

Cite as 3 WTD 357 (1987)

BEFORE THE INTERPRETATION AND APPEALS SECTION
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 Correction of Assessment)	
and Refund of)	No. 87-233
)	
. . .)	Registration No. . . .
)	Tax Assessment Nos. . . .
)	

[1] **RULE 246:** B & O TAX -- EXEMPTION -- DIRECT SELLER'S REPRESENTATIVE

-- RELATIONSHIP TO SELLER. The direct seller's representative exemption is not lost if the direct seller's representative is owned by some of the owners of the seller. The seller and the direct seller's representative were separate corporations and therefore separate persons under Washington's excise tax system even though they shared some ownership in common.

[2] **RULE 246:** B & O TAX -- EXEMPTION -- DIRECT SELLER'S REPRESENTATIVE

-- EXCLUSIVITY OF SALES. The direct seller's representative exemption is not lost if sales are made to Washington customers other than through direct seller's representatives if those sales are constitutionally exempt from tax.

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: . . .
. . .

DATE OF HEARING: April 29, 1987

NATURE OF ACTION

The taxpayer petitioned for a correction of two assessments issued after an audit of its records.

FACTS

Potegal, A.L.J. -- The taxpayer corporation is based in . . . , Oregon. It is in the business of selling food products at wholesale. It solicits sales in Washington through the efforts of another Oregon corporation with whom it has some of the same shareholders in common.

During a portion of the audit period (January 1, 1981 through March 31, 1986), the taxpayer also had one employee who periodically came into Washington to solicit sales from one small account. The sales resulting from this employee's efforts were always arranged so that the customer came into Oregon to pick up the goods. This employee also serviced the counters of the customer's stores in Washington one day per month. Counter servicing involved rotating products on shelves and positioning products for display.

The taxpayer had another position, filled by two persons at different times, which involved coming into Washington one day a month to perform counter servicing for several small accounts near Portland. The employees who filled this position did not solicit sales.

Sales to Washington customers that were not solicited by the other Oregon corporation were arranged by telephone. Customers called the taxpayer in Oregon and placed an order. The taxpayer in response shipped the order into Washington by common carrier.

When the Department audited the taxpayer, the audit staff made the following findings. The counter servicing performed by the taxpayer's employees did not rise to the level of activity necessary to create sufficient local nexus to tax sales into Washington. The solicitation by the taxpayer's employee did not lead to taxation because the sales arising from that solicitation actually took place in Oregon, the place of delivery. All telephone sales were disassociated from any local activity and were therefore not subject to tax. The activities of the other Oregon corporation, however, did establish sufficient local nexus to tax the sales solicited by that corporation.

The audit staff also took the position that sales solicited by the other Oregon corporation did not qualify for the direct seller's representative exemption (RCW 82.04.423 and WAC 458-20-246). The basis for this position apparently was that the taxpayer and the other Oregon corporation had some of the same stockholders. Otherwise, the exemption would have applied.

ISSUES

1. Is the taxpayer entitled to a cancellation of the assessments and refund of all business and occupation taxes paid since January 1, 1982 on grounds set forth by the appellants in two cases pending before the United States Supreme Court -- National Can Corp., et al v. Washington Dept. of Revenue, No. 85-2006 and Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue, No. 85-1963?
2. Is the taxpayer entitled to a cancellation of taxes assessed and a refund of taxes paid for business activity occurring since August 23, 1983, the effective date of the direct seller's representative exemption?

DISCUSSION

1. The recently issued decision in the cases cited do not support the taxpayer's petition. The Department prevailed with respect to Tyler Pipe Industries. The holding of the court with respect to National Can Corp., while not favorable to the Department, dealt with the effect of the business and occupation tax on manufacturers. The taxpayer here is not a manufacturer.
2. The direct seller's representative exemption is found at RCW 82.04.423. That law is implemented by WAC 458-20-246 (Rule 246), a duly adopted rule of the Department of Revenue which, by virtue of RCW 82.32.300, has the same force and effect as the law. That rule provides in part:

A "direct seller's representative" is a person who (a) buys "consumer products" on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or other than in a permanent retail establishment or (b) sells or solicits the sale of, "consumer products" in the home or other than in a permanent retail establishment. In order to be considered a "direct seller's representative" a person must also show that:

1. Substantially all of the remuneration paid, whether or not paid in cash, for the performance of services is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and
2. The services performed are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract

provides that the person will not be treated as an employee with respect to such services for federal tax purposes.

BUSINESS AND OCCUPATION TAX

WHOLESALE AND RETAILING. The business and occupation tax does not apply to an out-of-state seller making wholesale or retail sales to or through a "direct seller's representative." The out-of-state seller must show that it is represented in this state by a "direct seller's representative," as defined above. In addition, the out-of-state seller must also show that it:

1. Does not own or lease real property within this state;
2. Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business;
3. Is not a corporation incorporated under the laws of this state; and
4. Makes sales in this state exclusively to or through a "direct seller's representative."

Thus, a representative who solicits sales of "consumer products" in this state, other than in a permanent retail establishment, and also meets the other requirements of the law as set forth above, qualifies as a "direct seller's representative." If the out-of-state seller and the in-state representative can factually establish compliance with all of the above listed requirements, the out-of-state seller is exempt from business and occupation tax.

The exemption is available only where an out-of-state seller is present in this state and represented exclusively by a "direct seller's representative." If an out-of-state seller makes wholesale or retail sales of "consumer products" in Washington to or through a "direct seller's representative" and also has a branch office, local outlet, or other local place of business, or is represented by any other employee, agent, or other representative, no portion of the sales are exempt from business and occupation tax.

We find that, based upon the evidence presented, the taxpayer is entitled to the direct seller's exemption from business and occupation tax. It meets all requirements for exemption discussed in the rule. The taxpayer does not own or lease real property in the state, does not maintain a stock of goods in the state, and is not incorporated under the laws of this state. The remaining requirement is that it make sales in this state exclusively to or through a direct seller's representative.

[1] There is no doubt that the Oregon corporation soliciting sales on behalf of the taxpayer is a direct seller's representative. It solicits sales of consumer products other than in a permanent retail establishment, is paid a commission based on sales, and performs its service pursuant to written contract which provides that it is not an employee for federal tax purposes. These are the only elements of being a direct seller's representative which are stated in the statute and rule. The fact that some of the same individuals have ownership interests in both the taxpayer and the direct seller's representative has absolutely no impact on the exemption. The taxpayer and the other Oregon corporation are separate persons under Washington's excise tax system despite any degree of commonality of ownership. WAC 458-20-203.

A very technical argument could be made that sales in Washington are not made exclusively through direct seller's representatives. Some sales take place when Washington customers telephone orders directly to the taxpayer in Oregon and the goods are shipped by common carrier into Washington. Because delivery is in Washington, the sales could be deemed to take place in Washington. WAC 458-20-103. However, to adopt this approach would lead to the incongruous result of the taxpayer losing an exemption for one type of sale solely because it makes another type of sale which neither involves any in-state activity nor is subject to tax.

[2] The Department does not take that approach. The Department's position is that the direct seller's representative exemption will not be lost merely because the seller made other constitutionally exempt sales into Washington. Determination No. 87-232, _____ WTD _____ (1987).

DECISION AND DISPOSITION

The taxpayer's petition is denied as to sales occurring before August 23, 1983. The taxpayer's petition is granted as to sales occurring on and after August 23, 1983. Tax Assessment No. . . . , which only includes the year 1981, in the amount of \$. . . , plus interest of \$. . . , for a total of \$. . . , is due for payment by August 9, 1987. Tax Assessment No. . . . , which

covers the period from 1982 through the first quarter of 1986, will be adjusted to delete tax on sales made on and after August 23, 1983. The taxpayer will be advised later of the amount remaining due and the due date. Finally, the taxpayer will be issued a refund, plus interest, of business and occupation tax paid on sales occurring since August 23, 1983.

DATED this 10th day of July 1987.