Cite as 10 WTD 429 (1990).

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. 91-075
. . .	Registration No. . . .
	. . ./Audit No. . . .

[1] RULE 193B -- B&O TAX -- NEXUS -- TERMINATION OF NEXUS ACTIVITY -- SUBSEQUENT SALES. Nexus exists where taxpayer conducts or has conducted activities in this state which are significantly associated with taxpayer's ability to establish and maintain a market for the sales. Once that nexus is established, the Department will presume that subsequent sales to the same buyers are related to that nexus and taxable even though the nexus-creating activity may be terminated. Accord: Det. No. 87-286, 4 WTD 51 (1987); citing Det. No. 86-295, 2 WTD 11 (1986), ETB 506.04.193B.

[2] RCW 82.08.050: RETAIL SALES TAX -- UNCOLLECTED -- SELLER'S PERSONAL LIABILITY -- TAX PAID BY PURCHASER DIRECTLY TO THE STATE -- DOCUMENTATION. Where the seller alleges that use and/or deferred sales tax was paid by the purchaser directly to the state of Washington, the burden is on the seller to provide documentation substantiating that fact. Unsubstantiated assertions by either the seller or the purchaser that tax was paid on a tax return or audit assessment are insufficient.

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 TELEPHONE CONFERENCE: . . .

NATURE OF ACTION:

A taxpayer protests additional taxes and interest assessed in an audit report.

FACTS AND ISSUES:

Okimoto, A.L.J. -- [Taxpayer] is a distributor of [product], and [product] display and packaging materials whose main offices are located in . . ., Florida. A Department of Revenue (Department) auditor examined the taxpayer's books and records for the period January 1, 1986 through December 31, 1989. As a result of this audit examination, Document No. . . . was issued . . . for additional taxes and interest in the amount of $ . . . . The taxpayer has protested the entire amount assessed and it remains due.

TAXPAYER'S EXCEPTIONS:

The taxpayer explained its objections to the assessment in its petition and the subsequent teleconference as follows:

Schedule II: Tax Due on Unreported Wholesale Sales

In this schedule, the auditor assessed Wholesaling B&O tax on unreported sales to Washington customers which occurred during the period when the taxpayer had a salesperson residing within the state of Washington.

Although the taxpayer concedes that it had nexus with the state of Washington prior to [March of 1989], it argues that this nexus was terminated thereafter because its only in-state employee left the company payroll. The taxpayer explained in its petition and at the teleconference, that it does not maintain a formal Northwest sales office, but that its Northwest office is "simply located where the sales person who staffs the office happens to make his or her home." [In March of 1989] the Washington-based sales person for the Northwest region terminated employment with the taxpayer. A new salesperson for the area was not hired to replace him until March of 1990 and although she is also based in Washington, the taxpayer argues that she does not have to be.

Basically, the taxpayer argues that when the Washington-based salesperson quit [in March of 1989], the company gave up any direct connection with the state of Washington. It contends that during this interim period, it had no nexus, and that nexus was not re-established until March of 1990 when the

taxpayer hired a new Washington-based salesperson. The taxpayer argues that nexus, once attained, does not remain with a company for the remainder of its existence and that the underlying facts and circumstances must be examined. Although the taxpayer concedes that its Washington customers continued to order goods throughout 1989, it states that these orders were made by telephone and delivered by common carrier. The taxpayer argues that after the salesperson was terminated, [taxpayer] simply did not have the presence in Washington that National Bellas Hess requires.

Schedules III & IIIA: Tax Due on Unreported Retail Sales

In this schedule, the auditor assessed Retailing B&O and retail sales tax on unreported retail sales of [product] displays made to Washington retail [product] stores. Schedule IIIA assesses tax on these unreported retail sales on an actual basis for all of taxpayer's accounts that exceeded $10,000 in annual sales. No projection was made for these accounts.

Schedule III examines display sales made to accounts that had less than $10,000 in annual sales. In this schedule, the auditor used 1988 as a test year, and projected those results to the remaining years in the audit period.

The taxpayer objects to the projection in Schedule III because it contends that the projection results in an inflated and inaccurate taxable amount. First, the taxpayer argues that by excluding accounts over $10,000 in annual sales, too little weight is being accorded to the out-of-state sales. Second, because both the taxpayer and the auditor agreed that 1988 would be the test period, then any test projection should be based on 1988 display sales for all accounts and not just those under $10,000 in annual sales.

In the alternative, the taxpayer asks that the tax be limited to errors actually found.

Finally, the taxpayer argues that some Washington purchasers may have already unilaterally paid use tax directly to the state on the display materials purchased from the taxpayer. The taxpayer argues that the state should not collect the retail sales/use tax twice on the same transaction.

DISCUSSION:

[1] WAC 458-20-193B (Rule 193B) is the Department of Revenue's duly adopted rule that describes the types of local

activities that create sufficient nexus for Washington to subject an out-of-state company to its taxing jurisdiction. The rule states in part:

> 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:
> ...
> (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." (Emphasis ours)

Rule 193B clearly provides that because the taxpayer's sales of . . . products were solicited by an in-state employee, Washington has sufficient nexus to subject the taxpayer's sales to its taxing authority.

Nor is it significant that the taxpayer did not have an in-state employee soliciting sales within the state for a portion of the audit period. Rule 193B further states:

> 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. (Emphasis ours)

The rule clearly provides that nexus is not severed merely because a taxpayer temporarily removes from the state the activity creating the nexus. This phenomenon has been referred to as "hit-and-run nexus." Case law and Department precedent hold that no taxpayer is entitled to such a subjective approach to tax liability and that nexus for one sale is nexus for all sales unless certain sales are

specifically divorced from the activity which created the nexus.

> When an out-of state seller makes multiple sales to buyers in this state and B&O tax is assessed on the first sale because there is sufficient nexus, the Department will presume that a subsequent sale to the same buyer is sufficiently related to the first sale and tax it as well. ...

Det. No. 86-295, 2 WTD 11, 16 (1986).

Accordingly, we must deny the taxpayer's petition on this issue.

Schedules III & IIIA: Tax Due on Unreported Retail Sales

Although we do not agree with the taxpayer that the projection in Schedule III results in an inflated taxable amount, we will nevertheless acquiesce to the taxpayer's request that its tax liability be computed on an actual basis. We have contacted the auditor and he has consented to revise the assessed amounts to an actual basis provided that the appropriate information is made available to him. Accordingly, the taxpayer is instructed to list the amounts, invoice numbers, and purchasers of all [product] display sales made to Washington accounts of less than $10,000 in annual sales for the years 1986, 1987, and 1989 and submit these figures to the auditor for verification by June 30, 1991. If these figures are not submitted to the auditor by that date, the taxpayer's petition will be denied on this issue and the projected assessment will be sustained.

[2] In regards to the taxpayer's contention that some purchasers may have already paid use tax directly to the state of Washington on these sales, we find it to have considerable merit. RCW 82.08.050 clearly provides that the retail sales tax shall be paid by the "buyer to the seller" and it is only in those cases where the buyer fails to collect the tax, that the seller is held "personally" liable for payment of the tax to the state. The seller's liability is secondary and if the taxpayer can document that the purchaser has paid the appropriate tax directly to the state of Washington on either its state excise tax returns or during the course of an audit examination, these amounts shall be deleted from this assessment.

The burden of documentation is entirely on the taxpayer, however, and it is not an easy one. Proper documentation that

a purchaser has paid use tax directly to the state of Washington on an excise or use tax return shall substantially comply with the attached "Certification of Use and/or Deferred Sales Tax Paid" form[1]. In addition, if the purchaser claims that the tax was paid in an audit assessment, the taxpayer should obtain the following additional documentation.

1. The period covered by the audit assessment;
2. The title and schedule number of the schedule where the tax was assessed;
3. Detail showing that the individual invoices have been included in the audit;
4. If the tax was assessed on a sample basis, a copy of the detailed results of the sample period tested showing that one or more of the non-taxed purchases had been included in the projection base.

This issue shall be remanded to the Audit Division to allow the taxpayer additional time to gather the appropriate documentation.

DECISION AND DISPOSITION:

Taxpayer's petition is denied in part and remanded to the Audit Division in part.

DATED this 22nd day of March 1991.

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[1]This form requires that the seller procure an affidavit from an authorized representative of the purchaser listing the purchaser's name and Washington registration number. It also itemizes the individual invoice numbers and amounts purchased, date and amount of tax paid, and a description of the tax return or document on which tax was paid.