BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	D E T E R M I N A T I O N
	No. 88-368
. . .	Registration No. . . .
	Tax Assessment No. . . .

RULE 193B: B&O TAX -- EXEMPTION -- INTERSTATE COMMERCE -- NEXUS. Infrequent visits to Washington customers by nonresident employees constitute sufficient local nexus to support taxation of sales where the visits involved either solicitation of sales or providing advice on the safe handling of the dangerous product sold by the taxpayer.

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: July 9, 1986

NATURE OF ACTION:

The taxpayer petitioned for a correction of a tax assessment issued as the result of an audit.

FACTS AND ISSUES:

Potegal, A.L.J. -- The taxpayer is an out-of-state corporation which manufactures chemical products. It has two categories of customers in Washington. One category includes two large . . . companies . . . in Washington. During the audit period the taxpayer sold . . . compounds to the . . .

companies who then blended the compounds into their products. The major portion of the taxpayer's sales into Washington were to the . . . companies. The other category of customers consists of smaller chemical manufacturers who incorporate the taxpayer's products into their own.

The taxpayer has no offices, property, or resident employees in Washington. Its presence in Washington during the audit period was through occasional visits by employees who were residents of California.

With respect to the . . . companies the visits were not sales calls. The taxpayer's employees discussed national trends in . . . content of . . . , how to handle the taxpayer's product, and safety considerations. (The taxpayer's product is very dangerous. It is highly explosive and is a class two poison.) Sales to the . . . companies were negotiated at a national level. None of the negotiations took place in Washington nor were the contracts signed here. Decisions on when and how much of the taxpayer's product is shipped to Washington are made by the . . . companies outside of this state.

With respect to the chemical manufacturers the visits were sales calls. During these visits orders were solicited, product specifications were discussed, and information about quantities and times of delivery was exchanged. The taxpayer's employees did not have the authority to accept the orders they received. The orders were approved by the taxpayer at an out-of-state location. The taxpayer's decision on an order was communicated back to the customer by the employee who took the order. If the customer decided to make the order it would either mail or phone it in.

Employees each made one or two trips into Washington per year. Each trip would last two or three days during which four to six customers would be contacted.

The taxpayer contends that its contacts with Washington are insufficient to support imposition of the business and occupation tax.

DISCUSSION:

RCW 82.04.4286 provides a business and occupation tax deduction for:

> Amounts derived from business which the state is prohibited from taxing under . . . the Constitution or laws of the United States.

Specific federal legislation establishes limits on the states' ability to impose a net income tax on income derived from interstate commerce. 15 USC Sec. 381 et seq. This legislation, however, does not apply in the context of the Washington business and occupation tax. Tyler Pipe v. Department of Revenue, 105 Wn. 2d 318 (1986). Instead, we are guided by the general provisions of the Constitution of the United States, particularly the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of Article I, Sec. 8, and the case law that has arisen thereunder.

WAC 458-20-193B presents a codification of the collective rationale of numerous court decisions. It defines the Constitutional limits upon this state's ability to impose its excise tax upon sales of goods originating in other states to persons in Washington. The rule provides in part:

> RETAILING, WHOLESALING. Sales to persons in this state are taxable when the property is shipped from points outside this state to the buyer in this state and the seller carries on or has carried on in this state any local activity which is significantly associated with the seller's ability to establish or maintain a market in this state for the sales. If a person carries on significant activity in this state and conducts no other business in this state except the business of making sales, this person has the distinct burden of establishing that the instate activities are not significantly associated in any way with the sales into this state. The characterization or nature of the activity performed in this state is immaterial so long as it is significantly associated in any way with the seller's ability to establish or maintain a market for its products in this state. The essential question is whether the instate services enable the seller to make the sales.
>
> Applying the foregoing principles to sales of property shipped from a point outside this state to the purchaser in this state, the following activities are examples of sufficient nexus for application of the business and occupation tax:

. . .

(3) The order for the goods is solicited in this state by an agent or other representative of the seller.

. . .

(5) Where an out-of-state seller, either directly or by an agent or other representative, performs significant services in relation to establishment or maintenance of sales into the state, the business tax is applicable, even though (a) the seller may not have formal sales offices in Washington or (b) the agent or representative may not be formally characterized as a "salesman."

. . .

Under the foregoing principles, sales transactions in which the property is shipped directly from a point outside the state to the purchaser in this state are exempt only if there is and there has been no participation whatsoever in this state by the seller's branch office, local outlet, or other local place of business, or by an agent or other representative of the seller.

Under the rule all the taxpayer's sales into Washington are subject to business and occupation tax.

The taxpayer solicits sales from the chemical manufacturers. Example (3) from the rule clearly states that this is sufficient local nexus to support taxation. Nexus having been established, the taxpayer has the burden of proving that its instate activities are not significantly associated with its sales into the state. Obviously, the solicitation of sales cannot be disassociated from the sales that result.

The visits to the . . . companies, while not amounting to solicitation, nevertheless were significant services in relation to the maintenance of sales into the state. In our opinion, giving advice on correct handling and safety procedures for a very dangerous product is an extremely significant service. Without such advice the . . . companies would be less likely to buy from the taxpayer. This local activity falls under example (5) of the rule. The fact

that the sales contracts were negotiated outside of Washington does not prove that the local activity was disassociated from the sales. To the contrary, at the conference the taxpayer indicated that the parties to the contracts understood that the taxpayer would provide these services as an implied part of its duties under the contracts.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 23rd day of September 1988.