Cite as Det. No. 93-281, 14 WTD 035 (1994).

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

In the Matter of the Petition For Refund by:	)	D E T E R M I N A T I O N
	)	No. 93-281
. . .	)	
	)	Registration No. . . .

[1] RCW 82.04.220; 15 U.S.C. § 381, ET SEQ.: B&O TAX -- NET INCOME TAX -- INTERSTATE COMMERCE -- IN-STATE SOLICITATION OF BUSINESS. The State Taxation of Income from Interstate Commerce Act of 1959, 15 U.S.C. § 381, et seq., (Pub. L. No. 86-272) prohibits a state from imposing a net income tax on a business whose sole activity within a state is the solicitation of orders for goods to be delivered from outside the state. Because Washington's Business and Occupation (B&O) tax is imposed on gross proceeds of sales for the privilege of doing business in this state--and is not a net income tax--that Act does not prohibit the imposition of the B&O tax on a business whose sole activity within the state is the solicitation of orders for goods to be delivered from outside the state.

[2] RCW 82.04.220; U.S. CONST. ART. I, § 8, CL. 3: B&O TAX -- COMMERCE CLAUSE -- NEXUS -- IN-STATE SOLICITATION OF BUSINESS. In general, the Commerce Clause requires, inter alia, that there be substantial nexus before the state can impose B&O taxes on an out-of-state business which delivers goods from outside the state. The test is whether the taxpayer's in-state activities are significantly associated with the taxpayer's ability to establish and maintain a market in this state. It is well settled that the in-state solicitation of orders through an employee or an independent contractor provides sufficient nexus for the imposition of the B&O tax.

[3] RULE 193; RCW 82.04.220: B&O TAX -- NEXUS -- IN-STATE SOLICITATION OF BUSINESS. By way of administrative rule, the Department of Revenue has compiled a list of

> examples of what activities provide sufficient local nexus. Included within those examples is the in-state solicitation of orders by an employee or independent contractor.

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:

Out-of-state taxpayer seeks refund of Business & Occupation (B&O) tax under the theory that its in-state solicitation of business is immune from such taxation under the State Taxation of Income from Interstate Commerce Act of 1959, 15 U.S.C. § 381, et seq., and on the basis that its activities provide insufficient nexus with the state of Washington under the Commerce Clause of the United States Constitution.

FACTS:

Mahan, A.L.J. -- The taxpayer is a manufacturer and world wide distributor. Its main office, regional offices, and distribution centers are located outside the state of Washington. According to the taxpayer's representative, the company employs one salesperson in the state of Washington. That salesperson solicits and takes orders from customers in Washington. When a customer has not ordered supplies for awhile, the salesperson also contacts or visits the customer in order to further name recognition and encourage orders. All orders are shipped by common carrier from the out-of-state distribution centers. The company owns no property and does not maintain an office in the state of Washington.

The taxpayer seeks a refund of the wholesaling and retailing B&O taxes that it paid for the period of January 1, 1989 through June 30, 1993. It voluntarily collects and remits retail sales or use tax and those taxes are not at issue here.[1]

In its refund petition, the taxpayer claims that the B&O taxes were "illegally imposed" based on 15 U.S.C. § 381, et seq., the United States Constitution Art. I, § 8, Cl. 3 (Commerce Clause), recent United States Supreme Court decisions, and a statement

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[1]Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

from the Multistate Tax Commission. In support of its claims the taxpayer relies on the holdings in Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992) and Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992), and on a Statement of
Information Covering Practices of Multistate Tax Commission and Signatory States under Public Law 86-272.[2]

ISSUES:

1. Whether 15 U.S.C. § 381, et seq., makes the taxpayer's in-state solicitation of business immune from the imposition of Washington's B&O tax.

2. Whether the imposition of Washington's B&O tax on gross income derived from the taxpayer's in-state solicitation of business violates the Commerce Clause because of the lack of sufficient local nexus.

DISCUSSION:

[1] The taxpayer's reliance on 15 U.S.C. § 381, et seq., is misplaced. The Act was passed, effective September 14, 1959, in response to a series of United States Supreme Court cases which culminated in a denial of certiorari in International Shoe Co. v. Fontenot, 236 La. 279, 107 So. 2d 640 (1958), cert. denied, 359 U.S. 984 (1959). In that case, the Louisiana Supreme Court upheld the imposition of a net income tax based on the in-state solicitation of orders by salespersons who carried samples and were provided company-owned automobiles. This denial of certiorari in conjunction with earlier United States Supreme Court cases indicated that the Commerce Clause was not violated by the imposition on a net income tax under such circumstances. Congress responded by enacting 15 U.S.C. § 381, et seq.

As enacted, the law prohibits states from imposing a net income tax on a business whose sole activity within a state is the solicitation of orders for goods to be delivered from outside the state. As stated in Wrigley, the Act sets "a 'minimum standard' for the imposition of a state net-income tax based on the solicitation of interstate sales...." 112 S.Ct. at 2453. The reach of the Act, however, is limited to "a tax imposed on, or measured by, net income." 15 U.S.C. § 383. The Wrigley case involved a net income based franchise tax.

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[2]Public Law No. 86-272 has been codified at 15 U.S.C. § 381, et seq. Washington has adopted the Multistate Tax Compact as set forth under RCW 82.56.

The fundamental problem with the taxpayer's argument is that the B&O tax imposed in Washington is not a net income tax. RCW 82.04.220 provides:

> There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

Thus, by definition, the B&O tax is not a net-income tax. For this reason, an argument identical to the one advanced by the taxpayer was rejected by the Supreme Court of Washington. In Tyler Pipe Industries, Inc. v. Department of Revenue, 105 Wn.2d 318, 327, 715 P.2d 123 (1986), rev'd on other grounds, 483 U.S. 232 (1987), the court concluded:

> Tyler Pipe raises the issue of whether the federal interstate income tax act, 15 U.S.C. § 381 et seq. (1982), exempts Tyler Pipe from Washington's B&O tax. This argument is without merit. The federal statute applies only to a "net income tax;" Washington's B&O tax is not a net income tax or a net tax on anything. Rather, "B&O taxes are for the privilege of engaging in business during certain time frame, measured by applying a rate of tax to some tax base." Puyallup v. Pacific Northwest Bell Tel. Co., 98 Wn.2d 443, 451, 656 P.2d 1035 (1982).

See also Det. No. 87-342, 4 WTD 229 (1987); Det. No. 88-185, 5 WTD 315 (1988); Det. No. 88-249, 6 WTD 109 (1988). Accordingly, we cannot find that 15 U.S.C. § 381, et seq., prohibits the imposition of Washington's B&O tax on sales solicited by in-state employees of an out-of-state manufacturer.

[2] The imposition of the B&O tax under the circumstances of this case also passes constitutional muster. In general, "a state tax on the 'privilege of doing business' is [not] per se unconstitutional when it is applied to interstate commerce." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 289 (1977). In Complete Auto, the court adopted a four part test for sustaining a tax against a Commerce Clause challenge, to wit:

> the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

430 U.S. at 279. We are concerned here only with the substantial nexus part of the Complete Auto test.

It is well settled that the nexus part of the test is satisfied by the in-state solicitation of orders by either an independent contractor or an employee of the out-of-state manufacturer or retailer. Scripto, Inc. v. Carson, 362 U.S. 207 (1960); Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975); Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232 (1987).
In Standard Pressed Steel an employee worked out of his home. He did not solicit business and only consulted with an in-state customer regarding its needs and requirements. The court held that this activity provided sufficient nexus for the imposition of B&O tax on sales by an out-of-state manufacturer to its Washington customer. More recently, in Tyler Pipe, the court affirmed the imposition of B&O tax when the taxpayer's independent contractor
solicited orders and visited with customers in this state, although the company maintained no office, owned no property, and had no employees within the state.[3] The court concluded that:

> As the Washington Supreme Court determined, 'the crucial factor governing nexus is whether the activities performed in the state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.' 105 Wash. 2d, at 323, 715 P.2d at 126.

483 U.S. at 250.

In the present case, the taxpayer's use of an employee to solicit sales in Washington allowed it to establish and maintain its market in this state. Substantial nexus clearly exists for Commerce Clause purposes.

In contrast, the Quill case, on which the taxpayer relies, involved a mail order firm whose only contact with the taxing state was through the mails and common carriers. It did not solicit sales within the state through either an employee or an independent contractor. Under those very different circumstances, the court found insufficient nexus under the Commerce Clause. That is not the case here.

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[3]Such activities are also sufficient to require the taxpayer to collect and remit retail sales or use tax. RCW 82.12.040.

[3] By administrative rule, Washington has compiled examples of when sufficient local nexus exists for purpose of imposing its B&O tax. WAC 458-20-193(7)(c)(Rule 193), in relevant part, provides:

> The following activities are examples of sufficient nexus in Washington for the B&O tax to apply:
>
> (i) The goods are located in Washington at the time of sale and the goods are received by the customer or its agent in this state.
>
> (ii) The seller has a branch office, local outlet or other place of business in this state which is utilized in any way, such as in receiving the order, franchise or credit investigation, or distribution of the goods.
>
> (iii) The order for the goods is solicited in this state by an agent or other representative of the seller.
>
> (iv) The delivery of the goods is made by a local outlet or from a local stock of goods of the seller in this state.
>
> (v) The 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, even though the seller may not have formal sales offices in Washington or the agent or representative may not be formally characterized as a "salesperson".
>
> (vi) The 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. (Emphasis added.)

The taxpayer's activities clearly fall within the examples provided by the Department of Revenue as to what constitutes sufficient nexus.

The Department has also routinely upheld the imposition of the B&O tax under circumstances similar to the one presented here. See, e.g., Det. No. 88-368, 6 WTD 417 (1988); Det. No. 91-213, 11 WTD 239 (1991); Det. No. 91-279, 11 WTD 273 (1991).

For these various reasons, we conclude that the taxpayer's nexus argument is also without merit.

DECISION AND DISPOSITION:

The taxpayer's refund petition is denied.

DATED this 27th day of October 1993.