

Cite as Det. No. 92-057, 12 WTD 109 (1993).

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 Tax Ruling of)	
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)	No. 92-057
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. . .)	Registration No. . . .
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)	

[1] RULE 103 & RULE 159: B&O TAX -- INTERSTATE -- TIME AND PLACE OF SALE -- CONSIGNMENT SALES. An out-of-state taxpayer who consigns inventory to an out-of-state distributor's warehouse pending subsequent sales by that distributor in its own name to retail outlets is deemed to be making wholesale sales to that distributor. If the warehouse is located outside the state of Washington, then the sale takes place outside the state of Washington.

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.

NATURE OF ACTION:

A taxpayer appeals an adverse ruling received from the Taxpayer Information and Education Section regarding consignment sales to wholesale distributors made outside the state of Washington.

TAXPAYER REPRESENTED BY: . . .

DATE OF TELECONFERENCE: . . .

FACTS:

Okimoto, A.L.J. -- . . . (taxpayer) is located outside Washington and owns a record label for which it produces songs made by recording artists. The taxpayer has one resident employee located in this state whose sole function is to visit radio stations to entice the airplay of its music artists. The

activity is designed to stimulate retail purchases by Washington customers of the taxpayer's product. This employee, however, does not engage in the sale or distribution of taxpayer's records, cassettes or compact disks.

The taxpayer explains the process as follows. It contracts with various music artists to make a master tape recording of their songs/albums. This master tape is sent to a manufacturer to duplicate the albums onto salable records, CDs, or cassettes. These activities occur outside Washington. The manufacturer then ships the records directly to an out-of-state distributor who stores the albums in out-of-state warehouses. Sales from taxpayer to the distributor are made on a consignment basis. Title to the albums remains in the taxpayer's name at all times prior to any negotiated sale made to a Washington customer. Once a sale is negotiated, the distributor removes the album from inventory and ships it to the Washington customer at a location within the state. The distributor bills the Washington customer (a retail outlet) on its own invoices and receives payment for the entire amount, including any freight billings.

At the end of the month, the distributor pays the taxpayer a negotiated price for the consigned sales. (This is usually retail sales price, less freight and other related costs, plus a profit factor.)

The distributor maintains all records of sale, i.e. name of purchaser, place of delivery, shipping date, and sales price. In fact the taxpayer receives no breakdown of sales by state.

TAXPAYER'S EXCEPTIONS:

The taxpayer does not dispute that the activities of its resident employee constitute sufficient instate activity to create nexus for its sales made into the state of Washington. Instead, it simply argues that it makes no such sales. The taxpayer explains that all of its inventory is consigned to and stored by out-of-state distributors at the distributor's warehouses. These warehouses are located in Los Angeles, Chicago, Atlanta, and Philadelphia. None are located in Washington. The taxpayer argues that, since title to and possession of the inventory transfers from the taxpayer to the distributors at these warehouses, all sales occur outside the state of Washington. Hence, the taxpayer contends that it makes no Washington sales. The taxpayer relies on WAC 458-20-159 in support of this analysis.

ISSUE:

1. Is a taxpayer who consigns inventory to its distributor's out-of-state warehouse pending subsequent sales by that

distributor in that distributor's own name to Washington customers subject to wholesaling B&O tax on its sales to that out-of-state distributor?

DISCUSSION:

[1] 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); Det. No. 91-042, 11 WTD 91 (1991).

Although the taxpayer concedes the nexus issue, it disputes that the delivery of goods to the buyer took place within this state. We have examined the taxpayer's contract with its distributor and it provides in pertinent part:

Title to Products manufactured and to be distributed hereunder shall remain in Company [taxpayer], Products shall be consigned by Company to [distributor], subject to the provision of this Agreement. Distributor will, in turn, consign Records to X. Neither [distributor nor X] shall be deemed to have purchased Company's Products hereunder but, as consignees, are hereby and shall be empowered to pass title to said Products directly to Customers.

(Brackets supplied.)

The contract also provides that the distributor prepare customer invoices, set the selling price, and set the terms of sale of the product to its customers.

Finally, the contract specifically provides that distributor is not an agent of the taxpayer. It states:

In entering into this Agreement Company [taxpayer] and [distributor] each have and shall have the status of an independent contractor, and shall not be deemed to be partners or joint venturers and nothing herein contained shall contemplate or constitute Company as [distributor's] agent or employee or [distributor] as Company's agent or employee.

(Brackets and emphasis supplied.)

WAC 458-20-159 (Rule 159) is the duly promulgated rule governing the application of tax laws to agents, consignors and consignees. It has the same force and effect as a statute unless declared invalid by the judgment of a court of record not appealed from. RCW 82.32.300. Rule 159 states in part:

RETAILING AND WHOLESALING. Every consignee, bailee, factor, agent or auctioneer having either actual or constructive possession of tangible personal property, or having possession of the documents of title thereto, with power to sell such tangible personal property in his or its own name and, actually so selling, shall be deemed the seller of such tangible personal property and taxable under the retailing or wholesaling classification of the business and occupation tax, depending upon the nature of the transactions. In such case the consignor, bailor, principal or owner shall be deemed a seller of such property to the consignee, bailee, factor or auctioneer and taxable as a wholesaler with respect to such sales.

(Emphasis supplied.)

We have examined the sample invoices submitted by the taxpayer and they clearly indicate that the sale to the Washington customer is made in the name of and by the out-of-state distributor. This documentation together with the express language in Rule 159 can result in only one conclusion. The taxpayer has made a wholesale sale directly to its distributor. The distributor, in turn, has made another wholesale sale to the Washington retailer.

The remaining issue is to decide where the sale from the taxpayer to the distributor takes place. WAC 458-20-103 (Rule 103) is the lawfully promulgated rule governing the time and place of sale. Rule 103 states in part:

Under the Revenue Act of 1935, as amended, the word "sale" means any transfer of the ownership of, title to, or possession of, property for a valuable consideration, and includes the sale or charge made for performing certain services.

For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this state when the goods sold are delivered to the buyer in this state, irrespective of whether title to the goods passes to the buyer at a point within or without this state.

(Emphasis supplied.)

In applying the above rule to the taxpayer's situation, it is clear that delivery and possession transfers from the taxpayer to the distributor at the out-of-state warehouses. Accordingly, we

find that the sales do not take place within the state of Washington.

DECISION AND RULING:

Where a taxpayer consigns inventory to a wholesale distributor at the distributor's out-of-state warehouse pending a subsequent sale by the distributor in its own name, the sale between the taxpayer and the distributor takes place at the warehouse where the inventory is delivered to the distributor. If the warehouse is located outside the state of Washington, the sale does not take place within the state of Washington.

This legal opinion may be relied upon for reporting purposes and as support of the reporting method in the event of an audit. This ruling is issued pursuant to WAC 458-20-100(9) and is based upon only the facts that were disclosed by the taxpayer. In this regard the department has no obligation to ascertain whether the taxpayer has revealed all of the relevant facts or whether the facts disclosed were actually true. This legal opinion shall bind this taxpayer and the department upon those facts. However, it shall not be binding if there are relevant facts which are in existence but not disclosed at the time this opinion was issued; if, subsequently, the disclosed facts are ultimately determined to be false; or if the facts as disclosed subsequently change and no new opinion has been issued which takes into consideration those changes. 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 5th day of March 1992.