

Cite as Det. No. 06-0028, 26 WTD 97 (2007)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 06-0028
)	
...)	Registration No. . . .
...)	Document No. . . .
...)	Audit No. . . .
)	Docket No. . . .
)	

Rule 193; ETA 56: B&O TAX -- INBOUND INTERSTATE SALES -- AGENCY -- FORM OVER SUBSTANCE. Sales of goods to purchasers in this state were taxable in this state even though the purchasers gave a for-hire carrier written authority to accept the goods at an out-of-state location. The mere giving to the for-hire carrier written authority to accept the goods at an out-of-state location, without some further act of acceptance, is not considered receipt by the purchaser or the purchaser's agent at that location. The taxpayer failed to show that the carrier actually accepted the goods at the out-of-state location on behalf of the purchaser.

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.

L. Chartoff, ALJ --An out-of-state wholesaler protests an Audit¹ assessment of wholesaling business and occupation (B&O) tax with respect to sales of goods to Washington purchasers allegedly accepted by an agent of the purchaser outside the state. The taxpayer's petition is denied.²

ISSUE

Did a for-hire motor carrier accept goods as an agent of the purchaser at the seller's out-of-state warehouse, thereby making the sales not subject to B&O tax under WAC 458-20-193 (Rule 193)?

¹ "Audit" refers to the Audit Division of the Department of Revenue.

² Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

FINDINGS OF FACT

The taxpayer is a [State A] corporation with its principal place of business in [State B]. It distributes [goods] to [purchasers]. The taxpayer distributes goods through a central warehouse, regional warehouses, and directly from manufacturers. At issue in this appeal are sales to Washington [purchasers] shipped from the taxpayer's regional warehouse in [State C].

The taxpayer was audited for the period January 1, 1997 through September 30, 2001. Audit found that the taxpayer had excluded from gross income sales to Washington [purchasers] originating from the taxpayer's [State C] regional warehouse. The taxpayer claimed that the motor carrier it hired to deliver the goods to [purchasers] accepted the goods on behalf of the Washington [purchasers] at the taxpayer's [State C] warehouse. Audit concluded that the taxpayer's books and records did not support the taxpayer's claim of out-of-state delivery, and included these sales in the taxpayer's gross income. This resulted in an assessment for \$. . . . The taxpayer appealed the assessment.

The terms and conditions of sale between the taxpayer and [purchasers] are stated in the [purchase agreement]. The [purchase] agreement states, in relevant part, that the taxpayer agrees: "To sell merchandise of the type typically sold in . . . stores . . ." and "to provide for shipment or delivery of such merchandise to the [purchaser's] address indicated on this Agreement . . ." The [purchase] agreement further states, in relevant part, that the [purchaser] agrees: "To buy from the [taxpayer] in accordance with the [taxpayer] procedures and practices" . . . with regard to placing and receiving orders, freight charges, and adjustments, claims and returns. . . .

The taxpayer contracts with [Delivery Corporation], a wholly owned subsidiary corporation, to deliver goods from the regional warehouses to [purchasers] as a contract carrier.³ . . . [T]he taxpayer sent a letter to each of its Washington [purchasers] asking them to grant authority to [Delivery Corporation] to act as their agent for accepting and rejecting goods at the [State C] warehouse. The letter included a "Limited Agency Agreement" form dated . . . between the [purchaser] and [Delivery Corporation] that the [purchaser] was directed to sign and return to the taxpayer.

The Agency Agreement states in relevant part:

1. Authority for carrier to act as customer's agent. Customer expressly authorizes Carrier to act as Customer's agent in accepting or rejecting all goods tendered to Carrier by the consignor. As a limited agent to Customer, Carrier has the right to inspect all such goods at the time of pick-up and to reject all or any portion of the goods that are damaged or which do not otherwise conform with the description of goods contained on the applicable shipping documents.

³ [Delivery Corporation] is licensed to operate as a common or contract carrier.

2. Freight loss, damage or delay. Once Carrier inspects and accepts the goods on behalf of Customer at origin, Carrier shall be liable to Customer for all freight loss or damage to the goods, except for any freight loss or damage caused by Customer.

The agreement provides no consideration to [Delivery Corporation] for performing this service and agreeing to be liable. The taxpayer represents that most but not all of its Washington customers signed and returned the Limited Agency Agreement.

The taxpayer entered into a "Contract Carrier Transportation Agreement" dated . . . , with [Delivery Corporation]. Under the agreement, [Delivery Corporation] agrees to provide motor contract carrier transportation services to [the taxpayer]. [T]he Agreement contains a term that only applies to shipments from the taxpayer's [State C] facility:

Notwithstanding anything to the contrary in this Agreement, Carrier understands and agrees that product moving from Shipper's [State C] facility shall be shipped and transported on an "FOB Origin" basis, and Carrier, as agent of Shipper's customers, agrees not to fault Shipper for any damage or shortage to product that should have been detected upon reasonable inspection by Carrier. As the agent for Shipper's customer, carrier agrees to:

- (a) Physically examine all goods tendered by Shipper at the time of pick-up;
- (b) Compare the goods to the shipping document to verify that the goods tendered to Carrier conform to said document;
- (c) Open and examine the contents of any sealed containers that are tendered to Carrier by Shipper; and
- (d) Document, as the agent of Shipper's customer, the customer's acceptance or rejection of the goods or any part thereof.

Accordingly, liability for such damage or shortage shall lie with carrier and/or Shipper's customers.

The agreement is signed by [Delivery Corporation] in its own capacity, and not in its capacity as agent for each of the [purchasers]. Further we note that even though this section purports to apply to all goods moving from the taxpayer's [State C] facility, [Delivery Corporation] delivers goods from this facility to [State C] and Washington [purchasers] who have not signed the agency agreement.

The following paragraphs describe the delivery and receiving procedures used by the parties during the audit period. Regional warehouse orders are delivered "on [the taxpayer] truck," once a week on a regularly scheduled delivery day. . . . [The taxpayer] charges [purchasers] for freight and sets a rate based on the [purchaser's] annual purchases. . . .

When a [Delivery Corporation] driver arrives to pick up his load, [the taxpayer] provides the driver the following five sets of documents: a driver's trip sheet, [the taxpayer] Delivery receipts, carton cross reference lists, receiving invoices, and \$. . . checklist reports.

The driver's trip sheet identifies the route and stops for the day. The trip sheet requires the driver to record arrival and departure times, break time, lunch time, miles traveled, and total time. The sample trip sheet submitted into evidence indicates that the driver made several deliveries in [State C] before continuing to Washington.

The driver receives a [taxpayer] Delivery Receipt for each [purchaser].⁴ The delivery receipt states "[taxpayer] Delivery Receipt" at the top, and does not identify [Delivery Corporation] as the carrier. The receipt lists the consignee/[purchaser], route, stop number, invoice numbers, number of cartons received along with the weight of each carton. The receipt has a line labeled "[purchaser's] signature" for the [purchaser] to sign and date to confirm receipt, and a line labeled "driver's signature" for the driver to sign to confirm delivery. . . . There is a section labeled "exception - over, short & damaged" for [purchasers] to write notes or instructions pertaining to overages, shortages or damaged merchandise.⁵ There is a space labeled "customer instructions" also for "notes or instructions pertaining to overages, shortages or damaged merchandise." . . .

The driver receives a carton cross reference list for each [purchaser] which lists each shipped item by carton number. The sample carton cross reference list submitted into evidence shows approximately 600 different types of items were shipped to one [purchaser] in one delivery. Because many of the items are small, the items are combined together The driver also receives a receiving invoice for each [purchaser] which lists each item being shipped by pick order.

Finally, the driver receives a \$. . . checklist report for each [purchaser]. The report identifies each item shipped worth \$. . . or more. Next to each item is space labeled "driver's initials" for the driver to verify delivery, and a space labeled store signature for the store representative signature to verify receipt. . . .

⁴ After the period under review, the taxpayer made the following changes to the delivery receipt: The title "[taxpayer] Delivery Receipt" was replaced with "[Delivery Company]"; "FOB Origin" was printed in the space for customer instructions; and "driver's signature" was replaced with "Trucking company's signature of inspection and acceptance." Since these changes were made after the period under review, we decline to consider them here. We find the forms in use during the period under review are the most persuasive evidence of the transactions during the period under review.

⁵ The taxpayer represented that it is the driver who writes notes regarding overages, shortages or damaged merchandise. Taxpayer provided several examples of filled out forms where goods were rejected as nonconforming. The taxpayer claimed that these were examples of the driver rejecting goods. However, the handwriting clearly matched the handwriting of the [purchaser] signature, not the driver signature. Furthermore, the policy and procedures manual states that the space is for the [purchaser] to write notes regarding overages, shortages, and damaged merchandise. Therefore, we conclude that it is the [purchaser] who writes the notes.

Upon receiving the load and delivery documents, the driver examines the contents of the trailer to make sure it contains the products destined for the scheduled route. The taxpayer was unable to testify to the level of inspection that the driver performs at pickup. However, the taxpayer did state that the driver does not perform a physical item by item inspection of the goods. The procedures are the same regardless of whether the [purchaser] signed an agency agreement or not. The driver does not sign anything at pickup signifying acceptance of the goods on behalf of the [purchaser]. There is no evidence that the driver eve[r] rejected any item at the warehouse.

Upon delivery at each [purchaser], the driver and [purchaser] fill out the delivery receipt and \$. . . trip sheet report. [Purchasers] may specify problems with the order on the delivery receipt. The taxpayer provided sample delivery receipts where the [purchasers] did specify problems with the order on the receipt. However, the [taxpayer's instruction] states that purchasers have up to 30 days to request adjustments for returns, overages (return or keep), shortages, pricing error, or damaged goods. . . . For items received in error, the [purchaser] is instructed to "return merchandise on [the taxpayer] truck" and to request an adjustment from [the taxpayer]. . . . For merchandise received that is labeled for another [purchaser], the [purchaser] is instructed to "notify your . . . driver" who "will complete a transfer or return of misdelivered merchandise form." . . .

Audit reviewed [the taxpayer]'s books and records and concluded that [the taxpayer] continues to grant adjustments and credits to [purchasers]. The taxpayer concurs that it continues to cure defects and shortages by granting adjustments and credits However, the taxpayer represents that it does so as a matter of good business practices and to foster a healthy working relationship with its [purchasers], and not because it is contractually bound.

ANALYSIS

WAC 458-20-103 (Rule 103) defines the place of sale, and states, in relevant part:

For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this state when 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 the state.

WAC 458-20-193 (Rule 193) further states, in relevant part: "Washington does not assert B&O tax on sales of goods which originate outside this state unless the goods are received by the purchaser in this state and the seller has nexus." Rule 193(7). In the present case, the taxpayer does not contest nexus. The taxpayer however argues that the goods are not taxable in Washington because it alleges they are received by the purchaser outside the state.

Rule 193(2)(d) defines "receipt" or "received" as "the purchaser or its agent first either taking physical possession of the goods or having dominion and control over them." "Agent" for purposes of Rule 193 is defined as "a person authorized to receive goods with the power to inspect and accept or reject them." Rule 193(2)(e).

With respect to delivery into this state by for-hire carrier, Rule 193(7)(a) states:

Delivery of the goods to a . . . 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 . . . for-hire carrier has express written authority to accept or reject the parts with the right of inspection.

Excise Tax Advisory 561.04.193⁶ (ETA 561) clarifies Rule 193 with respect to what constitutes receipt at an out-of-state location where the for-hire carrier is given express written authority to accept the goods for the buyer at an out-of-state location. ETA 561 states, in pertinent part:

For receipt to occur at the out-of-state location, the for-hire carrier must take those actions that would generally be taken by a prudent buyer to assure that the goods conform to the purchase order or contract. This generally requires at a minimum that the goods be physically examined by the receiving agent. The agent must also have access to the purchase order or contract in order to determine if the goods conform. *The mere giving to the for-hire carrier of a written authority to accept the goods at an out-of-state location, without some further act of acceptance, will not be considered as receipt by the purchaser or the purchaser's agent at that location. In short, the carrier must not only have written authority to accept or reject goods for the buyer, it must actually do so and provide documentation of that fact to the seller.*

If the goods are given by the seller to a for-hire carrier in sealed containers and the containers are not opened by the purchaser until arrival in Washington, it will be presumed that receipt did not occur until the goods arrived in Washington, irrespective of any express written authority granted to the carrier. *An agent acting for a buyer for receipt of goods must in some manner substantiate that the goods conform to the buyer's specifications.*

The department will not accept a mere stamped or other "form-over-substance" shipping document as satisfying the requirement that the goods have been accepted by the buyer's agent outside this state. This ETB [sic] expresses the intent of Rule 193 from its inception.

(Emphasis ours).

In the present case, many buyers granted the carrier the authority to accept or reject the goods with right of inspection at the taxpayer's warehouse. However, the mere grant of authority to a carrier to accept or reject the goods with right of inspection is not sufficient to constitute receipt

⁶ Issued as an Excise Tax Bulletin on April 30, 1993, and converted to ETA 561.04.193 on July 1, 1998.

by the purchaser or its agent. In addition, there must be evidence that the carrier actually inspected and accepted the goods and documented that acceptance to the seller. The agent must in some manner substantiate that the goods conform to the buyer's specifications.

In this case, the evidence does not show that the carrier accepted the goods at the taxpayer's warehouse in [State C]. When the driver arrives at the warehouse to pick up its load for the day, the driver takes only those steps it normally takes with any customer when accepting goods for shipment. Even though the driver will be delivering to some [purchasers] who have signed the agency agreement and some who have not, there is no difference in procedures. The driver receives the same delivery documents for each [purchaser]. While the driver must make sure the load received is destined for his intended route, the taxpayer did not testify to the level of inspection that takes place. Given the large number of different items shipped to each [purchaser], it is not possible for the driver to inspect and compare the goods to the purchase or shipping order in any meaningful way. The driver does not sign anything at pickup signifying acceptance of the goods on behalf of the [purchaser]. There is no evidence that the driver eve[r] rejected any item at the warehouse.

Instead, the evidence is consistent with the [purchasers] inspecting and accepting the goods upon receipt in Washington. At the [purchaser's] location in Washington, the [purchaser] signs the delivery receipt to confirm receipt of the goods, and the driver signs the receipt to confirm delivery. The parties are required by [the taxpayer] to separately acknowledge delivery and receipt of each item worth over \$ The [purchasers] note on the receipt any shortages, overages, or damages. The [purchasers] can also note misshipments on the form from the previous week's delivery and return the goods to the driver. The taxpayer takes responsibility for curing order and delivery errors. There is no evidence that the taxpayer has ever refused to cure an error claiming that the goods were accepted at the warehouse per the Contract Carrier Transportation Agreement.

The agency agreement . . . of the Contract Carrier Transportation Agreement have had no substantive effect on the course of performance of the parties. The performance of the parties is consistent with receipt in Washington. Because ETA 561 requires us to consider substance, we conclude that the purchaser receives the goods upon delivery in Washington.

The taxpayer argues that Rule 193 requires only that the carrier have the authority to accept or reject with right of inspection, and that ETA 561 imposes additional requirements that are not binding on the taxpayer. The taxpayer is correct that ETAs are advisory for taxpayers (RCW 34.05.230); but that does not mean ETA 561 does not provide useful guidance. The Department issues ETAs to explain the Department's policy regarding how tax laws apply to specific issues or sets of facts. In fact, it is encouraged "to advise the public of its current opinions, approaches, and likely courses of action." *Id.*

In this case, the ETA provides reasonable guidance as to what the Department will review in determining whether Rule 193 requirements have been met. That guidance is consistent with the ability of the Department to look at the substance of a transaction to determine the correct tax

treatment. *See, e.g., Time Oil Co. v. State*, 79 Wn. 2d 143, 146, 483 P.2d 628 (1971) (“here we are not concerned with the technicalities of the transference of title and possession. Rather, our primary concern is whether the transactions involved constitute a taxable business activity within the contemplation of the business and occupation tax statutes.”). It is further consistent with the ability to look beyond contract terms that purport to establish agency but do not in fact do so. *See, e.g., City of Tacoma v. The William Rogers Co., Inc.*, 148 Wn.2d 169, 178, 60 P.3d 79 (2002) (“The existence of that agency relationship is not controlled by how the parties described themselves in their contract documents.”).

ETA 561 provides notice that a purely formalistic approach will not suffice to meet Rule 193’s requirements for delivery outside Washington. In this regard, the taxpayer has not met its burden to show that delivery in fact occurred outside Washington for purposes of Rule 193.

DECISION AND DISPOSITION

Taxpayer's petition is denied. . . .

Dated this 23rd day of February 2006.