

Cite as 10 WTD 400 (1990).

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

In the Matter of the Petition	)	<u>D E T E R M I N A T I O N</u>
For Refund of	)	
	)	No. 91-050
. . .	)	
	)	Registration No. . . .
	)	Audit No. . . .
	)	

- [1] **RULE 193B:** INTERSTATE SALES TO WASHINGTON CUSTOMERS -- NEXUS -- B & O TAX. The rule makes clear that soliciting sales or performing significant services to establish or maintain those sales in Washington is sufficient to establish a taxable presence or nexus with this state for B & O tax purposes. The rule applies even if the sales or service visits are infrequent. Accord: Det. 88-368, 6 WTD 417 (1988).
- [2] **RULE 193B:** B & O TAX -- NEXUS -- BURDENS OF PROOF - - DISASSOCIATION. Initially, the burden is on the state to show jurisdiction to tax interstate sales to Washington buyers. It meets the burden by showing the seller's local activity is significantly associated with the seller's ability to establish or maintain a market for sales into Washington. Once shown, the burden shifts to the seller to prove that some or any of its sales were disassociated from the significant local activity. Failure to disassociate subjects all of taxpayer's sales into Washington to B & O tax. Accord: Det. 88-366A, 9 WTD 286-55 (1990), 6 WTD 417, supra.
- [3] **RULE 193B:** B & O TAX -- SALES TAX -- REPAIRS. The rule considers repair of tangible personal property in the state to be an inherently local business activity subject to B & O tax. In every case where B & O tax is due, taxpayer is required to collect and remit sales tax, if applicable.

- [4] **RULES 173 AND 193B:** SALES TAX -- REPAIRS -- LACK OF KNOWLEDGE. Taxpayer's lack of knowledge about collecting sales tax for repair work to machinery does not relieve it of its tax obligation. Accord: Det. 86-226, 1 WTD 67 (1986), Det. 86-278, 1 WTD 287 (1986).
- [5] **RULE 193B:** B & O TAX -- NEXUS -- LOCAL INSTALLATION. Where majority of sales activity is carried on outside Washington, but by separate contract instate installation of machinery is performed and a taxpayer visits potential customers, it is held all of taxpayer's sales into Washington are subject to B & O tax. Accord: Hayssen Manufacturing Co. v. Dept. of Rev., BTA Docket No. 29569 (1985).

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.

TAXPAYER REPRESENTED BY: . . .

#### NATURE OF ACTION:

The taxpayer is an [out-of-state] corporation which disputes an assessment of Business and Occupation (B&O) tax and sales tax due to Audit Division's findings that it has significant activities in Washington.

#### FACTS:

De Luca, A.L.J. - The taxpayer originally filed a petition [in September of 1989] with the Department's [local] office for correction of an assessment. Interpretation and Appeals received it [in April of 1990]. Subsequently, the taxpayer remitted payment of the disputed taxes. Therefore, the petition will be treated here as one for refund. The taxpayer is registered with the Department of Revenue. It collected and remitted sales tax for most, but not all, of its retail sales into Washington. It did not pay B & O taxes.

The assessment was issued [in July 1989] and covered the period January 1, 1985 through March 31, 1989. The assessment included a credit for retail sales tax in the amount of \$ . . . . B & O and sales taxes found owing were \$ . . . . The result was a net credit of \$ . . . plus interest of \$ . . . , amounting to \$ . . . , which was refunded [in August 1989].

Shortly afterwards, the auditor and the taxpayer agreed on several other adjustments which further reduced the assessment. As noted, the taxpayer paid the remaining, disputed taxes.

The taxpayer is in the business of selling rock-crushing equipment and parts as well as installing and repairing such equipment. The taxpayer states in its petition and in its Washington Business Activities Statement that it has two non-resident salesmen who each travel to Washington on average 1.5 to 2 times per month for up to three days per trip. They call on existing customers and occasionally prospective ones. Furthermore, the taxpayer admits it repairs and installs rock-crushing equipment in Washington.

The auditor found the taxpayer's employees and agents had solicited equipment sales in Washington in addition to repairing and installing equipment here. The auditor reported that he excluded from the assessment all sales where delivery occurred outside Washington.

#### ISSUE

Are the taxpayer's activities in Washington significantly associated with its ability to establish or maintain a market in this state for sales and thereby subject it to B & O and sales taxes?

#### TAXPAYER'S EXCEPTIONS

The taxpayer denies it has significant activity or presence in Washington to subject it to B & O tax and states in part:

If a customer decides they need a particular machine they have no choice but to contact the dealer in their area. It is not necessary for us to actively seek business in Washington or to provide any special services to these customers in order to sell to them. While we do occasionally provide some installation services they are not as a condition of the sale. If a customer wants rock crusher "X" and we are the dealer for it, they must come to us. Any services we provide are as a courtesy to the manufacturer, not a condition of the sale.

The petition then lists the audit schedules with which it disagrees. The auditor adjusted several of them to the

taxpayer's satisfaction following receipt of the petition. The remaining ones are described as follows:

- 1) Schedule II concerns \$ . . . of wholesaling B & O tax assessed against the taxpayer's invoice . . . (sic) for sale and installation of a rock crusher to [A].
- 2) Schedule III pertains to \$ . . . of B & O tax assessed on invoices during the audit period.
- 3) Schedule IV page 3 concerns \$ . . . of retailing B & O tax and \$ . . . of retail sales tax assessed against invoice . . . for repairs done on equipment in Washington. The taxpayer contends it was not aware that sales taxes had to be collected on service work performed. It argues it cannot go back to the customer many months after the work was completed and expect the customer to pay the tax.
- 4) Schedule IV page 4 concerns \$ . . . of retailing B & O tax assessed against invoice . . . . However, \$ . . . assessed in retail sales tax was agreed to by the taxpayer.

#### DISCUSSION:

Rule 193B is the controlling rule in this appeal. It provides the tests we use to determine whether an out-of-state taxpayer who sells tangible personal property to customers in Washington or installs or repairs such property here is subject to B & O and sales taxes. . . .

[1] We will address Schedule III first. It pertains to unreported sales. Rule 193B(3) and (5) make clear that soliciting sales or performing significant services to establish or maintain those sales in Washington is sufficient to establish a taxable presence or nexus with this state for B & O purposes. The rule applies even if the sales or service visits to Washington are infrequent. Det. 88-368, 6 WTD 417 (1988).

[2] Rule 193B initially places the burden on the state to show jurisdiction to tax sales. The state meets the burden by showing the seller's local activity is significantly associated with seller's ability to establish or maintain a market for sales in Washington. Det. 88-366A, 9 WTD 286-55

(1990). This requirement has been met by the taxpayer's admissions of sales, repair and installation activities in Washington. Moreover, the auditor found the same types of activities performed by the taxpayer.

Once nexus has been established, Rule 193B places the burden on the taxpayer to show that its instate activities are not significantly associated in any way with its ability to establish or maintain a market for its products in this state. id. The taxpayer has not met this burden. It has not presented any evidence to disassociate its sales to Washington customers from its activities in the state. Therefore, Rule 193B provides that all of the taxpayer's sales into this state are subject to the B & O tax. id., 6 WTD 417.

Furthermore, the auditor reported that he only included sales where delivery occurred in Washington. The taxpayer has not shown that any of its sales at issue have contracts or selling agreements providing for delivery (transfer of possession) of the goods to the buyers outside this state. Such out-of-state transactions would also exempt the sales from the tax. Det. 86-161A, 2 WTD 397 (1987). Schedule III is sustained.

[3] We will next address Schedule IV, pages 3 and 4. Page 3 pertains to invoice . . . ([B]). There is \$ . . . in B & O tax and \$ . . . in sales tax in dispute. Page 4 concerns invoice . . . and \$ . . . in B & O tax. The taxpayer has conceded the \$ . . . in sales tax for page 4. These two items involve service and repair of equipment in Washington. Rule 193B considers repair of tangible personal property in this state to be "inherently local business activities subject to [B & O] tax." Additionally, the rule requires the taxpayer to collect and remit retail sales tax "in every case where business and occupation tax is due...", if applicable. Thus, the auditor correctly advised the taxpayer the sale or services rendered to [B] is deemed a retail sale with sales tax owing unless the customer furnishes it a resale certificate. WAC 458-20-102 and WAC 458-20-173.

[4] The taxpayer's lack of knowledge about collecting the sales tax on service work performed for invoice . . . ([B]) does not relieve it of its tax obligation. The state does try to provide accessible taxpayer information with regional offices and an office of taxpayer information. However, the Department is not required to make sure that every business knows its tax obligations before it can assess taxes. The burden must be on the taxpayer to determine if it has an obligation to pay taxes. Det. 86-226, 1 WTD 67 (1986), Det.

86-278, 1 WTD 287 (1986). Thus, the B & O and sales tax assessments in Schedule IV are sustained.

[5] Schedule II is the last matter addressed. The auditor assessed \$ . . . in wholesaling B & O tax on the sale of a rock crusher to [A]. The auditor found the taxpayer assisted in the installation of it at the customer's Washington location. However, the taxpayer asserts the installation was not a condition of sale, but was offered to the customer as a courtesy to the manufacturer. Therefore, the taxpayer urges the Department is precluded from applying Rule 193B. Like Schedule III above, the taxpayer has not presented evidence which disassociates the sale and installation of the rock crusher from its activities in this state. Therefore, all of its Washington sales are taxable.

Furthermore, the Washington Board of Tax Appeals decided a similar case involving an out-of-state taxpayer/manufacturer of packaging machinery whose employees supervised the installation of the machines in Washington. See Hayssen Manufacturing Co. v. Department of Rev., BTA Docket No. 29569 (1985). . . . The issue in Hayssen was whether the taxpayer performed significant services in relation to establishing or maintaining sales in Washington to create nexus with the state.

Like the present appeal, Hayssen's out-of-state activities concerning sales to Washington customers were much more extensive than its in-state activities. Similarly, only a small percentage of the taxpayer's total receipts were generated by Washington sales. Hayssen's contacts with Washington consisted solely of nonresident salespersons who occasionally visited customers in the state. Additionally, nonresident service technicians came into Washington to supervise the installation of machinery sold to Washington customers and to repair that machinery. Furthermore, Hayssen's machine sales were not conditioned upon the customers requesting installation by Hayssen. Sales and supervision of installation were contracted separately. Based on these facts the taxpayer argued there was insufficient activity in Washington to create nexus.

The Board did not find that installation was a condition of sale. Still, after reviewing the standards of Rule 193B, the Board declared the taxpayer's arguments "spurious" and found its activities significantly associated with its sales into this state. The Board stated in affirming the assessment:

...., if the sale of the manufactured machinery was not conditioned upon a service contract, certainly the services and the activity surrounding the supervision and installation were generated as a result of the sale of the manufactured machinery thereby creating significant activity in the state of Washington to establish nexus and further maintain the corporation's position in the marketplace.

The reasoning of Hayssen applies to the present appeal. Even if installation was not a condition of sale, the services and activities relating to installation resulted from the sale. The taxpayer's sales were significant activities in Washington to establish nexus and further maintain the taxpayer's position in the marketplace. See 193B(5). The assessment in Schedule II is sustained.

DECISION AND DISPOSITION:

The taxpayer's petition for refund is denied.

DATED this 25th day of February, 1991.