

**Tax Avoidance Provisions**  
**(§§ 201-204, 2ESSB 6143)**

1        NEW SECTION.    **Sec. 201.**    A new section is added to chapter 82.32  
2    RCW to read as follows:

3        (1) It is the legislature's intent to require all taxpayers to pay  
4    their fair share of taxes. To accomplish this purpose, it is the  
5    legislature's intent to stop transactions or arrangements that are  
6    designed to unfairly avoid taxes.

7        (2) The department must disregard, for tax purposes, the tax  
8    avoidance transactions or arrangements that are described in subsection  
9    (3) of this section. The department must deny the tax benefit that  
10   would otherwise result from the tax avoidance transaction or  
11   arrangement. In determining whether the department must disregard a  
12   transaction or arrangement described under subsection (3) of this  
13   section, the department may consider:

14        (a) Whether an arrangement or transaction changes in a meaningful  
15   way, apart from its tax effects, the economic positions of the  
16   participants in the arrangement when considered as a whole;

17        (b) Whether substantial nontax reasons exist for entering into an  
18   arrangement or transaction;

19        (c) Whether an arrangement or transaction is a reasonable means of  
20   accomplishing a substantial nontax purpose;

21        (d) An entities' relative contributions to the work that generates  
22   income;

23        (e) The location where work is performed; and

24        (f) Other relevant factors.

25        (3) This section applies only to the following transactions or  
26   arrangements:

27        (a) Arrangements that are, in form, a joint venture or similar  
28   arrangement between a construction contractor and the owner or  
29   developer of a construction project but that are, in substance,  
30   substantially guaranteed payments for the purchase of construction  
31   services characterized by a failure of the parties' agreement to  
32   provide for the contractor to share substantial profits and bear  
33   significant risk of loss in the venture;

34        (b) Arrangements through which a taxpayer attempts to avoid tax  
35   under chapter 82.04 RCW by disguising income received, or otherwise  
36   avoiding tax on income, from a person that is not affiliated with the  
37   taxpayer from business activities that would be taxable in Washington

1 by moving that income to another entity that would not be taxable in  
2 Washington; and

3 (c) Arrangements through which a taxpayer attempts to avoid tax  
4 under chapter 82.08 or 82.12 RCW by engaging in a transaction to  
5 disguise its purchase or use of tangible personal property by vesting  
6 legal title or other ownership interest in another entity over which  
7 the taxpayer exercises control in such a manner as to effectively  
8 retain control of the tangible personal property.

9 (4) In determining whether a transaction or arrangement comes  
10 within the scope of subsection (3) of this section, the department is  
11 not required to prove a taxpayer's subjective intent in engaging in the  
12 transaction or arrangement.

13 (5) The department must adopt rules to assist in determining  
14 whether a transaction or arrangement is within the scope of subsection  
15 (3) of this section. The adoption of a rule as required under this  
16 subsection is not a condition precedent for the department's exercise  
17 of the authority provided in this section. Any rules adopted under  
18 this section must include examples of transactions that the department  
19 will disregard for tax purposes.

20 (6) This section does not affect the department's authority to  
21 apply any other remedies available under statutory or common law.

22 (7) For purposes of this section, "affiliated" means under common  
23 control. "Control" means the possession, directly or indirectly, of  
24 more than fifty percent of the power to direct or cause the direction  
25 of the management and policies of a person, whether through the  
26 ownership of voting shares, by contract, or otherwise.

27 NEW SECTION. **Sec. 202.** A new section is added to chapter 82.32  
28 RCW to read as follows:

29 (1)(a) The department may not use section 201 of this act to  
30 disregard any transaction or arrangement initiated before the effective  
31 date of this section, if, in respect to such transaction or  
32 arrangement, the taxpayer had reported its tax liability in conformance  
33 with either specific written instructions provided by the department to  
34 the taxpayer, a determination published under the authority of RCW  
35 82.32.410, or other document made available by the department to the  
36 general public.

1 (b) This section does not apply if the transaction or arrangement  
2 engaged in by the taxpayer differs materially from the transaction or  
3 arrangement that was addressed in the specific written instructions,  
4 published determination, or other document made available by the  
5 department to the general public.

6 (2) Section 201 of this act does not apply to any tax periods  
7 ending before May 1, 2010, that were included in a completed field  
8 audit conducted by the department.

9 (3) For purposes of this section, "specific written instructions"  
10 means tax reporting instructions provided to a taxpayer and which  
11 specifically identify the taxpayer to whom the instructions apply.  
12 Specific written instructions may be provided as part of an audit, tax  
13 assessment, determination, closing agreement, or in response to a  
14 binding ruling request.

15 **Sec. 203.** RCW 82.32.090 and 2006 c 256 s 6 are each amended to  
16 read as follows:

17 (1) If payment of any tax due on a return to be filed by a taxpayer  
18 is not received by the department of revenue by the due date, there  
19 (~~shall be~~) is assessed a penalty of five percent of the amount of the  
20 tax; and if the tax is not received on or before the last day of the  
21 month following the due date, there (~~shall be~~) is assessed a total  
22 penalty of fifteen percent of the amount of the tax under this  
23 subsection; and if the tax is not received on or before the last day of  
24 the second month following the due date, there (~~shall be~~) is assessed  
25 a total penalty of twenty-five percent of the amount of the tax under  
26 this subsection. No penalty so added shall be less than five dollars.

27 (2) If the department of revenue determines that any tax has been  
28 substantially underpaid, there (~~shall be~~) is assessed a penalty of  
29 five percent of the amount of the tax determined by the department to  
30 be due. If payment of any tax determined by the department to be due  
31 is not received by the department by the due date specified in the  
32 notice, or any extension thereof, there (~~shall be~~) is assessed a  
33 total penalty of fifteen percent of the amount of the tax under this  
34 subsection; and if payment of any tax determined by the department to  
35 be due is not received on or before the thirtieth day following the due  
36 date specified in the notice of tax due, or any extension thereof,  
37 there (~~shall be~~) is assessed a total penalty of twenty-five percent

1 of the amount of the tax under this subsection. No penalty so added  
2 (~~shall~~) may be less than five dollars. As used in this section,  
3 "substantially underpaid" means that the taxpayer has paid less than  
4 eighty percent of the amount of tax determined by the department to be  
5 due for all of the types of taxes included in, and for the entire  
6 period of time covered by, the department's examination, and the amount  
7 of underpayment is at least one thousand dollars.

8 (3) If a warrant (~~be~~) is issued by the department of revenue for  
9 the collection of taxes, increases, and penalties, there (~~shall be~~)  
10 is added thereto a penalty of ten percent of the amount of the tax, but  
11 not less than ten dollars.

12 (4) If the department finds that a person has engaged in any  
13 business or performed any act upon which a tax is imposed under this  
14 title and that person has not obtained from the department a  
15 registration certificate as required by RCW 82.32.030, the department  
16 (~~shall~~) must impose a penalty of five percent of the amount of tax  
17 due from that person for the period that the person was not registered  
18 as required by RCW 82.32.030. The department (~~shall~~) may not impose  
19 the penalty under this subsection (4) if a person who has engaged in  
20 business taxable under this title without first having registered as  
21 required by RCW 82.32.030, prior to any notification by the department  
22 of the need to register, obtains a registration certificate from the  
23 department.

24 (5) If the department finds that all or any part of a deficiency  
25 resulted from the disregard of specific written instructions as to  
26 reporting or tax liabilities, the department (~~shall~~) must add a  
27 penalty of ten percent of the amount of the additional tax found due  
28 because of the failure to follow the instructions. A taxpayer  
29 disregards specific written instructions when the department (~~of~~  
30 ~~revenue~~) has informed the taxpayer in writing of the taxpayer's tax  
31 obligations and the taxpayer fails to act in accordance with those  
32 instructions unless the department has not issued final instructions  
33 because the matter is under appeal pursuant to this chapter or  
34 departmental regulations. The department (~~shall~~) may not assess the  
35 penalty under this section upon any taxpayer who has made a good faith  
36 effort to comply with the specific written instructions provided by the  
37 department to that taxpayer. Specific written instructions may be  
38 given as a part of a tax assessment, audit, determination, or closing

1 agreement, provided that such specific written instructions (~~shall~~)  
2 apply only to the taxpayer addressed or referenced on such documents.  
3 Any specific written instructions by the department (~~of revenue~~  
4 ~~shall~~) must be clearly identified as such and (~~shall~~) must inform  
5 the taxpayer that failure to follow the instructions may subject the  
6 taxpayer to the penalties imposed by this subsection.

7 (6) If the department finds that all or any part of a deficiency  
8 resulted from engaging in a disregarded transaction, as described in  
9 section 201(3) of this act, the department must assess a penalty of  
10 thirty-five percent of the additional tax found to be due as a result  
11 of engaging in a transaction disregarded by the department under  
12 section 201(2) of this act. The penalty provided in this subsection  
13 may be assessed together with any other applicable penalties provided  
14 in this section on the same tax found to be due, except for the evasion  
15 penalty provided in subsection (7) of this section. The department may  
16 not assess the penalty under this subsection if, before the department  
17 discovers the taxpayer's use of a transaction described under section  
18 201(3) of this act, the taxpayer discloses its participation in the  
19 transaction to the department.

20 (7) If the department finds that all or any part of the deficiency  
21 resulted from an intent to evade the tax payable hereunder, a further  
22 penalty of fifty percent of the additional tax found to be due  
23 (~~shall~~) must be added.

24 ~~((+7))~~ (8) The penalties imposed under subsections (1) through (4)  
25 of this section can each be imposed on the same tax found to be due.  
26 This subsection does not prohibit or restrict the application of other  
27 penalties authorized by law.

28 ~~((+8))~~ (9) The department (~~of revenue~~) may not impose (~~both~~)  
29 the evasion penalty (~~and~~) in combination with the penalty for  
30 disregarding specific written instructions or the penalty provided in  
31 subsection (6) of this section on the same tax found to be due.

32 ~~((+9))~~ (10) For the purposes of this section, "return" means any  
33 document a person is required by the state of Washington to file to  
34 satisfy or establish a tax or fee obligation that is administered or  
35 collected by the department (~~of revenue~~), and that has a statutorily  
36 defined due date.

1        NEW SECTION.    **Sec. 204.**    A new section is added to chapter 82.32  
2    RCW to read as follows:

3        There is hereby created a joint tax avoidance review committee  
4    which is a bipartisan committee consisting of three members of the  
5    senate, two from the majority caucus and one from the minority caucus,  
6    and three members of the house of representatives, two from the  
7    majority caucus and one from the minority caucus. The senate members  
8    of the committee must be appointed by the majority leader of the  
9    senate, and the house members of the committee must be appointed by the  
10   speaker of the house. The appointing authorities must also appoint one  
11   alternate member from each of the two largest caucuses of each  
12   legislative chamber.

13        (1) (a) Members and alternates must be appointed as soon as possible  
14    after the effective date of this section, and their terms continue  
15    until such persons no longer wish to serve on the committee or no  
16    longer serve in the legislature, whichever occurs first.

17        (b) A vacancy must be filled by the appointment of a legislator  
18    from the same legislative chamber and caucus as the original  
19    appointment. The appropriate appointing authority must make the  
20    appointment within thirty days of the vacancy occurring. Former  
21    committee members and alternates may be reappointed to the committee.

22        (2) The committee must choose its chair and vice-chair from among  
23    its membership. The committee meets at the call of the chair. The  
24    chair of the committee must cause all meeting notices and committee  
25    documents to be sent to the committee members and alternates.

26        (3) Staff support for the committee must be provided by the senate  
27    committee services and the house of representatives office of program  
28    research.

29        (4) The committee must:

30        (a) Generally monitor the department's implementation of Part II of  
31    this act, providing timely advice to the department in any rule making  
32    undertaken pursuant to the authority granted under section 201 of this  
33    act;

34        (b) Seek input from stakeholders and other legislators as the  
35    committee may determine is desirable and useful in the furtherance of  
36    its mission herein described;

37        (c) Review other cases, identified by the department, of tax

1 avoidance transactions not described in section 201 of this act that  
2 may represent examples of arrangements that circumvent the policies of  
3 this state and thus unfairly avoid taxes;

4 (d) Consider the need for an explicit statutory construction  
5 standard to provide direction to the courts on the interpretation of  
6 Part II of this act; and

7 (e) Provide a report to the fiscal committees of the house of  
8 representatives and senate by December 31, 2010, which must include:

9 (i) Recommended legislation on any matters that the committee deems  
10 advisable, including amendments to sections 201, 202, and 203 of this  
11 act; and

12 (ii) Recommendations for future legislative oversight of the  
13 department's implementation of sections 201, 202, and 203 of this act.

14 (5) For the purposes of this section, the disclosure of otherwise  
15 confidential tax information to the members of the committee is deemed  
16 to fall within the exception provided by RCW 82.32.330(3)(d).

17 (6) This section expires July 1, 2011.