Cite as 11 WTD 231 (1991).

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

In the Matter of the Petition For Correction of Assessments of . . .	D E T E R M I N A T I O N
	No. 91-188
	Registration No. . . .
	. . ./Audit No. . . .
	. . ./Audit No. . . .
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[1] **RULE 193B**: B&O TAX -- INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS -- SOLICITATION BY INDEPENDENT CONTRACTORS -- NEXUS. An out-of-state manufacturer/seller has no in-state office, owns no property in this state and has no employees within this state, but solicits customers located in this state through independent contractors also located here. The in-state sales representatives are engaged in substantial activities creating a sufficient nexus with Washington to establish jurisdiction to assess B&O taxes against the taxpayer. Accord: Tyler Pipe Indus., Inc. v. Department of Rev., 483 U.S. 232, 107 S.Ct. 2810 (1987), Det. 87-286, 4 WTD 51 (1987), Det. 88-368, 6 WTD 417 (1988).

[2] **RULE 193B AND RULE 103:** INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS -- DELIVERY -- 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 either pays the carrier's freight charges from the out-of-state shipping point (F.O.B. origin, freight collect) or carries the goods itself from seller's place, the sale and delivery are deemed to have occurred out-of-state and not subject to the B & O tax. Conversely, where an out-of-state seller, who has nexus with

Washington, either pays a for-hire carrier to deliver goods to a dealer in Washington or transports them itself to Washington, the delivery and sale are deemed to have occurred in Washington and the sale is subject to B&O tax. Accord: Final Det. 86-161A, 2 WTD 397 (1987).

[3] **RULE 193B AND RULE 103:** INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS -- OUT-OF-STATE DELIVERY. When out-of-state seller ships its products for delivery to non-Washington locations as required by its sales contracts,
the sales are not Washington sales and are not taxable by Washington even if the customers themselves are located in Washington. Accord: Final Det. 86-161A, 2 WTD 397 (1987).

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: . . .

NATURE OF ACTION:

An out-of-state taxpayer seeks to cancel wholesaling business and occupation (B&O) tax assessed against it for sales of goods to Washington buyers.

FACTS:

De Luca, A.L.J. -- The taxpayer appeals two assessments which resulted from file audits and also appeals four intervening balance due notices. The first assessment (. . .) covers the period February 1, 1985 through September 30, 1987. The assessment amounts to $ . . . in taxes and interest. The assessment was sent to the taxpayer [in November 1987] and payment was due [in December 1987]. It remains unpaid. [In December 1987], the Department of Revenue granted the taxpayer a 30 day extension to file its appeal with us. The taxpayer filed its petition [in January 1988].

The taxpayer next wrote letters [in October 1988 and November 1988] protesting balance due notices it received for the periods Q4-87, Q1-88, Q2-88 and Q3-88. The taxpayer explained that its appeal covered issues similar to the ones in the notices. The notices amount to $ . . . and remain unpaid.

The Department's second file audit (. . .) covers the period October 1, 1988 through December 31, 1989. It is dated [March 1990]. The assessment is for $ . . . in taxes and interest, and remains unpaid. The taxpayer appealed this assessment [in April 1990]. We will address all assessments and balance due notices in this determination.

The taxpayer manufactures and sells bathroom fixtures and accessories. Its customers include the building trade and retail outlets. The taxpayer is headquartered in California. It claims to have no place of business, no property and no employees in Washington.

The taxpayers admits it contracts with two independent contractors to represent it in Washington. The contractors periodically call on customers and potential customers to solicit sales. The representatives do not have the authority to accept orders and do not accept them. The representatives do not install the products. Instead, the taxpayer claims the buyers rely on its catalogs and place their orders directly with the taxpayer's California office by mail or telephone.

The taxpayer also asserts the total sales of goods to Washington customers were considerably more than the sales of goods actually shipped and delivered to customers in Washington. The taxpayer states many of the goods were shipped from California and delivered to Washington customers at locations outside Washington.

Audit assessed tax on total sales to Washington customers as reported by the taxpayer, apparently without allocating sales to states where delivery may have occurred outside Washington.

TAXPAYER'S EXCEPTIONS:

The taxpayer first claims as a matter of federal constitutional law that a state is prohibited from taxing interstate commerce.

The taxpayer next claims the B&O tax is unconstitutional as applied to it because the taxpayer lacks nexus with Washington. The taxpayer argues because it does not have employees permanently based in Washington there is not sufficient contact with the state to create nexus. The taxpayer recognizes the B&O tax has been upheld by the U.S. Supreme Court on a number of occasions, including General Motors Corp. v. Washington, 377 U.S. 436 (1964) and Standard Pressed Steel v. Department of Revenue of Washington, 419 U.S.

560 (1974). However, the taxpayer claims its situation is distinguished from those cases because those taxpayers had employees residing in Washington.

The taxpayer also tries to distinguish its use of the independent contractors in Washington from the jobbers employed in Scripto v. Carson, 362 U.S. 207 (1960). The taxpayer contends although the jobbers in Scripto were labelled independent contractors they were actually the taxpayer's sales force. The Supreme Court focused on their activities in finding nexus when it declined to distinguish employees and independent contractors. In contrast, the taxpayer contends the independent contractors it uses are true independent contractors who do not conduct local sales operations or perform significant services in relation to establishing or maintaining sales into Washington.

If the tax is determined to be constitutional in this matter, the taxpayer's next asserts the assessments and balance due notices failed to allocate sales to other states when delivery occurred outside Washington. The taxpayer states it contributed to these over-assessments by reporting all sales to Washington customers including those delivered to out-of-state locations.

ISSUES:

First, does Washington have sufficient nexus with the taxpayer to assess its B&O tax? Second, should sales and, therefore, gross income be allocated to other states if deliveries to Washington customers occur outside Washington?

DISCUSSION:

Washington's B&O tax is imposed on every person "for the act or privilege of engaging in business activities" in this state. The tax is measured by the application of rates against the value of products, gross proceeds of sales, or gross income of the business as the case may be. RCW 82.04.220.

" 'Business' includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140. Moreover, there is a requirement for persons engaged in any business for which a tax is imposed under the Revenue Act to register with the Department of Revenue. WAC 458-20-101.

WAC 458-20-193B (Rule 193B) governs whether sales of goods originating in other states to persons in Washington are subject to the B & O tax. The rules provides in part:

> RETAILING, WHOLESALING. Sales to persons in this state are taxable when the property is shipped from points outside this state to the buyer in this state and the seller carries on or has carried on in this state any local activity which is significantly associated with the seller's ability to establish or maintain a market in this state for the sales. If a person carries on significant activity in this state and conducts no other business in this state except the business of making sales, this person has the distinct burden of establishing that the instate activities are not significantly associated in any way with the sales into this state. The characterization or nature of the activity performed in this state is immaterial so long as it is significantly associated in any way with the seller's ability to establish or maintain a market for its products in this state. The essential question is whether the instate services enable the seller to make the sales.
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> Applying the foregoing principles to sales of property shipped from a point outside this state to the purchaser in this state, the following activities are examples of sufficient local nexus for application of the business and occupation tax:
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> ***
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> (3) The order for the goods is solicited in this state by an agent or other representative of the seller.
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> ***
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> (5) Where an out-of-state seller, either directly or by an agent or other representative, performs significant services in relation to establishment or maintenance of sales into the state, the business tax is applicable, even though (a) the seller may not have formal sales offices in Washington or (b) the agent or representative may not be formally characterized as a "salesman."

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> Under the foregoing principles, sales transactions in which the property is shipped directly from a point outside the state to the purchaser in this state are exempt only if there is and there has been no participation whatsoever in this state by the seller's branch office, local outlet, or other local place of business, or by an agent or other representative of the seller.

[1] The Department of Revenue does not require a vendor's representative to live in Washington or take orders in the state before the tax can apply. Significant activity which establishes or maintains sales controls. Soliciting is one such activity as described by Rule 193B(3). Such activity by a representative or agent does not have to be the only or most important factor, but it is significant if it has an impact on sales. Otherwise, no reason exists to employ the person. The Department has consistently held "if the in-state activity is economically meritorious for a taxpayer (if it is worth spending budget dollars to do it), then the activity is market driven and it generally establishes nexus with the state of Washington." Determination No. 87-286, 4 WTD 51 (1987).

For example, the Department has even held infrequent visits to Washington customers by nonresident employees, who are not salespersons, constitutes sufficient local nexus to allow taxation of income from sales. See Determination No. 88-368, 6 WTD 417 (1988). In that matter, the employees provided advice to the customers regarding the safe handling of a product. Such activity was important in maintaining sales into the state.

Indeed, the U.S. Supreme Court addressed the question of nexus under very similar facts in Tyler Pipe Indus., Inc. v. Department of Rev., 483 U.S. 232, 250-251, 107 S.Ct. 2810 (1987). In Tyler, an out-of-state manufacturer sold its products in Washington. The taxpayer had no property or employees in Washington. Instead, it used independent contractors to solicit business in the state. The taxpayer claimed there was not sufficient nexus with Washington to justify collecting tax on its wholesale sales.

However, the Court in Tyler quoted with approval the Washington Supreme Court's discussion of nexus: "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly

associated with the taxpayer's ability to establish and maintain a market in this state for the sales." The Court found sufficient nexus by stating "we agree that the activities of Tyler's sales representatives adequately support the State's jurisdiction to impose its wholesale tax on Tyler". 483 U.S. at 251.

Moreover, the Court in Tyler cited Scripto when it found nexus existed. The Court held that characterizing a person as an independent agent rather than as an agent does not defeat nexus. 483 U.S. at 250.

Thus, Tyler rejects the taxpayer's claims that merely using independent contractors rather than employees or agents in Washington to solicit business is not sufficient nexus to tax. The next issue raised is whether states may tax interstate commerce. This question was readily answered by the Washington Supreme Court when Tyler was remanded to it: "... the Court was clear in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, ... (1977) that interstate commerce may be made to pay its fair share of tax burdens." See National Can v. Department of Rev., 109 Wn.2d 878, 749 P.2d 1286 (1988), cert. denied, 486 U.S. 1040, 108 S.Ct. 2030 (1988). See also American Nat'l Can v. Department of Rev., 114 Wn.2d 236, 787 P2d 545 (1990), cert. denied, 59 U.S.L.W. 3250 (1990).

In sum, the taxpayer's constitutional claims against the B&O tax are rejected.

The final issue concerns allocating the sales and gross income among other states where delivery of its products to Washington customers may have occurred. In order for Washington to impose its B & O tax against the transactions, there must be both nexus with the seller and delivery of the goods (transfer of possession) in this state. Final Det. No. 86-161A, 2 WTD 397 (1987). Accordingly, the goods must be delivered to the buyer in this state for a sale to take place here.

[2] We include and exclude certain factors in determining where delivery occurs. WAC 458-20-103 (Rule 103) declares the Department is not concerned where legal title transfers. The Department will consider whether risk of loss is on the out-of-state seller or the Washington buyer. However, under Rules 103 and 193B as well as our determinations, we do weigh heavily who pays the expense of transporting the goods by common or contract carriage into Washington.

The Department considers 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 as evidenced by the shipping documents, has paid the shipping costs, and has nexus with this state, the sale is taxable here. Det. No. 86-161A, 2 WTD 397.

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.

[3] Therefore, if the taxpayer shipped its products for delivery to non-Washington locations as required by its sales contracts, the sales are not Washington sales and are not taxable by Washington even if the customers themselves are located in Washington.

Furthermore, products shipped from the taxpayer's facilities in California to Washington locations when the buyers either paid the carriers for shipment or carried the products themselves are not Washington sales and are not taxable because the seller was not obligated to get the products to Washington.

Shipments are taxable by Washington where the seller either delivered the products itself to a Washington location or paid a carrier to haul the products to a Washington location.

DECISION AND DISPOSITION:

The taxpayer's petition is conditionally granted on the question of allocation of sales during the period February 1, 1985 through December 31, 1989.

DATED this 19th day of July 1991.