Cite as 3 WTD 423 (1987)

BEFORE THE INTERPRETATION AND APPEALS SECTION

DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	D E T E R M I N A T I O N
	No. 87-230
. . .	Registration No. . . .
	Tax Assessment No. . . .

[1] **RULE 193A:** B&O TAX -- WHOLESALING -- EXEMPTION -- INTERSTATE SALE -- DELIVERY TO FREIGHT FORWARDER. When a seller delivers sold goods to a freight forwarder hired by the seller for delivery to an out-of-state buyer's location, the sale is exempt from B&O tax provided there was an agreement with the buyer to make such delivery and documentary evidence (bill of lading, contract of carriage, etc.) retained by the seller showing that delivery was in fact made to the buyer outside this state.

[2] **RULE 193A:** B&O TAX -- WHOLESALING -- INTERSTATE SALE -- CARRIER AS AGENT FOR THE SELLER -- RISK AND EXPENSE OF THE SELLER. There is a presumption that the party bearing the "risk and expense" of the shipment is the one for whom the carrier acts as agent. Shipment by the seller on a "freight collect" basis does not make the seller's selected carrier an agent of the buyer. Whether the seller prepays the freight charge or has his carrier collect the freight charges from the buyer, the carrier is acting as agent on behalf of the seller in effecting an out-of-state delivery.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: August 6, 1986

NATURE OF ACTION:

Petition for refund of Wholesaling business and occupation (B&O) taxes assessed and paid on disallowed interstate sales deductions.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is engaged in the business of retailing and wholesaling food and restaurant supply items.

The Department of Revenue examined the taxpayer's business records for the period from October 1, 1981 through December 31, 1984. As a result of this audit, the Department issued Tax Assessment No. . . . on December 12, 1985 asserting excise tax liability in the amount of $ . . . and interest due in the amount of $ . . . for a total sum of $ . . . which has been paid in full.

The taxpayer's protest involves Schedule III of the audit report where interstate sales deductions were disallowed and were subjected to Wholesaling B&O tax. The auditor took this action because his examination of the documents provided by the taxpayer and other evidence acquired by the auditor showed that transactions involving . . . Freight and Consolidators, . . . as carrier led the auditor to believe that local delivery of the merchandise sold was effected by the taxpayer to out-of-state buyers because [the freight forwarder] was deemed to have acted on behalf of the purchasers.

The examined documents consisted of the following:

1. Straight Bill of Lading (. . .).

   This document retained by the taxpayer indicates that [the freight forwarder] received from the taxpayer, as shipper, the itemized sold goods for delivery to . . . as consignee, in . . . , Alaska.

2. Freight Bill (. . .).

   This document retained by [consignee] indicates that [the freight forwarder], as shipper and carrier, received the sold goods from the taxpayer. The sold goods were consigned to . . . in Alaska. The freight charges were to be collected from the buyer, . . . , by billing . . . at a . . . , Washington address.

The auditor reports that he talked to the receptionist for [the freight forwarder] and was told that [it] acted on behalf of the purchasers (. . .) in Alaska. The auditor also talked to Mr. . . . , vice president in charge of

traffic at [the freight forwarder], who specifically stated there was an agency relationship between [it] and [the buyer in Alaska]. Mr. . . . told the auditor the following:

1. [The freight forwarder] consolidates shipments for the purchasers.

2. [The freight forwarder] contracts with its affiliate, . . . , for shipment of the merchandise to Alaska. The affiliate then contracts with major sea carriers for the actual transportation of the merchandise to Alaska.

3. Freight is billed to and paid by the purchaser.

In protesting the assessment of the Wholesaling B&O tax, the taxpayer asserts that the auditor erroneously concluded that the taxpayer's delivery of the sold goods to a common carrier in Seattle was delivery to out-of-state customers in the state of Washington and was therefore subject to the B&O tax. The taxpayer provided the following information and explanation relevant to the sales in question.

. . . is the owner of [the buyer] in Fairbanks and Anchorage, Alaska. [The buyer], by telephone conference with the taxpayer, orders food supplies from the taxpayer. [The buyer] requires that the ordered goods be delivered to specific locations in Alaska. [The buyer] does not specify how the goods are to be delivered but leaves the delivery to the taxpayer-seller. [The buyer] authorizes shipment by C.O.D. and pays the collect charges when the goods are delivered at their destination in Alaska. [The buyer] has no contract with the carrier selected by the taxpayer.

The taxpayer prepares a shipper's order and selects a carrier (. . .) to deliver the goods to the buyer as consignee. The shipper's order, on execution by the carrier becomes a bill of lading (. . .) which provides that the carrier will deliver the goods itemized thereon to the destination in Alaska designated by the taxpayer-seller-shipper. The carrier, upon delivery in Alaska, collects the freight charge by billing [the buyer's owner] in . . . , Washington.

The taxpayer cites RCW 62A.2-401(2)(b) as providing that unless there is an agreement to the contrary, title to the goods sold passes to the buyer on tender at the destination where the contract requires delivery at the destination.

The taxpayer cites RCW 62A.2-509(1)(b) as providing that when goods are shipped by a carrier and are required to be delivered at a particular destination, the risk of loss

remains with the seller until the goods are tendered by the carrier to the buyer at the particular destination.

The taxpayer contends that it has complied with WAC 458-20-193A (Rule 193A) in that delivery of the goods takes place outside the state of Washington and is therefore entitled to the interstate deduction.

The taxpayer submitted an affidavit, . . . , from the general manager of [the freight forwarder] which furnishes the following information:

1. [It] accepts goods from the taxpayer for delivery to specific destinations in Alaska.

2. The taxpayer, as shipper, prepares a shipping order of the goods to be delivered to consignees in Alaska.

3. When [the freight forwarder] takes delivery of the goods from the taxpayer, [the freight forwarder] signs the taxpayer-shipper's order which then becomes a contract between the taxpayer-shipper and the carrier (. . .) in the form of a nonnegotiable bill of lading. This bill of lading instructs [the carrier] to deliver the goods to the consignee at a specific destination in Alaska and to collect the freight charges from the consignee.

4. [The freight forwarder-carrier] has no contract with the out-of-state consignee. Only the taxpayer-shipper designates the shipping destination and determines that . . . be used as the carrier.

The taxpayer submitted also an affidavit, . . . , from [the buyer's owner], which furnishes the following information:

1. [The buyer's owner] purchases food supplies from the taxpayer by telephone conference for its [business] in Alaska.

2. [The buyer's owner] does not specify how the goods will be delivered but leaves this decision to the taxpayer-seller.

3. [The buyer's owner] authorizes shipment by C.O.D. and pays collect charges to the carrier.

4. [The buyer's owner] has no contract with the carrier selected by the taxpayer.

The taxpayer explained that it sends the goods "freight collect" because the cost of the freight is not known when shipment is made. The carrier prepares a freight bill from

the bill of lading for the specific quantities of the shipment.

The issue in this case is whether the taxpayer has satisfied the requirements of Rule 193A to be entitled to the exemption from the B&O tax.

DISCUSSION:

Rule 193A in pertinent part provides:

BUSINESS AND OCCUPATION TAX

. . .

> Where the seller agrees to and does deliver the goods to the purchaser at a point outside the state, neither retailing nor wholesaling business tax is applicable. Such delivery may be . . . by a carrier for hire . . . [F]or proof of entitlement to exemption the seller is required to retain in his records documentary proof (1) that there was such an agreement and (2) that delivery was in fact made outside the state. Acceptable proof will be:
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> a. The contract or agreement AND
>
> b. if shipped by a for hire carrier, a waybill, bill of lading or other contract of carriage by which the carrier agrees to transport the goods sold, at the risk and expense of the seller, to the buyer at a point outside the state; . . .

While in this case there was no written agreement requiring the taxpayer-seller to deliver the goods to the buyer at points outside this state, we are cognizant that as a custom of commercial trade many purchase orders are placed without any written memorandum as to the delivery details. Established customers may call in orders or have standing orders of which the delivery details are reflected only on billing invoices and/or shipping documents.

[1] In essence, Rule 193A requires that a seller claiming an interstate exemption must factually establish that it delivered the goods to the purchaser at an out-of-state point. Where the goods are shipped by common carrier, it is required that the seller retain and furnish a bill of lading issued by the carrier constituting the contract of interstate carriage whereby the carrier agrees to transport the goods sold "at the risk and expense of the seller." The Department has always presumed that the party bearing the "risk and expense of shipment" is the one for whom the

carrier acts as agent. Indeed, the May 10, 1983 revision of Rule 193A replaced the words "as agent of the seller" with the words "at the risk and expense of the seller" to remove the uncertainty inherent in determining agency status.

Essentially, then, in order for the taxpayer-seller to perfect its entitlement to the exemption for interstate delivered sales in this situation, the taxpayer must demonstrate that it caused the goods to be shipped to the buyer's out-of state location by a for hire carrier acting for the taxpayer-seller. Obviously, if the carrier is acting for the buyer, delivery to the carrier in this state is tantamount to delivery to the buyer itself in this state. Less obvious, however, is how to determine for whom the carrier is acting as agent, that is, for whose risk and expense. The documentary proof examples described in Rule 193A (waybill, bill of lading, etc) are acceptable forms of proof, but not necessarily the acceptable form of proof. Where the documents do not strictly comply with the examples given in Rule 193A, the Department closely examines the substance of the transaction to determine for whom the carrier was acting as agent.

Turning to the documentation, . . . , submitted by the taxpayer, we find the following. The taxpayer, as seller and shipper, contracted with [the freight] to deliver the goods to . . . as consignee in Alaska. [The freight forwarder] issued a bill of lading to the taxpayer as receipt for the goods [and the freight forwarder] agreed to collect the freight charges from [the buyer]. [The freight forwarder] billed [the buyer] for the freight charges.

[2] Rule 193A does not preclude "freight collect" deliveries made by the taxpayer's selected carrier. Merely because [the freight forwarder] agreed with the taxpayer to bill [the buyer] for the freight charges because the cost of the freight is not known, does not mean that [it] was acting as agent for the buyer, [.] Whether the taxpayer prepays the freight charges or has the carrier collect the freight charges from the buyer, it is clear that the taxpayer was effecting an out-of-state delivery by selecting the carrier which acted on behalf of the taxpayer.

With respect to Rule 193A's "carrier transporting the good at the risk of the seller," RCW 62A.2-509 in pertinent part provides:

> (1) Where the contract requires or authorizes the seller to ship the goods by carrier
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> . . .

> (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery
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> . . .
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> (3) In any case not within subsection (1) . . ., the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

In this case, the taxpayer-seller was required to deliver the goods at a particular out-of-state destination. The risk of loss was with the taxpayer-seller until the goods were tendered by the carrier at the destination in Alaska to the buyer.

Accordingly, we believe that the taxpayer has met the "risk and expense" requirement of Rule 193A insofar as the documentary evidence establishes that the carrier was acting as agent on behalf of the taxpayer.

We do not give much credence to the receptionist's statement to the auditor that [the freight forwarder] acted on behalf of the purchasers. While [it's] vice president's statement to the auditor that there was an agency relationship between [the freight forwarder] and [buyer] carries some weight, [the] general manager's affidavit supported by the documentary evidence is more credible in showing that [the freight forwarder] was hired by the taxpayer and directed to deliver the goods out of state. Indeed, except for [the] billing for freight charges after delivery of the goods to . . . in Alaska, there was no contact nor contractual arrangement between [the freight forwarder and the buyer].

In the Washington State Board of Tax Appeals (BTA) case of Proctor Sales, Inc. v. Department of Revenue, BTA 80-7 (1980), and Thurston County Superior Court case of Broadview Farms Company v. Department of Revenue, No. 59863 (January 11, 1979), the B&O tax was held to apply on sales by Washington sellers to buyers in Alaska where the buyers specified, arranged and contracted with freight forwarders/consolidators to pick up the goods from the sellers in Washington and deliver the goods to the buyers in Alaska. Therefore, we do not find these cases persuasive authority to uphold the tax.

In the BTA case of Savage Wholesale Building Materials, Inc. v. Department of Revenue, BTA 81-18 (1981), the B&O tax was held not to apply on sales by a Washington seller to buyers in Alaska where the freight forwarders/consolidators were

hired by and acted on behalf of the seller to see that the goods were transported to Alaska and the seller retained bills of lading signed by the freight forwarders/consolidators. The fact situation in this Determination is similar to the fact situation in the BTA case.

While there is indication that [the freight forwarder] consolidates shipments, there is no evidence that [it] did freight consolidation at the request or direction of the out-of-state buyer.

We conclude that the taxpayer has satisfied the requirements of Rule 193A and Savage Wholesale Building Materials, Inc. v. Department of Revenue, supra, and thereby find that the taxpayer is entitled to exemption from the B&O tax on its interstate sales.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. This matter is being referred to the Department's Audit Section for computation of the amount of refund including applicable interest in line with the holding in this Determination and authorization of the issuance of the appropriate refund to the taxpayer.

DATED this 23rd day of July 1987.