

Cite as Det. No. 91-236, 11 WTD 407 (1992).

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

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment And)
For Refund of) No. 91-236
)
) Registration No. . . .
) . . ./Audit No. . . .
)

[1] RULES 193A AND 193C: SALES AND DELIVERIES TO OUT-OF-STATE BUYERS -- FREIGHT COLLECT -- WHOLESALING B&O TAX -- EXEMPTION. Seafood products sold by a Washington seller which are shipped freight collect or freight prepaid to out-of-state buyers and destinations are exempt from wholesaling B&O tax. Accord: Det. No. 89-355, 8 WTD 83 (1989).

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: . . .
. . .
. . .
. . .

DATE AND PLACE OF CONFERENCE: June 25, 1991; Seattle

NATURE OF ACTION:

The taxpayer petitions for a correction of an assessment of wholesaling business and occupation (B&O) tax in addition to seeking a refund of similar taxes.

FACTS :

De Luca, A.L.J. -- The taxpayer is a Washington based company which sells seafood wholesale to customers in Washington as well as in other states and foreign countries. The Department of Revenue's Audit Division audited the taxpayer for the period January 1, 1985 through May 31, 1989. No taxes were found owing for the years 1985 and 1986. However, Audit found \$. . . in

wholesaling B&O taxes, \$. . . in service B&O taxes and \$. . . in litter taxes plus \$. . . in interest . . . were owing for the remainder of the audit period.

Audit issued the assessment [in November 1989]. Payment was due [in December 1989]. The assessment remains unpaid. In January 1990, the taxpayer appealed portions of the wholesaling B&O tax assessed in Schedule II and also claimed a refund of other wholesaling B&O taxes paid. The refund request amounts to \$. . . for 1985, \$. . . for 1986 and \$. . . for 1987

The taxpayer owns the seafood it sells to its customers. The taxpayer keeps the seafood in cold storage warehouses located in Washington. It does not own the warehouses. When the taxpayer makes sales, it advises the warehouses to release the appropriate products. The warehouses will then prepare bills of lading showing the taxpayer as the shipper, the customers as the consignees and the shipment destinations. In some instances, the bills of lading will identify the same customers, but the destinations have not been typed onto these documents. However, the evidence leaves no doubt the shipments were transported to the same out-of-state destinations as those shipments which had bills of lading listing both the customers and destinations.

The disputed sales concern interstate and foreign shipments. Audit assessed wholesaling B&O tax against the sales to out-of-state buyers where it claims deliveries were made to the buyers at the Washington warehouses. Audit determined those deliveries occurred when either the buyers themselves picked up the goods at the warehouses or when the buyers hired common carriers, i.e. the bills of lading or other shipping documents showed the shipments moved freight collect to the out-of-state destinations.

ISSUE:

Are seafood sales to out-of-state buyers subject to Washington's wholesaling B&O tax if they were shipped freight collect?

TAXPAYER'S EXCEPTIONS:

The taxpayer does not dispute the assessment against all of the sales to out-of-state buyers. It agrees with Audit that in those instances where customers themselves picked up the seafood in Washington, the sales are taxable. At the hearing, the taxpayer also identified numerous taxable sales it does not contest because either it concedes they were Washington sales or it does not have the documents to support a claim otherwise. The taxpayer identified in Schedule II of the audit report those assessed sales which it does not contest.

However, the taxpayer does specify scores of sales in Schedule II for which it does have documents supporting its claim that they were non-Washington sales and, therefore, nontaxable. These sales generally were shipped freight collect to out-of-state buyers. The taxpayer also argues that sales to readily identifiable out-of-state customers are exempt even if some of the bills of lading failed to list their destinations because of other supporting evidence.

In short, Audit found the taxpayer had \$. . . in taxable sales. The taxpayer counters by claiming that [some] of those sales are nontaxable because they were in interstate or foreign commerce. The taxpayer concedes the remaining . . . sales are taxable.

The taxpayer primarily cites as its authority that freight collect shipments to out-of-state buyers are tax exempt according to a December 6, 1984 letter from the then Director of the Department of Revenue to [attorney] regarding "Washington Tax Issues Affecting Seafood Industry". The Department widely distributed the letter to the industry. The taxpayer also cites Revenue Policy Memorandum No. 89-2 (RPM 89-2).

DISCUSSION:

[1] The Director's December 6, 1984 letter answered the question of when a sale occurs in Washington for seafood industry purposes. Four different scenarios were provided. In particular, the letter addressed one situation where a Washington seller stores its product at an independent warehouse in Washington. The buyer is located out-of-state. The warehouse is directed to ship the seafood to the buyer freight collect. In the given example, the bill of lading shows the warehouse as the consignor and the buyer as the consignee with an out-of-state destination.

The Director's letter stated in reply:

In the meantime and until otherwise advised by the Department, the industry should treat as interstate sales under WAC 458-20-193A, any sale where the seller is the consignor and the buyer is the consignee, at its out-of-state address, on the interstate bill of lading issued by the carrier.

In your letter you provide the details of four situations taken from actual industry practice. We have reviewed these factual situations in light of the above discussion and believe that in each case the delivery and sale occurred outside Washington for

excise tax purposes. Thus, the transactions would qualify as interstate sales under WAC 458-20-193A.

Thus, the Department's long-held position has been that seafood shipments to out-of-state customers even if sent freight collect are exempt from excise taxes. See Det. No. 89-355, 8 WTD 83 (1989) which also exempted freight collect seafood shipments:

In this case, we find that taxpayer has complied with the intent of the statute, which is to ensure that products which escape state taxation are actually delivered to customers outside the state.

Following the release of that Determination, the Department issued RPM 89-2 which is consistent with the Director's December 6, 1984 letter, but which applies to all tangible personal property and not just seafood:

Sales by sellers located in this state of goods delivered to buyers outside this state by carriers-for-hire are not subject to the wholesaling or retailing business and occupation tax or the retail sales tax in any case where the seller is shown as consignor and the buyer is shown as consignee on the delivery bill of lading or other contract of carriage under which the goods are shipped to the out-of-state destination. This interstate sales exemption applies even in cases where the shipment is arranged through a freight consolidator or freight forwarder acting on behalf of either the seller or the buyer. It also applies regardless of whether the shipment is arranged on a "freight prepaid" or "freight collect" basis. (Underlining ours).

Based on the above-cited authorities, we hold in the present appeal the taxpayer's sales to out-of-state customers which were shipped to them freight collect are exempt from wholesaling B&O taxes.

Further, in this particular appeal we hold those shipments for which the bills of lading list the out-of-state customers, but fail to state the destinations are also exempt. This holding is supported by numerous other bills of lading to the same customers which consistently identify their out-of-state destinations. Additionally, the taxpayer's representatives stated at the hearing that the failure to list the destinations in those instances was an oversight, but such sales went to the same out-of-state destinations as those shipments which listed both the customers and the destinations.

In particular, the sales listed in Attachment A as identified by their invoice numbers in Schedule II are exempt from B&O tax:

The taxpayer has also requested a refund for taxes paid during the years 1985, 1986 and 1987. The refund request likewise is based upon the claim that the sales were made to out-of-state customers and also are exempt. As noted, the taxpayer filed its refund request in January 1990. Therefore, the request for a refund for the year 1985 is time-barred. See RCW 82.32.060.

For 1986, the taxpayer seeks a \$. . . refund. For 1987, the taxpayer seeks \$. . . in refunds. The taxpayer again has supplied numerous bills of lading supporting its claims. The invoice numbers in Attachment B have bills of lading or other documents showing the sales were delivered to customers outside Washington and therefore are exempt sales.

DECISION AND DISPOSITION:

The taxpayer's petition for correction of the assessment and refund of other taxes paid is granted, except for the refund request for 1985. This matter is remanded to Audit. Audit will set a new payment date.

DATED this 23rd of August 1991.