

ORDINANCE NO. 2007-12-099

AN ORDINANCE OF THE CITY OF BELLINGHAM AMENDING BELLINGHAM MUNICIPAL CODE CHAPTER 6.04, BELLINGHAM BUSINESS AND OCCUPATIONS TAX CODE, TO REFLECT STATE LAW CHANGES.

WHEREAS, in December 2002 Council adopted a new Business and Occupations (B&O) Tax Code that was based on a model ordinance prepared in coordination with several B&O tax cities, including Bellingham, and the Washington business community; and,

WHEREAS, in December 2004, Council amended the B&O Tax code as required by Engrossed House Bill 2030 (EHB 2030), as codified in RCW Chapter 35.102; and,

WHEREAS, Section 13 of EHB 2030 required all local B&O Tax cities to adopt allocation and apportionment provisions of gross income for B&O Tax purposes as part of an updated city B&O tax model ordinance by January 1, 2008; and,

WHEREAS, several of the B&O tax cities, including Bellingham, in cooperation with the Association of Washington Cities, worked with representatives of various stakeholders such as the Association of Washington Business, the Governor's office, and the Department of Revenue, to develop a model ordinance that incorporates additional changes required by state law; and,

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

NOW, THEREFORE, THE CITY OF BELLINGHAM DOES ORDAIN:

Section 1. BMC 6.04.020 is hereby amended as follows:

6.04.020 - Exercise Of Revenue License Power

The provisions of this chapter shall be deemed an exercise of the power of the City to license for revenue. The provisions of this chapter are subject to periodic statutory or administrative rule changes or judicial interpretations of the ordinances or rules. The responsibility rests with the licensee or taxpayer to reconfirm tax computation procedures and remain in compliance with the City code.

Section 2. BMC 6.04.030 is hereby amended as follows:

2.1. The following definition of "delivery" is added at subsection J. and all following subsections shall be re-lettered accordingly:

J. "Delivery": "Delivery" means the transfer of possession of tangible personal property between the seller and the buyer or the buyer's

representative. Delivery to an employee of a buyer is considered delivery to the buyer. Transfer of possession of tangible personal property occurs when the buyer or the buyer's representative first takes physical control of the property or exercises dominion and control over the property. Dominion and control means the buyer has the ability to put the property to the buyer's own purposes. It means the buyer or the buyer's representative has made the final decision to accept or reject the property, and the seller has no further right to possession of the property and the buyer has no right to return the property to the seller, other than under a warranty contract. A buyer does not exercise dominion and control over tangible personal property merely by arranging for shipment of the property from the seller to itself. A buyer's representative is a person, other than an employee of the buyer, who is authorized in writing by the buyer to receive tangible personal property and take dominion and control by making the final decision to accept or reject the property. Neither a shipping company nor a seller can serve as a buyer's representative. It is immaterial where the contract of sale is negotiated or where the buyer obtains title to the property. Delivery terms and other provisions of the Uniform Commercial Code (Title 62A RCW) do not determine when or where delivery of tangible personal property occurs for purposes of taxation.

2.2 The definition of "engaging in business" in BMC 6.04.030.L. is hereby modified in following respects only:

(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. Such activities do not include those in subsection (3).

2.3 The definition of "sale at retail" or "retail sale" is hereby modified as follows:

MM. 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; 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.

f. Purchases for the purpose of satisfying the person's obligations under an extended warranty as defined in subsection (7) of this section, if such tangible personal property replaces or becomes an ingredient or component of property covered by the extended warranty without intervening use by such person.

2. Sale at retail or retail sale also means every sale of tangible personal property to persons engaged in any business activity that is taxable under BMC 6.04.050(5).

3. 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 nonprofit 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, except telephone business and cable service, 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;

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.

4. Sale at retail or retail sale shall also include the providing of competitive telephone service to consumers.

5. Sale at retail or retail sale 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.

6. Sale at retail or retail sale shall also include Public Road Construction, which is 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.

7. Sale at retail or retail sale shall also include the sale of or charge made for an extended warranty to a consumer. For purposes of this subsection, "extended warranty" means an agreement for a specified duration to perform the replacement or repair of tangible personal property at no additional charge or a reduced charge for tangible personal property, labor, or both, or to provide indemnification for the replacement or repair of tangible personal property, based on the occurrence of specified events. The term "extended warranty" does not include an agreement, otherwise meeting the definition of extended warranty in this subsection, if no separate charge is made for the agreement and the value of the agreement is included in the sales price of the tangible personal property covered by the agreement.

8. Sale at retail or retail sale shall also include Government Contracting, which is 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 (government contracting).

9. Sale at retail or retail sale shall not 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 (This is reported under the service or other classification).

10. Sale at retail or retail sale shall not include the sale of or charge made for labor and services rendered for environmental remedial action. (This is reported under the service and other classification).

2.4 The definition of "sale at wholesale" or "wholesale sale" is hereby modified as follows:

NN. Sale at wholesale or wholesale sale means any sale of tangible personal property which is not a retail sale, and any charge made for labor and services rendered for persons who are not customers, in respect to real or personal property, if such charge is expressly defined as a retail sale when rendered to or for consumers. Sale at wholesale also includes the sale of telephone business to another telecommunications company as defined in RCW 80.04.010 for the purpose of resale, as contemplated by RCW 35.21.715.

2.5 The definition of "value proceeding or accruing" is hereby modified as follows:

SS. Value proceeding or accruing means the consideration, whether money, credits, rights, or other property expressed in terms of money, a person is entitled to receive or which is actually received or accrued. The term shall be applied, in each case, on a cash receipts or accrual basis according to which method of accounting is regularly employed in keeping the books of the taxpayer.

Section 3. BMC 6.04.060 is hereby amended as follows:

6.04.060 - Doing Business With The City

A. Persons or businesses which do any work or perform services for, or provide materials, supplies or equipment to, the City of Bellingham are required to register and to pay business and occupation tax on the act or privilege of entering into a contract for such transactions with the City, regardless of whether the business activity involved is performed or takes place within or without the City and whether or not such person has an office or place of business within or without the City.

B. Except as provided in BMC 6.04.077, as to such persons or business, the amount of tax shall be equal to the gross contract price multiplied by the rate under section .050 that would otherwise apply if the sale or service were taxable pursuant to that section.

Section 4. BMC 6.04.075 is hereby amended as follows:

**6.04.075 - Deductions To Prevent Multiple Taxation Of Manufacturing Activities
And Prior To January 1, 2008, Transactions Involving More Than One
City With An Eligible Gross Receipts Tax**

A. Amounts subject to an eligible gross receipts tax in another city that also maintains nexus over the same activity. For taxes due prior to January 1, 2008, a taxpayer that is subject to an eligible gross receipts tax on the same activity in more than one jurisdiction may be entitled to a deduction as follows:

1. A taxpayer that has paid an eligible gross receipts tax, with respect to a sale of goods or services, to a jurisdiction in which the goods are delivered or the services are provided may deduct an amount equal to the gross receipts used to measure that tax from the measure of the tax owed to the City.
2. Notwithstanding the above, a person that is subject to an eligible gross receipts tax in more than one jurisdiction on the gross income derived from intangibles such as royalties, trademarks, patents, or goodwill may deduct from the measure of the tax on those amounts the gross income used in measuring the eligible gross receipts tax paid to the other jurisdiction where the person's headquarters is located.
3. A taxpayer that has paid an eligible gross receipts tax on the privilege of accepting or executing a contract with another city may deduct an amount equal to the contract price used to measure the tax due to the other city from the measure of the tax owed to the City.

B. **Person manufacturing products within and without the City.** A person manufacturing products within the City using products manufactured by the same person outside the City may deduct from the measure of the manufacturing tax the value of products manufactured outside the City and included in the measure of an eligible gross receipts tax paid to the other jurisdiction with respect to manufacturing such products.

Section 5. BMC 6.04.077 is hereby added as follows:

BMC 6.04.077 - Allocation And Apportionment Of Income When Activities Take Place In More Than One Jurisdiction.

Effective January 1, 2008, gross income, other than persons subject to the provisions of chapter 82.14A RCW, shall be allocated and apportioned as follows:

A. Gross income derived from all activities other than those taxed as service or royalties under BMC 6.04.050.E. shall be allocated to the location where the activity takes place.

B. In the case of sales of tangible personal property, the activity takes place where delivery to the buyer occurs.

C. Gross income derived from activities taxed as services and other activities taxed under BMC 6.04.050.E. shall be apportioned to the city by multiplying apportionable income by a fraction, the numerator of which is the payroll factor plus the service-income factor and the denominator of which is two.

1. The payroll factor is a fraction, the numerator of which is the total amount paid in the city during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period. Compensation is paid in the city if:

- a.** The individual is primarily assigned within the city; or
- b.** The individual is not primarily assigned to any place of business for the tax period and the employee performs fifty percent or more of his or her service for the tax period in the city; or
- c.** The individual is not primarily assigned to any place of business for the tax period, the individual does not perform fifty percent or more of his or her service in any city and the employee resides in the city.

2. The service income factor is a fraction, the numerator of which is the total service income of the taxpayer in the city during the tax period, and the denominator of which is the total service income of the taxpayer everywhere during the tax period. Service income is in the city if:

- a.** The customer location is in the city; or
- b.** The income-producing activity is performed in more than one location and a greater proportion of the service-income-producing activity is performed in the city than in any other location, based on costs of performance, and the taxpayer is not taxable at the customer location; or
- c.** The service-income-producing activity is performed within the city, and the taxpayer is not taxable in the customer location.

3. If the allocation and apportionment provisions of this subsection do not fairly represent the extent of the taxpayer's business activity in the city or cities in which the taxpayer does business, the taxpayer may petition for or the tax administrators may jointly require, in respect to all or any part of the taxpayer's business activity, that one of the following methods be used jointly by the cities to allocate or apportion gross income, if reasonable:

- a. Separate accounting;
 - b. The use of a single factor;
 - c. The inclusion of one or more additional factors that will fairly represent the taxpayer's business activity in the city; or
 - d. The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.
- D. The definitions in this subsection apply throughout this section.
1. **"Apportionable income"** means the gross income of the business taxable under the service classifications of a city's gross receipts tax, including income received from activities outside the city if the income would be taxable under the service classification if received from activities within the city, less any exemptions or deductions available.
 2. **"Compensation"** means wages, salaries, commissions, and any other form of remuneration paid to individuals for personal services that are or would be included in the individual's gross income under the federal internal revenue code.
 3. **"Individual"** means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee of that taxpayer.
 4. **"Customer location"** means the city or unincorporated area of a county where the majority of the contacts between the taxpayer and the customer take place.
 5. **"Primarily assigned"** means the business location of the taxpayer where the individual performs his or her duties.
 6. **"Service-taxable income"** or **"service income"** means gross income of the business subject to tax under either the service or royalty classification.
 7. **"Tax period"** means the calendar year during which tax liability is accrued. If taxes are reported by a taxpayer on a basis more frequent than once per year, taxpayers shall calculate the factors for the previous calendar year for reporting in the current calendar year and correct the reporting for the previous year when the factors are calculated for that year, but not later than the end of the first quarter of the following year.
 8. **"Taxable in the customer location"** means either that a taxpayer is subject to a gross receipts tax in the customer location for the privilege of

doing business, or that the government where the customer is located has the authority to subject the taxpayer to gross receipts tax regardless of whether, in fact, the government does so.

E. Assignment or apportionment of revenue under this Section shall be made in accordance with and in full compliance with the provisions of the interstate commerce clause of the United States Constitution where applicable.

Section 6. BMC 6.04.078 is hereby added as follows:

6.04.078 – Allocation And Apportionment Of Printing And Publishing Income When Activities Take Place In More Than One Jurisdiction.

Notwithstanding RCW 35.102.130, effective January 1, 2008, gross income from the activities of printing, and of publishing newspapers, periodicals, or magazines, shall be allocated to the principal place in this state from which the taxpayer's business is directed or managed. As used in this section, the activities of printing, and of publishing newspapers, periodicals, or magazines, have the same meanings as attributed to those terms in RCW 82.04.280(1) by the department of revenue.

Section 7. BMC 6.04.090(O) is hereby amended as follows:

O. Employees.

1. This chapter shall not apply to any person in respect to the person's employment in the capacity as an employee or servant as distinguished from that of an independent contractor. For the purposes of this subsection, the definition of employee shall include those persons that are defined in the Internal Revenue Code, as may be amended hereafter.

2. A booth renter is an independent contractor for purposes of this chapter.

Section 8. BMC 6.04.100.F. is hereby amended as follows:

F. Receipts from tangible personal property delivered outside the State. In computing tax, there may be deducted from the measure of tax under retailing or wholesaling amounts derived from the sale of tangible personal property that is delivered by the seller to the buyer or the buyer's representative at a location outside the State of Washington.

Section 9. BMC 6.04.100 is hereby amended to add the following subsections:

N. Receipts from the sale of tangible personal property and retail services delivered outside the City of Bellingham but within Washington. Effective January 1, 2008, amounts included in the gross receipts reported on the tax return derived from the sale of tangible personal property delivered to the buyer or the

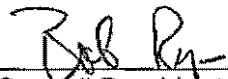
buyer's representative outside the City of Bellingham but within the State of Washington may be deducted from the measure of tax under the retailing, retail services, or wholesaling classification.

O. Professional employer services. In computing the tax, a professional employer organization may deduct from the calculation of gross income the gross income of the business derived from performing professional employer services that is equal to the portion of the fee charged to a client that represents the actual cost of wages and salaries, benefits, workers' compensation, payroll taxes, withholding, or other assessments paid to or on behalf of a covered employee by the professional employer organization under a professional employer agreement.

Section 10. Effective Date and Implementation Date.

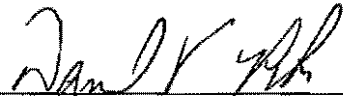
This Ordinance shall take effect pursuant to the terms of the Bellingham City Charter but the implementation of these requirements will begin for the tax year beginning on January 1, 2008.

PASSED by Council this 10th day of December, 2007.



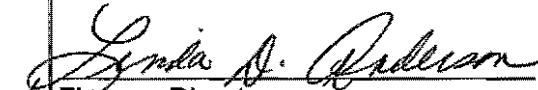
Council President

APPROVED by me this 3rd day of December, 2007.



Mayor

Attest:



Finance Director

Approved as to Form:



Office of the City Attorney

Published: December 14, 2007

An Ordinance Amending BMC
Chapter 6.04, B&O Tax Code - 11

City of Bellingham
CITY ATTORNEY
210 Lottie Street
Bellingham, Washington 98225
Telephone (360) 676-6903