Cite as 10 WTD 133

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. 90-348
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .

[1] RULE 193B: INTERSTATE SALES OF GOODS TO PERSONS IN WASHINGTON -- B&O TAX -- NEXUS -- DISASSOCIATION -- BURDENS OF PROOF. The state must establish jurisdiction to tax interstate sales by out-of-state sellers. Once established, the burden shifts to the seller to disassociate some or any of its sales from its significant instate activities. Accord: Chicago Bridge v. Dep't. of Revenue, 98 Wn.2d 814, 659 P.2d 463 (1983), Det. No. 87-69, 2 WTD 347 (1987), WAC 458-20-193B.

[2] RULES 193B AND 103: INTERSTATE SALES OF GOODS TO PERSONS IN WASHINGTON -- NEXUS -- DELIVERY -- B & O TAX -- SALES TAX. For excise tax purposes the taxability of sales transactions is governed by the Revenue Act and the rules respecting that act (in this matter Rules 193B and 103), not the Uniform Commercial Code. Accord: Det. No. 86-161A, 2 WTD 397 (1987).

[3] RULE 193B: COLLECTING SALES/USE TAXES. The out-of-state vendor must collect sales/use taxes from its Washington customers where 1) the vendor owes B & O tax or 2) its salespersons/agents regularly solicit orders in Washington or 3) the vendor is registered with the Department of Revenue. Accord: Det. No. 87-69, 2 WTD 347 (1987).

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: . . .

NATURE OF ACTION

The taxpayer petitioned for a correction of an assessment of retail sales/use tax which resulted from an audit.

FACTS

De Luca, A.L.J. -- The audit period was from . . . through . . . . In a post audit adjustment, the auditor assessed the taxpayer $ . . . in retail sales tax, $ . . . in Retailing business and occupation (B & O) tax, plus $ . . . in interest and $ . . . in penalties for a total of $ . . . . The auditor has stated credit adjustments to the retail sales tax will be allowed if the taxpayer provides credible evidence showing its customers have paid use tax on their purchases of the taxpayer's products. The taxpayer paid $ . . . of the assessment in July 1990 and continues to collect and submit documentation from its buyers showing that they have paid use tax.

The taxpayer is a foreign corporation based in a Middle Atlantic state. It manufactures complex medical equipment there. The taxpayer has resident salespersons in Washington according to the auditor's report and the Washington Business Activities Statement prepared by the taxpayer. The salespersons solicit orders here for the taxpayer's products and the taxpayer has sold such equipment to several Washington hospitals. It does not maintain a stock of goods in this state.

ISSUES:

Is the out-of-state taxpayer required to pay retailing B & O tax on all sales of its products to its Washington customers?

Is the taxpayer required to collect retail sales/use taxes from its Washington customers and remit the taxes to the State of Washington?

TAXPAYER'S EXCEPTIONS:

The taxpayer quotes WAC 458-20-193A (Rule 193A) as authority for its contention that "the retail sales tax does not apply when the seller agrees to, and does, deliver property to the buyer outside the state, or delivers the same to a for hire carrier consigned to the purchaser outside the state". The taxpayer argues that applying the sales tax "would be in direct conflict with interstate commerce" and inconsistent with Rule 193A.

The taxpayer also cites Section 2-509(1)(b) [RCW 62A.2-509(1)(b)] of the U.C.C. The goods were shipped from the taxpayer's out-of-state location to its Washington customers by common carrier. The taxpayer claims title passed to the customers "upon delivery to the carrier".

The taxpayer further cites McLeod v. Dilworth Co., 322 U.S.327 (1944) to support its contention "it is clear that a tax cannot be

collected by the buyer's state on orders solicited in one state, accepted in another, and shipped at the purchaser's risk."

Finally, the taxpayer concedes "[w]e will, however, pay the Business and Occupation Tax to the State of Washington for those sales directly solicited."

DISCUSSION

The controlling rules are WAC 458-20-193B and WAC 458-20-103, not Rule 193A. Rule 193A is inapplicable because it pertains to sales of goods originating in Washington to persons in other states. The situation at issue conforms to Rule 193B - sales of goods originating in other states to persons in Washington. Moreover, the taxpayer clearly is doing business within Washington. It has salespersons who work in the state and it is registered with the Department. The governing statutes are RCW 82.04.220 (B & O tax) RCW 82.08.050 (sales tax) and RCW 82.12.040 (use tax).

Rule 193B pertains both to the B & O tax and the sales tax. The rule provides in part for the B & O tax:

> 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.
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> 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 local nexus for application of the business and occupation tax:
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> ***
>
> (3) The order for the goods is solicited in this state by an agent or other representative of the seller.

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> 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.

[1] Thus, the rule requires the state to establish jurisdiction to tax interstate sales by out-of-state sellers. Once established, the rule places the burden on the taxpayer to show that its in-state activities are not significantly associated in any way with the sales to the customers. Determination No. 87-69, 2 WTD 347 (1987). Accordingly, the Washington Supreme Court has stated

> "..., once a corporation enters a state to do local business and has submitted itself to the taxing power of the state, it is the corporation's burden to exempt itself from the local tax by showing no in-state activities were associated with the interstate business. [citations]. To meet this burden, a corporation must show that its in-state services were not decisive in establishing and holding the market.

Chicago Bridge v. Dep't of Revenue, 98 Wn.2d 814, 822, 659 P.2d 463 (1983).

The state has established its jurisdiction to tax the taxpayer because of the actions of the resident employees. Therefore, all of the taxpayer's sales to its Washington customers are subject to the B & O tax whether directly solicited or not unless the taxpayer can show its in-state activities are not associated with certain sales which it may claim are exempt. 2 WTD 347. However, the taxpayer has not stated in its petition that it disputes the B & O tax assessment on any particular sales. Further, it did not present any evidence disassociating certain sales from its instate activities.

[2] The taxpayer cited RCW 62A.2-509(1)(b) to show title to the goods passed outside Washington. Therefore, it attempted to use the U.C.C. provision as the element to determine whether tax liability arises. However, the Department has held that Rule 193B and Rule 103 govern whether a taxpayer's activities are subject to B & O and sales taxes, rather than U.C.C. provisions regarding the passage of title. See Determination No. 86-161A, 2 WTD 397 (1987). Rule 103 states in part:

> For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this state when the goods sold are delivered to the buyer in this state, irrespective of whether title to the goods passes to the buyer at a point within or without this state.

By citing and quoting RCW 62A.2-509(1)(b), the taxpayer, in effect, concedes the deliveries of its products occur in Washington. The statute reads:

> (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.

The statute is clear that delivery of goods shipped to a particular destination occurs when the goods are tendered to the buyer at that destination. See J. White and R. Summers, Handbook of the Law under the Uniform Commercial Code Sec. 5-2 at 180 (2d ed. 1980). In the present matter, the taxpayer shipped its goods by common carrier to particular destinations in Washington where they were tendered to the customers for delivery.

As noted, Rule 193B also pertains to the collection of sales and use taxes. The rule provides in part:

> Retail sales tax must be collected and accounted for in every case where business and occupation tax is due as outlined above.
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> The following sets forth the conditions under which out-of-state vendors are required to collect and remit the retail sales tax or use tax on deliveries to customers in this state. It conforms to the recommended jurisdiction standards of the multistate tax commission.
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> JURISDICTION STANDARD. A vendor is required to pay or collect and remit the tax imposed by chapter 82.08 or 82.12 RCW if within this state he directly or by any agent or other representative:
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> ***
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> (3) Regularly solicits orders whether or not such orders are accepted in this state, unless the activity in this state consists solely of advertising or of solicitation by direct mail;

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> All vendors who are registered with the department of revenue are required to collect use tax or sales tax from all persons to whom goods are sold for use in this state irrespective of the absence of local activity on any given sale.

[3] The rule provides several reasons why the taxpayer must collect sales tax from its customers or be held liable for it. First, the taxpayer concedes it owes B & O tax. Under the rule the sales tax must be collected and accounted for where the B & O tax is due. And we hold that B & O tax is due on all sales. Second, the taxpayer's salespersons regularly solicit orders in Washington. Under the rule, it does not matter whether the orders are accepted in this state. Third, the taxpayer is registered with the Department of Revenue. 2 WTD 347.

DECISION AND DISPOSITION

The taxpayer's petition is denied.

DATED this 26th day of September 1990.