

Cite as 6 WTD 109 (1988)

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. 88-249

. . .

Registration No. . . .  
Assessment No. . . .

[1] **RULE 193B:** B&O TAX -- INTERSTATE COMMERCE -- NEXUS --  
FACTORS DETERMINING. The key factor in determining  
whether nexus exists is whether 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. Lack of  
repeated contact with prospective clients is not  
determinative in a case where a taxpayer's sales are to  
one-time customers.

[2] **RULE 193B:** B&O Tax -- INTERSTATE COMMERCE -- NEXUS -- 15  
U.S.C. 381. 15 U.S.C. 381 (Public Law 86-272) applies  
only to taxes on or measured by net income. Washington's  
business and occupation tax is measured by gross receipts  
from sales in this state only. Nexus requirements of the  
federal statute are inapplicable.

TAXPAYER REPRESENTED BY: . . .  
. . .

DATE OF HEARING: October 9, 1986

NATURE OF ACTION:

Out-of-state corporation protests assessment of B&O tax on its  
Washington sales, claiming that its contacts with this state are  
insufficient to give Washington taxing authority.

FACTS AND ISSUES:

Johnson, A.L.J. (successor to Dressel, A.L.J.) -- Taxpayer is an  
out-of-state seller of water treatment and wastewater treatment  
equipment. Its products are such that they are generally sold to

one-time customers, because the equipment has a long useful life; the purchasers make their own arrangements for installation and maintenance. Orders are obtained by an independent sales representative who, during the period giving rise to the assessment, had a contract for exclusive rights to sell the products in Washington and Oregon. The contract expressly states that the representative is not an agent of the taxpayer; the representative is paid by commission only and is not an employee. The representative obtains orders for the equipment, and all other processing and credit investigation work is handled through taxpayer's Illinois office. Shipping is from Illinois, and taxpayer's employees make no trips into Washington to serve the purchasers. The assessment, . . . , remains unpaid.

#### DISCUSSION:

[1] WAC 458-20-193B (Rule 193B) reads in pertinent part as follows:

RETAILING, WHOLESALING. 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. If a person carries on significant activity in this state and conducts no other business in this 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. The characterization or nature of the activity performed in this state is immaterial so long as it is significantly associated in any way with the seller's ability to establish or maintain a market for its products in this state. The essential question is whether the instate services enable the seller to make the sales.

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 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."

. . . .

Under the foregoing principles, sales transactions in which the property is shipped directly from a point outside the state to the purchaser in this state are exempt only if there is and there has been no participation whatsoever in this state by the seller's branch office, local outlet, or other local place of business, or by an agent or other representative of the seller. (Emphasis supplied.)

The taxpayer contends that insufficient nexus is established by its activities in Washington. The examples listed in Rule 193B, however, are not intended to be exclusive. The taxpayer's activities fall within those described in examples (3) and (5): an order for goods is taken by a representative who has an exclusive contract to handle Washington state sales and an out-of-state seller is performing significant services in relation to obtaining sales in Washington, even though it has no formal offices or formally-characterized salesmen in Washington.

In this case, the taxpayer's claim that the representative has limited contact with purchasers is largely without merit because of the nature of the equipment being sold. While repeat contacts and repeat purchases might indicate a level of activity sufficient to establish nexus in some cases, this taxpayer's business is not operated in that manner. This taxpayer sells equipment to purchasers, usually on a one-time basis; the equipment does not generate repeat business for supplies or maintenance. Consequently, measuring contacts by a standard used for businesses which maintain relationships with their customers over time is not applicable to the taxpayer's situation.

The language of Rule 193B clearly indicates that activities which make it possible for the out-of-state seller to make sales in Washington will be sufficient to establish nexus and taxability. Additionally, the United States Supreme Court recently affirmed the Washington Supreme Court's holding that "the crucial factor governing nexus is 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." Tyler Pipe Industries, Inc. v. Department of

Revenue, 483 U.S. \_\_\_\_\_, 97 L.Ed.2d 199, 215-216, 107 S.Ct. 2810, 2822 (1987).

This seller has a commissioned representative who solicits sales of the products in Washington. By taxpayer's own account, these sales would be less likely to occur absent the activities of the representative. The equipment is expensive, of limited application and long life; consequently, a small number of large annual sales occur. The fact that the number of sales is small is not determinative. The activities of the representative, which enable such sales in Washington, are sufficient to render the sales taxable under the Washington business and occupation tax.

[2] During the hearing, the taxpayer raised the issue of whether 15 U.S.C. 381 (Public Law 86-272) applied to the facts of this case. The federal act, by its terms, applies only to taxes on or measured by net income. The Washington tax is measured by gross receipts; consequently, the federal nexus requirements of that particular statute are inapplicable to the business and occupation tax.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 29th day of June 1988.