

Cite as 10 WTD 55

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

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|---------------------------------|---|----------------------------------|
| In the Matter of the Petition |) | <u>D E T E R M I N A T I O N</u> |
| For Correction of Assessment of |) | |
| |) | No. 90-266 |
| |) | |
| . . . |) | Registration No. . . . |
| |) | Notices of Balance Due |
| |) | |

- [1] **RULE 193B, RCW 82.04:** B & O TAX -- INTERSTATE SALES OF GOODS TO PERSONS IN WASHINGTON -- TELEPHONE SOLICITATION -- NEXUS. The taxpayer's out-of-state telephone solicitation of Washington customers, by itself, does not constitute a local activity which is significantly associated with its ability to establish or maintain a market in this state for its sales. Therefore, the taxpayer is not subject to the B & O tax.
- [2] **RULE 221, RCW 82.12:** USE TAX -- INTERSTATE SALES OF GOODS TO PERSONS IN WASHINGTON -- TELEPHONE SOLICITATION. Telephone solicitation by out-of-state seller requires collection of use taxes from Washington customers when seller is registered with the Department of Revenue.

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:

The taxpayer seeks cancellation of two notices of balance due for Business & Occupation (B & O) taxes for Quarters 3 and 4, . . . which amount to \$. . . and \$. . . , respectively.

FACTS:

De Luca, A.L.J. -- The taxpayer is a computer broker incorporated and located in Arizona. The taxpayer does not have an office, employees, sales representatives, agents, an outlet or a stock of goods in Washington. The taxpayer does not service or install the products in Washington and it does not lease them for use in

Washington. The taxpayer solicits sales in Washington only by telephone from out-of-state. The taxpayer is registered with the Department of Revenue.

TAXPAYER'S EXCEPTIONS:

The taxpayer argues that it should not be subject to the B & O tax (RCW 82.04) because of its lack of presence in Washington.

ISSUE:

Is the taxpayer subject to the B & O tax because it solicits Washington customers only by telephone from out-of-state?

DISCUSSION:

WAC 458-20-193B (Rule 193B) pertains to sales of goods originating in other states to persons in Washington:

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. The essential question is whether the instate services enable the seller to make the sales.

The rule continues by citing examples of activities which have sufficient local nexus for application of the B & O tax. The activities include the seller having a place of business or outlet in this state, or having representatives or agents who solicit or receive orders in this state. Other examples are the seller having a local stock of goods or the seller performing significant services to establish or maintain sales in the state.

[1] The taxpayer's out-of-state telephone solicitation of Washington customers by itself does not constitute a local activity which is significantly associated with its ability to establish or maintain a market in this state for the sales. Rule 193B. Therefore, the taxpayer is not subject to the B & O tax for sales procured by out-of-state telephone solicitation.

[2] The taxpayer had collected and remitted sales taxes on its sales of goods to Washington customers. The taxpayer must continue or resume collecting and remitting sales or use taxes. While the use tax is imposed on the consumer, the seller can be required to collect it. RCW 82.12.040. It is clear that the state of destination has the power to require collection of a use tax. General Trading Company v. State Tax Commission, 322 US 335 (1944). The following activities are sufficient under the U. S. Constitution to require the collection of such taxes:

Purposefully or systematically exploiting the market provided by this state by any media-assisted, media- facilitated, or media-solicited means, including, but not limited to, direct mail advertising, unsolicited distribution of catalogues, computer-assisted shopping, telephone, television, radio or other electronic media, or magazine or newspaper advertisements or other media;

WAC 458-20-221 (2)(i). (Underlining ours).

DECISION AND DISPOSITION

The taxpayer's petition is granted.

DATED this 28th day of June 1990