Cite as Det. No. 94-074E, 14 WTD 085 (1994).

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

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	No. 94-074E
. . .	)	Registration No. . . .
	)	Petition for Refund

[1] RULE 193: NEXUS - OIL EXCHANGES - INSPECTORS. Nexus found for a petroleum trader engaged in all of the following activities:

. .1. Delivery of products into Washington to customers;

. .2. Instantaneous possession of products purchased in Washington prior to their sale; and

. .3. Independent inspectors hired to confirm quantity and quality of products purchased and sold in Washington.

[2] RULE 252: INTERSTATE TRANSPORTATION FINALLY ENDED. Out- of-state sellers or producers need not pay hazardous substance or petroleum products taxes on substances shipped directly to customers in this state provided they did not certify to their customers that these taxes were paid.

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:

A trader of petroleum products petitions for refund contending that it had no nexus in Washington.

FACTS:

Pree, A.L.J.-- The taxpayer is engaged in the business of trading petroleum which it buys, sells, and exchanges inside and outside of Washington. The taxpayer is headquartered outside Washington and has no office or employees here. It owns no petroleum handling facilities such as barges, tanks, refineries, or retail outlets. It limits its dealings to paper transactions. It purchases the products and sells them as well as arranging shipping. Other entities physically handle the petroleum products. Its employees do not travel to Washington to solicit sales or purchase products. It pays inspectors who certify the quantity and quality of the products purchased and sold in Washington.

Through trading, the taxpayer states that it attempted to profit by buying a product from one oil company and arranging a simultaneous sale to another oil company for a higher price. If a simultaneous sale could not be arranged, it would have had to pay storage or transportation fees to third parties after a purchase. Those expenses would have reduced its profit in a subsequent sale. The taxpayer states that this never occurred in the case of property purchased in Washington. In other words, all its purchases in Washington were matched with simultaneous sales. This fact has not been verified by the Audit Division.

Some of these transactions were accomplished through exchanges. The taxpayer received consideration in the form of oil products in a location outside of Washington at a later date in exchange for the taxpayer's petroleum products in Washington at the time of the exchange. The taxpayer also received payments or other credits for sales.

Often the taxpayer purchased products outside Washington with a subsequent sale agreed to within Washington. The taxpayer arranged to have an independent carrier or oil company ship the product into Washington. When the product was unloaded at the flange of the ship, title transferred to the buyer.

The taxpayer paid wholesaling B&O tax on petroleum products sold in Washington. The Audit Division also assessed wholesaling B&O tax on unreported exchanges of these products for the period January 1, 1987 through June 30, 1991, which the taxpayer paid. The taxpayer now requests a refund for all B&O taxes paid with interest for the period January 1, 1989 through January 31, 1993, claiming it lacked sufficient contacts or nexus with the state of Washington. It does not dispute that the exchanges constituted sales in Washington.

The taxpayer also paid hazardous substance tax and petroleum products tax on these products during the period January 1, 1989 through January 31, 1993. The taxpayer is not aware that it ever

certified to its customers that it paid hazardous substance or petroleum products taxes. It requests that these taxes be refunded based on the same lack of nexus. It also contends that these taxes are not applicable to its products because interstate transportation had not finally ended under WAC 458-10-252 (Rule 252), subsection (4)(e)(ii).

The Audit Division denied the taxpayer's refund claim. It found that the taxpayer acquired products through its exchanges in Washington. As such, the taxpayer held inventory in this state, sufficient for nexus. In addition, the Audit Division found that the taxpayer hired independent contractors to inspect and verify the product sold. According to the Audit Division, the taxpayer's relationship with these inspectors and their activities regarding the sales in question constituted sufficient nexus.[1]

The taxpayer states that it never held title to products purchased in Washington. According to the taxpayer, any purchases in Washington were simultaneously sold. Only in cases where a product was purchased outside of Washington then shipped to Washington, did the taxpayer hold title to it. Rarely did this occur. If the taxpayer did hold such title at month's end, it would be shown on the books as an asset "in transit."

ISSUES:

1. Were the taxpayer's contacts with Washington sufficient to create nexus?

2. Had interstate transportation ended on its products?

In the case of an adverse determination, the taxpayer would like to provide documentation to the Audit Division to verify the exempt nature (i.e., export) of selected transactions.

DISCUSSION:

[1] Nexus. States may tax interstate business if there is nexus between the business being taxed and the state and if the income to which the tax is applied is rationally related to values connected with the state. Chicago Bridge & Iron Co. v. Department of Rev., 98 Wn.2d 814, 659 P.2d 463 (1983). The business and occupation tax collected on the gross proceeds of sales within the state does not violate the due process rights of a company involved in interstate business. Chicago Bridge at 820.

WAC 458-20-193 (Rule 193), subsection (2)(f), defines nexus as:

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

> . . . 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.

Subsection (7) provides:

> Washington does not assert 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. There must be both the receipt of the goods in Washington by the purchaser and the seller must have nexus for the B&O tax to apply to a particular sale. The B&O tax will not apply if one of these elements is missing. (Emphasis supplied.)
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> The following activities are examples of sufficient nexus in Washington for the B&O tax to apply:
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> (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.
>
> . . .
>
> (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".
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> . . .
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> (10) EXAMPLES - OUTBOUND SALES. The following examples show how the provisions of this section relating to interstate sales of tangible personal property will apply when the goods originate in Washington (outbound sales). The examples presume the seller has retained the proper proof documents and that the seller did not manufacture the items being sold.
>
> (11) EXAMPLES - INBOUND SALES. The following examples show how the provisions of this section relating to interstate sales of tangible personal property will apply when the goods originate outside Washington (inbound sales). The examples presume the seller has retained the proper proof documents.

. . .

(h) Company X is located in Ohio and has no office, employees, or other agents located in Washington or any other contact which would create nexus. Company X receives by mail an order from Company Y for parts which are to be shipped to a Washington location. Company X purchases the parts from Company Z who is located in Washington and requests that the parts be drop shipped to Company Y. Since Company X has no nexus in Washington, Company X is not subject to B&O tax or required to collect retail sales tax. Company X has not taken possession or dominion or control over the parts in Washington. Company Z may accept a resale certificate from Company X which will bear the registration number issued by the state of Ohio. Company Y is required to pay use tax on the value of the parts.

The taxpayer's admitted contacts with Washington were:

.A. Delivery of products into Washington to customers;

.B. Instantaneous possession of products purchased in Washington prior to their sale; and

.C. Independent inspectors hired to confirm quantity and quality of products purchased and sold in Washington.

We must determine whether these contacts are sufficient under Rule 193 to tax the taxpayer's sales in Washington. Under subsection (7), delivery alone of the product into Washington to customers is insufficient activity to create nexus.

The taxpayer likens instantaneous possession of products purchased in Washington prior to their sale to the drop shipment example in subsection (11)(h) of Rule 193. That example is distinguishable because the seller received the order to sell the product prior to arranging to have a third party provide its product to the buyer. In the taxpayer's situation, the opportunity to purchase the products may precede finding a buyer or arranging their sale. Arguably, the taxpayer has a stock of goods in Washington.

While it was the taxpayer's goal to instantaneously resell the products acquired in Washington, it was never assured that this would be the case. In such circumstances, the taxpayer would be obligated to arrange for storage or transportation of the products.

The taxpayer states that it never held title to the products in Washington. It only had these "paper rights" to the property. Yet these rights did constitute an asset "in transit". No one

else held title to the taxpayer's products during the time the taxpayer had these rights. The products to which the taxpayer held title were not intangible.

We have held that a taxpayer' ownership of commodities provides nexus where the taxpayer is out-of-state but the commodities underlying the warrants are warehoused in Washington. Det. No. 90-215A, 12 WTD 297 (1993). Likewise, title held by the taxpayer, even for an instant, gives the taxpayer property purchased in Washington at the time of sale. Under example (7)(c)(i), when goods are located in Washington at the time of sale, this creates nexus unlike the drop shipment example where the goods were sold prior to the taxpayer arranging to have them drop shipped.

The role played by the inspectors was significant to the taxpayer's sales in the state. The taxpayer must know the quantity and quality of what it acquires as well as what it sells. This assurance is essential to maintain its sales in the state.

The fact that it hires the inspectors also casts doubt on the taxpayer's claim that its possession is instantaneous and that it never really held title to the products in Washington. The taxpayer pays the inspectors to act on its behalf. Inspectors acting on the taxpayer's behalf would not be necessary if it were merely dealing in paper transactions. The seller would be obligated to deliver to the buyer the taxpayer's contracted amounts. If the buyer found the quality or quantity to be less than what it bargained to pay, the taxpayer should be indemnified by the seller who agreed to deliver the bargained quantity. None of these transactions involved companies whose ability to pay such claims is questioned. Through its inspector agents, the taxpayer actively participated in the physical possession and purchase of the products in Washington.

The taxpayer paid for the inspectors' services. They were the taxpayer's agents. They performed a significant service necessary to maintain the taxpayer's sales in the state. Under Rule 193(7)(c)(v) such activity is sufficient nexus for the B&O tax to apply. Taken together, the taxpayer's possession of the product and inspection by its agents clearly establish contacts sufficient to subject its Washington sales to B&O tax. The activities correspond to examples (i), (iv), and (v) in subsection (7)(c) of Rule 193.

[2] Hazardous substance and petroleum products taxes. The hazardous substance tax and petroleum products taxes are imposed on the privilege of possessing these products in Washington. RCW 82.21.030 and 82.23A.020. The fact that the taxpayer possessed these products in Washington is sufficient to impose the tax.

Rule 252 provides in Part I, subsection (4)(e)(ii):

> (ii) The tax will not apply with respect to any possession of any hazardous substance purchased, extracted, produced or manufactured outside this state which is shipped or delivered into this state until the interstate transportation of such substance has finally ended in this state. Thus, out of state sellers or producers need not pay the tax on substances shipped directly to customers in this state. The customers must pay the tax upon their first possession unless otherwise expressly exempt. (Emphasis supplied.)

Under Part II, subsection (1)(a), the application of the petroleum products tax with the exceptions noted therein is the same as the hazardous substance tax. To the extent that the taxpayer verifies that it paid these taxes on products shipped directly to customers
in Washington the taxes will be refunded, provided that the taxpayer did not bill or certify to subsequent possessors that it paid the tax relieving them of their obligation to pay the tax.

DECISION AND DISPOSITION:

Regarding the nexus issue, the taxpayer's petition for refund is denied. The taxpayer may provide verification to the Audit Division of hazardous substance and petroleum products taxes it paid on products shipped directly to this state for which no previously paid certificates were provided to the customers.

DATED this 18th day of April, 1994.