 c 275 § 2.]

**Effective date—1997 c 127:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 1997." [1997 c 127 § 2.]

**Severability—1996 c 148:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1996 c 148 § 7.]

services reflected in the price, if provided alone, would be taxed as services and not as separate retail or wholesale sales.

(3) Therefore, the intent of this act is to maintain the application of the law and not to extend retail treatment to activities not previously treated as retail activities. Services that are otherwise subject to tax as a service under RCW 82.04.290(2), including but not limited to engineering, architectural, surveying, flagging, accounting, legal, consulting, or administrative services, remain subject to tax as a service under RCW 82.04.290(2), if the person responsible for the performance of those services is not also responsible for the performance of the constructing, building, repairing, improving, or decorating activities. Additionally, unless otherwise provided by law, a person entering into an agreement to be responsible for the performance of services otherwise subject to tax as a service under RCW 82.04.290(2), and subsequently entering into a separate agreement to be responsible for the performance of constructing, building, repairing, improving, or decorating activities, is subject to tax as a service under RCW 82.04.290(2) with respect to the first agreement, and is subject to tax under the appropriate section of chapter 82.04 RCW with respect to the second agreement, if at the time of the first agreement there was no contemplation by the parties, as evidenced by the facts, that the agreements would be awarded to the same person." [1999 c 212 § 1.]

#### 82.04.055 "Selected business services."

**Reviser's note:** RCW 82.04.055 was amended by 1997 c 304 § 3 without reference to its repeal by 1997 c 7 § 5. It has been decodified for publication purposes under RCW 1.12.025.

#### 82.04.060 "Sale at wholesale," "wholesale sale."

"Sale at wholesale" or "wholesale sale" means: (1) Any sale of tangible personal property, any sale of services defined as a retail sale in RCW 82.04.050(2)(a), any sale of amusement or recreation services as defined in RCW 82.04.050(3)(a), any sale of canned software, or any sale of telephone service as defined in RCW 82.04.065, which is not a sale at retail; and (2) any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property, if such charge is expressly defined as a retail sale by RCW 82.04.050 when rendered to or for consumers: PROVIDED, That the term "real or personal property" as used in this subsection shall not include any natural products named in RCW 82.04.100. [2002 c 367 § 1; 1998 c 332 § 5; 1996 c 148 § 3; 1983 2nd ex.s. c 3 § 26; 1961 c 15 § 82.04.060. Prior: 1955 ex.s. c 10 § 4; 1955 c 389 § 7; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

**Severability—2002 c 367:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2002 c 367 § 7.]

**Effective date—2002 c 367:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect June 1, 2002." [2002 c 367 § 8.]

**Findings—Intent—Effective date—1998 c 332:** See notes following RCW 82.04.29001.

**Severability—Effective date—1996 c 148:** See notes following RCW 82.04.050.

**Construction—Severability—Effective dates—1983 2nd ex.s. c 3:** See notes following RCW 82.04.255.

**82.04.062 "Sale at wholesale," "sale at retail" excludes sale of precious metal bullion and monetized bullion—Computation of tax.** (1) For purposes of this chapter, "wholesale sale," "sale at wholesale," "retail sale,"

and "sale at retail" do not include the sale of precious metal bullion or monetized bullion.

(2) In computing tax under this chapter on the business of making sales of precious metal bullion or monetized bullion, the tax shall be imposed on the amounts received as commissions upon transactions for the accounts of customers over and above the amount paid to other dealers associated in such transactions, but no deduction or offset is allowed on account of salaries or commissions paid to salesmen or other employees.

(3) For purposes of this section, "precious metal bullion" means any precious metal which has been put through a process of smelting or refining, including, but not limited to, gold, silver, platinum, rhodium, and palladium, and which is in such state or condition that its value depends upon its contents and not upon its form. For purposes of this section, "monetized bullion" means coins or other forms of money manufactured from gold, silver, or other metals and heretofore, now, or hereafter used as a medium of exchange under the laws of this state, the United States, or any foreign nation, but does not include coins or money sold to be manufactured into jewelry or works of art. [1985 c 471 § 5.]

**Severability—Effective date—1985 c 471:** See notes following RCW 82.04.260.

**82.04.065 Telephone and telecommunications-related definitions. (Contingent expiration date.)** (1) "Competitive telephone service" means the providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as repair or maintenance service, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW and for which a separate charge is made.

(2) "Network telephone service" means the providing by any person of access to a telephone network, telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes the provision of transmission to and from the site of an internet provider via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, the providing of broadcast services by radio or television stations, nor the provision of internet service as defined in RCW 82.04.297, including the reception of dial-in connection, provided at the site of the internet service provider.

(3) "Telephone service" means competitive telephone service or network telephone service, or both, as defined in subsections (1) and (2) of this section.

(4) "Telephone business" means the business of providing network telephone service, as defined in subsection (2) of this section. It includes cooperative or farmer line telephone companies or associations operating an exchange.

(5) "Charges for mobile telecommunications services" means any charge for, or associated with, the provision of commercial mobile radio service, as defined in section 20.3,

Title 47 C.F.R. as in effect on June 1, 1999, or any charge for, or associated with, a service provided as an adjunct to a commercial mobile radio service, regardless of whether individual transmissions originate or terminate within the licensed service area of the mobile telecommunications service provider.

(6) "Customer" means: (a) The person or entity that contracts with the home service provider for mobile telecommunications services; or (b) the end user of the mobile telecommunications service, if the end user of mobile telecommunications services is not the contracting party, but this subsection (6)(b) applies only for the purpose of determining the place of primary use. The term does not include a reseller of mobile telecommunications service, or a serving carrier under an arrangement to serve the customer outside the home service provider's licensed service area.

(7) "Designated data base provider" means a person representing all the political subdivisions of the state that is:

(a) Responsible for providing an electronic data base prescribed in 4 U.S.C. Sec. 119(a) if the state has not provided an electronic data base; and

(b) Approved by municipal and county associations or leagues of the state whose responsibility it would otherwise be to provide a data base prescribed by 4 U.S.C. Secs. 116 through 126.

(8) "Enhanced zip code" means a United States postal zip code of nine or more digits.

(9) "Home service provider" means the facilities-based carrier or reseller with whom the customer contracts for the provision of mobile telecommunications services.

(10) "Licensed service area" means the geographic area in which the home service provider is authorized by law or contract to provide commercial mobile radio service to the customer.

(11) "Mobile telecommunications service" means commercial mobile radio service, as defined in section 20.3, Title 47 C.F.R. as in effect on June 1, 1999.

(12) "Mobile telecommunications service provider" means a home service provider or a serving carrier.

(13) "Place of primary use" means the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which must be:

(a) The residential street address or the primary business street address of the customer; and

(b) Within the licensed service area of the home service provider.

(14) "Prepaid telephone calling service" means the right to purchase exclusively telecommunications services that must be paid for in advance, that enables the origination of calls using an access number, authorization code, or both, whether manually or electronically dialed, if the remaining amount of units of service that have been prepaid is known by the provider of the prepaid service on a continuous basis.

(15) "Reseller" means a provider who purchases telecommunications services from another telecommunications service provider and then resells, uses as a component part of, or integrates the purchased services into a mobile telecommunications service. "Reseller" does not include a serving carrier with whom a home service provider arranges for the services to its customers outside the home service provider's licensed service area.

(16) "Serving carrier" means a facilities-based carrier providing mobile telecommunications service to a customer outside a home service provider's or reseller's licensed service area.

(17) "Taxing jurisdiction" means any of the several states, the District of Columbia, or any territory or possession of the United States, any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or other political subdivision within the territorial limits of the United States with the authority to impose a tax, charge, or fee. [2002 c 67 § 2; 1997 c 304 § 5; 1983 2nd ex.s. c 3 § 24.]

**Finding—Contingency—Court judgment—Effective date—2002 c 67:** See notes following RCW 82.04.530.

**Findings—Severability—Effective date—1997 c 304:** See notes following RCW 35.21.717.

**Construction—Severability—Effective dates—1983 2nd ex.s. c 3:** See notes following RCW 82.04.255.

**License fees or taxes on telephone business by cities:** RCW 35.21.712 through 35.21.715.

**Sales tax exemption for certain network telephone service:** RCW 82.08.0289.

**82.04.065 "Competitive telephone service," "network telephone service," "telephone service," "telephone business." (Contingent effective date.)** (1) "Competitive telephone service" means the providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as repair or maintenance service, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW and for which a separate charge is made.

(2) "Network telephone service" means the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes interstate service, including toll service, originating from or received on telecommunications equipment or apparatus in this state if the charge for the service is billed to a person in this state. "Network telephone service" includes the provision of transmission to and from the site of an internet provider via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, the providing of broadcast services by radio or television stations, nor the provision of internet service as defined in RCW 82.04.297, including the reception of dial-in connection, provided at the site of the internet service provider.

(3) "Telephone service" means competitive telephone service or network telephone service, or both, as defined in subsections (1) and (2) of this section.

(4) "Telephone business" means the business of providing network telephone service, as defined in subsection (2) of this section. It includes cooperative or farmer line

amounts charged for room and board by an educational institution when the property or service for which such charges are made is furnished exclusively to the students or faculty of such institution. "Educational institution," as used in this section, means only those institutions created or generally accredited as such by the state and includes educational programs that such educational institution co-sponsors with a nonprofit organization, as defined by the internal revenue code Sec. 501(c)(3), if such educational institution grants college credit for coursework successfully completed through the educational program, or an approved branch campus of a foreign degree-granting institution in compliance with chapter 28B.90 RCW, and in accordance with RCW 82.04.4332 or defined as a degree-granting institution under RCW 28B.85.010(3) and accredited by an accrediting association recognized by the United States secretary of education, and offering to students an educational program of a general academic nature or those institutions which are not operated for profit and which are privately endowed under a deed of trust to offer instruction in trade, industry, and agriculture, but not including specialty schools, business colleges, other trade schools, or similar institutions. [1993 sp.s. c 18 § 37; 1993 c 181 § 13; 1992 c 206 § 1; 1985 c 135 § 1; 1961 c 15 § 82.04.170. Prior: 1955 c 389 § 18; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

**Reviser's note:** This section was amended by 1993 c 181 § 13 and by 1993 sp.s. c 18 § 37, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Effective date—1993 sp.s. c 18:** See note following RCW 28B.10.265.

**Effective dates—1992 c 206:** "This act shall take effect July 1, 1992, except sections 7 and 8 of this act which shall take effect January 1, 1993, and sections 9 through 12 of this act which are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect June 1, 1992." [1992 c 206 § 16.]

**82.04.180 "Successor."** "Successor" means any person to whom a taxpayer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys, directly or indirectly, in bulk and not in the ordinary course of the taxpayer's business, a major part of the materials, supplies, merchandise, inventory, fixtures, or equipment of the taxpayer. Any person obligated to fulfill the terms of a contract shall be deemed a successor to any contractor defaulting in the performance of any contract as to which such person is a surety or guarantor. [1985 c 414 § 6; 1961 c 15 § 82.04.180. Prior: 1955 c 389 § 19; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

**82.04.190 "Consumer."** "Consumer" means the following:

(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real

or personal property of or for consumers other than for the purpose (a) of resale as tangible personal property in the regular course of business or (b) of incorporating such property as an ingredient or component of real or personal property when installing, repairing, cleaning, altering, imprinting, improving, constructing, or decorating such real or personal property of or for consumers or (c) of consuming such property in producing for sale a new article of tangible personal property or a new substance, of which such property becomes an ingredient or component or as a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale or (d) purchases for the purpose of consuming the property purchased in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose of such property is to create a chemical reaction directly through contact with an ingredient of ferrosilicon;

(2)(a) Any person engaged in any business activity taxable under RCW 82.04.290; (b) any person who purchases, acquires, or uses any telephone service as defined in RCW 82.04.065, other than for resale in the regular course of business; (c) any person who purchases, acquires, or uses any service defined in RCW 82.04.050(2)(a) or any amusement and recreation service defined in RCW 82.04.050(3)(a), other than for resale in the regular course of business; and (d) any person who is an end user of software;

(3) Any person engaged in the business of contracting for the building, repairing or improving of any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state of Washington or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind as defined in RCW 82.04.280, in respect to tangible personal property when such person incorporates such property as an ingredient or component of such publicly owned street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle by installing, placing or spreading the property in or upon the right of way of such street, place, road, highway, easement, bridge, tunnel, or trestle or in or upon the site of such mass public transportation terminal or parking facility;

(4) Any person who is an owner, lessee or has the right of possession to or an easement in real property which is being constructed, repaired, decorated, improved, or otherwise altered by a person engaged in business, excluding only (a) municipal corporations or political subdivisions of the state in respect to labor and services rendered to their real property which is used or held for public road purposes, and (b) the United States, instrumentalities thereof, and county and city housing authorities created pursuant to chapter 35.82 RCW in respect to labor and services rendered to their real property. Nothing contained in this or any other subsection of this definition shall be construed to modify any other definition of "consumer";

(5) Any person who is an owner, lessee, or has the right of possession to personal property which is being construct-

ed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business;

(6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation; also, any person engaged in the business of clearing land and moving earth of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW. Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person;

(7) Any person who is a lessor of machinery and equipment, the rental of which is exempt from the tax imposed by RCW 82.08.020 under RCW 82.08.02565, with respect to the sale or for charge made for tangible personal property consumed in respect to repairing the machinery and equipment, if the tangible personal property has a useful life of less than one year. Nothing contained in this or any other subsection of this section shall be construed to modify any other definition of "consumer";

(8) Any person engaged in the business of cleaning up for the United States, or its instrumentalities, radioactive waste and other byproducts of weapons production and nuclear research and development; and

(9) Until July 1, 2003, any person engaged in the business of conducting environmental remedial action as defined in RCW 82.04.2635(2). [2002 c 367 § 2. Prior: 1998 c 332 § 6; 1998 c 308 § 2; prior: 1996 c 173 § 2; 1996 c 148 § 4; 1996 c 112 § 2; 1995 1st sp.s. c 3 § 4; 1986 c 231 § 2; 1985 c 134 § 1; 1983 2nd ex.s. c 3 § 27; 1975 1st ex.s. c 90 § 2; 1971 ex.s. c 299 § 4; 1969 ex.s. c 255 § 4; 1967 ex.s. c 149 § 6; 1965 ex.s. c 173 § 4; 1961 c 15 § 82.04.190; prior: 1959 ex.s. c 3 § 3; 1957 c 279 § 2; 1955 c 389 § 20; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

**Severability—Effective date—2002 c 367:** See notes following RCW 82.04.060.

**Findings—Intent—Effective date—1998 c 332:** See notes following RCW 82.04.29001.

**Effective dates—1998 c 308:** See note following RCW 82.04.050.

**Findings—Intent—1996 c 173:** See note following RCW 82.08.02565.

**Severability—Effective date—1996 c 148:** See notes following RCW 82.04.050.

**Effective date—1996 c 112:** See note following RCW 82.04.050.

**Findings—Effective date—1995 1st sp.s. c 3:** See notes following RCW 82.08.02565.

**Construction—Severability—Effective dates—1983 2nd ex.s. c 3:** See notes following RCW 82.04.255.

**Application to preexisting contracts—1975 1st ex.s. c 90:** See note following RCW 82.12.010.

**Effective date—1975 1st ex.s. c 90:** See note following RCW 82.04.050.

**Effective dates—Severability—1971 ex.s. c 299:** See notes following RCW 82.04.050.

**Construction—Severability—1969 ex.s. c 255:** See notes following RCW 35.58.272.

**82.04.200 "In this state," "within this state."** "In this state" or "within this state" includes all federal areas lying within the exterior boundaries of the state. [1961 c 15 § 82.04.200. Prior: 1955 c 389 § 21; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

**82.04.210 "Byproduct."** "Byproduct" means any additional product, other than the principal or intended product, which results from extracting or manufacturing activities and which has a market value, without regard to whether or not such additional product was an expected or intended result of the extracting or manufacturing activities. [1961 c 15 § 82.04.210. Prior: 1955 c 389 § 22; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

**82.04.212 "Retail store or outlet."** "Retail store or outlet" does not mean a device or apparatus through which sales are activated by coin deposits but the phrase shall include automats or business establishments retailing diversified goods primarily through the use of such devices or apparatus. [1961 c 15 § 82.04.212. Prior: 1959 c 232 § 1.]

**82.04.213 "Agricultural product," "farmer."** (1) "Agricultural product" means any product of plant cultivation or animal husbandry including, but not limited to: A product of horticulture, grain cultivation, vermiculture, viticulture, or aquaculture as defined in RCW 15.85.020; plantation Christmas trees; short-rotation hardwoods as defined in RCW 84.33.035; turf; or any animal including but not limited to an animal that is a private sector cultured aquatic product as defined in RCW 15.85.020, or a bird, or insect, or the substances obtained from such an animal. "Agricultural product" does not include animals defined as pet animals under RCW 16.70.020.

(2) "Farmer" means any person engaged in the business of growing, raising, or producing, upon the person's own lands or upon the lands in which the person has a present right of possession, any agricultural product to be sold. "Farmer" does not include a person growing, raising, or producing such products for the person's own consumption; a person selling any animal or substance obtained therefrom in connection with the person's business of operating a stockyard or a slaughter or packing house; or a person in respect to the business of taking, cultivating, or raising timber. [2001 c 118 § 2; 2001 c 97 § 3; 1993 sp.s. c 25 § 302.]

**Reviser's note:** This section was amended by 2001 c 97 § 3 and by 2001 c 118 § 2, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Severability—Effective dates—Part headings, captions not law—1993 sp.s. c 25:** See notes following RCW 82.04.230.

- 82.08.0276 Exemptions—Sales of wearing apparel for use only as a sample for display for sale.
- 82.08.0277 Exemptions—Sales of pollen.
- 82.08.0278 Exemptions—Sales between political subdivisions resulting from annexation or incorporation.
- 82.08.0279 Exemptions—Renting or leasing of motor vehicles and trailers to a nonresident for use in the transportation of persons or property across state boundaries.
- 82.08.02795 Exemptions—Sales to free hospitals.
- 82.08.02805 Exemptions—Sales to blood, bone, or tissue bank—Exceptions.
- 82.08.02806 Exemptions—Sales of human blood, tissue, organs, bodies, or body parts for medical research and quality control testing.
- 82.08.02807 Exemptions—Sales to organ procurement organization.
- 82.08.0281 Exemptions—Sales of prescription drugs.
- 82.08.0282 Exemptions—Sales of returnable containers for beverages and foods.
- 82.08.0283 Exemptions—Certain medical items.
- 82.08.0285 Exemptions—Sales of ferry vessels to the state or local governmental units—Components thereof—Labor and service charges.
- 82.08.0287 Exemptions—Sales of passenger motor vehicles as ride-sharing vehicles.
- 82.08.02875 Exemptions—Vehicle parking charges subject to tax at stadium and exhibition center.
- 82.08.0288 Exemptions—Lease of certain irrigation equipment.
- 82.08.0289 Exemptions—Certain network telephone service.
- 82.08.0291 Exemptions—Sales of amusement and recreation services or personal services by nonprofit youth organization—Local government physical fitness classes.
- 82.08.02915 Exemptions—Sales used by health or social welfare organizations for alternative housing for youth in crisis.
- 82.08.02917 Youth in crisis—Definition—Limited purpose.
- 82.08.0293 Exemptions—Sales of food products for human consumption.
- 82.08.0294 Exemptions—Sales of feed for cultivating or raising fish for sale.
- 82.08.0295 Exemptions—Lease amounts and repurchase amount for certain property under sale/leaseback agreement.
- 82.08.0296 Exemptions—Sales of feed consumed by livestock at a public livestock market.
- 82.08.0297 Exemptions—Sales of food purchased with food stamps.
- 82.08.0298 Exemptions—Sales of diesel fuel for use in operating watercraft in commercial deep sea fishing or commercial passenger fishing boat operations outside the state.
- 82.08.0299 Exemptions—Emergency lodging for homeless persons—Conditions.
- 82.08.031 Exemptions—Sales to artistic or cultural organizations of certain objects acquired for exhibition or presentation.
- 82.08.0311 Exemptions—Sales of materials and supplies used in packing horticultural products.
- 82.08.0315 Exemptions—Rentals or sales related to motion picture or video productions—Exceptions—Certificate.
- 82.08.0316 Exemptions—Sales of cigarettes by Indian retailer under cigarette tax contracts.
- 82.08.032 Exemption—Sales, rental, or lease of used park model trailers.
- 82.08.033 Exemptions—Sales of used mobile homes or rental or lease of mobile homes.
- 82.08.034 Exemptions—Sales of used floating homes or rental or lease of used floating homes.
- 82.08.035 Exemption for pollution control facilities.
- 82.08.036 Exemptions—Vehicle battery core deposits or credits—Replacement vehicle tire fees—"Core deposits or credits" defined.
- 82.08.037 Credits and refunds—Debts deductible as worthless.
- 82.08.040 Consignee, factor, bailee, auctioneer deemed seller.
- 82.08.050 Buyer to pay, seller to collect tax—Statement of tax—Exception—Penalties.
- 82.08.055 Advertisement of price.
- 82.08.060 Collection of tax—Methods and schedules.
- 82.08.064 Tax rate change.
- 82.08.066 Deemed location for mobile telecommunications services.
- 82.08.080 Vending machine and other sales.
- 82.08.090 Installment sales and leases.
- 82.08.100 Tax may be paid on cash receipts basis if books are so kept—Exemption for debts deductible as worthless.
- 82.08.110 Sales from vehicles.
- 82.08.120 Refunding or rebating of tax by seller prohibited—Penalty.
- 82.08.130 Resale certificate—Purchase and resale—Rules.
- 82.08.140 Administration.
- 82.08.150 Tax on certain sales of intoxicating liquors—Additional taxes for specific purposes—Collection.
- 82.08.160 Remittance of tax—Liquor excise tax fund created.
- 82.08.170 Apportionment and distribution from liquor excise tax fund.
- 82.08.180 Apportionment and distribution from liquor excise tax fund—Withholding for noncompliance.
- 82.08.810 Exemptions—Air pollution control facilities at a thermal electric generation facility—Exceptions—Exemption certificate—Payments on cessation of operation.
- 82.08.811 Exemptions—Coal used at coal-fired thermal electric generation facility—Application—Demonstration of progress in air pollution control—Notice of emissions violations—Reapplication—Payments on cessation of operation.
- 82.08.820 Exemptions—Remittance—Warehouse and grain elevators and distribution centers—Material-handling and racking equipment—Construction of warehouse or elevator—Information sheet—Rules—Records—Exceptions.
- 82.08.830 Exemptions—Sales at camp or conference center by nonprofit organization.
- 82.08.832 Exemptions—Sales of gun safes.
- 82.08.834 Exemptions—Sales/leasebacks by regional transit authorities.
- 82.08.840 Exemptions—Machinery, equipment, or structures that reduce field burning.
- 82.08.850 Exemptions—Conifer seed.
- 82.08.860 Exemptions—Landslide area.
- 82.08.870 Exemptions—Motorcycles for training programs.
- 82.08.880 Exemptions—Animal pharmaceuticals.
- 82.08.890 Exemptions—Dairy nutrient management equipment and facilities.
- 82.08.900 Exemptions—Anaerobic digesters.
- 82.08.910 Exemptions—Propane or natural gas to heat chicken structures.
- 82.08.920 Exemptions—Chicken bedding materials.
- Changes in tax law—Liability: RCW 82.08.064, 82.14.055, and 82.32.430.*
- Community college capital improvements bond redemption fund of 1972—Tax receipts: RCW 28B.56.100.*
- Credit for retail sales or use taxes paid to other jurisdictions with respect to property used: RCW 82.12.035.*
- Direct pay permits: RCW 82.32.087.*
- Excise tax on real estate transfers: Chapters 82.45 and 82.46 RCW.*
- Local sales tax: Chapter 82.14 RCW.*

**82.08.010** Definitions. For the purposes of this chapter,

(1) "Selling price" means the consideration, whether money, credits, rights, or other property except trade-in property of like kind, expressed in the terms of money paid or delivered by a buyer to a seller without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes other than taxes imposed under this chapter if the seller advertises the price as including the tax or that the seller is paying the tax, or any other expenses whatsoever paid or accrued and without any deduction on account of losses; but shall not include the amount of cash discount actually taken by a buyer; and shall be subject to modification to the extent modification is provided for in RCW 82.08.080.

When tangible personal property is rented or leased under circumstances that the consideration paid does not represent a reasonable rental for the use of the articles so

rented or leased, the "selling price" shall be determined as nearly as possible according to the value of such use at the places of use of similar products of like quality and character under such rules as the department of revenue may prescribe;

(2) "Seller" means every person, including the state and its departments and institutions, making sales at retail or retail sales to a buyer or consumer, whether as agent, broker, or principal, except "seller" does not mean the state and its departments and institutions when making sales to the state and its departments and institutions;

(3) "Buyer" and "consumer" include, without limiting the scope hereof, every individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise, municipal corporation, quasi municipal corporation, and also the state, its departments and institutions and all political subdivisions thereof, irrespective of the nature of the activities engaged in or functions performed, and also the United States or any instrumentality thereof;

(4) The meaning attributed in chapter 82.04 RCW to the terms "tax year," "taxable year," "person," "company," "sale," "sale at retail," "retail sale," "sale at wholesale," "wholesale," "business," "engaging in business," "cash discount," "successor," "consumer," "in this state" and "within this state" shall apply equally to the provisions of this chapter. [1985 c 38 § 3; 1985 c 2 § 2 (Initiative Measure No. 464, approved November 6, 1984); 1983 1st ex.s. c 55 § 1; 1967 ex.s. c 149 § 18; 1963 c 244 § 1; 1961 c 15 § 82.08.010. Prior: (i) 1945 c 249 § 4; 1943 c 156 § 6; 1941 c 78 § 8; 1939 c 225 § 7; 1935 c 180 § 17; Rem. Supp. 1945 § 8370-17. (ii) 1935 c 180 § 20; RRS § 8370-20.]

**Purpose—1985 c 2:** "The purpose of this initiative is to reduce the amount on which sales tax is paid by excluding the trade-in value of certain property from the amount taxable." [1985 c 2 § 1 (Initiative Measure No. 464, approved November 6, 1984).]

**Effective dates—1983 1st ex.s. c 55:** "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1983, except that section 12 of this act shall take effect January 1, 1984, and shall be effective for property taxes levied in 1983, and due in 1984, and thereafter." [1983 1st ex.s. c 55 § 13.]

**82.08.011 Retail car rental—Definition.** For purposes of this chapter, "retail car rental" means renting a rental car, as defined in RCW 46.04.465, to a consumer. [1992 c 194 § 2.]

**Effective dates—1992 c 194:** See note following RCW 46.04.466.

**82.08.020 Tax imposed—Retail sales—Retail car rental.** (Effective until April 1, 2003, if Referendum Bill No. 51 is approved at the November 2002 general election.)

(1) There is levied and there shall be collected a tax on each retail sale in this state equal to six and five-tenths percent of the selling price.

(2) There is levied and there shall be collected an additional tax on each retail car rental, regardless of whether the vehicle is licensed in this state, equal to five and nine-tenths percent of the selling price. The revenue collected under this subsection shall be deposited in the multimodal transportation account created in RCW 47.66.070.

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(3) The taxes imposed under this chapter shall apply to successive retail sales of the same property.

(4) The rates provided in this section apply to taxes imposed under chapter 82.12 RCW as provided in RCW 82.12.020. [2000 2nd sp.s. c 4 § 1; 1998 c 321 § 36 (Referendum Bill No. 49, approved November 3, 1998); 1992 c 194 § 9; 1985 c 32 § 1. Prior: 1983 2nd ex.s. c 3 § 62; 1983 2nd ex.s. c 3 § 41; 1983 c 7 § 6; 1982 1st ex.s. c 35 § 1; 1981 2nd ex.s. c 8 § 1; 1977 ex.s. c 324 § 2; 1975-'76 2nd ex.s. c 130 § 1; 1971 ex.s. c 281 § 9; 1969 ex.s. c 262 § 31; 1967 ex.s. c 149 § 19; 1965 ex.s. c 173 § 13; 1961 c 293 § 6; 1961 c 15 § 82.08.020; prior: 1959 ex.s. c 3 § 5; 1955 ex.s. c 10 § 2; 1949 c 228 § 4; 1943 c 156 § 5; 1941 c 76 § 2; 1939 c 225 § 10; 1935 c 180 § 16; Rem. Supp. 1949 § 8370-16.]

**Application—2000 2nd sp.s. c 4 § 1:** "Section 1 of this act applies to taxes collected on and after December 31, 1999." [2000 2nd sp.s. c 4 § 34.]

**Effective date—2000 2nd sp.s. c 4 §§ 1-3, 20:** "Sections 1 through 3 and 20 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and take effect immediately [May 2, 2000]." [2000 2nd sp.s. c 4 § 35.]

**Purpose—Severability—1998 c 321:** See notes following RCW 82.14.045.

**Contingent effective dates—1998 c 321 §§ 23-42:** See note following RCW 35.58.410.

**Legislative intent—1992 c 194:** "The legislature intends to exempt rental cars from state and local motor vehicle excise taxes, and to impose additional sales and use taxes in lieu thereof. These additional sales and use taxes are intended to provide as much revenue to the funds currently receiving motor vehicle excise tax revenue, including the transportation funds and the general fund, as each fund would have received if the motor vehicle excise tax exemptions had not been enacted. Revenues from these additional sales and use taxes are intended to be distributed in the same manner as the motor vehicle excise tax revenues they replace." [1992 c 194 § 4.]

**Effective dates—1992 c 194:** See note following RCW 46.04.466.

**Construction—Severability—Effective dates—1983 2nd ex.s. c 3:** See notes following RCW 82.04.255.

**Construction—1983 c 7:** "This act shall not be construed as affecting any existing right acquired, or liability or obligation incurred under the sections amended in this act, nor any rule, regulation, or order adopted, nor any proceeding instituted, under those sections." [1983 c 7 § 34.]

**Severability—1983 c 7:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 7 § 35.]

**Effective dates—1983 c 7:** "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect March 1, 1983, except as follows:

(1) Sections 9 through 22, and 25 through 31 of this act shall take effect June 30, 1983.

(2) Sections 23 and 24 of this act shall take effect January 1, 1984, for taxes first due in 1984 and thereafter.

The department of revenue and the department of licensing shall immediately take necessary steps to ensure that all sections of this act are properly implemented on their effective dates. The additional taxes and tax rate changes imposed under this act shall take effect on the dates designated in this act notwithstanding the date this act becomes law under Article III, section 12 of the state Constitution." [1983 c 7 § 37.]

**Severability—1982 1st ex.s. c 35:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1982 1st ex.s. c 35 § 47.]

**Effective dates—Expiration date—1982 1st ex.s. c 35:** "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institu-

tions, and shall take effect immediately, except that sections 28, 29, and 30 of this act shall take effect on May 1, 1982, sections 33 and 34 of this act shall take effect on July 1, 1983, and sections 35 through 38 of this act shall take effect on January 1, 1983.

Sections 28 and 29 of this act shall expire on July 1, 1983. The additional taxes imposed under this act shall take effect on the dates designated in this act notwithstanding the date this act becomes law under Article III, section 12 of the state Constitution." [1982 1st ex.s. c 35 § 48.]

**Effective date—1975-'76 2nd ex.s. c 130:** "This 1976 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately: PROVIDED, That the provisions of this 1976 amendatory act shall be null and void in the event chapter . . . (\*Substitute Senate Bill No. 2778), Laws of 1975-'76 2nd ex. sess. is approved and becomes law." [1975-'76 2nd ex.s. c 130 § 4.]

**\*Reviser's note:** "Substitute Senate Bill No. 2778" failed to become law.

*High capacity transportation systems—Sales and use tax: RCW 81.104.170. Manufacturers, study: 1994 c 66.*

**82.08.020 Tax imposed—Retail sales—Retail car rental. (Effective April 1, 2003, if Referendum Bill No. 51 is approved at the November 2002 general election.) (1)** There is levied and there shall be collected a tax on each retail sale in this state equal to six and five-tenths percent of the selling price.

(2) There is levied and there shall be collected an additional tax on each retail car rental, regardless of whether the vehicle is licensed in this state, equal to five and nine-tenths percent of the selling price. The revenue collected under this subsection shall be deposited in the multimodal transportation account created in RCW 47.66.070.

(3) Beginning April 1, 2003, there is levied and collected an additional tax of one percent of the selling price on each retail sale of a motor vehicle in this state, other than retail car rentals taxed under subsection (2) of this section.

(4) For purposes of subsection (3) of this section, "motor vehicle" has the meaning provided in RCW 46.04.320, but does not include farm tractors or farm vehicles as defined in RCW 46.04.180 and 46.04.181, off-road and nonhighway vehicles as defined in RCW 46.09.020, and snowmobiles as defined in RCW 46.10.010.

(5) The revenue collected under subsection (3) of this section must be deposited into the multimodal transportation account under RCW 47.66.070.

(6) The taxes imposed under this chapter shall apply to successive retail sales of the same property.

(7) The rates provided in this section apply to taxes imposed under chapter 82.12 RCW as provided in RCW 82.12.020. [2002 c 202 § 401; 2000 2nd sp.s. c 4 § 1; 1998 c 321 § 36 (Referendum Bill No. 49, approved November 3, 1998); 1992 c 194 § 9; 1985 c 32 § 1. Prior: 1983 2nd ex.s. c 3 § 62; 1983 2nd ex.s. c 3 § 41; 1983 c 7 § 6; 1982 1st ex.s. c 35 § 1; 1981 2nd ex.s. c 8 § 1; 1977 ex.s. c 324 § 2; 1975-'76 2nd ex.s. c 130 § 1; 1971 ex.s. c 281 § 9; 1969 ex.s. c 262 § 31; 1967 ex.s. c 149 § 19; 1965 ex.s. c 173 § 13; 1961 c 293 § 6; 1961 c 15 § 82.08.020; prior: 1959 ex.s. c 3 § 5; 1955 ex.s. c 10 § 2; 1949 c 228 § 4; 1943 c 156 § 5; 1941 c 76 § 2; 1939 c 225 § 10; 1935 c 180 § 16; Rem. Supp. 1949 § 8370-16.]

**Effective date—2002 c 202 §§ 401 and 402:** "Sections 401 and 402 of this act take effect April 1, 2003." [2002 c 202 § 705.]

**Referral to electorate—2002 c 202 §§ 101 and 201-705:** See note following RCW 44.40.001.

**Severability—Part headings not law—2002 c 202:** See notes following RCW 44.40.001.

**Application—2000 2nd sp.s. c 4 § 1:** "Section 1 of this act applies to taxes collected on and after December 31, 1999." [2000 2nd sp.s. c 4 § 34.]

**Effective date—2000 2nd sp.s. c 4 §§ 1-3, 20:** "Sections 1 through 3 and 20 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and take effect immediately [May 2, 2000]." [2000 2nd sp.s. c 4 § 35.]

**Purpose—Severability—1998 c 321:** See notes following RCW 82.14.045.

**Contingent effective dates—1998 c 321 §§ 23-42:** See note following RCW 35.58.410.

**Legislative intent—1992 c 194:** "The legislature intends to exempt rental cars from state and local motor vehicle excise taxes, and to impose additional sales and use taxes in lieu thereof. These additional sales and use taxes are intended to provide as much revenue to the funds currently receiving motor vehicle excise tax revenue, including the transportation funds and the general fund, as each fund would have received if the motor vehicle excise tax exemptions had not been enacted. Revenues from these additional sales and use taxes are intended to be distributed in the same manner as the motor vehicle excise tax revenues they replace." [1992 c 194 § 4.]

**Effective dates—1992 c 194:** See note following RCW 46.04.466.

**Construction—Severability—Effective dates—1983 2nd ex.s. c 3:** See notes following RCW 82.04.255.

**Construction—1983 c 7:** "This act shall not be construed as affecting any existing right acquired, or liability or obligation incurred under the sections amended in this act, nor any rule, regulation, or order adopted, nor any proceeding instituted, under those sections." [1983 c 7 § 34.]

**Severability—1983 c 7:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 7 § 35.]

**Effective dates—1983 c 7:** "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect March 1, 1983, except as follows:

(1) Sections 9 through 22, and 25 through 31 of this act shall take effect June 30, 1983.

(2) Sections 23 and 24 of this act shall take effect January 1, 1984, for taxes first due in 1984 and thereafter.

The department of revenue and the department of licensing shall immediately take necessary steps to ensure that all sections of this act are properly implemented on their effective dates. The additional taxes and tax rate changes imposed under this act shall take effect on the dates designated in this act notwithstanding the date this act becomes law under Article III, section 12 of the state Constitution." [1983 c 7 § 37.]

**Severability—1982 1st ex.s. c 35:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1982 1st ex.s. c 35 § 47.]

**Effective dates—Expiration date—1982 1st ex.s. c 35:** "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately, except that sections 28, 29, and 30 of this act shall take effect on May 1, 1982, sections 33 and 34 of this act shall take effect on July 1, 1983, and sections 35 through 38 of this act shall take effect on January 1, 1983.

Sections 28 and 29 of this act shall expire on July 1, 1983. The additional taxes imposed under this act shall take effect on the dates designated in this act notwithstanding the date this act becomes law under Article III, section 12 of the state Constitution." [1982 1st ex.s. c 35 § 48.]

**Effective date—1975-'76 2nd ex.s. c 130:** "This 1976 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately: PROVIDED, That the provisions of this 1976 amendatory act shall be null and void in the event chapter . . . (\*Substitute Senate Bill No. 2778), Laws of 1975-'76 2nd ex. sess. is approved and becomes law." [1975-'76 2nd ex.s. c 130 § 4.]

- 82.12.040 Retailers to collect tax—Penalty.  
 82.12.045 Collection of tax on motor vehicles by county auditor or director of licensing—Remittance.  
 82.12.060 Installment sales, leases, bailments.  
 82.12.070 Tax may be paid on cash receipts basis if books are so kept—Exemption for debts deductible as worthless.  
 82.12.080 Administration.  
 82.12.800 Exemptions—Uses of vessel, vessel's trailer by manufacturer.  
 82.12.801 Exemptions—Uses of vessel, vessel's trailer by dealer.  
 82.12.802 Vessels held in inventory by dealer or manufacturer—Tax on personal use—Documentation—Rules.  
 82.12.810 Exemptions—Air pollution control facilities at a thermal electric generation facility—Exceptions—Payments on cessation of operation.  
 82.12.811 Exemptions—Coal used at coal-fired thermal electric generation facility—Application—Demonstration of progress in air pollution control—Notice of emissions violations—Reapplication—Payments on cessation of operation.  
 82.12.820 Exemptions—Warehouse and grain elevators and distribution centers.  
 82.12.832 Exemptions—Use of gun safes.  
 82.12.834 Exemptions—Sales/leasebacks by regional transit authorities.  
 82.12.840 Exemptions—Machinery, equipment, or structures that reduce field burning.  
 82.12.845 Use of motorcycles loaned to department of licensing.  
 82.12.850 Exemptions—Conifer seed.  
 82.12.880 Exemptions—Animal pharmaceuticals.  
 82.12.890 Exemptions—Dairy nutrient management equipment and facilities.  
 82.12.900 Exemptions—Anaerobic digesters.  
 82.12.910 Exemptions—Propane or natural gas to heat chicken structures.  
 82.12.920 Exemptions—Chicken bedding materials.

*Changes in tax law—Liability: RCW 82.08.064, 82.14.055, and 82.32.430.  
 Direct pay permits: RCW 82.32.087.*

**82.12.010** Definitions. For the purposes of this chapter:

(1)(a) "Value of the article used" shall mean the consideration, whether money, credit, rights, or other property except trade-in property of like kind, expressed in terms of money, paid or given or contracted to be paid or given by the purchaser to the seller for the article of tangible personal property, the use of which is taxable under this chapter. The term includes the amount of any freight, delivery, or other like transportation charge paid or given by the purchaser to the seller with respect to the purchase of such article. The term also includes, in addition to the consideration paid or given or contracted to be paid or given, the amount of any tariff or duty paid with respect to the importation of the article used. In case the article used is acquired by lease or by gift or is extracted, produced, or manufactured by the person using the same or is sold under conditions wherein the purchase price does not represent the true value thereof, the value of the article used shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character under such rules as the department of revenue may prescribe.

(b) In case the articles used are acquired by bailment, the value of the use of the articles so used shall be in an amount representing a reasonable rental for the use of the articles so bailed, determined as nearly as possible according to the value of such use at the places of use of similar products of like quality and character under such rules as the department of revenue may prescribe. In case any such

articles of tangible personal property are used in respect to the construction, repairing, decorating, or improving of, and which become or are to become an ingredient or component of, new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing or attaching of any such articles therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, then the value of the use of such articles so used shall be determined according to the retail selling price of such articles, or in the absence of such a selling price, as nearly as possible according to the retail selling price at place of use of similar products of like quality and character or, in the absence of either of these selling price measures, such value may be determined upon a cost basis, in any event under such rules as the department of revenue may prescribe.

(c) In the case of articles owned by a user engaged in business outside the state which are brought into the state for no more than one hundred eighty days in any period of three hundred sixty-five consecutive days and which are temporarily used for business purposes by the person in this state, the value of the article used shall be an amount representing a reasonable rental for the use of the articles, unless the person has paid tax under this chapter or chapter 82.08 RCW upon the full value of the article used, as defined in (a) of this subsection.

(d) In the case of articles manufactured or produced by the user and used in the manufacture or production of products sold or to be sold to the department of defense of the United States, the value of the articles used shall be determined according to the value of the ingredients of such articles.

(e) In the case of an article manufactured or produced for purposes of serving as a prototype for the development of a new or improved product, the value of the article used shall be determined by: (i) The retail selling price of such new or improved product when first offered for sale; or (ii) the value of materials incorporated into the prototype in cases in which the new or improved product is not offered for sale.

(f) In the case of an article purchased with a direct pay permit under RCW 82.32.087, the value of the article used shall be determined by the retail selling price, as defined in RCW 82.08.010, of such article if but for the use of the direct pay permit the transaction would have been subject to sales tax;

(2) "Value of the service used" means the consideration, whether money, credit, rights, or other property, expressed in terms of money, paid or given or contracted to be paid or given by the purchaser to the seller for the service, the use of which is taxable under this chapter. If the service is received by gift or under conditions wherein the purchase price does not represent the true value thereof, the value of the service used shall be determined as nearly as possible according to the retail selling price at place of use of similar services of like quality and character under rules the department of revenue may prescribe;

(3) "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean:

(a) With respect to tangible personal property, the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption within this state; and

(b) With respect to a service defined in RCW 82.04.050(2)(a), the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property upon which the service was performed (as a consumer), and include installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption of the article within this state;

(4) "Taxpayer" and "purchaser" include all persons included within the meaning of the word "buyer" and the word "consumer" as defined in chapters 82.04 and 82.08 RCW;

(5) "Retailer" means every seller as defined in RCW 82.08.010 and every person engaged in the business of selling tangible personal property at retail and every person required to collect from purchasers the tax imposed under this chapter;

(6) The meaning ascribed to words and phrases in chapters 82.04 and 82.08 RCW, insofar as applicable, shall have full force and effect with respect to taxes imposed under the provisions of this chapter. "Consumer," in addition to the meaning ascribed to it in chapters 82.04 and 82.08 RCW insofar as applicable, shall also mean any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services. With respect to property distributed to persons within this state by a consumer as defined in this subsection (6), the use of the property shall be deemed to be by such consumer. [2002 c 367 § 3; 2001 c 188 § 3; 1994 c 93 § 1. Prior: 1985 c 222 § 1; 1985 c 132 § 1; 1983 1st ex.s. c 55 § 2; 1975-'76 2nd ex.s. c 1 § 1; 1975 1st ex.s. c 278 § 52; 1965 ex.s. c 173 § 17; 1961 c 293 § 15; 1961 c 15 § 82.12.010; prior: 1955 c 389 § 24; 1951 1st ex.s. c 9 § 3; 1949 c 228 § 9; 1945 c 249 § 8; 1943 c 156 § 10; 1939 c 225 § 18; 1937 c 191 § 4; 1935 c 180 § 35; Rem. Supp. 1949 § 8370-35.]

**Severability—Effective date—2002 c 367:** See notes following RCW 82.04.060.

**Finding—Intent—Effective date—2001 c 188:** See notes following RCW 82.32.087.

**Effective date—1994 c 93:** "This act shall take effect July 1, 1994." [1994 c 93 § 3.]

**Effective dates—1983 1st ex.s. c 55:** See note following RCW 82.08.010.

**Application to preexisting contracts—1975-'76 2nd ex.s. c 1; 1975 1st ex.s. c 90:** "In the event any person has entered into a contract prior to July 1, 1975 or has bid upon a contract prior to July 1, 1975 and has been awarded the contract after July 1, 1975, the additional taxes imposed by chapter 90, Laws of 1975 1st ex. sess., section 5, chapter 291, Laws of 1975 1st ex. sess. and this 1975 amendatory act shall not be required to be paid by such person in carrying on activities in the fulfillment of such contract." [1975-'76 2nd ex.s. c 1 § 3; 1975 1st ex.s. c 90 § 4.]

**Severability—1975-'76 2nd ex.s. c 1:** "If any provision of this 1975 amendatory act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1975-'76 2nd ex.s. c 1 § 4.]

**Construction—Severability—1975 1st ex.s. c 278:** See notes following RCW 11.08.160.

**Effective date—1965 ex.s. c 173:** See note following RCW 82.04.050.

**82.12.020 Use tax imposed. (Effective until April 1, 2003, if Referendum Bill No. 51 is approved at the November 2002 general election.)** (1) There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer: (a) Any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280 (2) or (7); or (b) any canned software, regardless of the method of delivery, but excluding canned software that is either provided free of charge or is provided for temporary use in viewing information, or both.

(2) This tax shall apply to the use of every service defined as a retail sale in RCW 82.04.050 (2)(a) or (3)(a) and the use of every article of tangible personal property, including property acquired at a casual or isolated sale, and including byproducts used by the manufacturer thereof, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured or are available for purchase within this state.

(3) Except as provided in RCW 82.12.0252, payment by one purchaser or user of tangible personal property or service of the tax imposed by chapter 82.08 or 82.12 RCW shall not have the effect of exempting any other purchaser or user of the same property or service from the taxes imposed by such chapters.

(4) The tax shall be levied and collected in an amount equal to the value of the article used or value of the service used by the taxpayer multiplied by the rate in effect for the retail sales tax under RCW 82.08.020. [2002 c 367 § 4; 1999 c 358 § 9; 1998 c 332 § 7; 1996 c 148 § 5; 1994 c 93 § 2; 1983 c 7 § 7; 1981 2nd ex.s. c 8 § 2; 1980 c 37 § 79; 1977 ex.s. c 324 § 3; 1975-'76 2nd ex.s. c 130 § 2; 1975-'76 2nd ex.s. c 1 § 2; 1971 ex.s. c 281 § 10; 1969 ex.s. c 262 § 32; 1967 ex.s. c 149 § 22; 1965 ex.s. c 173 § 18; 1961 c 293 § 9; 1961 c 15 § 82.12.020. Prior: 1959 ex.s. c 3 § 10; 1955 ex.s. c 10 § 3; 1955 c 389 § 25; 1949 c 228 § 7; 1943 c 156 § 8; 1941 c 76 § 6; 1939 c 225 § 14; 1937 c 191 § 1; 1935 c 180 § 31; Rem. Supp. 1949 § 8370-31.]

**Severability—Effective date—2002 c 367:** See notes following RCW 82.04.060.

**Effective date—1999 c 358 §§ 1 and 3-21:** See note following RCW 82.04.3651.

**Findings—Intent—Effective date—1998 c 332:** See notes following RCW 82.04.29001.

**Severability—Effective date—1996 c 148:** See notes following RCW 82.04.050.

**Effective date—1994 c 93:** See note following RCW 82.12.010.

**Construction—Severability—Effective dates—1983 c 7:** See notes following RCW 82.08.020.

**Intent—1980 c 37:** See note following RCW 82.04.4281.

**Effective date—1975-'76 2nd ex.s. c 130:** See note following RCW 82.08.020.

**Application to preexisting contracts—1975-'76 2nd ex.s. c 1:** See note following RCW 82.12.010.

**Severability—1975-'76 2nd ex.s. c 1:** See note following RCW 82.12.010.