Cite as Det. No. 01-9915, 22 WTD 202 (2003)

September 27, 2001

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Re: . . .

[1] RULE 193: B&O TAX – DISCRIMINATION – EXEMPTION FOR DIRECT SELLERS. Washington's tax structure does not discriminate against interstate commerce. If anything, a potential tax benefit is provided to the out-of-state firm using a direct sellers representative, since no equivalent is granted to a Washington-based seller of goods in the home or non-permanent retail locations.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Dear Mr. . . . :[1]

You are the representative of . . . ("Taxpayer"). Taxpayer, imports toys, primarily from Asia and sells to unrelated retailers throughout the United States. Taxpayer is headquartered [outside Washington]; it does not have a place of business in any other state. No orders are final until approved at the company's home office.

Taxpayer makes sales to Washington customers. The goods are sold "FOB [outside Washington]." Orders from Washington customers come from a variety of sources:

- Catalogs
- Trade shows
- Telephone
- Independent sales agents[2]

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

[2] The independent sales agents represent a number of companies other than Taxpayer.

On March 21, 2001, you filed a ruling request on behalf of your client Specifically, your client requests a ruling as to the constitutional validity of the business and occupation ("B&O") tax law that imposes B&O tax on sales made in Washington by independent representatives when a B&O tax exemption exists for sales made by competing companies that use direct sellers.

On August 9, 2000, the Compliance Division of the Department of Revenue ("Department') sent Taxpayer a letter requesting information about its business activity in Washington. On September 14, 2000, Taxpayer provided the information requested by the Compliance Division. On September 22, 2000, the Compliance Division notified Taxpayer that it must register with the Department and pay B&O tax. Taxpayer told a Compliance agent during a November 14, 2000 telephone conversation that it was not required to register and pay B&O tax because all of its sales were made "FOB [outside Washington]." That same day, the Compliance agent sent Taxpayer a letter explaining that where the receipt of the goods occurs determines tax liability and that for Washington tax purposes where the buyer receives the goods is not determined by the FOB location. Thus, Taxpayer must pay B&O tax on goods it sells "FOB [outside Washington]" but are received by the buyer in Washington.

On December 18, 2000, Taxpayer sent the Compliance Division a letter stating it did not have nexus with Washington under Public Law 86-272. On December 28, 2000, the Compliance Division sent Taxpayer a letter explaining that Public Law 86-272 applied to net income taxes and not to gross privileged based excise taxes such as Washington's B&O tax.

On January 12, 2001, Taxpayer wrote the Compliance Division and requested an explanation why it didn't qualify for the direct seller's B&O tax exemption granted by RCW 82.04.423. On January 16, 2001, a Compliance agent telephoned Taxpayer to explain that it did not qualify for the direct seller's exemption. The Compliance agent explained the exemption did not apply because Taxpayer's sales were to established retail businesses and the exemption only applied "to sales of goods sold in the home or otherwise than in a permanent retail establishment." Taxpayer disagreed. On March 23, 2001, Taxpayer filed an appeal of the Compliance Division's ruling that it must register with the Department and pay B&O tax on the sales its customers receive in Washington.

WAC 458-20-193(7) ("Rule 193") requires businesses to report and pay B&O tax on goods originating outside Washington when the seller has nexus and the goods are received by the buyer in Washington.

Taxpayer does not dispute either that the activities of its independent sales agents create nexus or that the goods it sells are received in Washington by its customers. Also, Taxpayer does not argue that its sales qualify for the direct seller's representative B&O tax exemption.[3] Rather,

[3] RCW 82.04.423 provides:

Taxpayer maintains that, as an out-of-state based seller of toys into Washington state, it has an economic disadvantage against those out-of-state sellers who sell toys in Washington and qualify for the direct seller's representative B&O tax exemption.

Taxpayer argues that Washington's B&O tax violates the Commerce Clause of the U.S. Constitution by granting exemptions from the tax to direct sellers, but imposes the tax on wholesalers whose only contact with Washington consists of solicitation.

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Taxpayer argues that the direct seller's representative B&O tax exemption wrongfully discriminates against Taxpayers, such as itself, that make sales using independent sales representatives. Thus, Taxpayer's challenge rests on the third prong of Complete Auto Transit, which asks: Does the tax sought to be imposed discriminate against interstate commerce in favor of intrastate commerce? The test seeks to determine the economic burden of a state tax. Does the tax place a greater economic burden upon interstate business transactions than it places on intrastate transactions for persons similarly situated? A tax on interstate commerce is not discriminatory unless it affords a "differential tax treatment of interstate and intrastate commerce" that redounds to the detriment of interstate commerce. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 618 (1981); Associated Industries of Missouri v.Lohman, 511 U.S. 641, 652 n.4 (1994); Chicago Bridge & Iron Co, v. Dep't of Revenue, 98 Wn.2d 814, 830, 659 P.2d 463 (1983).

Washington's tax treats interstate and intrastate business equally. All taxpayers, whether based in-state or out-of-state, that employ independent sales representatives to make sales in Washington pay the same B&O tax rate.

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(1) This chapter shall not apply to any person in respect to gross income derived from the business of making sales at wholesale or retail if such person:

(a) Does not own or lease real property within this state; and

(b) Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business; and

(c) Is not a corporation incorporated under the laws of this state; and

(d) Makes sales in this state exclusively to or through a direct seller's representative.

(2) For purposes of this section, the term "direct seller's representative" means a person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment; and

(a) Substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and

(b) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such purposes for federal tax purposes.

Washington's tax structure does not facially discriminate against interstate commerce as the taxpayer claims. If anything, a potential tax benefit is provided to the out-of-state firm using a direct seller's representative, since no equivalent is granted to a Washington-based seller of goods in the home or non-permanent retail locations.

Accordingly, we sustain the Compliance Division's ruling that Taxpayer must register with the Department and pay back taxes, penalties, and interest for the previous years.

Carl E. Lewis
Administrative Law Judge