Cite as Det. No. 93-283, 14 WTD 041 (1994).

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. 93-283
. . .	)	Registration No. . .
	)	FY. . ./Audit No. . . .
	)	FY. . ./Audit No. . . .

[1] RULES 193B AND 193: WHOLESALING B&O TAX -- INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS -- SUBSTANTIAL NEXUS. Out-of-state vendor with a representative residing in Washington who solicits sales and provides technical advice on uses of vendor's products to instate customers has substantial nexus with Washington.

[2] RULES 193B AND 193: WHOLESALING B&O TAX -- INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS -- DISSOCIATION. Out-of-state vendor is unable to dissociate sales to a Washington customer when the vendor has an instate sales and technical representative who was hired solely to maintain the vendor's existing sales base with that customer through regular visits and around-the-clock availability. Norton Co. v. Illinois Dept. of Revenue, 340 U.S. 534 (1951) and B.F. Goodrich Co. v. State, 38 Wn.2d 663, 231 P.2d 325 (1951) factually distinguished.

[3] RULE 193: WHOLESALING B&O TAX -- INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS. Out-of-state vendor's sales to Washington customers occurring January 1, 1992, and later are subject to Washington's taxes if the vendor has nexus with this state and the goods are received by the customers in this state.

[4] RULE 193B: WHOLESALING B&O TAX -- INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS. Out-of-state vendor's sales to Washington customers occurring before January 1, 1992 are subject to Washington's taxes if the vendor had nexus with this state and the goods were delivered to the customers in this state. Delivery occurred in

Washington when the vendor bears the risk of loss while the goods are in transit to Washington locations.

[5] RULE 228, RULE 230; RPM 89-4: UNREGISTERED TAXPAYER -- LIMITATIONS ON INTEREST AND PENALTIES -- WAIVER OF PENALTIES AND INTEREST. Former RPM 89-4 (now incorporated into Rule 230) provided that where the Department discovered an unregistered taxpayer doing business in Washington it would assess any taxes plus applicable interest and penalties for a period not to exceed seven years plus the current year. Penalties and interest may be waived only under specific situations described in Rule 228.

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:

Taxpayer protests and/or seeks a refund of wholesaling business and occupation (B&O) taxes along with penalties and interest assessed against it.

FACTS:

De Luca, A.L.J. -- The Department of Revenue audited the taxpayer for the period May 1, 1987 through December 31, 1987, and assessed wholesaling B&O tax, interest and penalties. The taxpayer timely paid the tax and the interest, but did not pay the penalty. The Department also audited the taxpayer for the period January 1, 1988 through August 31, 1992, and assessed wholesaling B&O tax, interest and penalties. The taxpayer timely paid the tax and the interest, but did not pay the penalty. The taxpayer seeks a refund of the amounts paid and a waiver of the penalties for both assessments. The taxpayer also paid under protest B&O tax for September, October and November 1992, for the same activities in question during the audit periods. The taxpayer seeks a full refund for those three months as well.

The taxpayer is a California corporation which distributes specialized aircraft and aerospace parts and products worldwide. It sells a significant portion of these parts and products to Washington customers, primarily [Customer X]. The taxpayer explains that prior to 1987 it handled all of its sales work and customer relations from its California location. However, in 1987 the taxpayer decided that a "local presence in Washington would help to maintain its existing sales base with [Customer X] since its main competitors utilized local representatives to meet

directly with [Customer X]" Consequently, the taxpayer retained the services of an independent contractor in Seattle in May 1987 to assist it with its customers' needs.

Furthermore, the taxpayer claims it contacted the Department in 1987 and an unnamed Department employee orally informed the taxpayer that it did not have a taxable presence in Washington. The taxpayer did not register with the Department until after the Department contacted it by letter on August 26, 1992.[1]

ISSUES:

1) Does the taxpayer have sufficient nexus with Washington to impose its B&O tax?

2) Are the taxpayer's sales to its Washington customers dissociated from its in-state activities.

3) Is the taxpayer entitled to a waiver of interest and penalties?

DISCUSSION:

[1] The taxpayer acknowledges Washington imposes the wholesaling B&O tax on interstate sales of goods into Washington per RCW 82.04.220 and .270 and WAC 458-20-193B (Rule 193B, prior to 1992) and WAC 458-20-193 (Rule 193, effective January 1, 1992). The taxpayer cites Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992) and Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) for the principle that taxes on interstate commerce are constitutional only if the activity has a "substantial nexus" with the taxing state. It contends its sales into Washington are not subject to the B&O tax due to a lack of substantial nexus.

Rule 193(2)(f) defines "nexus" as:

> . . . the activity carried on by the seller in Washington which is significantly associated with the seller's ability to establish or maintain a market for its products in Washington.

Former Rule 193B also describes types of nexus-creating activities by a seller which ". . . establish or maintain a market for its products in this state."

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

The taxpayer further cites Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev., 483 U.S. 232 at 250-251 (1987) where it quotes the Washington Supreme Court's decision in Tyler Pipe Industr., Inc. v. Department of Rev., 105 Wn.2d 318, 323, 715 P.2d 123 (1986):

> . . . the crucial factor governing nexus is whether the activities performed in this 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.

In Tyler Pipe the U.S. Supreme Court decided Washington had sufficient nexus to impose the B&O tax on an out-of-state seller who used independent contractors rather than employees to solicit sales in this state. The out-of-state taxpayer sought a refund of wholesaling B&O taxes it paid on sales to customers in Washington because it claimed it lacked sufficient nexus with the state. The products it sold were manufactured outside Washington. Tyler maintained no office, owned no property, and had no employees residing in Washington. The state courts found the in-state sales representative engaged in substantial activities that helped establish and maintain Tyler's market in Washington by "calling on its customers and soliciting orders." 483 U.S. at 249.

The present taxpayer argues there is a significant distinction between the ruling in Tyler Pipe and the standard used in Rules 193B and 193 due to the court's use of "establish and maintain" rather than the rules' language of "establish or maintain." (Emphasis supplied.) The taxpayer asserts before nexus can be found a seller's representative must both establish and maintain a market for its products. The taxpayer claims its sales into Washington were well-established prior to hiring the local representative in 1987. For example, its 1986 Washington sales totalled $1.2 million. Thus, the taxpayer hired the representative only "to maintain the already existing sales base with [Customer X]" and not to create a market.

The taxpayer states it uses its representative "primarily for customer relations purposes with [Customer X]." Purportedly, the representative "does not provide any significant on-site services to [Customer X] or solicit or receive orders, but instead acts primarily as a `conduit' for passing on customer questions, warranty matters and purchase orders" to the taxpayer's California headquarters.

These claims are somewhat in contrast to the representative's agreement with the taxpayer. That agreement provides the representative "has a highly specialized technical background in the use of [taxpayer's] products; and can provide the necessary

technical advice and services to [taxpayer's] customers." The representative shall provide 24 hour per day telephone technical advice to the customers. Additionally, the representative is to sell the taxpayer's products in Washington and Oregon including being "responsible for taking customers orders and placing such orders with [taxpayer]." The contract requires the representative to regularly visit the customers and, when available, introduce new products or techniques to induce purchases. Furthermore, the representative is to assist in the design and construction of customers' tools which may be necessary for the customers' most efficient use of the taxpayer's products. The taxpayer pays the representative a flat fee per year plus commission on sales.

Rule 193B provides that the following activities are examples of sufficient local nexus for application of the business and occupation tax:

. . .

> (3) The order for the goods is given in this state to an agent or other representative of the seller.
>
> . . .
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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."

We hold the taxpayer's activities meet the nexus examples (3) and (5) of Rule 193B as well as the similar activities listed in Rule 193(7)(c)(iii) and (v).

The Department of Revenue does not require a vendor's representative even to live in Washington or take orders in the state before the tax can apply. We note this representative does both. Significant activity which establishes or maintains sales controls. Such activity by a representative or agent does not have to be the only or most important factor, but it is significant if it has an impact on sales. Otherwise, no reason exists to employ the person. The Department has consistently held "if the in-state activity is economically meritorious for a taxpayer (if it is worth spending budget dollars to do it), then the activity is market driven and it generally establishes nexus with the state of Washington." Determination No. 87-286, 4 WTD 51 (1987).

For example, the Department has held infrequent visits to Washington customers by nonresident employees, who are not salespersons, constitute sufficient local nexus to allow taxation of income from sales. See Determination No. 88-368, 6 WTD 417 (1988). In that matter, the employees provided advice to the customers regarding the safe handling of a product. Such activity was important in maintaining sales into the state. See Det. No. 91-213, 11 WTD 239 (1991). See also Standard Pressed Steel Co. v. Department of Rev. of Wash., 419 U.S. 560 (1975) where nexus was established through the presence of a resident employee engineer who was not involved in sales, but instead consulted the customer regarding its product needs. Such activity did not establish sales, but obviously helped to maintain them. In the present matter, the representative is involved both in soliciting sales and giving technical advice.

The taxpayer admits its representative's purpose is to maintain sales with Customer X. Such activity creates substantial nexus under Rules 193B and 193, the Department's determinations, and the case law discussed. Moreover, Rules 193B and 193 "have the same force and effect [as statutes] unless declared invalid by the judgment of a court of record not appealed from." RCW 82.32.300. The rules specifically state a seller's in-state activities which "establish or maintain" a market for its products in this state is what is necessary to establish nexus. No court has declared these rule provisions invalid. Therefore, we find the taxpayer has substantial nexus with Washington allowing it to impose the B&O tax.

[2] We next address the taxpayer's claims that it can dissociate many of its sales to Customer X from its representative's in-state activities with Customer X. For example, the taxpayer states that it receives numerous orders directly from the customer without any involvement in those orders by the representative. The taxpayer cites Norton Co. v. Illinois Department of Revenue, 340 U.S. 534 (1951) to support its claim. In Norton, the taxpayer was a Massachusetts manufacturer with an office in Chicago which performed many functions including direct sales from inventory, receiving orders and distributing the goods. The present taxpayer quotes Norton at 539 where the Court wrote:

> The only items that are so clearly interstate in character that the State [Illinois] could not reasonably attribute their proceeds to the local business are orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester. Income from those we think was not subject to this tax.

We note Norton also stated a taxpayer ". . . cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business." Id. Finally, Norton held: "the general rule, . . ., is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption." Id. at 537.

Rules 193B and 193 are consistent with Norton. For example, Rule 193B provides:

> RETAILING, WHOLESALING. Sales 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.

Shortly after Norton was decided, the Washington Supreme Court rendered its decision in B.F. Goodrich Co. v. State, 38 Wn.2d 663, 231 P.2d 325 (1951), which also concerned dissociation. Goodrich described six situations involving sales and held that four of them were taxable by the state because "business was channeled through the company's local outlets." Id. at 667.

The court labelled "Class E sales" and "Class F Sales" as the two instances which were not taxable. Of those two, only Class E has facts which are relevant to the present issue. Class E sales were made by one of B.F. Goodrich's divisions. That division solicited sales by mail or by salesmen reporting only to the division's out-of-state headquarters. The Washington customers mailed their orders for the product directly to the division's out-of-state offices. Those offices then shipped the products directly to the purchasers. The soliciting salesmen had no connection with the division's Seattle office. Furthermore, "no salesmen or sales offices concerned with this product are maintained in Washington." Id. at 666. (Emphasis supplied.)

Unlike Goodrich, the present taxpayer does maintain a representative in Washington who is concerned with the products

ordered by its customers. In the present matter the taxpayer's representative both solicits sales from Customer X and provides it technical advice. His contract requires him to have "a highly specialized technical background in the use of [the taxpayer's] products." The contract also requires him to be on telephone call 24 hours per day, and to regularly visit Customer X to determine what service he may be to the customer and, when available, to introduce new products and techniques to induce it to purchase the products.

The facts of the present matter also contrast with Norton, supra. The Court there stated that the taxpayer's Chicago office intervened between the taxpayer and its Illinois customers by performing services helpful to the taxpayer's Illinois sales except when the buyer ordered directly from Worcester and the goods were shipped directly to the buyer. Norton, at 536. We find a locally based representative soliciting sales and giving technical advice at the customer's place of business to be distinguished from a buyer merely ordering goods directly from the out-of-state vendor when that buyer lacks contact with the vendor's local office or local representative.
It may be that Customer X need not pass every purchase order through the taxpayer's representative due to product familiarity or other factors. However, this representative's job exists solely because of the taxpayer's desire to maintain its sales with Customer X. We fail to see how it can dissociate some of its sales to Customer X from his presence when he is there to serve that customer both for sales and technical purposes. We find the representative's contacts with Customer X "are significantly associated . . . with the seller's ability to establish or maintain a market for its products in this state."

[3] The taxpayer correctly notes Rule 193(7) provides that Washington does not assert its B&O tax on sales of goods which originate outside this state unless the goods are received by the purchaser in this state and the seller has nexus. We have already found that the seller has nexus with Washington. The taxpayer's agreement with Customer X, "Purchase Order Terms and Conditions (Fixed Price Contract)", provides that it will ship the goods by common carrier to Customer X in Washington state. Upon receiving the goods here, the contract states that Customer X will accept the goods, following inspection, when it determines they meet all of the conditions and requirements of the contract. The example in Rule 193 (11)(b) expressly declares that this type of situation is a Washington sale subject to B&O tax against the out-of-state seller. Thus, all of the taxpayer's sales to Customer X occurring after December 31, 1991, are subject to wholesaling B&O tax.

[4] For sales occurring prior to January 1, 1992, Rule 193B controls. In order to impose its B&O tax on such sales, the Department has held there must be both nexus with the out-of-state seller and delivery must have occurred within Washington. Again, we have found that the taxpayer has substantial nexus with the state. We also find that the deliveries occurred in Washington according to the terms of its agreement with Customer X. The same contract states that ". . . all deliveries under this Contract shall be F.O.B. destination. Title and risk of loss of all Goods shall pass to Buyer upon acceptance." As noted above, acceptance occurs under their agreement after Customer X receives the goods in Washington. Furthermore, the contract states that the freight charges are included in the price unless separately specified in the purchase order.

Thus, the taxpayer has title and risk of loss until the goods are accepted in Washington by the buyer. The taxpayer is also obligated to get the goods to Customer X by paying the carrier its freight charges. We have held shipments which are F.O.B. destination and freight prepaid to be taxable under Rule 193B. Det. No. 91-188, 11 WTD 231 (1991); Det. No. 91-213, 11 WTD 239 (1991). Thus, the sales which occurred prior to 1992 also are taxable.

[5] The last issue concerns the taxpayer request for waiver of tax, interest and penalties based on former RPM 89-4. The RPM has largely been incorporated into WAC 458-20-230(3) (Rule 230, effective February 8, 1993). RPM 89-4 was in effect during much of the audit period and we will refer to it as controlling our discussion rather than Rule 230. RPM 89-4 declared the Department would assess taxes and interest for a period not to exceed four years plus the current year if an unregistered taxpayer voluntarily registered and reported in good faith all taxes due. However, if the Department discovered any unregistered taxpayer doing business in the state, the Department would assess any taxes plus applicable interest and penalties for a period not to exceed seven years plus the current year in which the discovery was made.

The Department discovered the taxpayer prior to its registration and therefore assessed the longer period. The Department sent an August 26, 1992, letter of inquiry to the taxpayer seeking information about its business activities in Washington. The taxpayer subsequently registered. We find the longer assessment period was appropriately assessed under RPM 89-4.

Furthermore, its has been the Department's long standing policy that oral instructions or interpretations by Department employees are not binding upon the Department. See Excise Tax Bulletin (ETB) 419.32.99. Consequently, any oral conversations the

taxpayer may have had with a Department employee in 1987 about its tax liability, or lack of, does not prevent the Department from assessing the tax, interest and penalties for either the four or seven year period.

Finally, RCW 82.32.050 and RCW 82.32.090 impose interest and penalties, respectively, on taxes due. RCW 82.32.105 allows a waiver or cancellation of interest and penalties only when the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer. WAC 458-20-228 (Rule 228) implements RCW 82.32.105. The rule specifically provides that the Department will not cancel penalties "merely because of ignorance or a lack of knowledge by the taxpayer of the tax liability." The rule also lists seven situations under which penalties will be cancelled. None of the seven apply to the present matter. Furthermore, the rule lists only two situations under which interest may be waived or cancelled. Again, neither of them apply to this matter.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 27th day of October, 1993