

Cite as 10 WTD 117

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

In the Matter of the Petition	)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment of	)	
	)	No. 90-322
	)	
. . .	)	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. 86-295, 2 WTD 11 (1986), WAC 458-20-193B.

[2] **RULE 193B:** B & O TAX -- INTERSTATE SALES -- NEXUS -- RESIDENT EMPLOYEES. Washington has sufficient local nexus to tax income from sales by an out-of-state vendor who sold its products to Washington distributors when the vendor had employees residing in Washington. The employees supported the distributors by giving technical advice. Accord: Standard Pressed Steel Co. v. Wash. Revenue Dept., 419 U.S. 560 (1975), Chicago Bridge v. Dep't. of Revenue, 98 Wn.2d 814, 659 P.2d 463 (1983), Det. No. 88-368, 6 WTD 417 (1988).

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.

NATURE OF ACTION

The taxpayer petitioned for a correction of an assessment of business and occupation Tax (B & O) which resulted from an audit.

FACTS

De Luca, A.L.J. -- The audit period was from . . . through . . . . The assessment was for \$ . . . . The taxes amount to \$ . . . (\$ . . . in Wholesaling B & O taxes and \$ . . . in Service B & O

taxes), plus \$ . . . in interest and an \$ . . . penalty. The assessment remains unpaid.

The taxpayer is a foreign corporation based in Ohio. It manufactures welding equipment and accessories there. The taxpayer does not have an office in Washington. It does not maintain a local stock of goods in this state.

The taxpayer has approximately 30 distributors of its products within Washington. The distributors apparently are independently owned and operated companies. Each distributor has a written agreement with the taxpayer for a non-exclusive distributorship. Among other matters, the agreement provides the following. The distributors "shall aggressively promote the sale" of taxpayer's products. Accordingly, they shall designate themselves as authorized distributors and may use the taxpayer's trademark and trade name in advertising, displaying and selling the products. The taxpayer provides the distributors with its catalogs and promotional materials.

The distributors may not establish additional places of business for the sale of the taxpayer's products without first obtaining written approval from the taxpayer. They are required to maintain sufficient quantities of the taxpayer's products to meet the agreement's sales and service responsibilities. They must maintain a service department with trained personnel and adequate supplies of the taxpayer's parts. The distributors submit their orders to the taxpayer at its Ohio offices or authorized warehouses. The taxpayer bills them from its headquarters. The products are sent by common carrier from Ohio to the distributors. The taxpayer pays the freight while the distributors bear the risk of shipment.

The taxpayer also has two salesmen residing in Washington. Each one manages a district which includes Washington among other states. According to the taxpayer, the salesmen's "main responsibility is to train and lend technical support to distributors and when needed to customers." For example, "if the distributor has problems operating the equipment or needs help setting up the equipment, he will contact the district manager and he will lend technical support wherever possible." Additionally, the salesmen have their own customers exclusive of the distributors. The taxpayer states its salesmen do not quote prices to or take orders from the distributors or the distributors' customers.

The auditor found the salesmen's instate activities, including soliciting sales, sufficient local nexus to apply the B & O tax.

#### ISSUE:

Whether the taxpayer can disassociate the sales of goods to its Washington distributors from its business activities in this state.

## TAXPAYER'S EXCEPTIONS:

The taxpayer concedes Washington has sufficient local nexus to tax income from the sales by its resident employees. However, it disputes the B & O tax assessed against income from sales to the distributors. The taxpayer contends its salesmen do not materially participate in the sales to the distributors. As noted, the salesmen do not solicit or take orders from the distributors. They do not quote prices to the distributors. Instead, the distributors submit their orders directly to the taxpayer's Ohio headquarters. Furthermore, the taxpayer bills the distributors from its headquarters.

## DISCUSSION:

Washington's B&O tax is imposed on every person for the act or privilege of engaging in business activities in this state. The tax is measured by the application of rates against the value of products, gross proceeds of sales, or gross income of the business. RCW 82.04.220. "Business" includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly. RCW 82.04.140. Moreover, there is a requirement for persons engaged in any business for which a tax is imposed under the Revenue Act to register with the Department of Revenue. WAC 458-20-101.

The taxpayer clearly is doing business within Washington. It has salesmen who reside and work in the state. It is registered with the Department.

Rule 193B governs whether sales of goods originating in other states to persons in Washington are subject to the B & O tax. The rules 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 local nexus for application of the business and occupation tax:

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(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."

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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 distributors. Determination No. 86-295, 2 WTD 11 (1986). 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 Department of Revenue does not require a vendor's representative to live in Washington, solicit, or take orders in the state before the tax can apply. Significant activity which establishes or maintains sales controls. Such activity by a

representative or agent does not have to be the only or most important factor, but it is significant if it has an impact on sales. For example, the Department has held infrequent visits to Washington customers by nonresident employees, who are not salespersons, constitutes sufficient local nexus to allow taxation of income from sales. See Determination No. 88-368, 6 WTD 417 (1988). In that matter, the employees provided advice to the customers regarding the safe handling of a product. Such activity was important in maintaining sales into the state.

Furthermore, the U. S. Supreme Court upheld Washington's B & O tax against constitutional challenges in Standard Pressed Steel Co. v. Wash. Revenue Dept., 419 U.S. 560 (1975). The taxpayer argued its in-state activities were too inconsequential to impose the tax against it. The taxpayer was an airplane parts manufacturer based in Pennsylvania. The taxpayer had only one Washington resident employee. He was an engineer whose office was in his home. He did not take orders from his Washington customer. Instead, he consulted with that customer regarding its anticipated product needs and followed up any difficulties in the use of the product after delivery. The Supreme Court found nexus and dismissed the challenge as "frivolous". The Court stated: "[f]or appellant's employee, Martinson, with a full-time job within the State, made possible the realization and continuance of valuable contractual relations between appellant and Boeing." 419 U.S. at 562.

[2] In the present matter, the taxpayer had considerable sales to its Washington distributors during the subject years. The taxpayer also had employees residing in Washington then. The employees supported and consulted the distributors regarding their technical questions about setting up or operating the taxpayer's products. Such activity was significantly associated with the seller's ability to establish or maintain a market for its products in this state. Rule 193B, Standard Pressed Steel, and 6 WTD 417, supra. As the Washington Supreme Court stated in Chicago Bridge, supra,: "[t]he value of the goodwill imparted by local personnel and the value of their presence should problems arise cannot be underestimated...." 98 Wn.2d at 822. The taxpayer has not met its burden of disassociating the sales to its distributors from its in-state activities.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 20th day of August, 1990.