

Cite as Det. No. 90-215A, 12 WTD 297 (1990).

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

In the Matter of the Petition)	<u>F</u> <u>I</u> <u>N</u> <u>A</u> <u>L</u>
For Refund of)	<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>
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)	No. 90-215A
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. . .)	Registration No. . . .
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[1] RULE 193B: NEXUS -- LOCAL STOCK OF GOODS. Where out-of-state commodities trading corporation owns a stock of goods located in Washington State, the commodities trading corporation has sufficient nexus with Washington to support imposition of B&O tax on its sales.

[2] RULE 103: COMMODITIES WARRANTS -- PLACE OF SALE -- TRANSFER OF TITLE TO TANGIBLE PERSONAL PROPERTY DELIVERED IN WASHINGTON STATE -- B&O TAX. The sale of tangible personal property effected by the transfer of a "commodities warrant" is subject to Washington B&O tax if the property underlying the warrant is delivered in Washington. ACCORD: Det. No. 88-155, 5 WTD 179 (1988); Det. No. 86-295, 2 WTD 11 (1986).

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:

Commodities trading corporation appeals Det. No. 90-215 which denied its petition for refund and held that sales of warrants, reflecting ownership of commodities stored in Washington warehouses, were subject to Washington B&O tax.

FACTS:

Roys, Sr. A.L.J. -- Prior to its liquidation in 1985, [taxpayer] was a Delaware corporation based [out-of-state]. Taxpayer seeks a refund of wholesaling B&O tax of \$. . . paid between 1981 and 1983 with respect to its sales of commodities warrants.

In our prior determination, we found:

The taxpayer was engaged in the business of dealing and trading in commodities such as copper, silver, etc. This dealing and trading was done through the purchase and sale of "warrants". The taxpayer was unable to furnish a copy of the "warrant" because it had no reason to keep copies after they had been sold.

. . .

The taxpayer asserts that its only connection with the State of Washington was the holding of "warrants" which represented ownership of finished metal stored by an unrelated party (. . .) at [its] smelting facilities in . . . , Washington. . . . The taxpayer did not take physical delivery of the metal The "warrants" gave the taxpayer paper title to the goods. The taxpayer sold the "warrants" through brokers outside of Washington. Eventually, the "warrant" was purchased by someone who took delivery of the commodity that has [sic] been stored in Washington. The taxpayer's entire profit was made from the purchase and sale of the "warrants".

Although taxpayer did not retain copies of the warrants which relate to its refund request, in response to a 1986 request by the Administrative Law Judge, taxpayer provided a copy of a warrant relating to a purchase it made subsequent to the refund period. The warrant, dated [April 1984], provides:

We confirm having purchased from you and you having sold to us the following:

Quantity: 2,900,000 lbs.

Description: . . . Warrants

. . .

Delivery: F.O.B. . . . WAREHOUSE

Shipment: May 1, 1984

. . .

Neither Buyer nor Seller shall be responsible for delay in or failure of shipment or delivery due to any condition beyond the reasonable control of the party in question.

Taxpayer reported its receipts from the sales effected by the warrants under the wholesaling classification of the B&O tax. In its appeal, taxpayer clarifies that it never exercised the warrants and contends that it therefore never purchased the underlying commodity. Taxpayer also provided information regarding "futures contracts" and "stock warrants." Based on this information, taxpayer argues that the commodities warrants at issue involve "purchasing a contract to purchase a commodity." In other words, taxpayer argues that the warrants merely represent the right to purchase the underlying commodity at a specified price and for a specified period of time. According to taxpayer, the warrants do not represent ownership of the underlying commodity. However, taxpayer concedes that if warrants are not sold before the delivery date, the commodities underlying the warrants will be delivered.

Taxpayer contends: 1) Taxpayer was not engaged in business activities in Washington; 2) Taxpayer did not engage in any sales transactions in Washington; 3) The warrants are intangible, and the sale of intangible property is not subject to B&O tax; and 4) If the sale of intangible property is subject to B&O tax, the sale of the warrants did not occur in Washington; the sales occurred in interstate commerce, and Washington's attempt to tax such sales is unconstitutional.

ISSUES:

1. Whether taxpayer's possession of commodities warrants provides nexus for Washington B&O tax purposes where taxpayer is out-of-state but the commodities underlying the warrants are warehoused in the state.
2. Whether taxpayer's transfer of commodities warrants is subject to Washington B&O tax where taxpayer is out-of-state but the commodities underlying the warrants are warehoused in the state.

DISCUSSION:

[1] In our prior determination, we denied taxpayer's petition for refund. We held:

With respect to the taxpayer's contention that insufficient nexus existed with the State of

Washington, WAC 458-20-193B (Rule 193B) in pertinent part provides:

...the following examples are examples of sufficient local nexus for application of the business and occupation tax:

...

(4) The delivery of the goods is made...from a local stock of goods of the seller in this state. (Emphasis supplied.)

A local stock of goods of the seller means having a stock of merchandise held for sale. It includes goods held in a warehouse of the vendor, held in the public or private warehouse of another, or held by an agent or bailee of the vendor. ETB 127.04.193 (ETB 127).

In this case, the taxpayer held for resale inventories of . . . for a number of years in the private warehouse . . . in Washington. Thus, there was sufficient local nexus for application of the B&O tax. Rule 193B and ETB 127.

We affirm the analysis and decision in our prior determination with respect to the nexus issue.¹

In affirming our prior decision, we decline to accept taxpayer's view of the warrants as intangible property. Specifically, taxpayer asserts that the warrants involve "purchasing a contract

¹While we note that ETB 127, which we cited in our prior determination, has been canceled, its cancellation does not change our finding that taxpayer has sufficient nexus with Washington State to support imposition of the B&O tax. See ETB 549. First, the ETB was canceled subsequent to the audit period. Second, the ETB was canceled because new WAC 458-20-193 (Rule 193), effective January 1, 1992, adequately addresses the nexus issues addressed in that ETB. Rule 193 is consistent with our finding of nexus in this case.

We further note that Rule 193B is not strictly applicable to the transactions here at issue because Rule 193B addresses sales of goods originating in other states to persons in Washington. Here, the goods are located in Washington at the time of sale and may or may not have been sold to a "person in Washington." Nonetheless, the nexus standards set forth in Rule 193B, having broad application, provide examples of nexus that are relevant to our determination.

to purchase a commodity," i.e., the right to purchase, in the future, commodities at a specified price. In support of its assertion, taxpayer provided general information regarding stock warrants and commodities futures contracts. None of the information taxpayer provided contained detailed information regarding commodities warrants. The information taxpayer provided is simply not sufficiently specific to counterbalance the probative weight of the copy of a commodities warrant taxpayer previously provided.

Contrary to taxpayer's assertion, the commodities warrant represents more than the right to purchase commodities in the future. Although the delivery date is four days from the date of execution, the warrant gives taxpayer actual title to the purchased commodity. The warrant contains no provisions that support taxpayer's assertion that the warrant simply embodies the right to purchase the commodity in the future. The mere fact that the delivery will occur in the future does not negate the fact that tangible personal property is being sold, such property being located in Washington at the time of sale. Thus, the warrant is similar to title to a car. Where a buyer and seller agree to transfer a car, the transfer is taxable here if the car is delivered to the purchaser in Washington. The fact that the contract may provide for delivery of the car four days in the future does not change the tax consequences of the transaction; it does not convert a sale of tangible personal property into a sale of intangible property.

We recognize that the commodities warrant taxpayer previously provided represents a purchase by taxpayer rather than a sale by taxpayer and that the transaction occurred outside the audit period. Thus, the sale that was effected by that warrant is not at issue here. However, taxpayer was given the opportunity to provide copies of the warrants involved in the sales at issue. Taxpayer failed to do so because it failed to keep copies of the warrants. RCW 82.32.070 provides:

Every person liable for any fee or tax . . . shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable All his books, records, and invoices shall be open for examination at any time by the department of revenue. . . . Any person who fails to comply with the requirements of this section shall be forever barred from questioning, in any court action or proceedings, the correctness of any assessment of taxes made by the department of revenue based upon any period for which such books, records, and invoices have not been so kept and preserved.

In failing to keep copies of the warrants, taxpayer failed to comply with the requirement of RCW 82.32.070 that it keep records for five years. In 1986, the Administrative Law Judge requested copies of warrants for transactions that occurred between 1981 and 1983. Thus, although the Administrative Law Judge's request occurred at most five years from the year at issue, taxpayer was unable to accommodate the Administrative Law Judge's request. Taxpayer is therefore barred from questioning our determination that the warrants constitute title to tangible personal property. [2] Having determined that taxpayer had nexus with Washington, we must next address whether our prior determination was correct in concluding that the sales effected by the warrants were subject to Washington tax. In our prior determination, we concluded:

[Taxpayer] was engaged in the activity of making sales of . . . , tangible personal property, when it transferred ownership and title to the . . . warehoused in Washington by selling the "warrants" which evidenced ownership and title to the property.

. . .

The . . . that was sold was warehoused in Washington. Upon the taxpayer's sale of the . . . , the metal remained in the warehouse awaiting its disposition by the buyer or by successive buyers. We conclude that the taxpayer made constructive delivery in this state of the metal sold to its buyer. Thus, the sale took place in this state.

The Department has uniformly and consistently held that where tangible personal property is located within this state at the time of its sale and delivered to the buyer within this state, the sale is local and taxable irrespective of where or how the contract is negotiated. Sales of local stocks of goods cannot possibly qualify as interstate sales because the goods sold do not move in interstate commerce. Excise Tax Bulletin 130.04.193 (ETB 130). Accordingly, we reject the taxpayer's argument that its sales were exempt from B&O tax because "interstate commerce" is involved.²

RCW 82.04.040 and WAC 458-20-103 (Rule 103) define the term "sale" to mean "any transfer of the ownership of, title to, or

²ETB 130 has been canceled. ETB 549. See discussion set forth above in footnote 1.

possession of, property for a valuable consideration." Rule 103 further provides:

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 the state.

Thus, the transfer of ownership alone is sufficient for a sale to occur, and such a transfer occurs where the right to possession and use, to sell or otherwise dispose of the property is transferred. It is not necessary that the seller have physical possession of the property or that the buyer take physical possession of the property. Constructive delivery is sufficient, and where the property that is constructively delivered is located in Washington before, during, and after the sale, the sale occurs in Washington and is subject to tax here. See Det. No. 88-155, 5 WTD 179 (1988); Det. No. 86-295, 2 WTD 11 (1986).

DECISION AND DISPOSITION:

Taxpayer's petition for refund is denied.

DATED this 30th day of September, 1992.