



RULE-MAKING ORDER PERMANENT RULE ONLY

CR-103P (October 2017) (Implements RCW 34.05.360)

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: February 08, 2018

TIME: 9:19 AM

WSR 18-05-011

Agency: Department of Revenue

Effective date of rule:

Permanent Rules

- 31 days after filing.
 Other (specify) _____ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

- Yes No If Yes, explain:

Purpose: The Department is amending both WAC 458-20-121 and WAC 458-20-134 to add definitions of "biomass fuel." Both rules also are amended to describe the new limit to just biomass fuel on the prior use tax exemption in RCW 82.12.0263 for extractors or manufacturers.

Citation of rules affected by this order:

New:
Repealed:
Amended: WAC 458-20-121 and WAC 458-20-134
Suspended:

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

Other authority:

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR 17-23-114 on November 16, 2017 (date).
Describe any changes other than editing from proposed to adopted version: None

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name:
Address:
Phone:
Fax:
TTY:
Email:
Web site:

Other: A preliminary cost-benefit analysis was not prepared.

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	___	Amended	___	Repealed	___
Federal rules or standards:	New	___	Amended	___	Repealed	___
Recently enacted state statutes:	New	___	Amended	___	Repealed	___

The number of sections adopted at the request of a nongovernmental entity:

New	___	Amended	___	Repealed	___
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The number of sections adopted on the agency's own initiative:

New	___	Amended	<u>2</u>	Repealed	___
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	___	Amended	___	Repealed	___
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The number of sections adopted using:

Negotiated rule making:	New	___	Amended	___	Repealed	___
Pilot rule making:	New	___	Amended	___	Repealed	___
Other alternative rule making:	New	___	Amended	___	Repealed	___

Date Adopted: February 8, 2018

Name: Erin T. Lopez

Title: Rules Coordinator

Signature:



AMENDATORY SECTION (Amending WSR 10-10-031, filed 4/26/10, effective 5/27/10)

WAC 458-20-121 Sales of heat or steam—Including production by cogeneration. (1) **Introduction.** This section provides tax reporting information to persons who sell heat and/or steam. Because heat and steam are often the product of a cogeneration facility, this section also provides tax information for persons operating cogeneration facilities. Persons generating electrical power should also refer to WAC 458-20-179 (Public utility tax).

(2) **Definitions.**

(a) The term "biomass fuel" means wood waste and other wood residuals, including forest derived biomass, but does not include firewood or wood pellets. "Biomass fuel" also includes partially organic by-products of pulp, paper, and wood manufacturing processes.

(b) The term "hog fuel" means wood waste and other wood residuals including forest derived biomass. "Hog fuel" does not include firewood or wood pellets.

(3) **Sale of heat or steam - Business and occupation (B&O) tax.** Persons engaging in the business of operating a plant for the production, extraction, or storage of heat or steam for distribution, for hire or sale, are taxable under the service and other business activities classification. This includes heat or steam produced by a biomass system, cogeneration, geothermal sources, fossil fuels, or any other method.

~~((3))~~ (4) **Sale or production of electricity - Cogeneration.** The production of steam, heat, or electricity is not a manufacturing activity within the definition of RCW 82.04.120. Persons who operate a plant or system for the generation, production or distribution of electrical energy for hire or sale are subject to the provisions of the public utility tax under the light and power tax classification. Persons who generate electrical energy should refer to WAC 458-20-179 (Public utility tax). A deduction may be taken for:

(a) Power generated in Washington and delivered out-of-state. (See RCW 82.16.050(6).)

(b) Amounts derived from the sale of electricity to persons who are in the business of selling electricity and are purchasing the electricity for resale. (See RCW 82.16.050(2).)

~~((4))~~ (5) **Tax incentive programs - Cogeneration.** There were tax incentive programs available for cogeneration projects begun before January 1, 1990. Sales and use tax deferrals may apply under certain conditions for power generation facilities, even though the production of power is not specifically subject to a manufacturing tax. For example, if the cogeneration facilities are part of a manufacturing plant for the production of new articles of tangible personal property and the requirements for tax deferral are met, the business may apply for tax deferral programs. These incentive programs are discussed in WAC 458-20-240 (Manufacturer's new employee tax credits), 458-20-24001 (Sales and use tax deferral—Manufacturing and research/development activities in rural counties—Applications filed after March 31, 2004), and 458-20-24002 (Sales and use tax deferral—New manufacturing and research/development facilities).

~~((5))~~ (6) **Fuel.** Persons who produce their own fuel to generate heat, steam, or electricity are subject to the manufacturing B&O tax on the value of the fuel. This includes the value of fuel which is

created at the same site as a by-product of another manufacturing process, such as production of hog fuel. The taxable value should be determined based on comparable sales, or on the basis of all costs in the absence of comparable sales. Refer to WAC 458-20-112 (Value of products).

(a) Fuel does not become an ingredient or component of power, steam, or electricity. The sale of fuel to be used by the purchaser to generate heat, steam, or electricity is a retail sale. In most cases, the purchase of fuel for such purposes is subject to payment of retail sales tax to the supplier. (See (b) of this subsection for discussion of a sales and use tax exemption specific to ~~((hog))~~ biomass fuel.)

In the event retail sales tax is not paid to the supplier, and no exemption from retail sales tax is available, deferred sales or use tax must be paid. However, the law provides a specific exemption from the use tax for biomass fuel ~~((which is))~~ used ~~((in the same))~~ by the fuel's extractor or manufacturer when used directly in the operation of the particular extractive operation or manufacturing plant which produced ((the)) or manufactured the same biomass fuel. For example, if a lumber manufacturer produces wood waste which is used in the same plant to produce heat for drying lumber ~~((and also electricity which is sold to a public utility district))~~, the wood waste is not subject to use tax even though the manufacturing B&O tax ~~((will apply))~~ applies to this biomass fuel. (See RCW 82.12.0263.)

(b) Effective July 1, 2009:

- Sales of hog fuel used to produce electricity, steam, heat, or biofuel are exempt from retail sales tax when the purchaser provides the seller with a properly filled out "buyer's retail sales tax exemption certificate." RCW 82.08.956.

- The use of hog fuel for production of electricity, steam, heat, or biofuel is exempt from use tax. RCW 82.12.956~~((For these exemptions, "hog fuel" means wood waste and other wood residuals including forest derived biomass, but not including firewood or wood pellets. "Biofuel" has the same meaning as provided in RCW 43.325.010))~~.

~~((6))~~ (7) Equipment and supplies. Persons who are in the business of producing heat, steam, or electricity are required to pay retail sales tax to suppliers of all equipment and supplies. If the supplier fails to collect retail sales tax, deferred sales or use tax must be paid.

AMENDATORY SECTION (Amending WSR 10-10-031, filed 4/26/10, effective 5/27/10)

WAC 458-20-134 Commercial or industrial use. (1) (~~Introduction~~) Definitions.

(a) "The term 'commercial or industrial use' means the following uses of products, including by-products, by the same person that extracted or manufactured them:

~~((a))~~ (i) Any use as a consumer; and

~~((b))~~ (ii) The manufacturing of articles, substances or commodities." (RCW 82.04.130.)

(b) The term "biomass fuel" means wood waste and other wood residuals, including forest derived biomass, but does not include firewood or wood pellets. "Biomass fuel" also includes partially organic by-products of pulp, paper, and wood manufacturing processes.

(2) **Examples of commercial or industrial use.** The following are examples of commercial or industrial use:

(a) The use of lumber by the manufacturer of that lumber to build a shed for its own use.

(b) The use of a motor truck by the manufacturer of that truck as a service truck for itself.

(c) The use by a boat manufacturer of patterns, jigs and dies which it has manufactured.

(d) The use by a contractor building or improving a publicly owned road of crushed rock or pit run gravel which it has extracted.

(3) **Business and occupation tax.** Persons manufacturing or extracting tangible personal property for commercial or industrial use are subject to tax under the manufacturing or extracting B&O tax classifications, as the case may be. The tax is measured by the value of the product manufactured or extracted and used. (See WAC 458-20-112 for definition and explanation of value of products.)

(4) **Use tax.** Persons manufacturing or extracting tangible personal property for commercial or industrial use are subject to use tax on the value of the articles used, unless a specific exemption is provided. (See WAC 458-20-178 for further explanation of the use tax and definition of value of the article used.)

(5) **Exemptions.** The following uses of articles produced for commercial or industrial use are expressly exempt of use tax.

(a) RCW 82.12.0263 exempts from the use tax the use of biomass fuel by the same person that extracted or manufactured that biomass fuel when it is used directly in the operation of the particular extractive operation or manufacturing plant which produced or manufactured the same biomass fuel.

(b) Property produced for use in manufacturing ferrosilicon which is subsequently used to make magnesium for sale is exempt of use tax if the primary purpose is to create a chemical reaction directly through contact with an ingredient of ferrosilicon. (RCW 82.04.190(1).)

(c) Effective July 1, 2009, hog fuel used to produce electricity, steam, heat, or biofuel is exempt from use tax. RCW 82.12.956. For the purposes of this exemption, "hog fuel" means wood waste and other wood residuals including forest derived biomass, but not including firewood or wood pellets. "Biofuel" has the same meaning as provided in RCW 43.325.010.

(6) **Special provisions regarding value of article used.** RCW 82.12.010 provides the following special valuation provisions to persons manufacturing products for commercial or industrial use:

(a) 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 United States Department of Defense, the value of the articles used is determined according to the value of the ingredients of those articles.

(b) 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 is determined by:

- The retail selling price of such new or improved product when first offered for sale; or
- The value of materials incorporated into the prototype in cases in which the new or improved product is not offered for sale.