Cite as 11 WTD 273 (1991).

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

In the Matter of the Petition For Correction of Assessment and Refund of	)	D E T E R M I N A T I O N
	)	No. 91-279
. . .	)	Registration No. . . .
	)	. . .

[1] **RULE 193B**: INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS -- NON-SALES REPRESENTATIVES -- NEXUS -- B&O TAX. Visits (infrequent or otherwise) to Washington customers by non resident employees who are not salespersons, but who monitor installations of equipment which the out-of-state taxpayer sold and give technical advice 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 -- B&O TAX. 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).

[3] **RULE 193B AND RULE 103:** INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS -- DELIVERY -- NEXUS -- B&O TAX. 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).

[4] **RULE 193B:** INTERSTATE SALE OF GOODS TO WASHINGTON CUSTOMERS -- REGISTERED VENDORS -- SALES TAX -- REFUND. Rule 193B states retail sales tax must be collected and accounted for in every case where B&O tax is due, assuming it is a retail sale. Furthermore, all vendors who are registered with the Department of Revenue are required to collect use or sales tax from all persons to whom goods are sold for use in Washington irrespective of the absence of local activity on any given sale. A sales tax refund is owing only if the taxpayer can document out-of-state delivery.

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 originally petitioned for a sales tax refund by claiming it lacked nexus with Washington. Subsequently, the Department of Revenue issued a balance due notice for business and occupation (B&O) taxes. The taxpayer then petitioned against that notice by again claiming lack of nexus. The two appeals have been consolidated and will be addressed in this determination.

FACTS:

De Luca, A.L.J. -- The taxpayer seeks a $ . . . refund of sales taxes by its petition filed [in November 1990]. It also petitioned [in April 1991] to cancel a $ . . . balance due notice of B&O taxes for Q3-90 issued [in January 1991] (. . .).

The taxpayer is a foreign corporation based in [the southwest]. It sells electrical equipment manufactured in [the southwest]. Some of its customers are located in Washington. However, the taxpayer states it has no employees soliciting sales in Washington. Instead, the taxpayer claims its customers contact it at its home office in [the southwest] when they wish to order items.

Furthermore, the taxpayer states it does not install the equipment it sells to Washington customers. Rather, when equipment needs to be installed, the customer will hire its own contractor and the taxpayer will send one of its employees from [the southwest] to Washington to be present to "turn-on" the equipment. For 1989, the taxpayer's employees were in Washington for four or five days serving such functions. As of [November 1990], none of its employees were in Washington for such purposes during that year.

The taxpayer also claims it ships the equipment from [the southwest] to Washington by common carrier. It denies that its employees deliver the goods to Washington locations.

Finally, the taxpayer notes that information on its original application of [June 1988] for sales tax registration has been superceded by its actual activities since then. The taxpayer originally stated it would solicit sales and install equipment in Washington. As mentioned, it claims it does not engage in such activities. It revised its description of activities in a Washington Business Activity Statement completed [in September 1990].

ISSUE:

Does the taxpayer have nexus with Washington thereby subjecting it to the state's taxing jurisdiction?

TAXPAYER'S EXCEPTIONS:

The taxpayer states it has insufficient physical presence in Washington to constitute nexus for tax purposes.

DISCUSSION:

Rule 193B governs whether sales of goods originating in other states to persons in Washington are subject to the B&O tax. The rule 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:

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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. (Underlining ours).

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SALES AND USE TAX

> Retail sales tax must be collected and accounted for in every case where business and occupation tax is due as outlined above.
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> ***
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> All vendors who are registered with the department of revenue are required to collect use tax or sales tax from all persons to whom goods are sold for use in this state irrespective of the absence of local activity on any given sale.

[1], [2] Thus, under Rule 193B when the taxpayer/seller has nexus with this state, to avoid B&O tax 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 is the controlling factor. 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 [southwestern]-based employee has made trips to Washington which resulted in him spending four or five working days in 1989 in this state monitoring equipment installations. While here, he provides

technical expertise 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 employee's on-site presence is intended to establish or maintain and, hopefully, increase the taxpayer's sales.

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 for B&O purposes. Such sales include those where the representatives travelling in Washington visit or call on customers to monitor installation of and turning on the taxpayers's products, explain policies or answer questions, etc.
However, a situation described above might disassociate some of the sales from the taxpayer's activities in this state. In particular, if a Washington customer placed an order at the taxpayer's [southwestern] office and the taxpayer's representatives in Washington did not participate or have prior contacts in Washington with the customer, it would appear, based on those facts alone, there was not a Washington sale. The reason is the seller has not had any local activities significantly associated with the sale. Det. No. 87-69, 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 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 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 397 (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.

[4] We next address the question of refunding sales tax. As shown, Rule 193B states that sales tax must be collected and accounted for in every case where B&O tax is due. We assume, of course, the sale is a retail sale and not a sale for resale. Thus, if it is a Washington retail sale, as described above, sales tax must be collected and remitted. Furthermore, even if there is absence of local activity on any given sale, Rule 193B still requires all registered vendors to collect use tax or sales tax from all persons to whom goods are sold and delivered for use in this state. The sales tax refund claim will be denied unless the taxpayer can document that the goods were delivered outside Washington.

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 notice of balance due is remanded to Audit Division on the question of allocating the sales during the refund period 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.

We have already discussed that the taxpayer must show out-of-state delivery to receive a sales tax refund.

DATED this 26th day of September, 1991.