

ORDINANCE NO. 2004-12-083

AN ORDINANCE OF THE CITY OF BELLINGHAM AMENDING OR MODIFYING CERTAIN PROVISIONS OF BELLINGHAM MUNICIPAL CODE CHAPTER 6.04, BELLINGHAM BUSINESS AND OCCUPATION TAX CODE.

WHEREAS in December 2002 the City adopted Ordinance No. 2002-12-105, which set forth a new City of Bellingham Business and Occupation (B&O) Tax Code ; and,

WHEREAS Ordinance No. 2002-12-105 took effect on April 1, 2003; and,

WHEREAS Ordinance No. 2002-12-105 was based upon a 2002 Association of Washington Cities ("AWC") model B&O tax ordinance that was developed in coordination with the business community; and,

WHEREAS Ordinance No. 2002-12-105 is codified in Bellingham Municipal Code Chapter 6.04; and,

WHEREAS in the 2003 Washington State Legislative Session, the Washington State Legislature adopted Engrossed House Bill 2030 (Chapter 79, Laws of 2003) ("EHB 2030") that effectively requires cities with local B&O taxes to revise the 2002 city B&O tax model ordinance and implement certain additional or modified requirements by December 31, 2004; and,

WHEREAS AWC, various cities, and business associations have been working on a revised model city B&O tax ordinance that reflects the new State Legislative mandates incorporated in EHB 2030; and

WHEREAS AWC, various cities, and business associations have developed a revised city B&O tax model ordinance; and,

WHEREAS this Ordinance modifies the City's existing B&O Tax Code, consistent with the revised model ordinance, to reflect the State Legislative mandated changes listed in EHB 2030;

NOW, THEREFORE, THE CITY OF BELLINGHAM DOES ORDAIN:

Section 1. Bellingham Municipal Code Chapter 6.04.030 outlining Definitions is hereby modified to add or modify definitions as follows:

- 1.1. The following definition of "business and occupation tax" is added:

"Business and Occupation Tax" "Gross Receipts Tax": "Business and occupation tax" or "gross receipts tax" means a tax imposed on, or measured by, the value of products, the gross income of the business, or the gross proceeds of sales, as the case may be, and that is the legal liability of the business.

- 1.2 The definition of "engaging in business" is hereby modified as follows:

"Engaging in business":

(1) [UNCHANGED]

(2) [UNCHANGED]

(3) If a person, or its employee, agent, representative, independent contractor, broker or another acting on the person's behalf, engages in no other activities in or with the City but the following, it need not register and obtain a business license and pay tax.

(a) Meeting with suppliers of goods and services as a customer.

(b) Meeting with government representatives in their official capacity, other than those performing contracting or purchasing functions.

(c) Attending meetings, such as board meetings, retreats, seminars, and conferences, or other meetings wherein the person does not provide training in connection with tangible personal property sold by the person or on its behalf.

(d) Renting tangible or intangible property as a customer when the property is not used in the City.

(e) Attending, but not participating in a "trade show" or "multiple vendor events". Persons participating at a trade show shall review the City's trade show or multiple vendor event ordinances.

(f) Conducting advertising through the email.

(g) Soliciting sales by phone from a location outside the City.

(4) A seller located outside the City merely delivering goods into the City by means of common carrier is not required to register and obtain a business license, provided that it engages in no other business activities in the City.

The City expressly intends that engaging in business include any activity sufficient to establish nexus for purposes of apply the tax under the law and the constitutions of the United States and the State of Washington. Nexus is presumed to continue as long as the taxpayer benefits from the activity that constituted the original nexus generating contact or subsequent contacts.

1.3 The following definition of "extracting" is added:

"Extracting": "Extracting" is the activity engaged in by an extractor and is reportable under the extracting classification.

1.4 The following definition of "gross receipts tax" is added:

"Gross Receipts Tax": See definition of Business and Occupation Tax.

1.5 The following definition of "manufacturing" is added:

"Manufacturing": "Manufacturing" means the activity conducted by a manufacturer and is reported under the manufacturing classification.

1.6 The following definition of "manufacturer" and "to manufacture" is hereby modified as follows:

"Manufacturer" "to manufacture" "processing for hire":

(1) [UNCHANGED]

(2) "To manufacture" means all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials or ingredients so that as a result thereof a new, different or useful product is produced for sale or commercial or industrial use, and shall include:

(a) the production of special made or custom made articles;

(b) the production of dental appliances, devices, restorations, substitutes, or other dental laboratory products by a dental laboratory or dental technician; and

(c) crushing and/or blending of rock, sand, stone, gravel, or ore; and,

(d) the producing of articles of sale, or for commercial or industrial use from raw materials or prepared materials by giving such materials, articles, and substances of trade or commerce new forms, qualities, properties, or combinations including, but not limited to, such activities as making, fabricating, processing, refining, mixing, slaughtering, packing, aging, curing, mild curing, preserving, canning, and the preparing and freezing of fresh fruits and vegetables.

"To manufacture" shall not include the production of computer software if the computer software is delivered from the seller to the purchaser by means other than tangible storage media, including the delivery by use of a tangible storage media where the tangible storage media is not physically transferred to the purchaser.

(3) "Processing for hire" means the performance of labor and mechanical services upon materials or ingredients belonging to others so that as a result a new, different or useful product is produced for sale, or commercial or industrial use. A processor for hire is any person who would be a manufacturer if that person were performing the labor and mechanical services upon that person's own materials or ingredients. If a person furnishes, or sells to the customer prior to manufacture, materials or ingredients equal to twenty percent (20%) or more of the total value of all materials or ingredients that become a part of the finished product the person will be deemed to be a manufacturer and not a processor for hire.

1.7: The following definition of "office" "place of business" is hereby modified as follows:

"Office" "place of business": "Office" or "place of business" means a fixed location or permanent facility where the regular business of the person is conducted and which is either owned by the person or over which the person exercises legal dominion and control. The regular business of the person is presumed conducted at a location:

- (1) Whose address the person uses as its business mailing address;
- (2) Where the place of primary use is shown on a telephone billing or a location containing a telephone line listed in a public telephone directory or other similar publication under the business name; and
- (3) Where the person holds itself out to the general public as conducting its regular business through signage or other means; and
- (4) Where the person is required to obtain any appropriate state and local business license or registration unless they are exempted by law from such requirement.

A vehicle such as a pick-up, van, truck, boat or other motor vehicle is not an office or place of business. A post office box is not an office or place of business. If a person has an office or place of business, the person's home is not an office or place of business unless it meets the criteria for office or place of business above. If a person has no office or place of business, the person's home or apartment within the City will be deemed the place of business.

- 1.8 The following definition of "retailing" is added:

"Retailing": "Retailing" means the activity of engaging in making sales at retail and is reported under the retailing classification.

- 1.9 The following definition of "services" is added:

"Services": "Services" means any business activity other than or in addition to those business activities enumerated in BMC Section 6.04.050(1) through (4) and as further provided in BMC Section 6.04.050(5).

- 1.10 The following definition of "software" et al is hereby modified as follows:

"Software" "prewritten software" "canned software" "custom software" "customization of canned software" "master copies" "retained rights":

- (1) "Prewritten software" or "canned software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to be other than prewritten computer software. Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such persons is not the author or creator, the person shall be deemed to be the author or creator only of the person's modifications or enhancements. Prewritten computer software or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software; however, where there is a reasonable, separately stated charge or an invoice or other

statement of the price given to purchaser for the modification or enhancement, the modification or enhancement shall not constitute prewritten computer software.

(2) "Custom software" means software created for a single person.

(3) "Customization of canned software" means any alteration, modification, or development of applications using or incorporating canned software to specific individualized requirements of a single person. Customization of canned software includes individualized configuration of software to work with other software and computer hardware but does not include routine installation. Customization of canned software does not change the underlying character or taxability of the original canned software.

(4) "Master copies" of software means copies of software from which a software developer, author, inventor, publisher, licensor, sublicensor, or distributor makes copies for sale or license. The software encoded on a master copy and the media upon which the software resides are both ingredients of the master copy.

(5) "Retained rights" means any and all rights, including intellectual property rights such as those rights arising from copyrights, patents, and trade secret laws, that are owned or are held under contract or license by a software developer, author, inventor, publisher, licensor, sublicensor, or distributor.

(6) "Software" means any information, program, or routine, or any set of one (1) or more programs, routines, or collections of information used, or intended for use, to convey information that causes one or more computers or pieces of computer-related peripheral equipment, or any combination thereof, to perform a task or set of tasks. "Software" includes the associated documentation, materials, or ingredients regardless of the media upon which that documentation is provided, that describes the code and its use, operation, and maintenance and that typically is delivered with the code to the consumer. All software is classified as either canned or custom.

1.11 The following definition of "value of productions" is hereby modified as follows:

"Value of products":

(1) The value of products, including by-products, extracted or manufactured, shall be determined by the gross proceeds derived from the sale thereof whether such sale is at wholesale or at retail, to which shall be added all subsidies and bonuses received from the purchaser or from any other person with respect to the extraction, manufacture, or sale of such products or by-products by the seller.

(2) Where such products, including by-products, are extracted or manufactured for commercial or industrial use; and where such products, including by-products, are shipped, transported or transferred out of the City, or to another person, without prior sale or are sold under circumstances such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale; the value shall correspond as nearly as possible to the gross proceeds from sales in this state of similar products of like quality and character, and in similar quantities by other taxpayers, plus the amount of subsidies or bonuses ordinarily payable by the purchaser or by any third person with respect to the extraction, manufacture, or sale

of such products. In the absence of sales of similar products as a guide to value, such value may be determined upon a cost basis. In such cases, there shall be included every item of cost attributable to the particular article or article extracted or manufactured, including direct and indirect overhead costs. The Director may prescribe rules for the purpose of ascertaining such values.

(3) Notwithstanding subsection (2) above, the value of a product manufactured or produced for purposes of serving as a prototype for the development of a new or improved project shall correspond to (a) the retail selling price of such new or improved project when first offered for sale or (b) the value of materials incorporated into the prototype in cases in which the new or improved product is not offered for sale.

1.12 The following definition of "wholesaling" is hereby added:

"Wholesaling": "Wholesaling" means engaging in the activity of making sales at wholesale, and is reported under the wholesaling classification.

Section 2. Bellingham Municipal Code Chapter 6.04.050 is hereby modified as follows:

6.04.050 - Imposition Of The Tax - Tax Or Fee Levied

Except as provided in BMC 6.05.040(D), there is hereby levied upon and shall be collected from every person a tax for the act or privilege of engaging in business activities within the City, whether the person's office or place of business be within or without the City. The tax shall be in amounts to be determined by application of rates against gross proceeds of sale, gross income of business, or value of products, including by-products, as the case may be, as follows:

(1) Upon every person engaging within the City in business as an extractor, the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, extracted within the City for sale or for commercial or industrial use, multiplied by the rate of seventeen one-hundredths of one percent . The measure of the tax is the value of the products, including by-products, so extracted, regardless of the place of sale or the fact that deliveries may be made to points outside the City.

(2) Upon every person engaging within the City in business as a manufacturer, the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, manufactured within the City or processed, multiplied by the rate of seventeen one-hundredths of one percent . The measure of the tax is the value of the products, including by-products, so manufactured or processed, regardless of the place of sale or the fact that deliveries may be made to points outside the City.

(3) Upon every person engaging within the City in the business of making sales at wholesale, the amount of tax with respect to such business shall be equal to the gross proceeds of such sales of the business without regard to the place of delivery of articles, commodities or merchandise sold, multiplied by the rate of seventeen one-hundredths of one percent .

(4) Upon every person engaging within the City in the business of making sales at retail or retail services, the amount of tax with respect to such business shall be equal to the gross proceeds of such sales of the business without regard to the place of delivery of articles, commodities or merchandise sold, multiplied by the rate of seventeen one-hundredths of one percent .

(5) Upon every other person engaging within the City in any business activity other than or in addition to those enumerated in the above subsections, the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of forty-four one-hundredths of one percent . This subsection includes, among others, and without limiting the scope hereof (whether or not title to material used in the performance of such business passes to another by accession, merger or other than by outright sale), persons engaged in the business of developing or producing custom software or of customizing canned software, producing royalties or commissions, and persons engaged in the business of rendering any type of service which does not constitute a sale at retail, a sale at wholesale, or retail service.

Section 3. Bellingham Municipal Code Chapter 6.04 is hereby amended to add BMC 6.04.076:

6.04.076 – Assignment of Gross Income Derived From Intangibles

Gross income derived from the sale of intangibles such as royalties, trademarks, patents, or goodwill shall be assigned to the jurisdiction where the person is domiciled, which shall include where its headquarters is located.

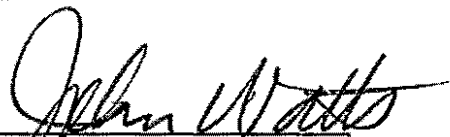
Section 4. Legislative intent regarding allocation and apportionment.

Engrossed House Bill 2030 (Chapter 79, Laws of 2003) ("EHB 2030") required cities imposing B&O taxes to comply with Sections 2 through 13 of EHB 2030 by December 31, 2004. This Ordinance is intended to implement that State legislative requirement. However, the Bellingham City Council recognizes an inconsistency in EHB 2030, to wit: that Section 13 of the EHB 2030 regarding allocating and apportioning a person's gross income for B&O tax purposes does not take effect, by its own terms, until January 1, 2008. Therefore, the Bellingham City Council recognizes the requirements of Section 13 and intends to take such legislative action as necessary to comply with the EHB 2030 Section 13 allocating and apportioning requirement by January 1, 2008.

Section 5. Implementation Date.

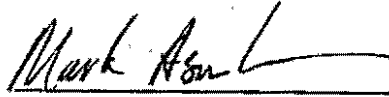
This ordinance shall take effect pursuant to the terms of the Bellingham City Charter and, thereby, the City will satisfy Engrossed House Bill 2030's requirement to comply by December 31, 2004. Implementation of these requirements will begin for the tax year beginning on January 1, 2005.

PASSED by Council this 6th day of December, 2004.



Council President

APPROVED by me this 9th day of Dec., 2004.



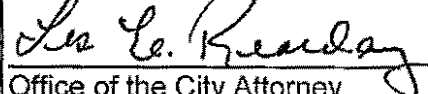
Mayor

ATTEST:



Finance Director

APPROVED AS TO FORM:



Office of the City Attorney

Published: December 10, 2004