Cite as Det. No. 98-146, 18 WTD 175 (1999)

BEFORE THE 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. 98-146
	)	
. . .	)	Registration No. . . .
	)	FY . . ./Audit No. . . .

[1] RULE 193: B&O TAX – NEXUS CREATING ACTIVITY. Visits by an out-of-state seller's salesperson to its only in-state customer two or three times a year for the purpose of delivering updates to the seller's catalog and providing "technical support" to the in-state customer constitute sufficient nexus to impose the B&O tax on sales into the state.

[2] RULE 193: B&O TAX – DELIVERY INTO THE STATE. The fact that sales are made "F.O.B. seller's out-of-state plant" is not controlling over whether a sale is completed in Washington for the purposes of the B&O tax. Uniform Commercial Code provisions do not control the place of sale for B&O tax purposes, rather Title 82 RCW and the administrative rules adopted thereunder control.

[3] RULE 193: B&O TAX – DISSOCIATION. Taxpayers have the burden to show that particular sales are dissociated from its nexus creating activity. Where the taxpayer's nexus creating activity is directed to the taxpayer's sole Washington customer, dissociation is not possible.

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:

An out-of-state manufacturer, whose salesperson visits its sole Distributor two or three times a year, protests the assessment of wholesaling business and occupation (B&O) tax on sales to that customer.[1]

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

FACTS:

Danyo, A.L.J. -- The taxpayer manufactures tooling component parts. The taxpayer operates manufacturing plants in . . . , Missouri and . . . , Texas. The taxpayer sells its products to distributors throughout the United States. Since 1964, it has had only one customer (Distributor) in Washington. Distributor sells products manufactured by over 150 different manufacturers.

Taxpayer Account Administration Division (TAA) of the Department of Revenue (Department) wrote to the taxpayer on June 9, 1994 inquiring about the taxpayer's business activities in this state. The taxpayer responded by completing a Washington Business Activities Statement on June 16, 1994. As a result of the information received, TAA issued the above-referenced tax assessment covering the period January 1, 1992 through June 30, 1996 assessing wholesaling B&O tax, late-payment penalties, and interest.[2] The tax assessment is based on estimated sales.

The taxpayer appealed, requesting cancellation of the assessment on the basis that Washington does not have sufficient nexus to tax its sales in this state. The taxpayer claims that it did not solicit or make sales in this state and did not maintain a stock of goods, a sales force, an office or a warehouse in this state.

Generally, the taxpayer sells its products through catalogs. The taxpayer periodically publishes updates to its catalog. Distributor places its orders by telephone, or fax, to the taxpayer's St. Louis office. The taxpayer usually fills Distributor's orders the same day and ships them to Distributor. Distributor can select the carrier, an overnight delivery service, or use its own vehicles to pick up the order. If Distributor does not make a selection, the taxpayer ships the goods by common carrier. In all instances, the taxpayer pays the shipping costs and bills Distributor for them.

The taxpayer's representative stated in his September 12, 1996 letter to TAA:

> As for the cost of shipping goods into Washington, most of the goods sold to [Distributor] are shipped using United Parcel Service, ("UPS"), with [the taxpayer] "prepaying" UPS and billing the cost to [Distributor] by adding the UPS cost to the invoice to [Distributor]. Thus, [Distributor] actually bears the cost of shipping the goods into Washington.

The taxpayer explains that due to its long-standing relationship, it is unnecessary for it to personally visit its Distributor. Therefore, the taxpayer does not maintain a sales force in Washington. However, it does have a salesperson in California whose job is to service several

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[2] Normally, . . . the Department will issue a tax assessment against a previously unregistered taxpayer covering seven years. However, for reasons discussed below, the taxpayer was found to have nexus with Washington starting in 1992.

accounts. The taxpayer explains that starting in 1992, as a courtesy, its California salesperson began personally delivering the updates to the catalog, providing technical advice, and explaining the new products to Distributor.[3] This salesperson visits Distributor two or three times per year for this purpose. The taxpayer states that the salesperson does not take any orders, service any equipment, or participate in any sales activity in Washington.

ISSUES:

1. Does the presence of a salesperson in the State of Washington two or three times per year for the purpose of delivering updates to taxpayer's catalog and providing technical advice constitute commerce clause nexus?

2. If the taxpayer has nexus with the State of Washington, are the sales to Distributor subject to Washington's B&O tax?

3. If sales to taxpayer's Distributor are subject to the B&O tax, can the taxpayer dissociate some sales from the nexus creating activity?

DISCUSSION:

1. Does the presence of a salesperson in the State of Washington two or three times per year for the purpose of delivering updates to taxpayer's catalog and providing technical advice constitute commerce clause nexus?

The Washington State Supreme Court summarized the commerce clause requirements for a valid state tax on interstate commerce as follows:

> (1) There must be a sufficient nexus or connection between the taxing state and the activities taxed; (2) the tax must be fairly apportioned; (3) the tax cannot discriminate against interstate commerce in favor of local commerce; and (4) the tax must be fairly related to the services provided by the taxing state. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977);

National Can V. Department of Rev., 105 Wn.2d 327, 333; 715 P.2d 128 (1986). (Emphasis in original.) The term "sufficient nexus" was clarified by the U. S. Supreme Court in Quill Corp. v. North Dakota, 504 U.S. 298 (1992), as substantial nexus. In Det. No. 96-147, 16 WTD 117 (1996), we stated:

[3] Letter dated March 11, 1997 from taxpayer's representative, page 2 states: "The salesperson's trips to Washington are for the purpose of deliver[ing] product catalog inserts to the [Distributor] and briefly explain new parts feature or application. The purpose is to simply inform the distributor so that he is aware of the product in the event of some future specification order from its customers."

> Substantial nexus has three elements. First, there must be some activity in Washington. Second, there must be a physical presence related to that activity in the state. Third, the activity's purpose is to establish or maintain a position in Washington's marketplace.

(Citations omitted.) Applying these elements to the taxpayer's facts, we find that making wholesale sales to Distributor constitutes an activity in this state as contemplated by Quill, supra. Although the taxpayer states that the salesperson's visits to Washington are not related to establishing or maintaining a market in the state, we find that the only purpose for visiting Distributor is to maintain its place in Washington's marketplace. If it were not for the sales to Distributor, the salesperson would not have been present in Washington. The salesperson delivers updates of the taxpayer's catalog to Distributor in this state. The salesperson also "give[s] technical support" to Distributor. See, Letter of September 12, 1996. Therefore, the salesperson's presence in Washington is related to the taxpayer's activity within the state. This activity is directly related to its sales to Distributor, which, as Taxpayer has emphasized, is its only customer in this state. Therefore, we find that the taxpayer has nexus with Washington.[4]

2. If the taxpayer has nexus with the State of Washington, are the sales into Washington subject to Washington's B&O tax?

The taxpayer makes two arguments concerning the taxability of sales to Distributor. First, the taxpayer argues that sales were completed in Missouri. Therefore, Washington cannot impose its B&O tax. Second, the taxpayer argues that it is subject to tax in Missouri on these sales. Therefore, the imposition of Washington's B&O tax results in double taxation.[5]

During the audit period, the taxation of inbound and outbound sales was, and continues to be, determined under WAC 458-20-193 (Rule 193).[6] Rule 193(7) states:

> Washington does not assert B&O tax on sales of goods which originate outside this state unless the goods are received by the purchaser in this state and the seller has nexus. There

[4] See WAC 458-20-193(7)(c)(v) which provides the following example of nexus creating activities:

> The 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, even though the seller may not have formal sales offices in Washington or the agent or representative may not be formally characterized as a "salesperson".

[5] Even if true, the taxpayer's argument that it is subject to double taxation is not a basis for invalidating the tax on inbound sales. The states are not required to adopt the identical apportionment/allocation methods. Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978). Thus, a taxpayer may be subjected to tax in multiple states. Det. No. 87-286, 4 WTD 51 (1987). See also RCW 82.04.440 - credits allowed for gross receipts taxes paid to another state.

[6] Taxpayer's reliance on Paccar v. Department of Rev., Thurston County Cause No. 91-2-017595-3 (1991) is misplaced. That decision only relates to sales prior to 1992. See Excise Tax Bulletin 560.04.193 and Det. 95-88ER, 17 WTD 25 (1998).

> must be both the receipt of the goods in Washington by the purchaser and the seller must have nexus for the B&O tax to apply to a particular sale. The B&O tax will not apply if one of these elements is missing.

We have already established that the taxpayer has nexus with Washington. Therefore, we must determine whether the goods sold to Distributor were received in Washington. Receipt is defined in Rule 193(2)(d) as when "the purchaser or its agent first either [takes] physical possession of the goods or [has] dominion and control over them." The taxpayer ships orders to Washington by common carrier.[7] Rule 193(7)(a) and (b) provide examples of receipt as follows:

> (a) Delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier located outside this state merely utilized to arrange for and/or transport the goods into this state <u>is not receipt of the goods by the purchaser or its agent unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.</u>
>
> (b) When the sales documents indicate the goods are to be shipped to a buyer in Washington, but the seller delivers the goods to the buyer at a location outside this state, the seller may use the proofs of exempt sales contained in subsection 4 to establish the fact of delivery outside Washington.

(Emphasis added.) The taxpayer states that the shipment terms were F.O.B. seller's plant, which means that title passed to Distributor in Missouri. Therefore, the taxpayer contends, Washington cannot assert its B&O tax on the gross receipts of those sales. We do not agree.

F.O.B. is a term used to identify where risk of loss or title passes. It is a term most often associated with the application of the Uniform Commercial Code (UCC). However, tax consequences of transactions are not determined by either the UCC's definitions of sale and title or by where risk of loss passes. <u>Inland Dairy v. Department of Rev.</u>, 14 Wn.App. 592, 594, 554 P.2d 52 (1975). The Department's Rule 193 governs. Under the facts as explained above, Taxpayer either received the goods in Washington via overnight express mail delivery or by common carrier. In the instances where the goods were shipped by common carrier, there is no evidence that the common carrier had the authority to accept or reject the goods in Missouri, with the right of inspection. In the instances where the goods were shipped overnight express, there is no argument that Taxpayer received the goods in Washington. Thus, with respect to these orders, Taxpayer received the goods in Washington at its location. Since, we have determined that the taxpayer has nexus with this State, and we find that the Distributor received the goods in this state, the taxpayer is subject to Washington's B&O tax at the wholesaling classification. RCW 82.04.270. This tax is imposed on the taxpayer's Washington sales.

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[7] Occasionally, the taxpayer will drop ship items directly to Distributor's clients. The taxability of these sales is determined by the location of the client. <u>Cf.</u> Det. No. 95-126, 15 WTD 149 (1996) (Litter tax applies to goods drop shipped to Washington customers.)

Washington's method of allocation of sales of tangible personal property is constitutional. See Det. No. 95-088ER, 17 WTD 25 (1998) in which we said:

> We find the case of Westinghouse Electric Corp. v. King, 678 S.W.2d 19 (Tenn. 1984), *appeal dismissed*, 470 U.S. 1075 (1985), to be instructive. In Westinghouse, the taxpayer Westinghouse Electric Corporation (Westinghouse) brought an action against the Tennessee Commissioner of Revenue seeking recovery of taxes and interest paid under protest. The Tennessee Supreme Court described Westinghouse as a nonresident electrical equipment company that agreed to design, manufacture, and sell nuclear steam supply systems and turbo-generator units to the Tennessee Valley Authority (TVA) for use in Tennessee. Westinghouse stipulated that it was doing business in Tennessee. The subject equipment was either manufactured or purchased by Westinghouse outside Tennessee. Title passed to TVA when it made payment and in all instances title passed outside Tennessee.
>
> Westinghouse argued in the case that its sales to TVA were not taxable by Tennessee because the transactions were not sales in the state because their contracts provided that title to the equipment passed outside the state. In affirming the lower court's decision that the sales were subject to tax, the Tennessee Supreme Court cited General Motors Corporation v. Washington, 377 U.S. 436, at 442-445 (1964), *overruled in part by* Tyler Pipe Industries, Inc. v. Washington, 483 U.S. 232, 248 (1987).[8] General Motors involved a corporation that manufactured automobiles outside Washington and then sold them to independent dealers within the state. The dealers sent their orders to an out-of-state office. General Motors accepted or rejected them out-of-state. The automobiles were shipped f.o.b. the out-of-state factory. Nonetheless, the U.S. Supreme Court upheld the B&O tax assessment by finding that General Motors' activities within Washington were substantial, "particularly with relation to the establishment and maintenance of sales, upon which the tax was measured." Id. at 447. See also Westinghouse, 678 S.W.2d at 25. Thus, the fact that title to the equipment sold in Westinghouse passed out-of-state, or that the automobiles in General Motors were sold f.o.b. the out-of-state factory, did not prevent Tennessee or Washington, respectively, from taxing the transactions when in each case the deliveries occurred in-state. We conclude that the products sold by the present taxpayer to its Washington customers were delivered in Washington even though they were sold f.o.b. its factory.

(Footnote in original.) See also Standard Pressed Steel v. Department of Rev. of Wash., 419 U.S. 560 (1987), and Chicago Bridge & Iron Co. v. Department of Revenue, 98 Wn.2d 814 (1983), appeal dismissed, 464 U.S. 1014 (1983).

With respect to the goods the Distributor picked-up in its own vehicles and transported back to Washington, the taxpayer's gross receipts from those sales are not subject to Washington's

[8] We note the part of General Motors that the Supreme Court overruled is not at issue in the present matter.

wholesaling B&O tax. Rule 193(11)(c). The taxpayer would not be assessed B&O tax on those sales provided its records show that Distributor received the goods outside this State. See RCW 82.32.070 and 82.32.100.

3. If sales to taxpayer's Distributor are subject to the B&O tax, can the taxpayer dissociate some sales from the nexus creating activity?

The U.S. Supreme Court has stated that even when a taxpayer has nexus and makes sales into a state; those sales may be exempt from the destination state's taxes. The term used is dissociation. Norton Co. v. Department of Rev. of Ill., 340 U.S. 534 (1951). Dissociation means that the sale is not related or connected with the nexus-creating activity. The taxpayer has the burden to dissociate sales. Rule 193(7)(c).

In conclusion, we find the taxpayer's sales representative's visits to Distributor two or three times a year were to both promote sales and maintain its established market in this state. This activity created nexus and, coupled with delivery of the taxpayer's goods to Distributor, gives Washington the authority to tax those sales. The taxpayer has the burden to prove that the sales representative's nexus-creating activity is dissociated from its sales in Washington. Based on the facts in this matter, we could find no other reason or purpose for the taxpayer's sales representative to enter Washington and to visit Distributor. The taxpayer has stated that while the "visits" began as courtesy visits, the sales representative, while here, does in fact provide information regarding products for sale. Therefore, the taxpayer has not met the burden of dissociating the sales from the nexus-creating activities, which began in 1992. See Det. No. 94-209R, 15 WTD 100 (1996) and Det. No. 86-295, 2 WTD 11 (1986).

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 12th day of August 1998.