Cite as Det. No. 99-216E, 18 WTD 264 (1999)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	F I N A L E X E C U T I V E L E V E L D E T E R M I N A T I O N
	)	No. 99-216E
. . .	)	Registration No. . . . FY. . . /Audit No. . . .

[1] RULE 193; RULE 103; RCW 82.04.240: WHOLESALING B&O TAX – PLACE OF SALE –RECEIPT OF GOODS – UCC DEFINITIONS OF DELIVERY. Sales take place in Washington where an out-of-state manufacturer sells products to a Washington buyer under a contract which provides that the goods will be sent f.o.b. the taxpayer's out-of-state manufacturing plant and that the products are subject to final inspection and acceptance by the buyer at the destination in Washington. Although the contracts provided that the buyer had the right to assign resident personnel at the taxpayer's facilities the authority to accept the goods, the taxpayer presented no evidence that such right was ever exercised or that the buyer had an employee or agent at the taxpayer's plants who inspected the goods and either accepted or rejected them on the buyer's behalf prior to shipment. Transfer of title is not dispositive for B&O tax purposes. Rule 193 cannot be read to permit transactions to escape taxation that the Supreme Court has specifically construed the B&O statute to include. Out-of-state delivery of a product by a seller to a common carrier does not constitute out-of-state receipt by a purchaser. Uniform Commercial Code definitions of delivery are not controlling for B&O tax purposes. Instead, a Washington sale takes place when the goods are received by the buyer or its agent in this state.

[2] RULE 193; RCW 82.04: B&O TAX -- CONSTITUTIONALITY OF STATUTES – DUE PROCESS CLAUSE – COMMERCE CLAUSE. The Department, as an administrative agency, does not have the authority to declare a statute to be unconstitutional. Only the courts have that power. For Due Process purposes, the state where the goods are ordered, delivered, received, accepted, and used has sufficient contact with and interest in these goods to tax them. Sales do not lack Commerce Clause nexus with Washington simply because title to the goods passes out-of-state. Where the taxpayer has a physical presence in this state and it delivers goods here, which are consumed here, it has sufficient Commerce Clause nexus. A

tax on interstate commerce is not discriminatory unless it affords a differential tax treatment of interstate and intrastate commerce which is detrimental to interstate commerce. Washington's tax treats interstate and intrastate business equally. It does not facially discriminate against interstate commerce. A Washington-based wholesaler pays the same B&O tax rate on its sales to Washington customers as an out-of-state vendor does on its wholesale sales to Washington customers.

[3] RULE 193; RCW 82.12.040: USE TAX – WHOLESALING B&O TAX -- VALIDITY OF RULE – UNAUTHORIZED ACTS – CONFLICT BETWEEN RULE AND STATUTE. Rule 193 does not conflict with RCW 82.12.040, and it is not invalid. RCW 82.12.040(1) applies to every person who has a place of business, maintains a stock of goods, or engages in business activities within this state, including every activity which is sufficient under the Constitution of the United States for this state to require collection of use tax. Because the use tax applies not just to goods purchased outside the state, RCW 82.12.040(1) does not provide any indication of where a sale takes place for purposes of Washington's retail sales tax or retailing B&O tax. As such, RCW 82.12.040(1) does not conflict in any manner with any part of Rule 193 relevant to this taxpayer's assessment of wholesaling B&O 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.

NATURE OF ACTION:

An out-of-state manufacturer of . . . parts protests the assessment of wholesaling business and occupation (B&O) tax on its sales to a Washington purchaser.[1]

FACTS:

De Luca, A.L.J. -- A foreign corporation (the taxpayer) manufactures . . . parts at out-of-state locations. It sells many of those parts to [a Washington manufacturer (hereafter "Manufacturer")], which uses them in manufacturing [products] in Washington. Sales from three of the taxpayer's manufacturing locations are involved in this matter.

The Audit Division of the Department of Revenue (the Department) reviewed the taxpayer's books and records for the period January 1, 1990 through December 31, 1993 and assessed $ . . . in taxes and interest. . . . . The vast majority of the taxes assessed relate to wholesaling B&O tax on the sales made to [Manufacturer] after 1991. The assessment includes $ . . . of B&O tax for sales by the taxpayer's . . . division . . . located in [State A]. . . . The assessment also includes $ . . . of wholesaling B&O tax for 1992 and 1993 sales to [Manufacturer] and other Washington customers by the taxpayer's . . . division . . . located in [State B] . . . , and $ . . . of B&O tax for 1990-1993 sales to [Manufacturer] and other Washington customers by the taxpayer's . . . division . . . , also in [State

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

B] . . . .[2] Only sales to [Manufacturer] that occurred on or after January 1, 1992 are at issue.

The terms of the taxpayer's contracts with [Manufacturer] provided that all products "shall be delivered F.O.B. carrier's transport at [the taxpayer's] plant." According to one contract, "Title to and risk of any loss of, or damage to" the products "shall pass from [the taxpayer] to [Manufacturer] upon delivery as set forth" in the above contract provision, "except for loss or damage resulting from the taxpayer's fault or negligence or failure to comply with the terms of the contract." The contracts provided that the products "shall be subject to final inspection and acceptance by [Manufacturer] at destination" in Washington, "notwithstanding any payment or prior inspection at source."

[The taxpayer] asserts that in one of its contracts, [Manufacturer] had the right to assign resident personnel at the taxpayer's facilities the authority to accept the goods, but no evidence was presented that such right was ever exercised. Further, the taxpayer and [Manufacturer] concede that [Manufacturer] did not have an employee or agent at the taxpayer's plants who inspected the parts and either accepted or rejected them on [Manufacturer]'s behalf prior to shipment.

The Audit Division found that [Manufacturer] accepted the parts in Washington. The Audit Division relied on WAC 458-20-193 (Rule 193), which became effective January 1, 1992, in assessing wholesaling B&O tax on the taxpayer's gross sales into Washington.

TAXPAYER'S EXCEPTIONS:

The taxpayer makes four arguments. First, the sales and deliveries occurred in [States A and B] pursuant to Rule 193 and, therefore, B&O tax does not apply. Second, commercial law and common law determine the place of delivery for Washington B&O tax purposes. Third, assuming, arguendo, that the B&O tax does apply, imposing the tax violates the Due Process Clause and the Commerce Clause of the U.S. Constitution. Fourth, assuming, arguendo, that the application of Rule 193 survives the constitutional challenge, the rule is invalid because it conflicts with RCW 82.12.040.

In its first argument, the taxpayer states it made deliveries of parts to [Manufacturer] at [the taxpayer's] out-of-state locations. Under the terms of their agreement, the parts were shipped by common carrier freight collect, f.o.b. [the taxpayer's] plant. Title and risk of loss or damage to the parts passed from it to [Manufacturer] at the out-of-state locations. The taxpayer contends that [Manufacturer] received the equipment outside Washington and, therefore, the sales proceeds are not subject to Washington's B&O tax.

In support of this conclusion, the taxpayer quotes the definitions of "delivery" and "receipt" contained in Rule 193(2).

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[2] $ . . . of wholesaling B&O was assessed in 1990 and 1991 against sales originating from Division . . . in [State B]. Furthermore, the assessment for [the other] Division . . . , [in State B] included revenue from several Washington customers other than [Manufacturer] both before and after 1992. In light of the clear declaration in the Petition that only sales occurring after January 1, 1992 to [Manufacturer] were at issue, we deem the taxpayer to have waived any argument with respect to sales to [Manufacturer] in 1990 and 1991 and sales to customers other than [Manufacturer] at any time.

> (c) "Delivery" means the act of transferring possession of tangible personal property. It includes among others the transfer of goods from consignor to freight forwarder or for-hire carrier, from freight forwarder to for-hire carrier, one for-hire carrier to another, or for-hire carrier to consignee.
>
> (d) "Receipt" or "received" means the purchaser or its agent first either taking physical possession of the goods or having dominion and control over them.

The taxpayer argues that, by definition, delivery cannot occur in two different places, so delivery occurred when the taxpayer relinquished possession of the parts by consigning them to a for-hire carrier. [Manufacturer] then assumed dominion and control over the parts, and the taxpayer's involvement with the sale ended at that point. It claims this activity constituted receipt of the parts by [Manufacturer].

The taxpayer further argues that the Washington Supreme Court has expressly held the U.C.C. is dispositive of where a sale occurs when determining the Washington tax consequences of a transaction. The taxpayer cites *Weyerhaeuser Co. v. Department of Rev.*, 106 Wn.2d 557, 562-63, 723 P.2d 1141 (1986). The taxpayer also cites a case where the Connecticut Supreme Court applied the U.C.C. to the terms of the parties' contract to determine where the sale occurred for state tax purposes. *Steelcase, Inc. v. Crystal*, 680 A.2d 289 (Conn. 1996).

The taxpayer also asserts for purposes of statutory construction, the legislature is deemed to have acted when passing legislation with an understanding of the then-existing case law. That is, a statute will not be construed in derogation of the common law unless the legislature has clearly expressed its intention to vary it. *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). Thus, the taxpayer contends unless the case law existing in 1935, when the Revenue Act was adopted, would have clearly considered the taxpayer's sales to have occurred within this state, RCW 82.04.270 must be construed to not impose the wholesaling B&O tax on its sales. The taxpayer argues that under Washington case law, as it existed in 1935, the f.o.b. point designated in the parties' sales contract is the point where the seller "delivers" the goods and where the buyer or its agent takes possession of the goods. *Valley Fruit Company v. United States Fidelity & Guaranty Co.*, 161 Wash 166, 296 P. 557 (1931).

Additionally, the taxpayer quotes WAC 458-20-103 (Rule 103) and cites the unpublished summary judgment order in *PACCAR Inc. v. Department of Rev.*, Thurston County Superior Court Cause No. 91-2-017595-3 (1991) in support of its position that the deliveries did not occur within Washington and the sales took place outside the state. Rule 103 provides in part:

> For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this state when the goods sold are delivered to the buyer in this state, irrespective of whether title to the goods passes to the buyer at a point within or without this state.

The taxpayer claims the court in *PACCAR, supra*, held that under Rule 103 the place of delivery

specified in PACCAR's contracts with its buyers controlled whether PACCAR had liability for Washington tax on its sales. The taxpayer also cites RCW 62A.2-401(2) where it provides that title passes when a seller "completes his performance with reference to the physical delivery of the goods . . .." According to the taxpayer, under Rule 193(7) and RCW 62A.2-401(2), physical delivery occurred when it committed itself to the act of making the shipments. Therefore, it relinquished physical possession at the f.o.b. point. [Manufacturer] obtained dominion and control over the goods at the same time.

The taxpayer's second argument is the B&O tax assessment is unconstitutional. The taxpayer contends imposing the B&O tax violates the Due Process Clause, because that clause prohibits one state from imposing a tax upon an event that occurs in another state. The taxpayer cites *United States v. R.P. Andrews & Co.*, 207 U.S. 229 (1907); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944); and *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), in support of its argument. Accordingly, the taxpayer asserts Washington cannot tax its sales to [Manufacturer] because the sales occurred in either [State A] or [State B], when the parts were delivered to the common carriers.

Additionally, the taxpayer asserts that imposing the B&O tax on its sales income violates the Commerce Clause. The taxpayer argues Washington lacked substantial nexus to tax the sales because they were consummated outside this state, citing the same four cases it used for its Due Process argument. Moreover, the taxpayer claims Rule 193's taxing scheme facially discriminates against interstate commerce under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

To illustrate the latter contention, the taxpayer provides a hypothetical example in support of its belief that in-state business interests are treated beneficially and out-of-state business interests are burdened by Rule 193. A Washington seller makes a retail sale to a Washington buyer. The seller is subject to retailing B&O tax and collects sales tax. The buyer pays only one sales tax. By comparison, a Wyoming vendor sells goods at retail to a Washington buyer. The seller has nexus with Washington, which contributed to the sale. The contract terms provide that the goods will be shipped f.o.b. Casper, Wyoming. The seller is required only to put the goods into a carrier's possession, and the buyer is required to pay the freight. At this point, the risk of loss passes to the buyer. The goods are shipped to the buyer in Washington where it inspects and accepts them. The taxpayer states that Rule 193 would require the seller to report retailing B&O tax and collect sales tax from the buyer. The taxpayer argues that Wyoming also would require the seller to collect Wyoming sales tax from the buyer on the same transaction, citing *In the Matter of the Appeals of Wyoming Machinery Co.*, Wyoming State Board of Equalization, Nos. A-88-76 and 89-157 (1990). The taxpayer states that chapter 82.08 RCW does not provide a credit against Washington sales tax for sales tax paid to another state. The taxpayer then contends the Wyoming seller is placed under an economic disadvantage compared to the Washington seller, which is facially discriminatory.

The taxpayer's third argument is that the Department exceeded its authority in adopting Rule 193. The taxpayer claims the rule unlawfully negates RCW 82.12.040(1), which requires retailers doing business in this state to obtain a certificate of registration and collect use tax. The taxpayer believes the statute contemplates the situation where an out-of-state vendor passes title to the purchaser at a point outside Washington, but delivers the property to the purchaser in Washington for use in

Washington. If we correctly understand the taxpayer's argument, the taxpayer contends that Washington's retail sales tax would not apply to such a sale and neither would the retailing B&O tax. Because Rule 193 attempts to make such taxes apply, the taxpayer contends that RCW 82.12.040(1) conflicts with and, therefore, invalidates Rule 193.

ISSUES:

1. Did the taxpayer's sales of parts to [Manufacturer] occur in Washington or outside the state?

2. Is Rule 193 unconstitutional for violating the Due Process Clause or the Commerce Clause?

3. Does Rule 193 conflict with RCW 82.12.040, thus making the rule invalid?

DISCUSSION:

The Sales Did Not Take Place in [State B] or [State A]

Statutory Authority

[1] By statute, RCW 82.04.220, Washington State imposes a Business and Occupation tax on engaging in business activities:

> **Business and occupation tax imposed.** There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

The statute has been construed many times by the Washington State Supreme Court to reach exactly the kinds of sales the taxpayer protests. For example, in *B.F. Goodrich v. State,* 38 Wn. 2d 663, *cert. denied*, 342 U.S. 876 (1951), the Court unanimously sustained the imposition of wholesaling B&O tax on products shipped directly to Washington purchasers, f.o.b. out-of-state locations. 38 Wn.2d at 664-66. Like the taxpayer in this case, B.F. Goodrich argued that transfer of title and delivery to the purchasers took place out-of-state because delivery to the common carrier was delivery to the purchaser. Based on the argument that the sales occurred out-of-state, B.F.Goodrich contended that the sales were exempt under RCW 82.04.4286 as now codified (exempting from tax transactions protected from taxation by the United States Constitution). Brief of Appellant at 59-61; Reply Brief of Appellant at 7, 21, *B.F. Goodrich*.[3] Noting that the transactions approved as taxable in *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), were all f.o.b. out-of-state locations, the

[3] B.F. Goodrich argued that the then-current version of Rule 193, which provided that such sales were taxable under the statute, was invalid. Reply Brief of Appellant, at 8. The rule at that time provided in part:

> A sale is made in this state when possession of the property sold passes to the buyer in this state. Delivery by the seller to a carrier outside this state, for delivery to the buyer in this state, and the carrier so delivering constitutes delivery of possession to the buyer in this state.

The Department subsequently revised that version of Rule 193 by publishing the rule in four separate parts, including former Rules 193A and 193B. Effective January 1, 1992, the current Rule 193 replaced former Rules 193 A and 193B.

Washington State Supreme Court sustained the wholesaling B&O tax on all classes of sales in which there was any involvement of a local Washington outlet. 38 Wn.2d at 670-77.

In *Field Enterprises, Inc. v. State*, 47 Wn.2d 852, 289 P.2d 1010 (1955), *aff'd*, 352 U.S. 806 (1956), the Washington State Supreme Court also unanimously sustained the imposition of retailing B&O tax on shipments made to Washington customers f.o.b. point of shipment. Because the sales were f.o.b. shipment point, the taxpayer argued that delivery occurred out-of-state. 47 Wn.2d at 854-55; Brief of Respondent at 34, *Field Enterprises*. Accordingly, Field Enterprises argued it was exempt from retailing B&O tax under RCW 82.04.4286, as currently codified. Brief of Respondent at 11. The Washington Supreme Court rejected this argument by concluding that its recent decision in *B.F. Goodrich* was controlling. 47 Wn.2d at 855-56.

Finally, in *General Motors Corp. v. State*, 60 Wn.2d 862, 376 P.2d 843 (1962) *aff'd*, 377 U.S. 436 (1964), *overruled in part on other grounds* by *Tyler Pipe Industries, Inc. v. Washington Department of Rev*., 483 U.S. 232, 248 (1987), the Washington Supreme Court again unanimously sustained the imposition of wholesaling B&O tax. *General Motors* involved a corporation that manufactured automobiles and parts outside Washington and then sold them to independent dealers within the state. The dealers sent their orders to an out-of-state office. General Motors accepted or rejected them out-of-state. The goods were shipped f.o.b. the out-of-state factory. General Motors argued at length that, with respect to such sales transactions, it was not "engaging within this state in the business of making sales at wholesale" within the meaning of RCW 82.04.270. Brief of Respondent and Cross-Appellant at 126-142, *General Motors*. In response to this argument, the Court first addressed the question "whether there is a *statutory* basis for imposing a tax on General Motors for the activities conducted by it within the state." (Emphasis added.)

> General Motors accomplishes wholesale sales of its products to retail dealers within the state. Part of the activities involved in these wholesale sales take place elsewhere *e.g.*, orders are filled, delivery made, and payment is received outside of the state. Nonetheless, business activities having a relation to wholesale sales are conducted in Washington. These activities provide an incident upon which the taxing statute operates. Whether or not these activities are sufficiently related to the accomplishment of wholesale sales to base the tax on the gross receipts of all wholesale sales to Washington retail dealers is a question with constitutional law ramifications in relation to the *measurement* of the tax and not the *imposition* of the tax. On the facts indicated, we hold that there is a statutory basis for imposing the tax.

60 Wn.2d at 872-73.

General Motors further argued that the Tax Commission's[4] rule bound the Commission to a position that the sales in question were "beyond statutory coverage." General Motors argued that the rule allowed the transactions to escape tax even if the statute did not (the same argument the taxpayer is making here). *See* Brief of Respondent and Cross-Appellant at 142-150. The Court rejected this argument, concluding that the Commission's position in court opposing this contention was consistent with both the statute and Rule 193 as it then existed. 60 Wn.2d at 873 n.2.

[4] The Tax Commission was the predecessor to the Department of Revenue.

B. Rule 103 and Rule 193. Rule 103 and Rule 193

A "sale" for B&O tax purposes is defined by statute. RCW 82.04.040 provides:

> "Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.04.050…

This statutory definition does not explicitly address "when" or "where" a sale occurs, but as we have seen, the Washington Supreme Court has declared that the B&O statute reaches the kinds of sales protested here. The rules promulgated by the Department are in conformity with those cases.

Rule 103 defines when and where sales are deemed by the Department to occur.

> WAC 458-20-103 TIME AND PLACE OF SALE.
>
> For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this state when the goods sold are delivered to the buyer in this state, irrespective of whether title to the goods passes to the buyer at a point within or without this state….
>
> (Emphasis added.)

This rule was augmented by Rule 193 effective January 1, 1992. The underlined portions of the rule quoted below clarify this effect:

> WAC 458-20-193 INBOUND AND OUTBOUND INTERSTATE SALES OF TANGIBLE PERSONAL PROPERTY.
>
> (1) INTRODUCTION. This section explains Washington's B&O tax and retail sales tax applications to interstate sales of tangible personal property. It covers the outbound sales of goods originating in this state to persons outside this state and of inbound sales of goods originating outside this state to persons in this state. This section does not include import and export transactions.
>
> (2) DEFINITIONS: For purposes of this section the following terms mean:
>
> (a) "State of origin" means the state or place where a shipment of tangible personal property (goods) originates.
>
> (b) "State of destination" means the state or place where the purchaser/consignee or its agent receives a shipment of goods.
>
> (c) "Delivery" means the act of transferring possession of tangible personal property. It includes among others the transfer of goods from consignor to freight forwarder or for-hire carrier, from freight forwarder to for-hire carrier, one for-hire carrier to another, or for-hire carrier to consignee.
>
> (d) "Receipt" or "received" means the purchaser or its agent first either taking physical possession of the goods or having dominion and control over them.
>
> (e) "Agent" means a person authorized to receive goods with the power to inspect and accept or reject them.

(7) INBOUND SALES

a. Delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier located outside this state merely utilized to arrange for and/or transport the goods into this state is not receipt of the goods by the purchaser or its agent unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.[5]

1. Dominion and Control

The taxpayer argues that under Rule 193, "dominion and control" shifts to the purchaser at the f.o.b. point out-of-state, so the purchaser "receives" the goods out-of-state, even if it doesn't have physical possession of them at that time. The taxpayer misconstrues the rule. The definition of receipt uses the concept of "dominion and control" to cover situations where possession has not transferred from the seller to the buyer, but in substance, a sale has been made. *See, e.g., Time Oil Co. v. State*, 79 Wn.2d 143, 483 P.2d 628 (1971); Rule 193(11)(i).

Further, as the Court held in *General Motors*, 60 Wn.2d at 873n.2, Rule 193 cannot be read to permit transactions to escape taxation that the Supreme Court has specifically construed our B&O statute to include. The statute has not changed since *B.F. Goodrich, Field Enterprises,* and *General Motors* were decided. The cases are binding on the Department in the interpretation of the statute. *See, Coast Pacific Trading v. Department of Rev.*, 105 Wn.2d 912, 719 P.2d 541 (1986) and *Budget Rent-a-Car of Washington-Oregon, Inc. v. Department of Rev*., 81 Wn.2d 171, 500 P.2d 847 (1972). Any construction of Rule 193 that equates delivery of goods to a common carrier with receipt of the goods by the buyer would contradict the holdings of these cases.

Finally, the rule is clear on its face. Rule 193(7)(a) declares that out-of-state delivery of a product by a seller to a common carrier does not constitute out-of-state receipt by a purchaser. Furthermore, two examples in the rule demonstrate that this is what the rule means, Rule 193 (11)(b) and (e). The only fact alleged by the taxpayer is that a common carrier picked up the goods in [State A] or [State B]. Under Washington rules, this fact is not determinative of when and where a sale has occurred.

The parties concede that [Manufacturer] did not have its employees or agents accepting or rejecting the parts following inspection at the taxpayer's out-of-state plants. Lastly, the common carriers that transported the parts to Washington did not have express written authority to accept or reject the goods for [Manufacturer] with the right of inspection.

2. Delivery

The taxpayer also argues that delivery, as such term is defined by the Uniform Commercial Code, occurred outside the state so Washington cannot reach such sales. Uniform Commercial Code definitions of delivery are not controlling for B&O tax purposes. *Time Oil Co. v. State*, 79 Wn.2d at 145-47. The argument that commercial law delivery terms were binding for tax purposes was posed

[5] The carrier must actually accept the goods by physically examining them, matching them against the purchase orders to determine if the goods actually conform. Just having the authority to accept is not acceptance. ETA 561.04.193.

by the taxpayer in *Field Enterprises*, citing *National Finance v. Emerson*, 117 Wash. 297, 201 P. 4 (1920) and was rejected by the Washington Supreme Court. Brief of Respondent at 34, *Field Enterprises. See also, Inland Empire Dairy Association v. Department of Revenue,* 14 Wn. App. 592, 594 n.6, 544 P.2d 52 (1975). Instead, a Washington sale takes place when the goods are received by the buyer or its agent in this state. Rules 103 and 193; Final Det. No. 86-161A, 2 WTD 397 (1986); Det. No. 95-088ER, 17 WTD 25 (1998).

We are not persuaded by the taxpayer's reliance on either *Weyerhaeuser* or *Valley Fruit Company, supra.* The Washington Supreme Court in *Weyerhaeuser* did not use the U.C.C. to decide where a sale occurred. Rather the court referenced the U.C.C. to determine whether Weyerhaeuser acted as a "for-hire carrier" because the term was not defined in either WAC 458-20-175 or RCW 82.08.0261. *Weyerhaeuser* does not stand for the principle that the U.C.C. can or should be used to interpret tax laws when there are existing tax rules and statutes on point. Indeed, the Supreme Court stated in *Weyerhaeuser* at 561 that the rules in WAC 458-20 that were promulgated to implement RCW Title 82 are controlling and have the same force and effect as the statutes in RCW Title 82.

We view *Valley Fruit Company* as a commercial transaction case that merely construed a contract's delivery terms. The case did not involve a tax statute. Further, RCW 82.04.270 did not incorporate f.o.b. terms in its language. Moreover, we have shown that the Washington Supreme Court, on at least three occasions, has interpreted the retailing B&O tax and wholesaling B&O tax statutes to apply to sales of goods to Washington customers that were shipped f.o.b. out-of-state plant. *See B.F. Goodrich, General Motors, and Field Enterprises, supra.*

Finally, taxpayer's reliance on PACCAR is misplaced. Unpublished trial court decisions, such as *PACCAR*, "have no precedential value." *Kitsap Cy. v. Allstate Ins. Co.*, 136 Wn.2d 567, 577 n.10, 964 P.2d 1173 (1998). While we do not concede its merit, particularly in light of *Goodrich*, *Field Enterprises*, and *General Motors*, nevertheless, we note that it concerned former WAC 458-20-193B (Rule 193B), Rule 103, and interstate sales of goods coming into Washington that occurred prior to January 1, 1992. *See*, Excise Tax Advisory 560.04.193. The present matter concerns Rule 193, rather than former Rule 193B, and sales that occurred on or after January 1, 1992.

We conclude that the products sold by the taxpayer to its Washington customers were delivered and received in Washington even though they were sold f.o.b. its factories.

Constitutional Claims

[2] The taxpayer is seeking relief by raising constitutional challenges to the Washington tax laws in Chapter 82.04 RCW and Rule 193 that impose the wholesaling B&O tax, as well as challenging Chapter 82.08 RCW. The Department, as an administrative agency, does not have the authority to declare a statute to be unconstitutional. Only the courts have that power. *Bare v. Gorton*, 84 Wn.2d 380, 381, 526 P.2d 379 (1974). Nevertheless we reject taxpayer's arguments and hold in favor of the constitutionality of the Department's interpretation of the statute and rules.

A. Due Process

We agree with the taxpayer that if the sales occurred in [State A] or [State B] it would be a violation of the Due Process Clause and the Commerce Clause of the United States Constitution for Washington to tax this transaction. But we do not agree that the sales occurred in [State A] or [State B]. For Due Process purposes, clearly the state where the goods were ordered, delivered, received, accepted, and used have sufficient contact with and interest in these goods to tax them. The Supreme Court has required far less connection. *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960) (use of independent contractors is sufficient contact); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (foreign taxpayer, without physical presence, purposefully avails self of benefits of economic market in the State has sufficient contact).

Taxpayer cites *United States v. R.P. Andrews Co.*, *supra*, *McGoldrick v. Berwind-White Coal Mining Co*. *supra*, *McLeod v. J.E. Dilworth*, *supra* and *Oklahoma Tax Commission v. Jefferson Lines*, Inc., *supra* for the premise that sales made out-of-state are not taxable under the Due Process Clause. Our reading of these cases leads us to a different conclusion.

Andrews involved a commercial transaction between the United States and a paper company. It is not a due process case involving the ability of a state to tax goods in interstate commerce. In *Andrews*, the Supreme Court noted that as a matter of commercial practice, where a purchaser directs a seller to deliver goods to a common carrier for the purchaser's account, the presumption is the carrier becomes the agent of the purchaser and delivery to the carrier constitutes delivery to the purchaser. Nothing in the case addressed where sales occur for tax purposes.

Berwind-White is actually a Commerce Clause case, not a Due Process Case. The quotation cited in taxpayer's brief, "The due process clause prohibits one state from imposing a tax upon an event which occurs in another state" comes not from the Court, but from the respondent's arguments in support of the invalidity of the tax preceding the Opinion of the Court. 309 U.S. at 40. Under facts similar to those at issue here, the Supreme Court upheld, under the Commerce Clause, a New York consumption tax on products ordered through the seller's office in New York, delivered in New York, and consumed in New York.

Dilworth was also a Commerce Clause case. Only the dissents to that case contained any Due Process discussion. In his famous dissent, Justice Rutledge acknowledged that there was sufficient connection between Arkansas and the sale for Due Process purposes based simply on the fact that the goods were consumed in Arkansas and that regular solicitation was made there**.** *International Harvester Co., v. Department of Treasury,* 322 U.S. 340, 351(1944). (Justice Rutledge's dissenting opinion in Dilworth is cited together with his concurring opinion in *International Harvester* and in *General Trading Co. v. State Tax Commission of Iowa*, 322 U.S. 335 (1944) (sustaining use tax). Finally, *Jefferson Lines* was also a Commerce Clause case, not a Due Process Case.

Even if commentators have occasionally interpreted *Dilworth* as potentially implicating Due Process concerns, such concerns are not present here. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the U.S. Supreme Court discussed the differences between the Due Process Clause and the Commerce Clause. Although the two clauses are closely related, the "…two constitutional requirements differ fundamentally, in several ways" and "…are analytically distinct." *Id.* at 305. The Due Process Clause "requires some definite link, some minimum connection, between a state

and the person, property or transaction it seeks to tax." *Id.* at 306, quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-345 (1954). Furthermore,

> Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytical touchstone of due process nexus analysis.

Quill at 312.

The taxpayer has presented no Due Process case which asserts that Washington would not have sufficient Due Process nexus to tax the sales in this case where the taxpayer regularly solicits sales in Washington, has an office and employees in Washington to support the sales, the goods are received in Washington, and are used in Washington. To the contrary, *General Motors*, 377 U.S. at 448 stands directly for the principle that Washington has sufficient Due Process nexus under the facts of this case.

B. Commerce Clause

We believe Rule 193 is consistent with *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), by which the Supreme Court announced the test to determine the validity of state taxation of interstate business under the Commerce Clause of the U.S. Constitution. The Washington Supreme Court summarized the Commerce Clause test in *Complete Auto* by declaring:

> Under this test, state taxation of interstate business must (1) tax only interstate activities having a sufficient connection to the taxing state (nexus requirement); (2) be fairly apportioned to taxpayer's activities in the state (apportionment requirement); (3) not discriminate against interstate commerce (nondiscrimination requirement); and (4) be fairly related to the services provided by the state.

American National Can v. Dept. of Rev., 114 Wn.2d 236, 241, 787 P.2d 545 (1990). Only the first and third issues are raised by the taxpayer here.

1. Nexus

Most of taxpayer's argument rests on the premise that its sales lack Commerce Clause nexus with the state of Washington, because title to the goods passes out-of-state. As noted above, the activities at issue here are sufficient to create nexus with Washington. The taxpayer has a physical presence in this state with an office and resident employees located here; it delivers goods here, which are consumed here. Whether or not title passes outside the state cannot be dispositive for tax purposes.

Justice Rutledge best addressed this contention under both Due Process and Commerce Clause analysis alike:

> Surely the state's power to tax is not to turn on the technical legal effect, relevant for other purposes but not for this, that "title passes" on delivery to the carrier in Memphis…. In the absence of other and more substantial difference, that irrelevant technical consideration should not control. However it may be determined for locating the incidence of loss in transit or other questions arising among buyer, seller and carrier, for purposes of taxation that factor alone is a will-o'-the-wisp, insufficient to crux a due process connection from selling to consuming state and incapable of increasing or reducing any burden the tax may place upon the interstate transaction.

International Harvester, at 351-352.

We believe *McGoldrick v. Berwind-White Coal Mining Co. supra,* cited by the taxpayer, actually stands for the principle that Washington can tax such sales under the Commerce Clause. Decided in 1939, *Berwind* concerned a New York City sales tax on coal delivered by the seller from a rail terminal in New Jersey. In that case the Court said the tax's only relation to the Commerce Clause arose from the fact that "immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title," the coal had been transported in interstate commerce. 309 U.S. at 49. Citing *Graybar Electric Co. v. Curry*, 309 U.S. 513 (1939), the Court explained that it had "uniformly sustained a tax imposed by the state of the buyer upon a sale of goods… effected by delivery to the purchaser upon arrival at destination after an interstate journey." *Id* at 50. Although the coal sold by Berwind-White had been delivered to purchasers by the taxpayer itself, the rationale of the court extended beyond those precise facts. For example, in *Graybar* the Court sustained the imposition of an Alabama sales tax on interstate sales transactions that were factually indistinguishable from the sales in dispute here, i.e., f.o.b. out-of-state locations. *Graybar Electric Co. v. Curry*, 238 Ala. 116, 189 So.186, 188-89, *aff'd*, 308 U.S. 513 (1930). Moreover, in a companion case, decided on the same day as *Berwind-White*, the Court sustained the imposition of New York City's sales tax on interstate sales transactions exactly like those here, relying on *Berwind-White* for that principle. *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U.S. 70 (1940) *rev'g A.H. DuGrenier, Inc. v. McGoldrick*, 281 N.Y. 608, 22 N.E. 2d 172 (1930).

Taxpayer also relies on *McLeod v.* J.E. *Dilworth*, *supra,* a 1944, 5-4 decision, in which the Supreme Court rejected an attempt by Arkansas to impose a retail sales tax on products which the taxpayer alleged were delivered in Tennessee not Arkansas because title to the products passed in Tennessee. Much of the reasoning in the case has been undercut by later developments.[6] Further, the author of the opinion, himself, acknowledged that Arkansas might have been successful if it had called the tax a "use" tax and not a "sales" tax. In fact, a similar distinction between a gross receipts tax, like

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[6] *Dilworth*, like *Freeman v. Hewit,* 329 U.S. 249 (1946*)* were both written by Justice Frankfurter. They were temporary throwbacks to the pre-*Western Livestock v. Bureau of Revenue,* 303 U.S. 250 (1938) cases that forbade states to tax interstate commerce at all. Dilworth has most frequently been cited for the premise that states can't tax interstate commerce, *see* dissent in *General Motors*, 377 U.S. at 460, a proposition long ago abandoned by the Supreme Court in *Complete Auto Transit*, 430 U.S. at 288-89; *see also, American Trucking Association v. Scheiner*, 438 U.S. 266, 294-96 (1987). Further it is frequently cited for the principle that a taxpayer's mere solicitation in the market state does not confer sufficient nexus between the taxpayer and the market state for the market state to tax the transaction. *See* dissent in *General Motors*, 377 U.S. at 456; *B.F. Goodrich*, 38 Wn.2d at 673. This principle has been overruled since *Tyler Pipe Industries, Inc. v. Washington*, 483 U.S. 232 (1987*).*

Washington's B&O tax, and a retail sales tax was drawn by the Court in *Jefferson Lines*, 514 U.S. at 187, resulting in the Court applying a different Commerce Clause analysis to retail sales tax than it had previously applied to a gross receipts tax, even though the Court acknowledged the two taxes' equivalent economic impact.

Any notion that *Dilworth* ever had any application to a gross receipts tax was severely undercut by *General Motors v. Washington*. 377 U.S. at 447-48[7] where the majority held there was sufficient nexus under the Commerce Clause for Washington to impose the B&O tax in circumstances indistinguishable from the facts set forth in *Dilworth*. The dissent in *General Motors* argued in vain that the holding conflicted with *Dilworth*. *Id. at 456.*

We find the case of *Westinghouse Electric Corp. v. King*, 678 S.W.2d 19 (Tenn. 1984), *appeal dismissed*, 470 U.S. 1075 (1985), to be instructive. In *Westinghouse*, the taxpayer Westinghouse Electric Corporation (Westinghouse) brought an action against the Tennessee Commissioner of Revenue seeking recovery of taxes and interest paid under protest. The Tennessee Supreme Court described Westinghouse as a nonresident electrical equipment company that agreed to design, manufacture, and sell nuclear steam supply systems and turbo-generator units to the Tennessee Valley Authority (TVA) for use in Tennessee. Westinghouse stipulated that it was doing business in Tennessee. The subject equipment was either manufactured or purchased by Westinghouse outside Tennessee. Title passed to TVA when it made payment and in all instances title passed outside Tennessee.

Westinghouse argued in the case that its sales to TVA were not taxable by Tennessee. Westinghouse contended the transactions were not sales in the state because its contracts provided that title to the equipment passed outside the state. In affirming the lower court's decision that the sales were subject to tax, the Tennessee Supreme Court cited *General Motors Corporation v. Washington*, 377 U.S. at 442-445. *Westinghouse*, 678 S.W.2d at 25. *See* discussion *supra* at 6. As discussed above, the U.S. Supreme Court upheld the B&O tax assessment by finding that General Motors' activities within Washington were substantial, "particularly with relation to the establishment and maintenance of sales, upon which the tax was measured." *Id*. at 447. *See also, Westinghouse,* 678 S.W.2d at 25. Thus, the fact that title to the equipment sold in *Westinghouse* passed out-of-state, or that the automobiles in *General Motors* were sold f.o.b. the out-of-state factory, did not prevent Tennessee or Washington, respectively, from taxing the transactions when in each case the deliveries occurred in-state.

2. Discrimination

The third prong of the *Complete Auto Transit* test is the requirement the tax not discriminate against interstate commerce. A tax on interstate commerce is not discriminatory unless it affords a "differential tax treatment of interstate and intrastate commerce" that redounds to the detriment of interstate commerce. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981); *Associated Industries of Missouri v. Lohman,* 511 U.S. 641, 652 n.4 (1994); *Chicago Bridge & Iron Co, v. Dep't of Revenue,* 98 Wn.2d 814, 830, 659 P.2d 463 (1983). Washington's tax treats interstate and intrastate business equally. It does not facially discriminate against interstate commerce as the

[7] We note the part of *General Motors* that the Supreme Court overruled is not at issue in the present matter.

taxpayer claims. A Washington-based wholesaler pays the same B&O tax rate on its sales to Washington customers as an out-of-state vendor does on its wholesale sales to Washington customers.

The taxpayer's "discrimination" argument based on a hypothetical retail sale by a Wyoming seller to a Washington buyer has nothing to do with whether the wholesaling B&O taxes assessed against the taxpayer are constitutional. The taxpayer was not assessed for any retail sales tax and none of the interstate sales transactions involved here originated in Wyoming. Nevertheless, we note that if for any reason Washington's retail sales tax could not be constitutionally imposed on the hypothetical retail sale transaction, and the hypothetical transaction would therefore be exempt from the retail sales tax due to RCW 82.08.0254, the hypothetical Wyoming seller would still be required to collect Washington's use tax from the hypothetical Washington buyer at the same rate as the retail sales tax that would be due on the interstate sale. RCW 82.12.020. In addition, Washington would provide a credit against the use tax for any legally imposed retail sales tax or use tax paid by the hypothetical Washington buyer to any other state or political subdivision with respect to the same property. RCW 82.12.035; RCW 82.56.010 (Art. V). We doubt that the hypothetical Wyoming seller could successfully argue that the Washington tax scheme unconstitutionally burdens interstate commerce. *See, e.g., Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

III. Use Tax . Use Tax . Use Tax

[3] The last issue concerns whether the Department exceeded its authority when it adopted Rule 193. The taxpayer is protesting the assessment of wholesaling B&O tax, but it argues that Rule 193 is invalid because it believes the rule conflicts with a use tax statute, RCW 82.12.040. The taxpayer did not protest a use tax assessment. So the issue of whether Rule 193 is in conflict with RCW 82.12.040 is not actually before us. We address taxpayer's contention by way of explanation only.

The taxpayer appears to assume that RCW 82.12.040(1) applies only when a sale takes place outside Washington, and therefore applies only when Washington would be statutorily and constitutionally prohibited from taxing the sale under chapter 82.08 RCW. We do not agree with that assumption.

The statute imposing the use tax, RCW 82.12.020, applies to goods purchased or manufactured in Washington as well as to goods purchased or manufactured outside the state and used in this state. *St. Paul & Tacoma Lumber Co. v. State*, 40 Wn.2d 347, 351-52, 243 P.2d 474 (1952); WAC 458-20-178(1), (2), (7)(d), (10); Det. No. 88-10, 4 WTD 437 (1987); *Metalfab, Inc. v. Department of Rev.*, BTA No. 93-33 (1995). RCW 82.12.040(1) applies to every person who has a place of business, maintains a stock of goods, or engages in business activities within this state, including "every activity which is sufficient under the Constitution of the United States for this state to require collection of [use] tax." Although the use tax statute includes within its reach at least some sellers located outside this state, *see* factors listed in Rule 193(9), the tax obviously is not limited to out-of-state sellers. Because the use tax applies not just to goods purchased outside the state, RCW 82.12.020, we cannot see how RCW 82.12.040(1) provides any indication of where a sale takes place for purposes of Washington's retail sales tax or retailing B&O tax.

We also disagree with the taxpayer's apparent argument that neither the retail sales tax nor the

retailing B&O tax applies when an out-of-state vendor passes title to the purchaser at a point outside Washington, but delivers the property to the purchaser in Washington for use in Washington. Whether title to tangible property passes to the buyer at a point within or without this state is immaterial, as long as the property is delivered to the buyer (i.e. is received by the buyer) in Washington, Rules 103 and 193.

Consequently we do not believe RCW 82.12.040(1) conflicts in any manner with any part of Rule 193 relevant to this taxpayer's assessment of wholesaling B&O tax.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 29th day of June, 1999.