

Cite as Det. No. 15-0340, 35 WTD 467 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
))	No. 15-0340
))	
...)	Registration No. . . .
))	

RCW 82.04.067(6); Rule 193 – SUBSTANTIAL NEXUS – ENGAGING IN BUSINESS. An out-of-state limited liability company has established substantial nexus with Washington State by employing a resident broker selling Taxpayer’s products to Washington distributors. The broker’s sales activities in Washington were significantly associated with Taxpayer’s ability to establish or maintain a market for Taxpayer’s products in Washington.

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.

Callahan, A.L.J. – An out-of-state limited liability company (“Taxpayer”) that sells gluten free bread products to Washington customers protests the Department of Revenue’s (the “Department”) tax assessment arguing that it does not have substantial nexus with Washington State. We deny the petition.¹

ISSUE

Under RCW 82.04.067(6) and WAC 458-20-193(“Rule 193”), does Taxpayer have substantial nexus with Washington State where Taxpayer employs a Washington broker selling Taxpayer’s products to Washington distributors?

FINDINGS OF FACT

Taxpayer is an out-of-state company that sells gluten free bread products to retailers and individual customers.² On January 28, 2014, the Department’s Compliance Division (“Compliance”) mailed Taxpayer a letter and a Washington Business Activities Questionnaire (“WBAQ”), inquiring about Taxpayer’s business activities in Washington for the period of January 1, 2007 through June 30, 2014.³ Taxpayer acknowledged in the WBAQ the following:

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

² . . . (last visited November 25, 2015).

³ Compliance response dated March 27, 2015, Exhibit 2.

- It makes wholesale sales to Washington distributors for resale.
- It does not have any employees or offices in Washington State.
- It delivers its products to Washington via common carriers.⁴

Upon receipt of the WBAQ, Compliance contacted Taxpayer to register with the Department.⁵ Taxpayer submitted a business license application dated, September 30, 2014, to the Department.⁶ Taxpayer acknowledged in its business license application that it employs an independent Washington broker selling Taxpayer's products to Washington distributors.⁷

Compliance determined that Taxpayer has substantial nexus with Washington State based on Taxpayer's answers in the WBAQ and in its business license application stated above. On January 29, 2015, Compliance issued an assessment for the period of October 1, 2012 through June 30, 2014 based on the sales figures for the period of October 2012 to June 2014 Taxpayer provided.⁸ The assessment was in the amount of \$. . . , which consisted of a small business credit of \$. . . , wholesaling business and occupation ("B&O") tax of \$. . . , litter tax of \$. . . , a delinquent penalty of \$. . . , interest of \$. . . , a 5% assessment penalty of \$. . . , and a 5% unregistered business penalty of \$

Taxpayer paid the assessment in full but timely petitioned the Department's Appeals Division for a refund. Taxpayer argues that it does not have substantial nexus with the state pursuant to Public Law 86-272. In addition, Taxpayer asserts that it is not subject to Washington State excise tax because it has no physical presence through employees or assets in the state.⁹ Taxpayer makes no arguments with respect to whether its broker's sales activities in Washington create substantial nexus with the state.

ANALYSIS

Washington imposes a B&O tax "for the act or privilege of engaging in business" in this state. RCW 82.04.220. Persons engaged in making sales at retail are subject to the B&O tax under the retailing tax rate on the gross proceeds of sales of the business. RCW 82.04.250. Persons engaged in making sales at wholesaling are subject to the wholesaling B&O tax. RCW 82.04.060. "Sale at wholesale" or "wholesale sale" means "[a]ny sale, which is not a sale at retail, of (a) Tangible personal property;..." RCW 82.04.060(1)(a).

Taxpayer's sales of its products to Washington customers will be subject to Washington taxes if it has substantial nexus with the state and the sales occur in Washington. RCW 82.04.067(6); Rule 193(1)(a).¹⁰

⁴ *Id.*

⁵ Compliance response dated March 27, 2015.

⁶ Compliance response, Exhibit 3.

⁷ *Id.*

⁸ Compliance response, Exhibit 4. The sales figures represent the sales Taxpayer made to Washington distributors . . . and

⁹ Taxpayer's petition dated February 28, 2015.

¹⁰ Laws 2015, 3rd sp.s. ch. 5, § 204, amended RCW 82.04.067, effective September 1, 2015. RCW 82.04.067(6) (2015) provides:

Substantial nexus with Washington State:

RCW 82.04.067(6) provided the nexus standard for retailing and wholesaling activities:

[A] person is deemed to have a substantial nexus with this state if the person has a physical presence in this state, which need only be demonstrably more than a slightest presence. For purposes of this subsection, a person is physically present in this state if the person has property or employees in this state. A person is also physically present in this state if the person, either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in this state.

RCW 82.04.067(6)(2010) (emphasis added).

The Department amended Rule 193 in 2015 to provide further guidance on how Washington's B&O tax and retail sales taxes apply to interstate sales of tangible personal property. Rule 193(102)(d), in relevant part, provides:

Nexus. A person who sells tangible personal property is deemed to have nexus with Washington if the person has a physical presence in this state, which need only be demonstrably more than the slightest presence. RCW [82.04.067\(6\)](#).

(a) **Physical presence.** A person is physically present in this state if:

- (i) The person has property in this state;
- (ii) The person has one or more employees in this state; or

(6)(a) Subsections (1) through (5) of this section only apply with respect to the taxes on persons engaged in apportionable activities as defined in RCW 82.04.460 or making wholesale sales taxable under RCW 82.04.257(1) or 82.04.270. For purposes of the taxes imposed under this chapter on any activity not included in the definition of apportionable activities in RCW 82.04.460, other than the business of making wholesale sales taxed under RCW 82.04.257(1) or 82.04.270, a person is deemed to have a substantial nexus with this state if the person has a physical presence in this state during the tax year, which need only be demonstrably more than a slightest presence.

(b) For purposes of this subsection, a person is physically present in this state if the person has property or employees in this state.

(c)(i) A person is also physically present in this state for the purposes of this subsection if the person, either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in this state.

(ii) A remote seller as defined in section 202 of this act is presumed to be engaged in activities in this state that are significantly associated with the remote seller's ability to establish or maintain a market for its products in this state if the remote seller is presumed to have a substantial nexus with this state under section 202 of this act. The presumption in this subsection (6)(c)(ii) may be rebutted as provided in section 202 of this act. To the extent that the presumption in section 202 of this act is no longer operative pursuant to section 205 of this act, the presumption in this subsection (6)(c)(ii) is no longer operative. Nothing in this section may be construed to affect in any way RCW 82.04.424, 82.08.050(11), or 82.12.040(5) or to narrow the scope of the terms "agent" or "other representative" in this subsection (6)(c).

A "remote seller" means "a seller that makes retail sales in this state through one or more agreements described in subsection (1) of this section, and the seller's other physical presence in this state, if any, is not sufficient to establish a retail sales or use tax collection obligation under the commerce clause of the United States Constitution." Laws 2015, 3rd sp.s. ch. 5, § 201.

(iii) The person, either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in Washington.

...

(d) **In-state activities.** Even if a person does not have property or employees in Washington, the person is physically present in Washington when the person, either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in Washington. It is immaterial that the activities that establish nexus are not significantly associated with a particular sale into this state.

For purposes of this rule, the term "agent or other representative" includes an employee, independent contractor, commissioned sales representative, or other person acting either at the direction of or on behalf of another.

A person performing the following nonexclusive list of activities, directly or through an agent or other representative, generally is performing activities that are significantly associated with establishing or maintaining a market for a person's products in this state:

(i) Soliciting sales of goods in Washington;

...

(iv) Delivering products into Washington other than by mail or common carrier;

...

(vii) Performing activities designed to establish or maintain customer relationships including, but not limited to:

(A) Meeting with customers in Washington to gather or provide product or marketing information, evaluate customer needs, or generate goodwill; or

(B) Being available to provide services associated with the product sold (such as warranty repairs, installation assistance or guidance, and training on the use of the product), if the availability of such services is referenced by the seller in its marketing materials, communications, or other information accessible to customers.

(Emphasis added.)

Nexus may be established through the activities of the seller's own employees, or the activities of independent contractor representatives. RCW 82.04.067(6); Rule 193(102); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987). The activities of the seller's employees or representatives need not involve the solicitation of sales. Det. No. 14-0383, 34 WTD 265 (2015); Det. No. 00-003, 19 WTD 685 (2000). Any activity performed in this state on behalf of the seller that is significantly associated with the seller's ability to establish and maintain a market in this state for the sales establishes nexus over the seller, [and] whether the activities generate sales are not determinative. *Space Age Fuels, Inc. v. Washington*, 315 P.3d 604, 178 Wn. App. 756 (2013); *Lamtec Corp. v. Dep't of Revenue*, 170 Wn.2d 838, 850-51, 246 P.3d 788, 795 (2011); *Standard Pressed Steel Co. v. Dep't of Revenue*, 419 U.S. 560 (1975).

Here, Taxpayer has no offices or Washington employees in this State. However, Taxpayer acknowledged in its business license application that it employs a Washington broker that makes sales to the distributors in Washington. Taxpayer's broker is its representative in this State. Rule 193(102)(d). Rule 193(102)(d) provides that when a person's representative solicits sales of goods in Washington, substantial nexus is established for B&O tax purposes. Further, when the representative performs significant activities "designed to establish or maintain customer relationships," such as meeting with customers in Washington or being available to provide services associated with the products sold, substantial nexus is established for the same excise tax purposes. Rule 193(102)(d). It is clear that the broker's sales activities, i.e., making sales to Washington distributors, are "significantly associated with [Taxpayer's] ability to establish or maintain a market for [Taxpayer's] products in Washington" that create substantial nexus with the State under RCW 82.04.067(6); Rule 193(102)(d). *See* Det. No. 98-134, 18 WTD 85 (1999).

Taxpayer also argues that it is not subject to excise tax pursuant to Public Law 86-272. 15 U.S.C. 381 (Public Law 86-272) is not applicable here because that federal law applies only to taxes that are based on net income. Rule 193(101). Rule 193(101) provides "Public Law 86-272 (15 U.S.C. Sec. 381 et seq.) applies only to taxes on or measured by net income. Washington's B&O tax is measured by gross receipts. Consequently, Public Law 86-272 does not apply." *See* Det. No. 01-9915, 22 WTD 202 (2003).

We conclude that Taxpayer's sales made to Washington are subject to the wholesaling B&O tax, and litter tax in Washington. RCW 82.04.060; Rule 193(103); RCW 82.19.010; WAC 458-20-243. We deny Taxpayer's petition.

DECISION AND DISPOSITION

We deny Taxpayer's petition.

Dated this 9th day of December, 2015.