Cite as Det. No. 00-098, 22 WTD 151 (2003)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment/Refund of	)	D E T E R M I N A T I O N
	)	No. 00-098
. . .	)	Registration No. . . .
	)	FY . . . /Audit No. . . .

Rule 193(7): B&O TAX--DISSOCIATION. Out-of-state taxpayer which maintains warranty service center for goods it sells in Washington cannot show that such centers are not significantly associated in any way with sales of such goods, including sales by national accounts. *Distinguishing Norton Co. v. 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:

Taxpayer seeks abatement of an assessment and a refund of taxes paid . . . because it should have been allowed to dissociate its national account sales from its other sales activities in the state. [1]

FACTS:

Bianchi, A.L.J[2]. -- The taxpayer was audited for the period January 1, 1994, through December 31, 1997. The Audit Division determined that the taxpayer's business activities in Washington consisted of wholesales sales of electronic equipment by local sales representatives in the state as well as sales of parts to independent contractors who provided warranty and repair services for the electronics and some computer products. Most of the sales identified in the audit were unreported sales that occurred prior to the time the Taxpayer registered on July 1, 1995. The total tax for the four years amounted to $ . . . . Together with penalties and audit interest, the total assessment was for $ . . . .

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

[2] Sylvia Thomas,ALJ, also participated in the hearing and drafting of this determination.

At the time of the assessment the taxpayer maintained that the auditor included in the measure of the tax all sales of taxpayer's goods delivered to Washington during the audit period. The taxpayer complained that, in addition to sales solicited by the Washington sales representatives, these deliveries included sales of goods solicited outside Washington by the taxpayer's national office. The taxpayer's national office negotiated sales directly with the national headquarters of electronic retailers. The taxpayer contends that any sales shipped to Washington retail outlets of such national retailers were not Washington sales and thus should not have been included in the measure of the tax. Audit offered to examine any records that would establish that the sales were to national accounts but also pointed out that the taxpayer's warranty service centers in Washington throughout the audit period demonstrated that the taxpayer had sufficient presence in the state to preclude its dissociation of the national account sales. The taxpayer did not provide audit with any documentation of the national account sales.

. . .

During the audit period, the company was organized into three Divisions, the . . . (Electronics Division), the . . . (Computer Division) and the Service Division. The Electronics Division was headquartered in [State A]. It was responsible for the sales of personal electronic items such as televisions, VCRs and microwave ovens. The Electronics Division was organized with two sections: national accounts and regional accounts. National accounts, which involved major retailers, . . . , were handled by sales staff in the [State A] office who dealt with and made calls to such retailers' headquarters. None of the headquarters of major retailers was located in Washington. The regional accounts section dealt with smaller retailers. These accounts were handled by an independent sales representative, a [State B] corporation. This corporation sent sales representatives into Washington to solicit sales from Washington retailers. . . .

The sales staff of the Computer Division, headquartered in [State C], sold computer hardware. There is no record of the Computer Division sales staff visiting customers in Washington.

The Service Division, headquartered in [State A], provided service and support of the products marketed by both the Computer and the Electronics Divisions. It operated toll-free telephone numbers to provide technical support, and service center referrals for the retail customers. The Service Division did not have any employees in Washington nor did its employees travel to Washington. There were, however, authorized service centers in Washington state during the entire audit period, approved by the Service Division to perform warranty and non-warranty repair services. Retail customers located the nearest authorized service center either by telephoning the taxpayer or accessing the taxpayer's webpage. All products sold by the Electronics Division could either be serviced by the independent service centers, or be shipped back to the headquarters for replacement. From September, 1995 computer monitors marketed by the Computer Division were also serviced by the independent service centers.
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ISSUES:

1. . . .

2. May the taxpayer dissociate its national account sales from its other instate activities?

DISCUSSION:

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Warranty Service Centers

Taxpayer attempts to dissociate electronics and computers sold through the national accounts from its other activities in Washington. The taxpayer contends that the bulk of its income assessed for 1994 and 1995 included the national accounts. Given the presence of the authorized warranty service centers in Washington throughout the audit period, such dissociation is not possible.

Taxpayer cites *Norton Co. v., Department of Revenue*, 340 U.S. 534 (1951) (*Norton*) for the principle that a seller may dissociate the sales of its national accounts from its activities of authorizing repair centers for its products in a state. Norton was a Massachusetts manufacturer of abrasive machines and supplies. It maintained a branch office and warehouse in Illinois from which it made local retail sales to over-the-counter customers. The branch office also serviced machines after they were purchased and gave engineering and technical advice. Other orders for sales were sent by Illinois residents directly to the home office of the Massachusetts company and were accepted and filled there. The Court allowed these latter sales to be dissociated from the taxpayer's other Illinois activities: "The only items that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business orders sent directly to Worchester by the customer and shipped directly to the customer from Worchester. *Id* at 539.

We doubt the continued validity of *Norton*. As the quotation above demonstrates, the premise in *Norton* was that states could not tax interstate commerce. And see *id* at 536-37. That premise was overruled in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 289 (1977) (*Complete Auto*). No federal court has relied upon *Norton's* dissociation holding after *Complete Auto Transit.* Second, *Norton* stated that merely sending solicitors (itinerant drummers) into the state would not provide nexus for any resulting sales. This holding has not been followed in numerous cases, *e.g. Scripto Inc. v. Carson*, 362 U.S. 207; 80 S.Ct. 619, 4 L.Ed. 2d 660 (1960).[3] Today, sending sales personnel into a state and delivering the goods here is sufficient presence to create both Due Process and Commerce Clause nexus.

[3] Although the solicitors were also residents of the state in *Scripto*, the Court did not rely on this fact in holding that solicitations by independent contractors create nexus.

Nevertheless, Rule 193(7)(c) continues to allow dissociation where the taxpayer can meet its terms:

> If a seller 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."

It is the Rule, not *Norton*, that controls our discussion of dissociation.

The service centers operated through independent contractors are a significant activity. The taxpayer authorizes the service centers to work on all products sold by the Electronics Division. Since September 1995, they have also been authorized to work on computer monitors, sold by the Computer Division as well.[4] On all products serviceable by the service centers, retail customers have a choice of taking the product to the local service center, or the customer can take advantage of the taxpayer's ship-in service. If the customer chooses to use the ship-in service, the customer pays shipping costs to the taxpayer and the taxpayer pays the costs to return the product to the customer.

The question is whether this activity is significantly associated in any way with the national account electronic sales and the computer sales into the state. [5]

> [O]nce a corporation enters a state to do local business and has submitted itself to the taxing power of the state, it is the corporation's burden to exempt itself from the local tax by showing no in-state activities were associated with the interstate business. To meet this burden, a corporation must show that its in-state services were not decisive in establishing and holding the market.

Chicago Bridge and Iron Co. v. Department of Rev., 98 Wn.2d 814, 822, 659 P.2d 463 (1983) (internal citations omitted).

Is it likely that the existence of the service centers influence retail customers to purchase the taxpayer's products? Or, phrased otherwise, if the retail customer's must ship-in the electronic product for authorized service, would that customer choose a product that offered in-state authorized service? The taxpayer currently touts its service centers as:

> unsupassed [sic] in the industry in ensuring the highest levels of support, service and responsiveness to our customers and dealers. . . .

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[4] Other products, such as hard disk drives, DVD/CD-ROM drives are not serviced by the taxpayer. If one of these items is faulty, the customer ships the defective equipment to the taxpayer, which ships the customer a new replacement.

[5] The Department has published numerous determinations that confirm the test is in-state activities "significantly associated" with the sale. See Det. No. 91-192, 11 WTD 383 (1992); Det. No. 94-209, 15 WTD 96 (1996); and Det. No. 97-235, 17 WTD 107 (1998).

. . .

For all electronics products and the computer monitors, the retail customer decides whether to utilize the local authorized service center.

We believe the existence of local service centers enhances the taxpayer's ability to maintain its Washington market. In today's fast moving environment, a consumer of retail electronics is less likely to be willing to bear the burden of shipping electronic products, especially items such as televisions, and microwaves to be repaired at a distant location. The existence of the service centers is undoubtedly an attractive option for persons buying the taxpayer's product. Because the existence of the service centers help establish and maintain the market for the taxpayer's products in Washington, it is an activity that cannot be dissociated from the sale of those products.

The taxpayer cites to a decline in sales for the Computer and the Electronics Division as evidence that the service centers do not serve to maintain its in-state market. Such a result is not dispositive. That the service centers establish or maintain a market does not imply that the taxpayer will increase in-state sales due to the presence of in-state service centers. The issue we are concerned with is whether the service centers are significantly associated in any way with the national account and Computer sales into this state. Rule 193(7) The simple fact that some customers chose to use the service centers rather than mail in their products for repair supports our conclusion upholding the Audit division's assessment. The services performed by the independently operated service centers cannot be separated from the taxpayer's ability to establish and maintain a market in Washington. The sales of all of taxpayers electronic equipment through both its regional accounts and national accounts were subject to wholesaling B&O tax.

During the audit period, the Computer Division did not share sales personnel with other Divisions and no sales person or representative in the state solicited the sale of computer hardware. Computers sold through the Computer Division have never been serviced by the local service centers and computer monitors have only been serviced by them since September, 1995. For the period prior to the service centers becoming authorized to repair computer monitors, the taxpayer argues that its instate activities [service centers] are not significantly associated in any way with the sales of computer hardware and even after the monitors were locally serviced the taxpayer argues that sales of other computer hardware should still be dissociated.

We do not find, however, that either nexus or dissociation requires a product by product analysis. It is not necessary for the warranty service centers to service any or all of the computer hardware sold by the taxpayer for a significant association to exist between the presence of the service centers and the sales of computer hardware. Computer hardware is not so dissimilar from electronic goods to erase any linkage consumers might make with the taxpayer's name and products. Servicing of other electronic goods helps establish and maintain a market and good reputation for computer hardware sold by the Computer Division. Therefore, we conclude that

taxpayer's sales of computers and computer monitors into the state may not be dissociated either prior to September, 1995 or thereafter.[6]

DECISION AND DISPOSITION:

The taxpayer petition for abatement of assessment and for refund are denied.

Dated this 31st day of May, 2000.

[6] If both the electronic and computer products [had been] sold by the same Division, the [taxpayer would] not have been [arguing] that the taxpayer could dissociate the sale of one product from another similar product. Thus the . . . thesis seems to be that the taxpayer's separation of its activities into separate divisions permitted dissociation of one division's activities from the other's. [We do not agree. *See*] *National Geographic Society v. California Board of Equalization,* 430 U.S. 551 (1977) . . . [I]n this instance Rule 193 allows a taxpayer to dissociate only if it can show that its service centers were not significantly associated in any way with its sales of computer hardware.