

Cite as Det. No. 91-157, 11 WTD 333 (1992).

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u> <u>N</u>
For Request of Ruling on Tax)	
Liability of)	No. 91-157
)	
. . .)	Registration No. . . .
)	
)	

[1] RULE 193B: B&O TAX -- OUT-OF-STATE MAIL ORDER COMPANY -- PLACING CATALOGS IN WASHINGTON STORES. An out-of-state mail order company which otherwise is not liable for B&O tax becomes liable for the tax by placing its catalogs in retail stores in Washington for customer distribution.

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 requests us to rule whether it is liable for business and occupation (B&O) tax, RCW 82.04.010 et seq., under two different scenarios. The request is made pursuant to RCW 458-20-100(9).

FACTS:

De Luca, A.L.J. -- The taxpayer explains it is a California mail order company which began collecting and remitting Washington sales tax in June 1987 due to an agreement it reached with the Multi State Tax commission. The taxpayer sells women's garments. Catalogs are sent to Washington customers directly from an out-of-state printer. The taxpayer states it has no goods warehoused in Washington nor any employees, representatives or business locations in this state. It claims to perform no services within this state. The orders are filled in California and shipped via common carrier to its customers in Washington.

The taxpayer does have a sister company with retail stores located in Washington. They are separate corporations without common officers and Board members. The taxpayer is adamant that the sister corporation's Washington stores presently do not perform any services for the taxpayer or its Washington customers.

The taxpayer requests us to determine whether it is liable for B&O tax under these facts. If we determine there is no liability, then the taxpayer asks whether it would be liable for B&O tax if it placed its catalogs in the sister company's retail stores to distribute to customers free of charge. The taxpayer claims the stores would provide no other service for it.

DISCUSSION:

WAC 458-20-193B (Rule 193B) governs whether out-of-state vendors selling goods to customers located in Washington are liable for Washington's excise taxes, including B&O taxes. . . .

We agree the taxpayer presently is not liable for B&O tax when considering the facts as given in light of Rule 193B. The taxpayer has no branch office, local outlet or other place of business in this state. Orders are not solicited or given to an agent here. The goods are not delivered from a local outlet or from a local stock. Furthermore, there are no significant services being performed in relation to establishing or maintaining sales into this state.

However, we view the placing of catalogs in the sister corporation's Washington stores as a significant service by an agent or other representative in order to establish or maintain sales into this state. Such an activity would cause B&O tax liability for the taxpayer for its sales into this state.

Rule 193B reads in part:

BUSINESS AND OCCUPATION TAX

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.

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."

Clearly, there is no other purpose in placing the catalogs in the Washington stores other than to enable the taxpayer to make sales. Additionally, although the taxpayer claims the Washington stores would provide no service to the taxpayer except distributing the catalogs, we envision the catalogs would inevitably lead to questions from customers to the stores' salespersons regarding the goods and how to order or exchange them. Such activity is significant in establishing or maintaining sales into this state.

RULING:

Under the facts given, the taxpayer is not liable for B&O tax for the way it currently makes sales to Washington customers. However, should the taxpayer place its catalogs in its sister corporation's Washington stores to distribute to customers, we would then view the taxpayer's activities in Washington as subject to B&O tax.

This opinion may be rescinded or revoked in the future, however, any such rescission or revocation shall not affect prior liability and shall have a prospective application only.

DATED this 10th day of June 1991.