

Cite as 11 WTD 91 (1991).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Request of Ruling on Tax)	
Liability and Refund of)	No. 91-042
)	
. . .)	Registration No. . . .
)	
)	

[1] RULE 193B AND RULE 103: INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS -- DELIVERY -- F.O.B. ORIGIN, FREIGHT COLLECT -- NEXUS. Where the contract of sale does not obligate the out-of-state seller to deliver goods to the buyer in Washington and that buyer pays the carrier's freight costs from the out-of-state shipping point (F.O.B. origin, freight collect), the sale and delivery are deemed to have occurred out-of-state and not subject to the B & O tax even if there is general nexus between Washington and the out-of-state seller.

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.

TAXPAYER REPRESENTED BY: . . .

DATES AND PLACE OF CONFERENCE: May 3, 1990 and January 30, 1991,
Olympia, Washington

NATURE OF ACTION:

The taxpayer filed a request for a ruling whether it is liable for Business and Occupation (B & O) tax on the inbound sale of beer and other beverages in Washington. The taxpayer supplemented its request with a petition for refund dated . . .

FACTS:

De Luca, A.L.J. - The taxpayer is headquartered [out-of-state]. It produces beer in regional breweries throughout the country. None of the breweries are located in Washington. The taxpayer sells its products from its breweries to independently-owned local distributors in various states, including several distributors in Washington. Most of the beer destined for Washington originates at the taxpayer's plant [out-of-state]. Occasionally, the taxpayer's other out-of-state breweries may supply the beer and beverages to the Washington distributors. The taxpayer does not have warehouses or other storage facilities in Washington for its products.

In late 1989 the distributors began to transmit their orders electronically to the taxpayer's out-of-state offices. Prior to then preprinted written orders were prepared by the distributors who would mail them. The distributor designates in its orders the carrier to be used to haul the products to Washington. Orders are not solicited or taken in Washington by the taxpayer's employees.

The contract between the taxpayer and the distributors provides that all products are sold F.O.B., brewery. Title and risk of loss pass to the buyer when the taxpayer delivers the products to the carrier.

Sample bills of lading, shipping orders and confirmation orders all reveal the goods sold to the distributors and list the taxpayer as seller/consignor, the distributor as buyer/consignee and the name of the carrier selected by the distributor. The taxpayer also has provided a copy of an invoice billed by a carrier to a distributor for its transportation charges. The taxpayer does not pay the shipping charges. Section 7 of the sample bill of lading is signed by the consignor thereby preventing the carrier from seeking recourse against the taxpayer for the freight charges.

ISSUE

Do these sales of beer and other beverages occur in Washington thereby subjecting the taxpayer to Wholesaling B & O tax?

TAXPAYER'S EXCEPTIONS

The taxpayer claims it has historically paid and continues to pay the tax on these sales pending this ruling. It concedes nexus and recognizes it has tax liability on sales of other products in this state. The refund period includes 1990 and

the taxpayer believes there were some B & O tax payments prior to 1990 which also would be eligible for refund if a favorable ruling is granted.

The basis of the taxpayer claim is that the sale of beer and other beverages destined for Washington does not occur in this state and therefore is not taxable by Washington. The reasons given by the taxpayer are based on the facts stated above and citations to WAC 458-20-103 (Rule 103), WAC 458-20-193B (Rule 193B), Determinations 87-214, 3 WTD 281 (1987), 86-161A, 2 WTD 397 (1987), RPM 89-2 as well as RCW 62A.2-319, RCW 62A.2-504 and some case law concerning place of delivery.

DISCUSSION:

Given that Washington has threshold nexus to tax the out-of-state seller due to its activities in Washington, the taxpayer has the burden to disassociate these sales from its Washington activities. See Rule 193B.

The Department of Revenue is not concerned with who bears the risk of loss or where legal title transfers. Det. 86-161A, 2 WTD 397. However, under our present regulations Rules 103 and 193B, we do weigh heavily who pays the expense of transporting the goods by common or contract carriage into Washington when we determine if there is tax liability. id. Rule 103 provides in part:

Under the Revenue Act of 1935, as amended, the word "sale" means any transfer of the ownership of, title to, or possession of, property for a valuable consideration, and includes the sale or charge made for performing certain services.

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.

Accordingly, the goods must be delivered to the buyer in this state for a sale to take place here. In order for Washington to impose its B & O tax against the transaction, there must be both nexus with the seller and delivery of the goods (transfer of possession) in this state. 2 WTD 397, supra.

The Department considers that delivery takes place in Washington if the out-of-state seller either delivers the goods itself in Washington or pays a for-hire carrier's freight charges. Prepaid shipments are paid by the seller and are viewed as being delivered in Washington because the out-of-state seller is obligated to get the goods to the buyer or the buyer's agent. If the seller has this in-state delivery obligation, has paid the shipping costs, and has nexus with this state, the sale is taxable here. id.

[1] Conversely, where the contract of sale does not obligate the out-of-state seller to deliver goods to the buyer in Washington and that buyer pays the carrier's freight costs from the out-of-state shipping point (f.o.b. origin, freight collect), the sale and delivery are deemed to have occurred out-of-state and not subject to the B & O tax even if there is general threshold nexus between Washington and the out-of-state seller.

RULING

The taxpayer is entitled to a refund of all Wholesaling B&O taxes paid for the sale of beer and other beverages shipped from out-of-state to Washington during the requested period, not preceding January 1, 1987. The refund is conditioned upon and limited to the auditor's verification by appropriate taxpayer documentation that the taxpayer made deliveries [out-of-state] to the Washington distributors and/or to for-hire carriers designated and paid by the distributors.

It is important to note the opening sentence in RPM 89-2. The Department of Revenue intends to amend Rules 193A and 193B. We believe the amendments will occur later this year. When the amendments are adopted, the situation addressed above may be treated differently for tax purposes than they are now.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in accordance with the Ruling part of this Determination. This matter is being referred to the Department's Audit Section for the indicated audit and computation of the refund plus applicable statutory interest.

DATED this 13th day of February 1991.