Cite as 11 WTD 239 (1991).

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

In the Matter of the Petition For Correction of Assessment and For Refund of	)	D E T E R M I N A T I O N
	)	No. 91-213
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .

[1] **RULE 193B**: INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS -- NON-SALES REPRESENTATIVES -- NEXUS. Visits (infrequent or otherwise) to Washington customers by non resident employees who are not salespersons, but who show new color and style product samples and explain new policies, constitute sufficient local nexus to allow B&O taxation of income from sales. Accord: Det. No. 88-368, 6 WTD 417 (1988).

[2] **RULE 193B**: INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS -- NEXUS -- DISASSOCIATION. An out-of-state business which has taxable nexus with Washington through out-of-state representatives visiting Washington customers may disassociate sales into this state where it has demonstrated that its instate activities are not significantly associated in any way with the sales. Accord: Det. 87-69, 2 WTD 347 (1987), Det. 88-144, 5 WTD 137 (1988), Norton Company v. Dept. of Revenue, 340 U.S. 534 (1951), Chicago Bridge v. Dept. of Revenue, 98 Wn.2d 814 (1983).

[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)

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:

The taxpayer seeks a refund of wholesaling business and occupation (B&O) taxes and also petitions to correct an assessment of wholesaling B&O taxes.

FACTS:

De Luca, A.L.J. -- The taxpayer filed its refund claim of $ . . . [in December 1989] for the years 1985 through 1988, inclusive. The taxpayer subsequently filed its petition for correction [in June 1990] pursuant to an extension granted in a [May 1990] Department letter. The taxpayer's petition for correction concerns an assessment dated [April 1990] resulting from an audit (. . .) for the period January 1, 1986 through September 30, 1989. The assessment was for $ . . . in wholesaling B&O taxes, $ . . . in use taxes, $ . . . in a balance due adjustment and $ . . . in interest, totalling $ . . . . The assessment was due for payment by [May 1990]. The taxpayer paid the $ . . . in use taxes and does not contest that amount. The taxpayer does contest the $ . . . in B&O taxes plus the interest.

The taxpayer is a foreign corporation and a subsidiary of . . . Corporation. The taxpayer has two divisions - the Underwear Division and the Printables Division. Both divisions are headquartered outside Washington. Because each division has its own products and customer base, each division is responsible for its own sales, marketing, accounts receivables, sales service and distribution. Underwear

Division manufactures and sells undergarments to retailers and Printables Division manufactures and sells T-shirts to wholesalers.

Underwear Division has a resident employee and an independent distributor in Washington. These individuals are directly involved in selling Underwear's products to department and clothing stores in Washington. The taxpayer does not contest the B&O tax it has paid on Underwear Division's sales.

The assessment at issue is based only on Printables Division's gross sales into Washington.

The taxpayer in 1988 purchased [A] Corporation which manufactured and sold T-shirts nationally. [A] had a resident salesman in Washington. However, the taxpayer decided not to employ him or use any other person residing in Washington, including independent distributors, to sell Printables' products after acquiring the company.

Instead, Printables has an employee who lives in [the west] and whose territory includes Washington. This person visits Washington approximately nine times a year for two days at a time. The taxpayer claims that person only calls on existing accounts. His primary purpose is to show new colors and styles, explain new policies, and otherwise supplement the customers' relationships with the taxpayer's home office.

The taxpayer further states the representative neither calls on prospective customers, solicits orders, collects bills nor answers complaints. However, Audit claims the taxpayer's [Western]-based employee does receive commissions attributable to sales within Washington.

The taxpayer also declares it "develops new accounts in Washington by promoting its goods at trade shows outside of Washington and through national advertising."

The taxpayer explains Printables' sales, acceptance of orders, collections, market analysis and receiving complaints are all handled by the division employees at its [Eastern] office.

ISSUE:

Whether the taxpayer can disassociate its Printables sales to Washington customers from its business activities in this state.

TAXPAYER'S EXCEPTIONS:

The taxpayer cites WAC 458-20-193B (Rule 193B), Norton Company v. Dept. of Revenue, 340 U.S. 534 (1951), B.F. Goodrich v. Washington, 38 Wn.2d 663, 231 P.2d 325 (1951), Field Enterprises v. State, 47 Wn.2d 852, 289 P.2d 1010 (1955), and Chicago Bridge v. Dept. of Revenue, 98 Wn.2d 814, 659 P.2d 463 (1983) to support its argument the services performed in Washington must be "significant" or "decisive factors" in order for the B&O tax to apply.

The taxpayer contends the approximately 18 days per year its [Western] based employee spends in Washington while merely showing new colors and explaining new policies do not make the Printables' sales taxable here. The taxpayer explains its sales increased over 70% during the audit period, yet it had no need to increase its presence or contacts in the state with additional personnel. Indeed, the taxpayer claims its Washington sales increased even though it did not retain the [A] employee after buying the company. The taxpayer argues these facts demonstrate its level of activities in Washington was not significantly associated with establishing or maintaining its market here.

DISCUSSION:

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. (Underlining ours).

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:

> ***
>
> (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."
>
> ***
>
> 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. (Underlining ours).

[1], [2] Thus, under Rule 193B when the taxpayer/seller has nexus with this state, the burden is on the seller to establish that its instate activities are not significantly associated in any way with sales into this state. See Det. 87-69, 2 WTD 347 (1987), Det. 88-144, 5 WTD 137 (1988), Norton, 340 U.S. at 537, Chicago Bridge, 98 Wn.2d at 822 and 827.

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. 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 held infrequent visits to Washington customers by nonresident employees, who are not salespersons, constitute 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.

Likewise, in the present matter, the [Western] based representative makes numerous trips per year to Washington which results in him spending nearly four working weeks a year in this state, a very substantial amount of time. While here, he shows new styles and colors of T-shirts, explains the taxpayer's new policies and "otherwise supplements the relationship established by the home office." We find such activity to be significant because, by its nature, it has an impact on sales. The discussion of styles and colors and any policy changes is intended to establish or maintain and, hopefully, increase the taxpayer's sales. There is no other reason to employ him.

Indeed, in Chicago Bridge, 98 Wn.2d at 827, the Washington Supreme Court cites the U. S. Supreme Court's comments in another Washington case, Standard Pressed Steel v. Dept. of Revenue, 419 U.S. 560, 563 (1975). In Standard the taxpayer had a resident employee engineer who was not involved in sales and had no office other than his home. He merely consulted with the customer regarding its needs. Nonetheless, his activities "were substantial with relation to the establishment and maintenance of sales upon which the tax was measured." The U. S. Supreme Court noted the engineer's activities were necessary in obtaining and retaining goodwill and rapport with the customer in addition to more tangible functions. Likewise, in the present matter, when the taxpayer's representative supplements the relationship established by the home office, he too is contributing to making and retaining goodwill with the Washington customers. His services are significant in maintaining the taxpayer's market in Washington.

Therefore, any Washington sales in which the taxpayer has had significant instate activities or services provided by its representatives are taxable. Such sales include those where the representatives residing or travelling in Washington

visit or call on customers to display their goods or samples, explain policies or answer questions, etc.

However, two situations described above would seem to disassociate some of the sales from the taxpayer's activities in this state. In particular, if a Washington customer attends an out-of-state trade show and places an order with the taxpayer there and the customer has not had prior contacts with the taxpayer's Washington sales representatives, it would appear, based on those facts alone, there have been no local activities significantly associated with the sale. Similarly, if some of the taxpayer's sales are the result solely of national advertising with no instate participation or prior contacts by its representatives there would not be a Washington sale because of a lack of local activity by the seller. Final Det. No. 86-161A, 2 WTD 347, (1987); Norton, 340 U.S. at 539, B.F. Goodrich, 38 Wn.2d at 674.

But, even if the taxpayer can disassociate some initial sales, it does not necessarily mean all subsequent sales to the same customers are also disassociated. If the taxpayer's former resident employee or its [Western]-based employee had subsequent instate contacts with those customers, sales following such contacts would presumably be taxable, unless the taxpayer can again disassociate them. Such contacts obviously are intended to maintain sales.

However, in all instances, the taxpayer must produce convincing evidence to meet its burden of disassociation. The taxpayer must show that a sale was not related in any significant way to its instate activity. That is, the sale resulted from a source completely independent of the taxpayer's instate activity, e.g. an out-of-state trade show or national advertising.

The following examples would be useful types of evidence to show whether or not sales are disassociated. They are not all-inclusive and not all are necessarily required: 1) the taxpayer's records showing which of its representatives got credit for the sales and where the representatives are located (however, credit to an out-of-state representative does not necessarily mean there was no in-state activity); 2) a list of customers visited in the state by its representatives and when they were visited; 3) sales contracts or purchase orders showing the parties or their representatives who were involved and where the transactions occurred; 4) correspondence, letters and/or affidavits from the taxpayer's employees and their customers showing when, where and how the sales occurred

and verifying the claims that there were no local activities involved in them; 5) shipping documents showing the consignor, the consignee, the origin and destination, and who bore the expense of shipping.

[3] The fifth example given raises another matter which does not concern disassociation as much as it concerns where delivery occurs. 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.

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 on 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. Final Det. No. 86-161A, 2 WTD 347, (1987).

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.

Products shipped from the taxpayer's out-of-state facilities 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 and its instate activities are significantly associated with the sale.

It is important to note the Department of Revenue intends to amend Rules 193A and 193B. We believe the amendments will occur by January 1, 1992. When the amendments are adopted, the situations addressed above regarding where delivery and, therefore, sales occur may be treated differently for tax purposes than they are now.

DECISION AND DISPOSITION:

The taxpayer's petition for refund and correction of the assessment is remanded to Audit Division on the question of allocating the sales during the period January 1, 1985 through September 30, 1989 due to disassociation or out-of-state delivery. The burden is on the taxpayer to disassociate the sales from its Washington activities to reduce its tax liabilities. Therefore, the taxpayer is required to produce for Audit's review its records, including, for example, its Washington representatives' records regarding customer contacts and their commissions, bills of lading, sales contracts, purchase orders, correspondence or other useful documents described above. These records must show there was no instate activity whatsoever by the taxpayer or its representatives significantly associated with the sales into Washington.

In order to allocate sales to other states because delivery occurred outside Washington, these records, especially bills of lading, must clearly show shipments where the buyer either hauled the products itself or paid the carrier's freight charges from the taxpayer's out-of-state facilities to Washington customers.

The taxpayer has 30 days from today either to submit the records to Audit or establish a satisfactory time with Audit to review them.

DATED this 9th day of August 1991.