Cite as Det. No. 92-124, 12 WTD 157 (1993).

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

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
) No. 92-124	)	
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
	)	

[1] RULE 193A: B&O TAX -- REPAIRING -- INSTALLING REPAIR PARTS -- SEPARATELY BILLED -- INTERSTATE DEDUCTION. Where out-of-state businesses ship property into Washington for repair, an in-state repair facility is not allowed an interstate deduction in respect to repair parts installed into the property during the repairing process and subsequently delivered to the customer at a point 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:

An owner of a Washington repair facility protests the denial of an interstate deduction claimed on parts installed as part of the repairing activity and delivered to an out-of-state customer.

TAXPAYER REPRESENTED BY: . . .
. . .

DATE OF HEARING: . . .

FACTS:

Okimoto, A.L.J. -- . . . (taxpayer) operates an equipment repair facility in Washington. The Department of Revenue (Department) auditors examined the taxpayer's books and records for the period January 1, 1986 through September 30, 1989 and issued an assessment for additional taxes and interest. The taxpayer does

not protest the additional taxes assessed in the audit report but instead protests the disallowance of a requested interstate deduction which would significantly offset the tax assessed. The taxpayer has made a partial payment of the tax assessment and the balance remains due.

TAXPAYER'S EXCEPTIONS:

In the audit report, the auditor disallowed a requested interstate deduction for retailing B&O taxes paid on the charge made for parts installed into equipment owned by out-of-state customers during the course of repairing the equipment. The repaired equipment was subsequently delivered to the out-of-state customer at a point outside the state of Washington. The taxpayer states that the invoice separately itemizes all charges for parts used in the repairing process from charges for repair labor. The taxpayer argues that it should be allowed to bifurcate parts from labor for purposes of applying the interstate deduction for B&O tax. If bifurcation is allowed, then the taxpayer argues that it is entitled to take an interstate deduction for the amounts charged for parts and delivered to the customer at a point outside the state of Washington.

The taxpayer primarily relies on WAC 458-20-103 (Rule 103) and WAC 458-20-193A (Rule 193A) among others, as supporting its position. The taxpayer also relies on ETBs 49 and 202. The taxpayer further cites the following published determinations: Det. No. 89-396, 8 WTD 143 (1989); Det. No. 89-509, 8 WTD 345 (1989); and Det. No. 88-459, 7 WTD 79 (1988).

ISSUE:

1. If an out-of-state business ships property into Washington for repair, is the in-state repair facility allowed an interstate sales deduction for repair parts installed here as a component part on the repaired property and delivered to the customer outside Washington?

DISCUSSION:

[1] RCW 82.04.050(1) includes within the definition of a retail sale:

> . . .every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons. . .

RCW 82.04.050(2) further includes within the definition of a retail sale:

> . . . the . . . charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, including charges made for the mere use of facilities in respect thereto, . . .

RCW 82.04.250 imposes a business and occupation tax:

> Upon every person . . . engaging within this state in the business of making sales at retail, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of forty-four one-hundredths of one percent.

(Emphasis supplied.)

Although the taxpayer strenuously argues that the issue is whether the taxpayer may bifurcate the sale of repair parts from the sale of repair labor, we disagree. We see this as being primarily an issue of determining the statutory measure of the B&O tax being imposed. In this regard, RCW 82.04.070 provides:

> "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and . . . for services rendered,

(Emphasis supplied.)

RCW 82.04.070 specifically provides that the gross proceeds of sales includes both the value accruing from the sale of the tangible personal property (repair parts) and the value accruing for services rendered (repair labor). Indeed, this position is fully supported by the Department's lawfully-promulgated rules on repairing activity and interstate sales. WAC 458-20-173 (Rule 173) states in part:

> Persons installing, cleaning, decorating, beautifying, repairing or otherwise altering or improving tangible personal property of consumers or for consumers are taxable under the retailing classification upon the gross proceeds received from sales of tangible personal property and the rendition of services.

Rule 173 further states:

> Where tangible personal property in the form of materials and supplies is sold or used in connection

> with such services [repair services], the retail sales tax applies to the total charges made for the sale of the materials and supplies and the services rendered in connection therewith.

(Emphasis and brackets supplied.)

Rule 173 also provides:

> REPAIRS FOR OUT-OF-STATE PERSONS. Persons residing outside this state may ship into this state articles of tangible personal property for the purpose of having the same repaired, cleaned or otherwise altered, and thereafter returned to them. The retail sales tax is not applicable to the charge made for labor and/or materials, provided the seller, as a requirement of the agreement, delivers the property to the purchaser at a point outside this state or delivers the property to a common or bona fide private carrier consigned to the purchaser at a point outside this state. Proof of exempt sales will be the same as that required for sales of tangible personal property in interstate commerce. WAC 458-20-193, Part A. No deduction is allowed, however, under the business and occupation tax.

(Emphasis supplied.)

Although Rule 173 provides that retail sales tax does not apply to the charge made for repair labor and materials of tangible personal property shipped into the state by nonresidents, this deduction is specifically excluded from the B&O tax.

Similarly, Rule 193A states in part:

BUSINESS AND OCCUPATION TAX

> ...EXTRACTING OR PROCESSING FOR HIRE, PRINTING AND PUBLISHING, REPAIR OR ALTERATION OF PROPERTY FOR OTHERS. These activities when performed in Washington are also inherently local and the gross income or total charge for work performed is subject to business tax, since the operating incidence of the tax is upon the business activity performed in the state. No deduction is permitted even though the articles produced, imprinted, repaired or altered are delivered to persons outside the state. It is immaterial that the customers are located outside the state, that the work was negotiated or contracted for outside the state, or that

> the property was shipped in from without the state for such work.

(Emphasis supplied.)

Notwithstanding the above rules, the taxpayer relies on the following language in Rule 103 in contending that the parts are exempt.

> WAC 458-20-103 TIME AND PLACE OF SALE.
>
> 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.
>
> With respect to the charge made for performing services which constitute sales as defined in RCW 82.04.040 and 82.04.050, a sale takes place in this state when the services are performed herein.

(Emphasis taxpayer's.)

The taxpayer argues that, because the charges for parts are separately identified on its invoice to customers and these parts are subsequently delivered to the customer at a point outside the state, this portion of the transaction is interstate in nature and exempt from tax.

We disagree. First, there is no specific statutory deduction for interstate sales. The deduction upon which the taxpayer relies is the general provision in RCW 82.04.4286 which states:

> In computing tax there may be deducted from the measure of tax amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

Therefore, under this deduction the state exempts only those limited business activities which occur within its borders that it is constitutionally prohibited from taxing.

The constitutional limitations of a state's taxing authority were discussed by the United States Supreme Court in the landmark case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). In that case, the Court overruled prior decisions which had held that a tax on the privilege of engaging in an activity in the state may not be applied to an activity that is part of interstate commerce. The court noted that such a rule has no relationship to economic realities. 430 U.S. at 279. "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." Id., quoting Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

The court endorsed the following test of constitutionality. To be valid, a state tax on interstate commerce must meet four requirements: (1) there must be a sufficient nexus between the interstate activities and the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the state. Complete Auto Transit, 430 U.S. at 279. Accordingly, if the tax at issue meets those requirements, it is not invalid even if the shipments are considered a part of interstate commerce.

The taxpayer concedes nexus and that it has derived substantial services from the state of Washington, but argues that the tax discriminates against interstate commerce, because the Department's application of Rules 193A and 193B are not mirror images of each other. The taxpayer cited Det. No. 88-459, 7 WTD 79 (1988) at the hearing as being inconsistent with the auditor's current interpretation of Rules 193A and 193B. We disagree.

7 WTD 79 involved a taxpayer who performed repairs on propellers for a Washington customer at the taxpayer's out-of-state facility. The propellers were then delivered to Washington customers at a point inside the state of Washington. The ALJ referred to the following excerpt from Rule 103: "With respect to the charge made for performing services which constitute sales as defined in RCW 82.04.040 and 82.04.050, a sale takes place in this state when the services are performed herein." She then went on to hold the entire amount charged for repair services to be exempt from Washington's taxing jurisdiction. We find her analysis entirely consistent with our above ruling. In that case, the repair services (including charges for installed parts) took place entirely outside the state. Consequently, the ALJ found that the sale of the services took place outside the state and were therefore exempt from tax. This taxpayer's case is the antithesis to 7 WTD 79. The repair services (including charges

for installed parts) were performed entirely within the state of Washington and are therefore fully subject to Washington's taxing jurisdiction. Nor do we believe that any other state can tax that activity.

We have further examined the numerous rules, ETBs and published determinations cited by the taxpayer and find them only tangentially pertinent. Some of the items cited by the taxpayer involve use and/or deferred retail sales tax and are not necessarily applicable to the B&O tax. The retail sales tax is a transaction tax imposed upon the consumer and collected by the seller on behalf of the state of Washington. The B&O tax is a tax imposed upon the privilege of engaging in business within the state and is measured by the gross receipts of that business. The two taxes accomplish different goals, are imposed on different parties, have different deductions and exemptions, and have different constitutional limitations. See also: WAC 458-20-221.

We also find the taxpayer's cited support for bifurcation of an invoice to be unpersuasive. The items cited by the taxpayer stand only for the proposition that a taxpayer is to be taxed on the business activity being engaged in. The cited cases simply do not address Washington's jurisdiction to tax a certain business activity. They are clearly distinguishable. Accordingly, the taxpayer's petition is denied.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 19th day of May 1992.