

Cite as Det. No. 17-0057, 36 WTD 529 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of) DETERMINATION
Assessment of)
) No. 17-0057
)
...) Registration No. . . .

[1] RCW 82.04.067; WAC 458-20-193 – NEXUS – PHYSICAL PRESENCE – PROPERTY – CONSIGNMENT GOODS. A wholesaler who sends products to Washington customers on consignment has substantial nexus based on physical presence because the wholesaler has property in Washington. When a person consigns tangible personal property, that person retains ownership in the tangible personal property.

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 THE CASE

Gabriella Herkert, T.R.O. – An out-of-state wholesaler protests the assessment of wholesaling business and occupation (B&O) tax on sales of its goods to Washington retailers, claiming it lacked nexus with the State of Washington prior to September 2015. We conclude Taxpayer has nexus with Washington and B&O tax, interest, and penalties were properly assessed. Taxpayer's petition is denied.¹

ISSUE

Under RCW 82.04.067 and WAC 458-20-193, was an out-of-state wholesaler subject to wholesaling B&O tax on its sales to Washington retailers when Taxpayer consigned tangible personal property to retailers for five days prior to sale?

FINDINGS OF FACT

Taxpayer is [an out-of-state] based diamond and gold wholesaler. Taxpayer makes no retail sales. Taxpayer does not employ anyone in Washington. Taxpayer has relationships with numerous jewelry retailers. When a customer of retailer orders a custom piece of jewelry, the retailer checks an inventory list provided by Taxpayer. The retailer then calls Taxpayer to make arrangements to receive whatever jewels the retailer thinks will satisfy the customer. Taxpayer ships the jewels to

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

the retailer via common carrier subject to a standard consignment memo (Memo). The Memo consigns Taxpayer's goods to retailer for five days.² The retailer makes arrangements with the customer to preview and select jewels. If the customer selects Taxpayer's jewels, the retailer purchases the jewels from Taxpayer and resells them, either as part of a finished good or individually. Any jewels not selected by customers are returned to Taxpayer within five days as required by the Memo.

On May 6, 2015, the Department of Revenue's Compliance Division (Compliance) identified financing statements in Washington UCC filings listing Taxpayer as a creditor. On August 7, 2015, Compliance mailed Taxpayer a Washington Business Activities Questionnaire ([Questionnaire]) and initial inquiry letter. On September 23, 2015, Compliance sent a commencement of audit letter to Taxpayer. On September 24, 2015, Compliance received a completed [Questionnaire] from Taxpayer. In the [Questionnaire], Taxpayer asserted that it takes orders by phone and ships via common carrier to jewelry retailers located in Washington, subject to consignment for up to five days.³ Jewels remain the property of Taxpayer in Washington for the duration of the consignment. Retailers purchase consigned inventory in Washington and send the remaining inventory back to Taxpayer within five days as required by the Memo.

Compliance reviewed Taxpayer's records for the period January 1, 2008, through September 30, 2015. Compliance concluded Taxpayer had physical presence nexus due to its ownership of personal property in the State of Washington and assessed Taxpayer \$. . .⁴ for tax period January 1, 2008, through December 31, 2010, and \$. . .⁵ for tax period January 1, 2011, through September 30, 2015. Compliance calculated its assessment using information provided by Taxpayer in response to Compliance's request for a schedule of Washington State sales, gross revenue or both. Taxpayer timely requested review of the assessment.

² Taxpayer's standard memo of consignment reads as follows:

The merchandise described below is delivered to you on memorandum, at your risk from all hazards, regardless of the cause of the loss or damage, only for examination and inspection by prospective purchasers, upon the express condition that all such merchandise shall remain the property of . . . and shall be returned on demand, in full in its original form. Until the merchandise is returned and actually received by us, you are fully responsible therefor, and, in the event of damage or loss, whether caused by you or by another, whether or not under your control, you will indemnify us immediately by payment of the stated value which represents the extent of the actual loss and is not intended to constitute a price for the sale of the merchandise. You acquire no writ or authority to sell, pledge, hypothecate or otherwise dispose of the merchandise, or any part thereof, by memorandum or otherwise, it being expressly understood that regardless of other transactions or prior trade customs, NO CREDIT IS EXTENDED with respect to this merchandise. A sale of all or any portion of the merchandise shall not affect the terms hereof with respect to the balance hereof. Receipt of the merchandise constitutes your agreement to the foregoing terms which represent the entire contract with respect to the merchandise herein described and which cannot be varied by oral statements, dealings with respect to other merchandise or any contrary custom of the trade.

³ [Questionnaire], Question 12 response reads as follows: "We don't consistently maintain a regular stock in Washington. Jewelers located all over Washington call us with their diamond needs and we then consign to them using a 5-day memo policy. The jeweler then reports to us if the diamond is sold or returns it at the end of the memo term."

⁴ Document No. . . . consisted of \$. . . wholesaling B&O tax, \$. . . late payment penalty, \$. . . interest, \$. . . 5% assessment penalty, and \$. . . 5% unregistered business penalty.

⁵ Document No. . . . consisted of \$. . . wholesaling B&O tax, \$. . . late payment penalty, \$. . . interest, \$. . . 5% assessment penalty, and \$. . . 5% unregistered business penalty.

ANALYSIS

Washington imposes a B&O tax “for the act or privilege of engaging in business” in the State of Washington. RCW 82.04.220. Ch. 82.04 RCW imposes B&O tax upon the gross proceeds of sales for the act or privilege of engaging in all activities, either directly or indirectly, within Washington State with the object of gain, benefit, or advantage to the taxpayer. *See generally* Ch. 82.04 RCW.

RCW 82.04.270 imposes upon every person engaging within Washington in the business of making sales at wholesale a tax of 0.484 percent of the gross proceeds of such sales. RCW 82.04.060 defines “sale at wholesale” as any sale which is not a sale at retail of tangible personal property. RCW 82.04.070 defines gross proceeds of sales as the value proceeding or accruing from the sale of tangible personal property.

Effective June 1, 2010, RCW 82.04.067(6) provided a statutory definition for “substantial nexus.” Laws of 2010, ch. 23, § 1709. This statute largely codified the Department’s practice and prior WAC 458-20-193, which were in effect during Taxpayer’s audit period. Substantial nexus for wholesaling sales prior to September 1, 2015, existed when a person had physical presence in the state during the tax year, which needed only be demonstrably more than a slightest presence. RCW 82.04.067(6)(a)(2010). A person is physically present in Washington if the person has property or employees in the state. RCW 82.04.067(6)(b). “A person has property in this state if the person owns, leases, or otherwise has a legal or beneficial interest in real or personal property in Washington.” WAC 458-20-193(102)(b) (2015). When a person consigns tangible personal property, that person retains ownership in the tangible personal property. *See Det. No. 90-215A, 12 WTD 297 (1990); 67 Am. Jur. 2d Sales § 67 (2014).*

Here, Taxpayer consigned tangible personal property to its retailers located in Washington to allow customers to inspect and select property prior to purchase. Taxpayer retained ownership of the tangible personal property in Washington through its consignment arrangement. Under RCW 82.04.067(6)(b), Taxpayer has physical presence in Washington on the basis of its ownership of tangible personal property within Washington.

In order for Washington to impose its B&O tax on sales made from a point outside the state to customers located within Washington, the Department has held that there must be both nexus with the out-of-state seller and receipt of the goods by the purchaser within Washington. WAC 458-20-193 (Rule 193).⁶ *See Det. No. 16-0149, 35 WTD 613 (2016).* Rule 193(7) describes the types of nexus-creating activities, when performed by a seller or its representative, that “establish or maintain a market for its products in this state.” These include activities where:

- (i) The goods are located in Washington at the time of sale and the goods are received by the customer or its agent in this state. . . .
- (iv) The delivery of the goods is made by a local outlet or from a local stock of goods of the seller in this state

⁶ This reference to WAC 458-20-193 is to the version of the rule applicable during the Taxpayer’s tax period.

Taxpayer's jewels are owned by and located in Washington at the time of sale to the jewelry retailer. This is similar to both examples [Rule 193](7)(i) and (7)(iv). *See* Det. No. 13-0068R, 33 WTD 55 (2014). Therefore, we conclude that Taxpayer has nexus with Washington. Since Taxpayer has nexus with Washington, assessment of B&O tax is proper. Taxpayer's petition is denied.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 7th day of March 2017.