Cite as Det. No. 91-020R, 13 WTD 27 (1993)

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

In the Matter of the Petition For Reconsideration the Prospective Ruling Pertaining To	)	R E C O N S I D E R A T I O N D E T E R M I N A T I O N No. 91-020R[1]
. . .	)	Registration No. . . .

[1] RULES 193B AND 193C -- B&O TAX -- NEXUS -- IMPORT/EXPORT EXEMPTION. Where a [foreign] manufacturer sells airplane galleys to foreign airline carriers and has them assembled, delivered, and repaired in this state by its Washington affiliate, the selling activity is B&O taxable. The Washington manufacturer's activities in this state are sufficient to constitute nexus, and the galleys have been taken out of the unbroken stream of commerce. Accord: Det. No. 89-471, 8 WTD 251 (1989).

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:

Petition requesting reconsideration of the ruling regarding the B&O taxability of a [foreign] manufacturer in Determination No. 91-020.

AMENDED FACTS:

Bauer, A.L.J. -- A [foreign] manufacturer sells galleys to European airline carriers.

It is argued that the Department came to the wrong conclusion in the second issue of Determination No. 91-020 (i.e., that the [foreign] manufacturer was taxable in Washington as a seller) because it

[1] The original determination, Det. No. 91-020, is published at 13 WTD 18 (1993). The executive determination, Det. No. 91-020E, is published at 13 WTD 33 (1993).

was "wrongly assumed" that the [foreign] manufacturer's Washington affiliate would install the galleys into its buyer's aircraft, which aircraft were being manufactured by [a Washington manufacturer]. The taxpayer now states this is incorrect.

The taxpayer submits that the following is representative of the business activities of the [foreign] manufacturer and its Washington affiliate:

The [foreign] manufacturer contracts with airline carriers . . . to build galleys for aircraft they are purchasing from . . . a Washington airplane manufacturer.

After negotiating the terms of the sale in Europe, the [foreign] manufacturer manufactures the galleys ordered by the carriers and ships them disassembled to its Washington affiliate for final assembly prior to delivery to [the airplane manufacturer]. The Washington affiliate assembles the galleys, furnishing labor and very little hardware, and then delivers the galleys to [the airplane manufacturer]. [The manufacturer's] employees install the galleys in the carriers' aircraft without assistance from the Washington affiliate. It is only when [the manufacturer's] employees damage the galleys in the installation process that the Washington affiliate repairs the damaged galleys.

The foreign airline carriers take delivery of the completed aircraft in which the galleys have been installed [in Washington]. Title passes, therefore, in [Washington], and the aircraft thereafter leaves the state for use in interstate or foreign commerce. The airline carriers purchase the galleys directly from the [foreign] manufacturer, and not from [the Washington manufacturer].

ISSUE:

This petition for reconsideration raises the following question:

Can the state of Washington properly tax the selling activity of a [foreign] manufacturer of airplane galleys to foreign airline carriers under the following conditions:

(1) sales are negotiated in Europe by the [foreign] manufacturer,

(2) the [foreign] manufacturer ships the disassembled galleys to its Washington affiliate for final assembly and the addition of minor hardware,

(3) the Washington affiliate assembles the galleys and adds and installs certain hardware,

(4) the Washington affiliate delivers the galleys to [a Washington manufacturer],

(5) the Washington affiliate repairs any damage rendered to the galleys in the course of their installation by the airplane manufacturer, and

(6) the airline carriers (buyers) are contractually committed to take delivery of the finished aircraft, all of which are expected to be removed for use in interstate commerce.

TAXPAYER'S ARGUMENTS:

It is contended that the [foreign] manufacturer is exempt from selling taxes under the Rule 193C export provisions, since the aircraft on which they are to be installed are committed for export out of state by their foreign buyers.

DISCUSSION:

The threshold question is whether the [foreign] manufacturer's activities in Washington through its Washington affiliate are sufficient under the amended facts to establish nexus with the state of Washington. WAC 458-20-193B (Rule 193B), provides that

> [s]ales 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:
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> * * *
>
> (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."
>
> (6) Where an out-of-state seller either directly or by an agent or other representative in this state installs its products in this state as a condition of the sale, the installation services shall be deemed significant services for establishing or maintaining a market in this state for such installed products and the gross proceeds from the sale and installation are subject to business tax.

> 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. . . .

(Emphasis added.)

We find that the [foreign] manufacturer, by virtue of having its Washington affiliate as its representative assemble and repair the galleys it sells and delivers here, will perform activities in this state significantly associated with its ability to maintain a market for its products in this state. Thus, we find nexus to tax the [foreign] manufacturer as a seller.

It is further argued that the [foreign] manufacturer's activities will be exempt from Washington's B&O tax under WAC 458-20-193C (Rule 193C), which addresses taxation of goods in interstate or foreign commerce. The rule, which concerns both imports and exports, provides in pertinent part:

FOREIGN COMMERCE

> Foreign commerce means that commerce which involves the purchase, sale or exchange of property and its transportation from a state or territory of the United States to a foreign country, or from a foreign country to a state or territory of the United States.
>
> IMPORTS. An import is an article which comes from a foreign country (not from a state, territory or possession of the United States) for the first time into the taxing jurisdiction of a state.
>
> Taxation of such goods is impermissible while the goods are still in the process of importation, i.e., while they are still in import transportation. Further, such goods are not subject to taxation if the imports are merely flowing through this state on their way to a destination in some other state.
>
> EXPORTS. An export is an article which originates within the taxing jurisdiction of the state destined for a purchaser in a foreign country. Thus ships stores and supplies are not exports.

BUSINESS AND OCCUPATION TAX

> WHOLESALING AND RETAILING.
>
> IMPORTS. Sales of imports by an importer or his agent are not taxable and a deduction will be allowed with respect to the sales of such goods, if at the time of sale such goods are still in the process of import transportation. Immunity from tax

> does not extend: (1) To the sale of imports to Washington customers by the importer thereof or by any person after completion of importation whether or not the goods are in the original unbroken package or container; nor (2) to the sale of imports subsequent to the time they have been placed in use in this state for the purpose for which they were imported; nor (3) to sales of products which, although imports, have been processed or handled within this state or its territorial waters.
>
> EXPORTS. A deduction is allowed with respect to export sales when as a necessary incident to the contract of sale the seller agrees to, and does deliver the goods (1) to the buyer at a foreign destination; or (2) to a carrier consigned to and for transportation to a foreign destination; or (3) to the buyer at shipside or aboard the buyer's vessel or other vehicle of transportation under circumstances where it is clear that the process of exportation of the goods has begun, and such exportation will not necessarily be deemed to have begun if the goods are merely in storage awaiting shipment, even though there is reasonable certainty that the goods will be exported. The intention to export, as evidenced for example, by financial and contractual relationships does not indicate "certainty of export" if the goods have not commenced their journey abroad; there must be an actual entrance of the goods into the export stream.
>
> In all circumstances there must be (a) a certainty of export and (b) the process of export must have started....

(Emphasis added.)

In this case, under the amended facts, the [foreign] manufacturer contracts with its Washington affiliate to assemble and repair, as necessary, the galleys delivered to [the Washington manufacturer]. We find that these activities are clearly instances of "processing and handling" within this state sufficient to break the stream of commerce and thus take taxpayer's activity out of the import immunity portion of Rule 193C.

Although it has been argued that the [foreign] manufacturer should be exempt under the export immunity portion of Rule 193C, we likewise disagree. Although the foreign buyers are contractually committed to take delivery of the finished aircraft with the expectation that they will remove the aircraft from Washington for use in interstate or foreign commerce, this is only an expectation at the time the galleys are delivered to [the manufacturer]. At this time the process of exportation will not have actually begun, and thus delivery has not been directly into the export stream.

[1] Thus, where a [foreign] manufacturer sells airplane galleys to foreign airline carriers, and has them assembled, delivered, and repaired in this state by its Washington affiliate, the selling activity is B&O taxable under Rules 193B and 193C. The [foreign] manufacturer's activities in this state are sufficient to constitute nexus, and the galleys have been taken out of the unbroken stream of commerce.

RULING:

The ruling set forth in Determination No. 91-020 is supplemented as set forth herein. The caveats contained in the basic ruling apply equally to this supplemental ruling.

DATED this 31st day of December, 1991.