

CITY OF BELLEVUE, WASHINGTON

ORDINANCE NO. 6487

AN ORDINANCE amending the Bellevue City Code (BCC) Section 4.09.077 – to adopt the mandatory updates to the Business and Occupation tax Model Ordinance in RCW 35.102.130 Allocation and Apportionment of Income.

WHEREAS, on February 8, 2003 the Bellevue City Council adopted Ordinance 5436 implementing a new chapter 4.09 of the Bellevue City Code adopting the model ordinance for Business and Occupation Tax which establishes a uniform set of rules for Cities administering a Business and Occupation tax.

WHEREAS, on November 19, 2007 the Bellevue City Council adopted Ordinance 5780 implementing a new Section 4.09.077 into the Bellevue City Code in order to adopt a mandatory provision for the uniform service apportionment rules for Business and Occupation Tax.

WHEREAS, on December 3, 2012 the Bellevue City Council adopted Ordinance 6092 amending chapter 4.09 Business and Occupation tax adopting the mandatory updates to the model ordinance for digital goods.

WHEREAS, additional amendments to BCC Section 4.09.077, are necessary to further align with the model ordinance.

THE CITY COUNCIL OF THE CITY OF BELLEVUE, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Section 4.09.077 of the Bellevue City Code is hereby amended to read as follows:

Allocation and apportionment of income when activities take place in more than one jurisdiction

For tax periods beginning on or after January 1, 2008, gross income, other than persons subject to the provisions of Chapter 82.14A RCW, shall be allocated and apportioned as follows:

- A. Gross income derived from all activities other than those taxed as service or royalties under BCC 4.09.050(B)(7) shall be allocated to the location where the activity takes place.

- B. In the case of sales of tangible personal property, the activity takes place where delivery to the buyer occurs.
- 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 section (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 subsections (C)(1) through (C)(5) of this section 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 section (D). The city may employ an alternative method for allocating the income from the sale of digital products if the methods provided in subsections (C)(1) through (C)(5) of this section 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 subsections (C)(1) through (C)(5) of this section, "receive" has the same meaning as in RCW 82.32.730, now or as hereafter amended.

- F. Gross income derived from activities taxed as services and other activities under BCC 4.09.050(B)(7) shall be apportioned to the city by multiplying apportionable income by a fraction, the numerator of which is the payroll factor plus the service income factor and the denominator of which is two.
1. The payroll factor is a fraction, the numerator of which is the total amount paid in the city during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period. Compensation is paid in the city if:
 - a. The individual is primarily assigned within the city;
 - b. The individual is not primarily assigned to any place of business for the tax period and the individual performs 50 percent or more of his or her service for the tax period in the city; or
 - c. The individual is not primarily assigned to any place of business for the tax period, the individual does not perform 50 percent or more of his or her service in any city and the individual resides in the city
 2. The service income factor is a fraction, the numerator of which is the total service income of the taxpayer in the city during the tax period, and the denominator of which is the total service income of the taxpayer everywhere during the tax period. Service income is in the city if the customer location is in the city.
 3. Gross income of the business from engaging in an apportionable activity must be excluded from the denominator of the service income factor if, in respect to such activity, at least some of the activity is performed in the city, and the gross income is attributable under subsection (2) of this section (F) to a city or unincorporated area of a county within the United States or to a foreign country in which the taxpayer is not taxable. For purposes of this subsection (F)(3), "not taxable" means that the taxpayer is not subject to a business activities tax by that city or county within the United States or by that foreign country, except that a taxpayer is taxable in a city or county within the United States or in a foreign country in which it would be deemed to have a substantial nexus with the city or county within the United States or with the foreign country under the standards in RCW 35.102.050 regardless of whether that city or county within the United States or that foreign country imposes such a tax

4. If the allocation and apportionment provisions of this section (F) do not fairly represent the extent of the taxpayer's business activity in the city, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
 - a. Separate accounting;
 - b. The exclusion of any one or more of the factors;
 - c. The inclusion of one or more additional factors that will fairly represent the taxpayer's business activity in the city; or
 - d. The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.
5. The party petitioning for, or the tax administrator requiring, the use of any method to effectuate an equitable allocation and apportionment of the taxpayer's income pursuant to subsection (4) of this section (F) must prove by a preponderance of the evidence:
 - a. That the allocation and apportionment provisions of this section (F) do not fairly represent the extent of the taxpayer's business activity in the city; and
 - b. That the alternative to such provisions is reasonable. The same burden of proof shall apply whether the taxpayer is petitioning for, or the tax administrator is requiring, the use of an alternative, reasonable method to effectuate an equitable allocation and apportionment of the taxpayer's income.
6. If the tax administrator requires any method to effectuate an equitable allocation and apportionment of the taxpayer's income, the tax administrator cannot impose any civil or criminal penalty with reference to the tax due that is attributable to the taxpayer's reasonable reliance solely on the allocation and apportionment provisions of this section (F).
7. A taxpayer that has received written permission from the tax administrator to use a reasonable method to effectuate an equitable allocation and apportionment of the taxpayer's income shall not have that permission revoked with respect to transactions and activities that have already occurred unless there has been a material change in, or a material misrepresentation of, the facts provided by the taxpayer

upon which the tax administrator reasonably relied in approving a reasonable alternative method

G The definitions in this subsection apply throughout this section.

1. “Apportionable income” means the gross income of the business taxable under the service classifications of a city's gross receipts tax, including income received from activities outside the city if the income would be taxable under the service classification if received from activities within the city, less any exemptions or deductions available.

2. “Business activities tax” means a tax measured by the amount of, or economic results of, business activity conducted in a city or county within the United States or within a foreign country. The term includes taxes measured in whole or in part on net income or gross income or receipts. “Business activities tax” does not include a sales tax, use tax, or a similar transaction tax, imposed on the sale or acquisition of goods or services, whether or not denominated a gross receipts tax or a tax imposed on the privilege of doing business.

3. “Compensation” means wages, salaries, commissions, and any other form of remuneration paid to individuals for personal services that are or would be included in the individual's gross income under the federal internal revenue code.

4. “Customer” means a person or entity to whom the taxpayer makes a sale or renders services or from whom the taxpayer otherwise receives gross income of the business.

5. “Customer location” means the following:

- a. For a customer not engaged in business, if the service requires the customer to be physically present, where the service is performed.
- b. For a customer not engaged in business, if the service does not require the customer to be physically present:
 - (i) The customer's residence; or
 - (ii) If the customer's residence is not known, the customer's billing/mailling address.
- c. For a customer engaged in business:
 - (i) Where the services are ordered from;
 - (ii) At the customer's billing/mailling address if the location from which the services are ordered is not known; or
 - (iii) At the customer's commercial domicile if none of the above are known.

6. “Individual” means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee of that taxpayer.

7. “Primarily assigned” means the business location of the taxpayer where the individual performs his or her duties.

8. “Service-taxable income” or **“service income”** means gross income of the business subject to tax under either the service or royalty classification.

9. “Tax period” means the calendar year during which tax liability is accrued. If taxes are reported by a taxpayer on a basis more frequent than once per year, taxpayers shall calculate the factors for the previous calendar year for reporting in the current calendar year and correct the reporting for the previous year when the factors are calculated for that year, but not later than the end of the first quarter of the following year.

H Assignment or apportionment of revenue under this Section shall be made in accordance with and in full compliance with the provisions of the interstate commerce clause of the United States Constitution where applicable.

Section 2. This Ordinance shall take effect and be in force thirty days after its passage and legal publication.

Section 3. The changes made by this ordinance shall be enforced effective January 1, 2020

Passed by the City Council this _____ day of _____, 2019
and signed in authentication of its passage this _____ day of _____,
2019.

(SEAL)

John Chelminiak, Mayor

Approved as to form:
Kathryn L. Gerla, City Attorney

Nicholas Melissinos, Deputy City Attorney

Attest:

Charmaine Arredondo, City Clerk

Published _____