

Excise Tax Advisory

Excise Tax Advisories are interpretive statements authorized by RCW 34.05.230.

ETA 3006.2010

Issue Date: August 5, 2010

The exemption provided by RCW 82.04.423 expired May 1, 2010. See Chapter 23, Laws of 2010, 1st Special Session (2ESSB 6143, Part IV).

Direct Seller's Use of the Internet, Mail Orders, Direct Calls, etc.

RCW 82.04.423 provides a business and occupation (B&O) tax exemption for wholesale and retail sales by certain out-of-state businesses that make sales in this state exclusively to or through a “direct seller’s representative.” This exemption is often referred to as the “direct seller’s exemption” and the person claiming the exemption is referred to as the “direct seller.” This exemption is limited to the B&O tax and does not extend to the retail sales tax.

The requirements necessary to qualify for the exemption are set forth in RCW 82.04.423 and WAC 458-20-246 (Rule 246). The exemption is only available to businesses that do not own or lease real property in the state, are not incorporated in the state, do not maintain inventory in this state, and make sales in this state exclusively to or through a direct seller’s representative. Readers should refer to Rule 246 (Sales to or through a direct seller’s representative) for additional information about this exemption.

This excise tax advisory (ETA) discusses the use of the internet, mail orders, direct calls, and other methods used by direct sellers to make sales directly to customers in this state. The ETA explains when these methods satisfy or fail to satisfy the statutory requirement that the direct seller make “sales in this state exclusively to or through a direct seller’s representative.”

Background:

Rule 246(4)(a)(iv) provides in relevant part:

To be eligible for the exemption, all sales by the direct seller in this state must be made to or through a direct seller’s representative. The direct seller may not claim any B&O tax exemption under RCW 82.04.423 if it has made sales in this state using means other than a direct seller’s representative. This requirement does not, however, limit the methods the direct seller’s representative may use to sell these products. For example, the representative can use the mail or the internet, **if all other conditions of the exemption are met.** The direct seller’s use of mail order or internet, separate from the representative’s use, may or may not be found to be “sales in this state” depending on the facts of the situation. If the direct seller’s use of methods other than to or through a direct

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seller's representative constitutes "sales in this state," the exemption is lost. (emphasis added.)

As explained in Rule 246(4)(a)(iv), the direct seller's **representative** may use the internet in making sales in this state. In addition, the representative may use the internet to advertise the products or provide contact information.

However, the direct seller may not make sales in this state directly to a customer by means other than "to or through" a direct seller's representative. This means the sale must be either to a direct seller's representative or made by means of, by reason of, or as a result of the representative. Internet sales, mail orders, and similar sales directly to customers are not made "to or through" a direct seller's representative even if the representative is involved in recruiting or enrolling the customer into the direct seller's program but is not otherwise involved in soliciting the sale, placing the order, or distributing the merchandise.

What activities are allowed/not allowed when the direct seller has, for example, an internet site?

A direct seller is not precluded from using the internet, but the direct seller's use of the internet cannot conflict with the statutory requirement that the direct seller make "sales in this state exclusively to or through a direct seller's representative." Examples of internet use by a direct seller that do not themselves cause the direct seller to be ineligible for RCW 82.04.423's B&O tax exemption include:

- Advertising its products; and
- Providing interested persons with contact information for making purchases from or through its direct seller's representatives.

In each of the above examples, the direct seller's use of the internet is not to make sales directly to customers in Washington.

On the other hand, examples of when a direct seller's use of the internet causes the direct seller to be ineligible for RCW 82.04.423's B&O tax exemption includes activities such as:

- Allowing any interested persons to order or purchase directly from the direct seller. The exemption is not available even if only persons outside the sales area of a direct seller's representative are allowed to order and purchase directly from the direct seller; or
- Having direct seller's representatives enroll customers, via the internet, that allows those customers to place order with or make purchases directly from the direct seller.

These latter two examples illustrate that the direct seller is making sales directly to customers and not exclusively to or through the direct seller's representative.

What is the tax result if the direct seller does not qualify for the exemption?

When a direct seller fails to comply with the requirements of the exemption, all tax relief granted by the exemption is lost, and the direct seller is subject to the B&O tax. Therefore, the direct seller is responsible for remitting B&O tax on all sales made in Washington, those made through a direct seller's representative or made via the internet, catalogs, and other means. In addition, retail sales tax must also be collected on all sales to consumers, unless a specific exemption applies.
