

# Excise Tax Advisory

Excise Tax Advisories are interpretive statements authorized by RCW 34.05.230.

ETA 3211.2019

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## Taxability of Firefighting Activities

### Purpose

This Excise Tax Advisory (ETA) addresses the business and occupation (B&O) and retail sales tax treatment of firefighting services and related activities, including services provided before, during or after a fire, and the rental of firefighting equipment.

### Taxability of Firefighting Services and Related Activities

#### ***Firefighting Services***

The gross income from firefighting services is generally subject to B&O tax under the service and other activities classification. RCW 82.04.290(2)(a).

#### ***Bare Rental of Firefighting Equipment***

Generally, the bare rental of tangible personal property (i.e., no operator provided) not for rent, including firefighting equipment, is taxable under the retailing B&O tax classification and subject to the retail sales tax. See RCW 82.04.050, 82.04.250, 82.08.020 and WAC 458-20-211 *Leases or rentals of tangible personal property, bailments*.

Note: The retail sales tax applies to bare rentals of firefighting equipment by a county, city, town or fire protection district even though the activity may be exempt from B&O tax (see "Exceptions" below).

#### ***Rental of Equipment with an Operator***

If firefighting equipment is rented with an operator, the rental is generally taxable under the retailing B&O tax classification and subject to the retail sales tax. See RCW 82.04.050, 82.04.250, 82.08.020. WAC 458-20-211 defines rental of equipment with operator as "the provision of equipment with an operator to a

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lessee to perform work under the specific direction of the lessee.” If the work is not performed under the specific direction of the customer, the provision of equipment and operator does not meet the definition of a “rental of equipment with operator.”

Factors that may indicate a rental of firefighting equipment with an operator include:

- The lessor does not determine how the work will be performed;
- The lessor bills a lessee on the basis of the amount of time the equipment is used; and
- The lessee is purchasing the use of the equipment, rather than purchasing the knowledge, skills, and expertise of the operator beyond those needed to operate the equipment.

The use of an operator’s knowledge, skills, and expertise beyond operating the equipment indicates that an operator is not merely operating under the specific direction of the lessee, but providing other services to the customer.

#### ***Other Related Services and Activities***

If a service performed before or after a fire meets the definition of a “retail sale” in RCW 82.04.050, then the activity is subject to the B&O tax under the retailing classification and to retail sales tax on the sale. See RCW 82.04.050, 82.04.250, 82.08.020.

Services performed before or after a fire, and not directly to fight a fire, are subject to B&O tax based on the nature of the activity performed. If no specific classification is provided for the activity under chapter 82.04 RCW, then the activity is taxable under the service and other business activities classification. See RCW 82.04.290(2)(a).

Examples of services provided before or after a fire that may be considered a retail sale include but are not limited to:

- *Construction, repair, or improvement of buildings or structures.* Construction, repairing and improving activities are generally retail sales under RCW 82.04.050(2)(b). These activities may be performed in anticipation of or in response to a fire, but are generally not firefighting activities.
    - *Landscape maintenance and horticultural activities.* Generally, landscape maintenance and horticultural activities are retail sales under RCW 82.04.050(3)(d) and WAC 458-20-226, including activities to restore landscaping damaged by a fire.
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- *Clearing of land and moving of earth.* The clearing of land to improve the land or create a cleared area available for a new or additional use, or the moving of earth for erosion control, is generally a retail sale under RCW 82.04.050(2)(b).

Examples of services provided before or after a fire that are generally **not** considered a retail sale and are instead taxable under the service and other activities B&O tax classification include:

- *Certain fire suppression services.* Services similar to landscape services performed on unimproved forest land for fire suppression (e.g. tree thinning or falling or girdling), when not performed for landscape maintenance or horticultural purposes.
- *Certain fire line services.* Creating a fire line on unimproved general forestland to aid in fire prevention, and not to create a new or additional use for the cleared land.
- *Standby charges.* While the rental of firefighting equipment generally meets the definition of a retail sale as discussed above, standby charges for having equipment (or both equipment and operator) nearby and available in case it is needed for emergency use is not a retail sale.

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## Exceptions

### ***B&O Tax Exemption for Activities that Constitute a Governmental Function***

Firefighting activities provided by a county, city, town, or fire protection district constitute a governmental function, and the gross income derived from performing firefighting services is not subject to B&O tax under RCW 82.04.419 and WAC 458-20-189. Additionally, the use of firefighting equipment and personnel from one fire district in another fire protection district under RCW 52.12.111 is also an exercise of a government function that is not subject to B&O tax.

The B&O tax exemption for gross income from activities that constitute a governmental function does not extend to any private entities performing firefighting services even if a governmental entity contracts with the private entity to provide the services. Thus, income received by a private contractor for providing firefighting personnel or firefighting services is subject to B&O tax under the service and other activities classification even if the contractor is hired by a government entity.

### ***Prohibition Against Tax on the United States***

Washington is prohibited from imposing its B&O tax or retail sales and use tax directly on the United States. See WAC 458-20-190.

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A lease of firefighting equipment to a federal agency (e.g. United State Forest Service) is a retail sale, but not subject to retail sales tax. However, the lessor of the firefighting equipment is still subject to B&O tax under the retailing classification on its receipts from its services performed in Washington for the lease. Additionally, the lessor is subject to retail sales or use tax on property it uses or consumes in performing services for the United States, unless an exemption applies.

Constructing, repairing, or improving buildings or structures of the United States are not retail sales under RCW 82.04.050(12). Likewise, the clearing of land that would otherwise be a retail sale, as discussed above, is not a retail sale when performed for the United States. Accordingly, amounts derived from these activities are taxable under the government contracting classification of the B&O tax. See WAC 458-20-17001.

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## Examples

The following examples identify a number of facts and then state a conclusion. These examples should only be used as a general guide. The tax results of other situations must be determined after a review of all the facts and circumstances.

### 1. **Firefighting and Other Related Services.**

#### **Facts:**

- The Washington Department of Natural Resources (DNR) hires ABC Company (ABC) to (a) thin trees, including felling or girdling hazard trees for fire suppression purposes, and (b) to rehabilitate, terrace, and replace brush for erosion control after a fire.

#### **Result:**

- The thinning of trees for fire suppression and ABC is subject to B&O tax under the service and other activities B&O classification on the gross income.
- The rehabilitation, terracing, and replacement of brush for erosion control after a fire is a retail sale and ABC is subject to retail sales tax and to B&O tax under the retailing classification as constructing, repairing, improving, or landscaping activities.

### 2. **Rental of Equipment with an Operator.**

#### **Facts:**

- DNR contracts with DEF Company (DEF) to rent equipment with operators to build fire lanes and for other support services during a fire. DEF and DNR enter into an agreement providing that in the case of a forest fire, DEF will make available specified pieces of equipment with operators to assist in fighting the fire.
  - DNR agrees to pay DEF a stated hourly rate for each piece. The equipment rented includes bulldozers, loaders, graders, transports, pumps, and water trucks.
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- DEF's personnel are not directly involved with fighting fires or extinguishing flames.
- DNR controls the equipment as well as the operators, and directs the operators to move dirt, terrace land, build fire lanes, and clear land with the equipment during fires. Water trucks are used for dust abatement on the roads and to fill holding tanks where helicopters can load the water to dump on the fire. DEF's personnel operates all equipment.

**Result:**

- The transaction meets the definition of "rental of equipment with operator."
  - Under the agreement, DNR specifically controls the equipment and operations, and directs DEF and its operators to perform tasks during emergencies.
  - The operators are not required to have any additional training, knowledge or experience beyond operating the equipment and do not perform tasks beyond operating the equipment.
  - Additionally, DEF bills DNR on an hourly basis for the equipment with no separate charge for the operators.
- Because the activity in this case is the rental of equipment with an operator, DEF is subject to B&O tax under the retailing classification and must collect the retail sales tax from DNR.

**3. Firefighting Services Provided Using Own Equipment.**

**Facts:**

- XYZ Company (XYZ) provides wildfire suppression and firefighting services to DNR. XYZ operates fire engines, and each engine is operated by a three-person crew. Crewmembers have training in fire suppression tactics. The crew and engine are leased together as a unit.
  - The engine and its crew are assigned particular tasks by DNR, such as extinguishing flames with water, digging fire lines, clearing brush to prevent fire, digging up smoldering earth to prevent fire from reigniting, clearing debris and felling burned trees to stabilize an area after fire, moving earth for erosion control, or providing mobile patrol to watch for fire spreading.
  - All crewmembers must be trained and knowledgeable in performing all of these tasks.
  - XYZ provides the work and use of equipment to DNR under a contract that provides that XYZ is responsible for all equipment, transportation, personnel, supervision and management of the personnel. XYZ must furnish each engine with a three-person crew; each firefighter must meet certain training and experience requirements. The requirements for the crew include firefighter training and safety courses. DNR pays XYZ a set daily rate after the crew leader completes a form verifying the activities performed and number of days worked.
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**Result:**

- The transaction does not meet the definition of “rental of equipment with operator.”
  - XYZ provided DNR with fire engines and a crew of firefighters, but each crewmember is required to be trained in firefighting and take safety courses, indicating the need for knowledge and skills beyond the mere operation of the equipment.
  - While DNR specifies which tasks to perform, it does not supervise or instruct the crew how to perform the task. The agreement specifically makes XYZ responsible to maintain supervision and management of its personnel and equipment. Thus, the operation of the equipment is not under the specific direction of DNR.
  - The primary purpose is to provide firefighting and fire suppression services, and not simply the rental of equipment.
- XYZ is subject to the service and other activities B&O tax classification.

**4. Rental of Equipment with Operator to the United States.**

**Facts:**

- The same facts as Example 2, a rental of equipment with operator, except that the lessee is the United States Forest Service (USFS) rather than DNR.

**Result:**

- Because this is a rental of equipment with operator to the United States, the rental is not subject to retail sales tax.
  - However, DEF is subject to B&O tax under the retailing classification on its receipts for the rental.
  - Additionally, if DEF has not itself paid retail sales tax on the equipment, fuel, fire retardant, or other items it uses, it is subject to use tax on these items unless an exemption applies.
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