

Cite as Det. No. 15-0218, 35 WTD 206 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 15-0218
)	
...)	Registration No. ...
)	

[1] RULE 19401; RCW 82.04.220: B&O TAX – ECONOMIC NEXUS – TRAILING NEXUS. Even if a taxpayer met one of the thresholds for economic nexus by only a small amount in a calendar year, that taxpayer nevertheless automatically had trailing nexus in the following calendar year, regardless of whether the taxpayer had any nexus-creating activity in Washington during that subsequent calendar year.

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.

Yonker, A.L.J. – An out-of-state web development company (Taxpayer) appeals the denial of its request for a refund of taxes. Taxpayer contends that it should not be liable for excise taxes in Washington in 2014 because it was only marginally over the nexus threshold for 2013. We deny Taxpayer’s petition.¹

ISSUE

Pursuant to RCW 82.04.220(2), did Taxpayer have “trailing” nexus in Washington in 2014, where Taxpayer established substantial nexus under the requirements of RCW 82.04.067 for 2013?

FINDINGS OF FACT

[Taxpayer] is [an out-of-state] corporation headquartered in . . . , that provides web development services primarily to law firms. In 2014, Taxpayer appealed a tax ruling in which the Department advised Taxpayer that it was required to report and pay taxes on its gross income in Washington for the 2013 tax year. On September 23, 2014, we issued Determination No. 14-0306, 34 WTD 127 (2015), in which we held that Taxpayer had established substantial nexus, and was, therefore, subject to taxation in Washington for the 2013 tax year. Specifically, we stated the following in that determination:

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

Here, Taxpayer concedes that it had one employee in Washington during 2013, and paid that employee a total of \$. . . during that year. While this amount is only slightly over the \$53,000 payroll threshold, it is, nevertheless, above that threshold. We have no authority to “waive” tax liability for any taxpayer that meets any of the thresholds identified in RCW 82.04.067.

[Taxpayer’s one employee in Washington left the state sometime during 2013, and there is no evidence that Taxpayer had any employees in Washington during 2014, or any other basis for establishing nexus in Washington during that year.]

On January 30, 2015, Taxpayer requested a refund for Washington taxes it paid for the 2014 tax year on the basis that it had “barely reached nexus” in 2013, and that further taxation in 2014 “seems like an abuse of power.” On February 12, 2015, the Department’s Taxpayer Account Administration (TAA) denied Taxpayer’s refund request. Taxpayer appealed TAA’s denial of the refund request.

ANALYSIS

Washington imposes upon “every person that has a substantial nexus with this state” a business and occupation (“B&O”) tax “for the act or privilege of engaging in business activities” in Washington. RCW 82.04.220(1). A state cannot tax business activity that does not have sufficient connection or “nexus” with the state. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076 (1977); *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 483 U.S. 232, 107 S.Ct. 2810 (1987); *Quill Corp. v. North Dakota*, 504 U.S.298, 112 S.Ct. 1904 (1992); Det. No. 05-0376, 26 WTD 40 (2007). The idea of “nexus” flows from limits on a state’s jurisdiction to tax found in the Due Process and Commerce Clause Provisions of the United States Constitution. Det. No. 01-188, 21 WTD 289 (2002); *see also* RCW 82.04.4286. The U.S. Supreme Court has held that the Commerce Clause requires that the transaction being taxed have “substantial nexus” with the taxing state. *Complete Auto Transit, Inc.*, 430 U.S. at 279.

In Washington, “substantial nexus” is defined in RCW 82.04.067, which provides a number of different means through which a taxpayer may establish substantial nexus with Washington. In addition, under RCW 82.04.220(2), “[a] person who has a substantial nexus with this state in any tax year under the provisions of RCW 82.04.067 will be deemed to have a substantial nexus with this state for the following tax year.” Thus, if any of the substantial nexus thresholds under RCW 82.04.067 is met for one tax year, RCW 82.04.220(2) provides that a taxpayer is deemed to have substantial nexus with Washington not only for that tax year, but for the following tax year, as well. This is sometimes referred to as “trailing” nexus.

In 34 WTD 127, we held that Taxpayer met the payroll threshold under RCW 82.04.067(1)(c)(ii) for establishing substantial nexus in Washington for 2013. As such, under RCW 82.04.220(2), Taxpayer automatically had substantial nexus for 2014.

Taxpayer appears to argue that the Department should, in essence, waive Taxpayer’s 2014 tax liability given that it originally met the payroll threshold in 2013 by a mere \$ As we stated in Determination 34 WTD 127, “[w]e have no authority to ‘waive’ tax liability for any taxpayer

that meets any of the thresholds identified in RCW 82.04.067.” We likewise have no authority to “waive” tax liability for any taxpayer that meets the requirements of trailing nexus under RCW 82.04.220(2). We, therefore, deny Taxpayer’s petition.

DECISION AND DISPOSITION

Taxpayer’s petition is denied.

Dated this 11th day of August, 2015.