

Cite as Det. No. 97-061, 18 WTD 211 (1999)

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

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment)
of) No. 97-061
)
...) Registration No. ...
) FY ... /Audit No. ...

[1] RULE 193: B&O TAX -- OUT-OF-STATE SELLER -- NEXUS -- SIGNIFICANT SERVICES. One or two short, non-sales visits per year by employees of an out-of-state seller for purposes of cultivating goodwill, obtaining input on taxpayer products, addressing user concerns, resolving problems with accounts, and dispensing information about taxpayer products are significant enough to confer nexus.

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 computer products manufacturer protests assessment of business and occupation tax on the grounds that it lacked nexus with Washington.¹

FACTS:

Dressel, A.L.J. -- . . . (taxpayer) manufactures computer hardware and software. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1990² through December 31, 1994. As a result a tax assessment, identified by the above-captioned numbers, was issued for \$ The taxpayer appeals.

Responding to a Washington Business Activities Statement³ sent by the Department, the taxpayer

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

² Although the stated audit period begins in 1990, no Washington sales were actually made until 1992. Thus, no tax was assessed in the audit for the years 1990 and 1991.

³ This "statement" is actually a questionnaire.

advised that it made sales into this state. It also stated that sales were solicited on its behalf from Washington customers by nonresident employees. It further reported that one or more of its employees made one to four visits per year to this state and that it shipped goods into Washington. On the basis of this statement, the Department determined that the taxpayer was required to register and pay business and occupation (B&O) tax.

While the taxpayer acknowledges the sales into Washington, it denies that it has established nexus here. It states that it has no office, assets, or inventory in Washington. The taxpayer says that its employees have not solicited any orders from inside this state. Orders are taken only by telephone by taxpayer employees at its headquarters in Utah. The taxpayer reports that it does not make "cold calls," meaning that it does not solicit business, even over the phone, from prospective customers with whom it has not had a previous business relationship. At the hearing, the taxpayer explained that it markets its products through magazine advertising, word of mouth, and by selling its computer products to large, well-known companies. Most of the taxpayer's Washington sales were in 1992 and 1993 to re-sellers and "educational dealers." The Washington visits by taxpayer employees would occur once or twice a year and would be of a duration of no more than two days. No sales were solicited on these visits. According to the taxpayer, they were for purposes of obtaining input on the taxpayer's products, addressing concerns of users, resolving any problems with its accounts, dispensing information about its products, and maintaining goodwill with its customers.

The taxpayer argues that this activity falls short of "significant services in relation to establishment or maintenance of sales into the state"⁴ and that, therefore, there is no nexus for purposes of the B&O tax.

ISSUE:

Does a manufacturer of computer hardware and software headquartered [outside Washington], who has no office in Washington, allegedly solicits no business in Washington, but visits Washington once or twice a year, have nexus with Washington?

DISCUSSION:

WAC 458-20-193 (Rule 193) reads, in part:

(7) INBOUND SALES. 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 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.

⁴Taxpayer's Petition for Correction, page 2, line 3.

In the instant case, goods were received by purchasers in this state. The precise question to be answered, then, is whether the taxpayer has nexus with Washington. "Nexus" is defined in Rule 193 as: "the activity carried on by the seller in Washington which is significantly associated with the seller's ability to establish or maintain a market for its products in Washington." *Id.* at ¶ 2(f). The rule gives some examples of activities which confer nexus, where it reads:

The following activities are examples of sufficient nexus in Washington for the B&O tax to apply:

...

(iii) The order for the goods is solicited in this state by an agent or other representative of the seller.

...

(v) 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".

The Department concluded that the solicitation of sales occurred in this state, based on the taxpayer's Business Activities Statement. On this form the taxpayer checked the "yes" box next to the question, "Are or were sales solicited on your behalf from Washington customers." Also, on the form the taxpayer indicated this solicitation was done by "Nonresident Employees." In its appeal petition and at the hearing of this matter, though, the taxpayer denied that any solicitation was done *inside* Washington. The taxpayer stated that any solicitation was done over the telephone by its employees from [outside Washington]. According to the taxpayer, the employee(s) who physically entered the state of Washington *did not* solicit any business while here. While we can see how the Department concluded that solicitation occurred here, the taxpayer's explanation is not, precisely speaking, inconsistent with the manner in which it filled out the Business Activities Statement. We have no reason to believe the taxpayer was not telling the truth on this point. We find, then, that the taxpayer did not solicit business inside the state of Washington.

Next, we examine the question of whether the taxpayer performed "significant services" in Washington. *See id.* at ¶ 7(c)(v). Addressing the same question in *Det. No. 88-368*, 6 WTD 417 (1988), we found that significant services were performed when non-soliciting employees of a chemical company made one or two visits per year to give a customer advice on correct handling and safety procedures vis-a-vis products the company had sold. In *Det. No. 91-279*, 11 WTD 273 (1991), we found that the presence in this state, for four or five days a year, of non-soliciting employees to turn on some equipment the taxpayer had sold and to give some technical advice about the equipment amounted to significant services. In both cases we found nexus on that basis, even though there was no solicitation of sales inside this state.

[1] In the instant case the taxpayer sent an employee(s) here for purposes of "obtaining input on the taxpayer's products, addressing concerns of users, resolving any problems with its accounts, dispensing information about its products, and maintaining goodwill with its customers." While, admittedly, this contact was minimal, we find it to be significant in that it had, or could have had, an impact on customer satisfaction and, thus, on sales. The employee's presence was, doubtless, "intended to establish or maintain and, hopefully, increase the taxpayer's sales" in Washington. *Det. No. 91-279, supra*, at 277. Indeed, we have held in the cited case and others that "if the in-state activity is economically meritorious for a taxpayer (if it is worth spending budget dollars to do it), then the activity is market driven and it generally establishes nexus with the state of Washington." *Id.* at 277, quoting *Det. No. 87-286, 4 WTD 51 (1987)*.⁵

We conclude that the taxpayer's in-state activity was significant enough to create nexus. Only if the taxpayer were able to disassociate its sales with the in-state activity, that is, only if the taxpayer were able to prove that certain sales had nothing to do with the in-state activity, could we exempt them from B&O taxation. See Rule 193(7)(c), and *Norton Company v. Department of Rev.*, 340 U.S. 534 (1951).

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 28th day of March 1997.

⁵Recent court developments are consistent with our holding in this and the cited WTD cases. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the court addressed the limitation on a state's ability to tax interstate activities. The court affirmed that a company must have a physical presence in a state in order to satisfy Commerce Clause requirements. It did so in order to provide a "bright-line" test with respect to interstate transactions. It also affirmed that more than the "slightest presence" was required. *Id.* at 305, fn. 8.

However, once a company has more than the slightest presence in the state, constitutional requirements may be satisfied. See *Orvis Company Inc. v. Tax Appeals Tribunal*, 86 N.Y.2d 165 (1995).