Cite as Det. No. 98-134, 18 WTD 85 (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. 98-134
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 193; RCW 82.04.220: B&O TAX – NEXUS – IN-STATE SOLICITATION OF BUSINESS. Washington has substantial nexus with an out-of-state furniture manufacturer that employs independent contractors to solicit sales of its products in Washington and, therefore, may impose the business and occupation tax on the manufacturer's gross proceeds from those sales.

[2] RULE 193; RCW 82.32.050: B&O TAX – NEXUS - IN-STATE SOLICITATION OF BUSINESS -DISASSOCIATION: A taxpayer may not disassociate a sale for business and occupation tax purposes for a period up to five years due to its prior nexus-creating activities even if a visit to the customer was not necessary.

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:

A foreign corporation that manufacturers furniture outside Washington and sells its products to Washington customers protests the assessment of business and occupation (B&O) tax because it claims a lack of nexus with this state.[1]

FACTS:

De Luca, A.L.J. -- The taxpayer manufactures furniture in the southeastern part of the United States. It sells its furniture throughout the country, including the state of Washington. The taxpayer explains that all of its sales originate outside the state of Washington and are shipped by

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

common carrier directly to customers in this state. The taxpayer claims it has no physical property or payroll in this state. According to the taxpayer, it employs non-exclusive independent contractors as sales agents. They travel in Washington, but do not reside here. The sales representatives do not install or receive the goods sold to in-state customers. The sales representatives do not have authority to intervene in credit matters and do not have the right to approve sales orders.

The taxpayer further explains that its sales into Washington are not necessarily consistent from year-to-year to the same customers. Thus, it has no regular pattern of sales to the same customers every year. The taxpayer declares that it solicits sales in various ways, such as direct mail advertising, industry magazines; telephone, and the Internet, as well as through the use of the independent sales representatives.

The Taxpayer Account Administration section (TAA) of the Department of Revenue (the Department) audited the taxpayer for the period February 1, 1993 through August 31, 1997 and assessed $. . . in tax and interest. . . . TAA concluded that the taxpayer's use of sales representatives in this state to solicit business constituted significant local activity to subject the sales to B&O tax.

TAXPAYER'S EXCEPTIONS:

The taxpayer disputes the entire assessment because it believes the assessment violates Public Law 86-272; Quill Corporation v. North Dakota, 504 U.S. 298 (1992); National Bellas Hess, Inc. v. Department of Rev. of Ill., 386 U.S. 753 (1967), and the Commerce Clause and the Due Process Clause of the U.S. Constitution.

ISSUE:

Does the taxpayer have substantial nexus with Washington to allow this state to assess it B&O tax on sales to customers in this state?

DISCUSSION:

Public Law 86-272 does not help the taxpayer in this matter because that federal law applies only to taxes that are based on net income. Quill, 504 U.S. at 316. Washington's B&O tax is a gross receipts tax. Tyler Pipe Industries, Inc. v. Department of Revenue, 105 Wn.2d 318, 327, 715 P.2d 123 (1986), rev'd on other grounds, 483 U.S. 232 (1987); and Det. No. 93-281, 14 WTD 035 (1994).

Quill , supra, does not support the taxpayer because Quill Corporation's only contacts with North Dakota were through catalogs and shipping of goods by common carrier. There was no physical in-state presence by Quill Corporation and the U.S. Supreme Court decided that a physical in-state presence was needed for use tax purposes. In contrast, the taxpayer in this matter has a physical in-state presence through its sales representatives. Likewise, National Bellas Hess' only contacts with Illinois were through mailing catalogs and advertising flyers to its in-state

customers. Again, there was no physical in-state presence in Bellas Hess, which contrasts with the immediate case. See Det. No. 93-281, supra. We note that the Quill court overruled Bellas Hess in part by holding that the Due Process Clause does not require the physical in-state presence of an out-of-state seller for a state jurisdiction to impose a tax or tax-collection duty upon the out-of-state seller.

Finally, the Supreme Court in Complete Auto Transit, Inc. v. Brady, 430 U.S. 357 (1977) held that interstate commerce does not enjoy immunity from state taxation, providing the tax meets a four-prong test, including substantial nexus. In Tyler Pipe Indus., Inc. v. Washington State Dep't. of Rev., 483 U.S. 232 (1987), the Court held that in-state sales representatives who were independent contractors supplied the requisite nexus in order for Washington to impose its B&O tax. The Court held that the critical test was:

> whether the activities performed in this State on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this State for the sales.

483 U.S. at 250. Accordingly, the Department has ruled that it ...

> does not require a vendor's representative to live in Washington or take orders in the state before the tax can apply. Significant activity which establishes or maintains sales is the controlling factor. 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. Otherwise, no reason exists to employ the person. The Department has consistently held "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." Determination No. 87-286, 4 WTD 51 (1987).
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> For example, the Department has held infrequent visits to Washington customers by nonresident employees, who are not salespersons, constitute 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.

Det. No. 91-279, 11 WTD 273 (1991). *See also* Det. No. 96-144, 16 WTD 201 (1996).

WAC 458-20-193 (Rule 193) is the Department's rule that governs whether sales of tangible personal property originating in other states to persons in Washington are subject to wholesaling B&O tax, or retailing B&O tax, and retail sales tax. The rule provides in part:

> (7)(c) If a seller carries on significant activity in this state and conducts no other business in the 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. Once nexus has been established, it will continue throughout the

> statutory period of RCW 82.32.050 (up to five years), notwithstanding that the instate activity which created the nexus ceased. Persons taxable under the service B&O tax classification should refer to WAC 458-20-194. The following activities are examples of sufficient nexus in Washington for the B&O tax to apply:
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> . . .
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> (iii) The order for the goods is solicited in this state by an agent or other representative of the seller.
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> . . .
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> (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".

[1] Thus, under Rule 193(7)(c) if an agent or other representative of the seller solicits sales in this state substantial nexus is established for B&O tax purposes. Moreover, if an agent or other representative performs significant services in relation to establishing or maintaining sales into this state, substantial nexus is established for the same excise tax purposes. We find under Rule 193 and our published determinations that when the taxpayer's representatives entered Washington to solicit sales it had substantial nexus with Washington. Such actions created a physical presence in Washington for the taxpayer in relation to making sales.

The taxpayer implies that some of its sales to Washington customers are disassociated from its in-state activities. Rule 193(7)(c) recognizes the right of out-of-state sellers to disassociate their sales. However, under the rule, such sellers have "the distinct burden of establishing that the instate activities are not significantly associated in any way with the sales into this state." *See also* Det. No. 86-31ER, 13 WTD 001 (1993) and Norton Company v. Illinois Department of Revenue, 340 U.S. 534, 537 (1951). The Department discussed this burden in Det. No. 91-279 by declaring:

> The following examples would be useful types of evidence to show whether or not sales are disassociated. They are not all-inclusive and not all are necessarily required: 1) the taxpayer's records showing which of its representatives got credit for the sales and where the representatives are located (however, credit to an out-of-state representative does not necessarily mean there was no in-state activity); 2) a list of customers visited in the state by its representatives and when they were visited; 3) sales contracts or purchase orders showing the parties or their representatives who were involved and where the transactions occurred; 4) correspondence, letters and/or affidavits from the taxpayer's employees and their customers showing when, where and how the sales occurred and verifying the claims that there were no local activities involved in them;

The Department also declared in Det. No. 91-279:

> But, even if the taxpayer can disassociate some initial sales, it does not necessarily mean all subsequent sales to the same customers are also disassociated. If the taxpayer's employee had subsequent instate contacts with those customers, sales following such contacts would presumably be taxable, unless the taxpayer can again disassociate them. Such contacts obviously are intended to maintain sales.

Similarly, Rule 193(7)(c) provides:

> Once nexus has been established, it will continue throughout the statutory period of RCW 82.32.050 (up to five years), notwithstanding that the instate activity which created the nexus ceased.

[2] Thus, the rule rejects the argument that a sale is disassociated because a trip to a current customer may not be necessary to obtain the sale due to in-state contacts with the same customer in prior years. The rule allows disassociation only if those in-state contacts with the customer occurred more than five years before the sales at issue occurred. Again, the taxpayer has this burden to prove disassociation.

DECISION AND DISPOSITION:

We remand this matter to TAA to allow the taxpayer 60 days from today's date to provide TAA sufficient information to support its claim that it can disassociate sales into Washington.

Dated this 31st day of July 1998.