

ORDINANCE NO. 2012-12-054

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 2003, the Washington State Legislature enacted Chapter 35.102 RCW, which required cities with local Business and Occupation (“B&O”) taxes to implement a modified B&O tax model ordinance with certain mandatory provisions; and

WHEREAS, the City has from time to time amended its B&O Tax Code, BMC 6.04, to remain consistent with the B&O tax model ordinance, including the State Legislature’s mandated changes; and

WHEREAS, several B&O tax cities, in cooperation with the Association of Washington Cities, met in 2012 to revise the B&O tax model ordinance to reflect changes to Chapter 35.102 RCW and other changes in state law since the B&O tax model ordinance was last updated; and

WHEREAS, all B&O tax cities must adopt the revisions to the mandatory provisions of the B&O tax model ordinance with an effective date of January 1, 2013 in accordance with RCW 35.102.040(1)(c); and

WHEREAS, this Ordinance modifies the City’s existing B&O Tax Code, consistent with the model ordinance, to reflect changes to Chapter 35.102 RCW and other changes in state law.

NOW, THEREFORE, THE CITY OF BELLINGHAM DOES ORDAIN:

Section 1. BMC 6.04.030 - Definitions is amended as follows:

1.1. The following definitions are added and all subsequent subsections are re-lettered accordingly:

K. Digital automated service, digital code, and digital goods have the same meaning as in RCW 82.04.192.

L. Digital products means digital goods, digital codes, digital automated services, and the services described in RCW 82.04.050(2)(g) and (6)(b).

1.2 The definition of “engaging in business” is amended 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. [UNCHANGED]
 - b. [UNCHANGED]
 - 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. This provision does not apply to any board of director member or attendee engaging in business such as a member of a board of directors who attends a board meeting.
 - d. [UNCHANGED]
 - e. [UNCHANGED]
 - f. [UNCHANGED]
 - g. [UNCHANGED]
4. [UNCHANGED]

1.3 The definition of “gross proceeds of sale” is amended as follows:

Gross proceeds of sales means the value proceeding or accruing from the sale of tangible personal property, digital goods, digital codes, digital automated services or for other services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

1.4 The definition of “Manufacturer; to manufacture; processing for hire” is amended as follows:

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.

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 digital goods or 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. [UNCHANGED]

1.5 The definition of “sale at retail; retail sale” is modified as follows:

Sale at retail; retail sale:

1. [UNCHANGED]

2. [UNCHANGED]

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. [UNCHANGED]

b. [UNCHANGED]

c. [UNCHANGED]

d. [UNCHANGED]

e. [UNCHANGED]

f. [UNCHANGED]

g. The installing, repairing, altering, or improving of digital goods for consumers;

h. The sale of or charge made for tangible personal property, labor and services to persons taxable under (a), (b), (c), (d), (e), and (f), and (g) 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. [UNCHANGED]

5. **a. Sale at retail or retail sale** shall also include the sale of prewritten 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. For purposes of this subsection, the sale of prewritten computer software includes the sale of or charge made for a key or an enabling or activation code, where the key or code is required to activate prewritten computer software and put the software into use. There is no separate sale of the key or code from the prewritten computer software, regardless of how the sale may be characterized by the vendor or by the purchaser. The term "**sale at retail**" or "**retail sale**" does not include the sale of or charge made for:

(i) Custom software; or

(ii) the customization of prewritten software.

b. (i) The term **sale at retail** or **retail sale** also includes the charge made to consumers for the right to access and use prewritten computer software, where possession of the software is maintained by the seller or a third party, regardless of whether the charge for the service is on a per use, per user, per license, subscription, or some other basis.

(ii)(A) The service described in (b)(i) of this subsection 5 includes the right to access and use prewritten software to perform data processing. (B) For purposes of this subsection, "data processing" means the systematic performance of operations on data to extract the required information in an appropriate form or to convert the data to usable information. Data processing includes check processing, image processing, form processing, survey processing, payroll processing, claim processing, and similar activities.

6. [UNCHANGED]

7. [UNCHANGED]

8. [UNCHANGED]

9. [UNCHANGED]

10. [UNCHANGED]

11. **Sale at retail** or **retail sale** shall also include the following sales to consumers of digital goods, digital codes, and digital automated services:

a. Sales in which the seller has granted the purchaser the right of permanent use;

b. Sales in which the seller has granted the purchaser a right of use that is less than permanent;

c. Sales in which the purchaser is not obligated to make continued payment as a condition of the sale; and

- d. Sales in which the purchaser is obligated to make continued payment as a condition of the sale.

A retail sale of digital goods, digital codes, or digital automated services under this subsection includes any services provided by the seller exclusively in connection with the digital goods, digital codes, or digital automated services, whether or not a separate charge is made for such services.

For purposes of this subsection, "permanent" means perpetual or for an indefinite or unspecified length of time. A right of permanent use is presumed to have been granted unless the agreement between the seller and the purchaser specifies or the circumstances surrounding the transaction suggest or indicate that the right to use terminates on the occurrence of a condition subsequent.

- e. "Sale at retail" or "retail sale" shall also include the installing, repairing, altering, or improving of digital goods for consumers.

- 1.6 The definition of "sale at wholesale or wholesale sale" is modified as follows:

Sale at wholesale or wholesale sale means any sale of tangible personal property, digital goods, digital codes, digital automated services, prewritten computer software, or services described in BMC 6.04.030.00.5(b)(i), 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.

Section 2. BMC 6.04.060 - Doing Business with the City is deleted in its entirety.

Section 3. BMC 6.04.077 - Allocation and Apportionment of Income when Activities Take Place in More than One Jurisdiction is amended to add the following new subsections C, D and E and all following subsections shall be re-lettered accordingly:

C. In the case of sales of digital products, the activity takes place where delivery to the buyer occurs. The delivery of digital products will be deemed to occur at:

1. The seller's place of business if the purchaser receives the digital product at the seller's place of business;

2. If not received at the seller's place of business, the location where the purchaser or the purchaser's donee, designated as such by the purchaser, receives the digital product, including the location indicated by instructions for delivery to the purchaser or donee, known to the seller;

3. If the location where the purchaser or the purchaser's donee receives the digital product is not known, the purchaser's address maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith;

4. If no address for the purchaser is maintained in the ordinary course of the seller's business, the purchaser's address obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith; and

5. If no address for the purchaser is obtained during the consummation of the sale, the address where the digital good or digital code is first made available for transmission by the seller or the address from which the digital automated service or service described in RCW 82.04.050 (2)(g) or (6)(b) was provided, disregarding for these purposes any location that merely provided the digital transfer of the product sold.

D. If none of the methods in subsection C for determining where the delivery of digital products occurs are available after a good faith effort by the taxpayer to apply the methods provided in subsection C, then the city and the taxpayer may mutually agree to employ any other method to effectuate an equitable allocation of income from the sale of digital products. The taxpayer will be responsible for petitioning the city to use an alternative method under this subsection D. The city may employ an alternative method for allocating the income from the sale of digital products if the methods provided in subsection C are not available and the taxpayer and the city are unable to mutually agree on an alternative method to effectuate an equitable allocation of income from the sale of digital products.

E. For purposes of this subsection the term "receive" has the same meaning as in RCW 82.32.730.

Section 4. Section 6.04.090 - Exemptions is amended to add the following exemption:

Insurance business. This chapter shall not apply to amounts received by any person who is an insurer or their appointed insurance producer upon which a tax based on gross premiums is paid to the state pursuant to RCW 48.14.020, and provided further, that the provisions of this subsection shall not exempt any bonding company from tax with respect to gross income derived from the completion of any contract as to which it is a surety, or as to any liability as successor to the liability of the defaulting contractor.

Section 5. Section 6.04.100 - Deductions is amended to add the following deduction:

Interest on investments or loans secured by mortgages or deeds of trust. In computing tax, to the extent permitted by Chapter 82.14A RCW, there may be deducted from the measure of tax by those engaged in banking, loan, security or other financial businesses, amounts derived from interest received on investments or loans primarily secured by first mortgages or trust deeds on non-transient residential properties.

Section 6. Effective Date.

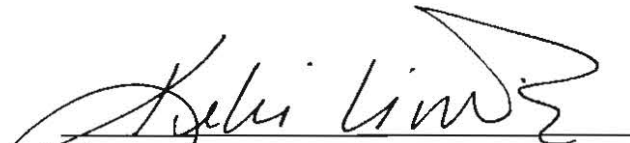
This Ordinance shall take effect on January 1, 2013.

PASSED by Council this 10th day of December, 2012.




Council President

APPROVED by me this 21st day of December, 2012.



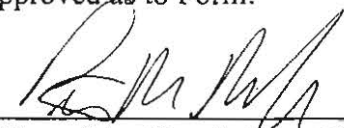
Mayor

Attest:



Finance Director

Approved as to Form:



Office of the City Attorney

Published: December 14, 2012