

HOUSE BILL REPORT

EHB 1354

As Passed House:
March 28, 2019

Title: An act relating to providing that scan-down allowances on food and beverages intended for human and pet consumption are bona fide discounts for purposes of the business and occupation tax.

Brief Description: Providing that scan-down allowances on food and beverages intended for human and pet consumption are bona fide discounts for purposes of the business and occupation tax.

Sponsors: Representatives Walen, Stokesbary, Wylie, Orcutt, Vick, Frame, Eslick and Ormsby.

Brief History:

Committee Activity:

Finance: 2/5/19, 2/26/19 [DP].

Floor Activity:

Passed House: 3/28/19, 93-0.

Brief Summary of Engrossed Bill

- Provides a business and occupation tax deduction for scan-down allowances for groceries and pet food.

HOUSE COMMITTEE ON FINANCE

Majority Report: Do pass. Signed by 12 members: Representatives Tarleton, Chair; Walen, Vice Chair; Orcutt, Ranking Minority Member; Young, Assistant Ranking Minority Member; Chapman, Frame, Macri, Morris, Orwall, Springer, Stokesbary and Vick.

Staff: Tracey O'Brien (786-7152).

Background:

Business and Occupation Tax.

Washington's major business tax is the business and occupation (B&O) tax. The B&O tax is imposed on the gross receipts of business activities conducted within the state, without any

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deduction for the costs of doing business. Businesses must pay the B&O tax even though they may not have any profits or may be operating at a loss.

A taxpayer may have more than one B&O tax rate, depending on the types of activities conducted. Major B&O tax rates are 0.471 percent for retailing; 0.484 percent for manufacturing, wholesaling, and extracting; and 1.5 percent for services and for activities not classified elsewhere. Several preferential rates also apply to specific business activities.

In addition, a taxpayer may be eligible to utilize other tax preferences, including credits and deductions, to reduce their tax liability. For example, a taxpayer engaging in activities subject to different B&O tax rates may be eligible for a Multiple Activities Tax Credit. A taxpayer may also be eligible for a small business credit that will either eliminate or reduce their B&O tax liability. In general, the credit is \$70 per month for service businesses and \$35 per month for all other businesses, multiplied by the number of months in the reporting period. The amount of the credit available phases out based on the business's gross receipts.

A business does not have to file an annual B&O tax return if the business does not owe other taxes or fees to the Department of Revenue (DOR) and has annual gross proceeds of sales, gross income, or value of products for all B&O tax classifications of less than \$28,000 per year, or less than \$46,667 if at least 50 percent of its taxable income is from services or activities not classified elsewhere.

A bona fide discount negotiated by a grocer from a distributor upon the purchase of goods is not subject to the B&O tax. Bona fide discounts include off-invoice allowances, scan-down allowances, and volume discount allowances. A scan-down allowance is a payment or credit by a distributor to a grocer exclusively for the grocer selling a specific volume of products during a certain timeframe.

If the grocer performs a service or benefit in exchange for the discount, the discount is not considered to be a bona fide discount and is subject to the B&O tax. For example, if a grocer receives a discount or some form of payment for advertising the distributor's products in print, on the Internet, or in the taxpayer's place of business, the discount or payment is subject to the B&O tax.

Tax Preferences.

State law provides for a range of tax preferences that confer reduced tax liability upon a designated class of taxpayer. Tax preferences include tax exclusions, deductions, exemptions, preferential tax rates, deferrals, and credits. Currently, Washington has over 650 tax preferences, including a variety of sales and use tax exemptions. Legislation that establishes or expands a tax preference must include a Tax Preference Performance Statement that identifies the public policy objective of the preference, as well as specific metrics that the Joint Legislative Audit and Review Committee (JLARC) can use to evaluate the effectiveness of the preference. All new tax preferences automatically expire after 10 years unless an alternative expiration date is provided.

Summary of Engrossed Bill:

A scan-down allowance may be credited against a taxpayer's B&O taxes. A scan-down allowance is defined as a payment or credit offered to a seller by a product manufacturer or distributor where the amount of the payment or credit is based on the quantity of the product sold by the seller within a specific period of time. The terms of the allowance must be known by the seller prior to making the sales and the seller may not be required to provide any services to the manufacturer or distributor in order to receive the scan-down allowance.

The scan-down allowance must only be for food, food ingredient products, and pet food.

This act is exempt from the requirements of a tax preference performance statement, a JLARC review, and the automatic 10-year expiration.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Historically, a scan-down discount allowance from a distributor was not subject to the service B&O tax. In 2013 the DOR issued an advisory opinion clarifying that scan-down reimbursements were not subject to the B&O tax because scan-downs without a required performance were a bona fide discount. As the result of a recent Washington State Supreme Court decision related to bona fide discounts, the DOR believes the tax treatment of the scan-down allowance needs further clarification from the Legislature. It makes sense to continue to exempt scan-down allowances from the B&O tax because the retailer passes the savings onto the consumer through a lower price. This bill is important for independent grocers. Unlike big grocery chains, independent grocers are not vertically integrated, and scan-down discounts allow them to stay competitive in a low-margin industry.

(Opposed) None.

Persons Testifying: Representative Walen, prime sponsor; Jan Gee, Washington Food Industry Association; Jeff Clemens, United Natural Food Incorporated; and Kyle Saar, Saars Marketplace.

Persons Signed In To Testify But Not Testifying: None.