

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

In the Matter of the Petition )	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
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For Refund of )	
)	No. 87-232
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. . . )	Registration No. . . .
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[1] **RULE 246:** B&O TAX -- EXEMPTION -- DIRECT SELLER'S REPRESENTATIVE -- EXCLUSIVITY OF SALES. A person selling both by direct mail and by direct seller's representatives is entitled to the exemption provided by RCW 82.04.423 if the direct mail sales are disassociated from any local activity.

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 refund of business and occupation tax paid on sales made to Washington residents since August 23, 1983, the effective date of RCW 82.04.423.

FACTS:

Potegal, A.L.J. -- The taxpayer is a manufacturer of shoes. Its plant, offices, employees, and tangible property are all located outside of Washington. It does not own or lease real property in this state. It does not maintain a stock of goods in this state. It is not a corporation incorporated under the laws of Washington.

Its method of making sales to customers in Washington is a hybrid of direct sales and direct mail business. Sales are all connected in some way with catalogs sent twice a year to addressees throughout the United States. Most sales occur when catalog recipients place orders for themselves directly from the catalog. Other sales, the sales in question in this petition, occur when catalog recipients act as independent salespersons by using order forms found in the catalog to order shoes for their customers. The catalog and the order forms provide that such salespersons are independent contractors and that they are paid on a commission basis.

In 1980 the Department ruled that the direct mail sales were not subject to business and occupation tax because they were disassociated from the local activity engaged in by the taxpayer, i.e., the sales effort of the independent salespersons. The only business and occupation tax paid by the taxpayer since that ruling has been on sales made by the independent salespersons.

#### DISCUSSION:

The direct seller's representative exemption is found at RCW 82.04.423. That law is implemented by WAC 458-20-246 (Rule 246), a duly adopted rule of the Department of Revenue which, by virtue of RCW 82.32.300, has the same force and effect as the law. That rule provides in part:

A "direct seller's representative" is a person who (a) buys "consumer products" on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or other than in a permanent retail establishment or (b) sells or solicits the sale of, "consumer products" in the home or other than in a permanent retail establishment. In order to be considered a "direct seller's representative" a person must also show that:

1. Substantially all of the remuneration paid, whether or not paid in cash, for the performance of services is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and
2. The services performed are performed pursuant to a written contract between such person and the person for whom the services are performed and such

contract provides that the person will not be treated as an employee with respect to such services for federal tax purposes.

#### BUSINESS AND OCCUPATION TAX

WHOLESALE AND RETAILING. The business and occupation tax does not apply to an out-of-state seller making wholesale or retail sales to or through a "direct seller's representative." The out-of-state seller must show that it is represented in this state by a "direct seller's representative," as defined above. In addition, the out-of-state seller must also show that it:

1. Does not own or lease real property within this state;
2. Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business;
3. Is not a corporation incorporated under the laws of this state; and
4. Makes sales in this state exclusively to or through a "direct seller's representative."

Thus, a representative who solicits sales of "consumer products" in this state, other than in a permanent retail establishment, and also meets the other requirements of the law as set forth above, qualifies as a "direct seller's representative." If the out-of-state seller and the in-state representative can factually establish compliance with all of the above listed requirements, the out-of-state seller is exempt from business and occupation tax.

The exemption is available only where an out-of-state seller is present in this state and represented exclusively by a "direct seller's representative." If an out-of-state seller makes wholesale or retail sales of "consumer products" in Washington to or through a "direct seller's representative" and also has a branch office, local outlet, or other local place of business, or is represented by any other employee, agent, or other

representative, no portion of the sales are exempt from business and occupation tax.

We find that, based upon the evidence presented, the taxpayer is entitled to the direct seller's exemption from business and occupation tax. It meets all requirements for exemption discussed in the rule. As noted above, the taxpayer does not own or lease real property in the state, does not maintain a stock of goods in the state, and is not incorporated under the laws of this state. The remaining requirement is that it make sales in this state exclusively to or through a direct seller's representative.

To be a direct seller's representative a person must be paid based on sales rather than hours worked. That is exactly how the taxpayer's salespersons are paid. Also, the services performed by the salespersons must be pursuant to a written contract which provides that the salespersons are not employees for federal tax purposes. The catalog and order forms, which must be signed by salespersons when placing an order, explain the conditions under which salespersons are paid for their services and specifically provide that salespersons are independent contractors and not employees. We find the catalogs and executed orders to be written contracts governing the services performed by independent contractors rather than employees. The taxpayer clearly sells through direct seller's representatives.

The final element needed to gain the exemption is that sales be made exclusively to or through a direct seller's representative. A very technical argument could be made that sales in Washington are not made exclusively through direct seller's representatives. Some sales occur when Washington customers mail orders directly to the taxpayer out-of-state. In response the taxpayer ships shoes into Washington. Because delivery is in Washington the sales could be deemed to take place in Washington. WAC 458-20-103. However, to adopt this approach would lead to the incongruous result of the taxpayer losing an exemption for one type of sale solely because it made another type of sale which neither involved any in-state activity nor was subject to business and occupation tax.

[1] The Department does not take that approach. The Department's position is that the direct seller's representative exemption will not be lost merely because the seller makes other, constitutionally exempt sales into Washington.

While we have ruled favorably on the question of business and occupation tax liability, we wish to emphasize that the taxpayer remains liable to collect sales tax on all of its sales to Washington customers. WAC 458-20-193B.

#### DECISION

The taxpayer's petition is granted. A refund, with interest, of business and occupation tax paid on sales occurring since August 23, 1983 will be issued to the taxpayer.

DATED this 10th day of July 1987.