

Cite as Det. No. 91-192, 11 WTD 383 (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 Correction of Assessment of	)	
	)	No. 91-192
	)	
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
	)	. . ./Audit No. . . .
	)	

- [1] **RULE 193B:** INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS -- NEXUS -- DISASSOCIATION. An out-of-state business which has taxable nexus with Washington through resident sales representatives 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. No. 87-69, 2 WTD 347 (1987), Det. No. 88-144, 5 WTD 137 (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 are 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, providing the seller's instate activities are significantly associated with the sale. Accord: Det. No. 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: Det. No. 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 reduce 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. The taxpayer filed its appeal [in April 1990]. The first assessment ( . . ./Audit No. . . .) covers the period April 1, 1983 through December 31, 1984. It amounted to \$ . . . in taxes, interest and penalties. It was due for payment by [March 1990]. The taxpayer made partial payment for the amount not in dispute. A balance of \$ . . . plus interest and penalties remains.

The second assessment ( . . ./Audit No. . . .) covers the period January 1, 1985 through December 31, 1989. It amounted to \$ . . . in taxes, interest and penalties. It also was due for payment by [March 1990]. The taxpayer made partial payment for the amount not in dispute. A balance of \$ . . . plus interest and penalties remains.

The taxpayer sells wrist watches and timepieces wholesale. The taxpayer is incorporated [out-of-state] and maintains offices in [A] and [B]. The taxpayer claims to have no property, inventory, or offices in Washington. The taxpayer admits it has employees residing in Washington. They solicit orders from existing and prospective Washington customers. The Washington employees apparently do not perform credit checks or any other activities. The taxpayer approves orders outside Washington. It then fills the orders from out-of-state inventory. The taxpayer claims it does not directly advertise in Washington.

The taxpayer states that, in addition to and completely separate from its Washington sales force, it accepts "direct" orders from certain national customers which have retail stores located in

this state. The taxpayer gives two such examples. One, Washington retailers might submit purchase orders directly to the taxpayer at trade shows outside Washington. Two, certain major customers have their central buying offices outside Washington. These offices will submit orders to the taxpayer's offices in [A] or [B]. The taxpayer further explains that one of its national sales managers may travel from its [B] office to [another state] to solicit an order. The representative then sends the order to [A] for acceptance. If accepted, the order might be shipped from [A] to [that state] and then reshipped by the retailer to one of its stores in Washington.

#### ISSUE:

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

#### TAXPAYER'S EXCEPTIONS:

The taxpayer argues it should be allowed to allocate such sales, and therefore gross income, to other states when no local activity is involved in the sales to Washington customers. The taxpayer claims such sales are not in any way connected to any soliciting conducted in Washington by its resident employees. The taxpayer cites WAC 458-20-193B (Rule 193B).

#### 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:

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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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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] 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. No. 87-69, 2 WTD 347 (1987) and Det. No. 88-144, 5 WTD 137 (1988).

The taxpayer's examples described above would seem to dissociate the sales from its 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 representative, it would appear, based on those facts alone, that there have been no local activities significantly associated with the sale. Similarly, if the taxpayer's out-of-state sales representatives sell its goods to an out-of-state customer who subsequently ships the items to its retail store(s) in Washington, there would not be a Washington sale because of a lack of local activity by the seller. 2 WTD 347.

However, the taxpayer must produce convincing evidence to meet its burden of disassociation. The following examples would be useful types of evidence. They are not all-inclusive and not all are necessarily required: 1) the taxpayer's records showing which of its sales representatives got credit for the sales and where the representatives are located; 2) sales contracts or purchase orders showing the parties or their representatives who were involved and where the transactions occurred; 3) letters and/or

affidavits from the taxpayer's employees and/or their customers verifying the claims that there were no local activities involved in the sales; 4) shipping documents showing the consignor, the consignee, the origin and destination, and who bore the expense of shipping.

[2], [3] The fourth 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. 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. 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.

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 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.

#### DECISION AND DISPOSITION:

The taxpayer's petition is conditionally granted on the question of allocating the sales during the period April 1, 1983 through December 31, 1989 due to disassociation and/or out-of-state delivery. This matter is remanded to Audit Division. In order to disassociate sales from Washington and reduce its tax liabilities, the taxpayer is required to produce for Audit's review its records, including, for example, sales representatives' records, bills of lading, sales contracts, purchase orders 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 from the taxpayer's out-of-state facilities to Washington customers either 1) were shipped and delivered to locations outside Washington, or 2) if shipped to Washington locations, the buyer either hauled the products itself or paid the carrier's freight charges.

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

If the taxpayer fails to submit the records or arrange for their production and review within the next 30 days, Document No. . . . in the amount of \$ . . . , plus unwaived interest in the amount of \$ . . . for a total of \$ . . . and Document No. . . . in the amount of \$ . . . , plus unwaived interest in the amount of \$ . . . for a total of \$ . . . are due for payment by [August 1991]. Because the delay in issuing this determination was for the convenience of the Department, extension interest will be waived from [April 1991].

DATED this 26th day of July 1991.