Cite as Det. No. 94-209R, 15 WTD 100 (1996).

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. 94-209R
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 193: B&O TAX -- NEXUS -- DISSOCIATION -- INDEPENDENT SOURCE. A taxpayer may be allowed to dissociate sales from its nexus creating activities if it can document that the customer relationship was derived from an exclusively independent source, and the local activity creating nexus was not significantly associated, in any way, with the sales transaction in question.

[2] RULE 193: B&O TAX -- INTERSTATE SALES -- INBOUND SALES -- PLACE OF SALE -- RECEIPT IN THIS STATE -- FREIGHT FORWARDER. Delivery to a Washington freight forwarder for shipment to Alaska customers was not subject to Washington's B&O tax where there was no evidence that the freight forwarder had express written authority from the buyer to accept or reject the goods while they were in 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:

A nonresident manufacturer petitions for reconsideration of Det. No. 94-209 that denied its request to dissociate some of its sales to Washington customers.[1]

FACTS:

Okimoto, A.L.J. -- Taxpayer is a nonresident manufacturer of heating and ventilation equipment. In Det. No. 94-209, Taxpayer conceded nexus relating to all sales delivered to Washington customers that were made through its independent local sales agents, but sought to dissociate direct telephone orders processed by its home office. Because Taxpayer failed to submit documentation that its independent local sales agents were not involved "in any way" with these Washington sales, Det. No. 94-209 denied Taxpayer's request for dissociation. Taxpayer now concedes nexus for the home office telephone sales and instead argues that it should be allowed to dissociate sales made to its Alaska customers and to one of its major wholesalers (Company).

Company Sales:

During the teleconference, Taxpayer explained that all sales to Company resulted from a contract that was negotiated and consummated between Company employees located in Wisconsin and Taxpayer's home office employees located in the East Coast. Taxpayer manufactures heating equipment pursuant to Company's specifications, puts that equipment under Company's label and direct ships it to Company's customers. Taxpayer does not sell this equipment under its own label and Company sales representatives are the only persons who sell the equipment in Washington. Company directly bills its customers and all warranty problems are handled by Company representatives.

Alaska Sales:

During the teleconference, Taxpayer explained that it also has Alaska-based sales representatives that solicit and service all of its Alaska customers. Upon an examination of its commission statements, Taxpayer testified during the teleconference that no Washington sales representatives received any commissions from sales made to Taxpayer's Alaska customers. Taxpayer states that the only connection that these sales have with the state of Washington, is that they are shipped to a freight forwarder in Washington who then furthers the shipment to Alaska.

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

Taxpayer argues that these sales should be exempt from B&O tax because they can be dissociated from the nexus created by its Washington sales representatives, and in the alternative, that the sales took place outside the state of Washington.

ISSUE:

1) May Taxpayer dissociate Company and Alaska sales from the nexus created by its Washington sales representatives?

2) If not, have the Alaska sales taken place outside the state of Washington?

DISCUSSION:

Because Taxpayer has conceded that nexus with the state of Washington has been created by its independent sales representatives, we will only discuss the dissociation and place of sale issues.

Even though Taxpayer has established nexus with the state of Washington, it still may be exempt from B&O taxes if it can dissociate some portion of its sales from the significant in-state activity that created the nexus. Norton Co. v Illinois Rev. Dept., 340 U.S. 534 (1951). However, the burden to dissociate sales is exclusively that of the taxpayer and it is not easily satisfied:

> But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption.

Norton, supra at 537.

Consequently, the state of Washington is not required to establish nexus contacts in each instance of sale. Nexus having been found, the burden shifts to the taxpayer to dissociate. Nexus for one sale is nexus for all sales unless some sales are specifically divorced from the activity which created the nexus. Det. No. 87-69, 2 WTD 347 (1987).

When contemplating dissociation, the Department has considered this evidence pertinent: if the customer relationship was derived from an exclusively independent source; and has allowed

dissociation if the local activity creating nexus was not significantly associated, in any way, with the sales transaction in question. Det. No. 86-295, 2 WTD 11 (1986).

In this case, Taxpayer has alleged sufficient facts to establish that the customer relationships were derived from a source other than its Washington sales representatives. This existence of an exclusively independent source can be determined by examining the contract between Taxpayer and Company and/or other appropriate evidence. Accordingly, this issue will be remanded to Audit for verification of the existence of an exclusively independent source for these sales. Similarly, we will remand the Alaska sales issue to Audit to examine Taxpayer's commission records to verify that all Alaska sales commissions were paid to Taxpayer's Alaska sales agents, with no portion thereof, being remitted to Washington agents.
Assuming that Taxpayer establishes an independent source for the sales in question, Taxpayer must also establish that the local activities of its Washington independent sales force were not significantly associated with the disputed sales in any way. In deciding the case of a similar out-of-state taxpayer, we described the types of evidence required. We stated:

> The following examples would be useful types of evidence to show whether or not sales are disassociated. They are not all-inclusive and not all are necessarily required: 1) the taxpayer's records showing which of its representatives got credit for the sales and where the representatives are located (however, credit to an out-of-state representative does not necessarily mean there was no in-state activity); 2) a list of customers visited in the state by its purchase orders showing the parties or their representatives who were involved and where the transactions occurred; 4) correspondence, letters and/or affidavits from the taxpayer's employees and their customers showing when, where and how the sales occurred and verifying the claims that there were not local activities involved in them; 5) shipping documents showing the consignor, the consignee, the origin and destination, and who bore the expense of shipping.

Det. No. 91-279, 11 WTD 273, 278 (1991).

Therefore, we will remand this issue to Audit to allow it time to examine documentation verifying that the Washington independent sales representatives were not involved "in any way" with the disputed sales to Company and Alaska customers.

Delivery Issue: Pre-1992

Next, assuming that Taxpayer is unable to dissociate, we must still determine whether delivery of the goods occurred within the state of Washington. In general, the Department of Revenue has not been preoccupied with determining who bears the risk of loss or where legal title transfers for purposes of determining place of sale. See Det. No. 86-161A, 2 WTD 397 (1987). However, under the applicable regulations for the period prior to January 1, 1992, WAC 458-20-103 (Rule 103) and WAC 458-20-193B (Rule 193B), we did weigh heavily on who paid the expense of transporting the goods by common carriage into Washington when determining tax liability. Rule 103 covers the issue of time and place of sale and states in pertinent part:

> 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.

Former Rule 193B, which was in effect during a portion of the audit period, governed the taxation of sales of goods originating in other states shipped to persons in Washington. Rule 193B stated in part:

> 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.

Thus for periods prior to the effective date of the new revised WAC 458-20-193, (Rule 193), we will grant Taxpayer's petition, provided that Taxpayer can produce sufficient documentation, such as Alaska customer contracts and shipping documents, which show that the delivery of the goods to the customers actually occurred in Alaska. Such documents must show that, even though Taxpayer delivered the goods to a Washington freight forwarder, they were merely in-transit through Washington on their way to their ultimate Alaska destination. If such was the case, they are not subject to Washington's B&O tax, because there has been no sale in Washington.

Post-January 1, 1992:

The taxation of sales transactions occurring on January 1, 1992, and thereafter, are governed by the newly revised WAC 458-20-193 (Rule 193). It states in pertinent part:

> (7) INBOUND SALES. 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.

Rule 193 states that the B&O tax will apply to sales originating outside the state of Washington if the purchaser received the goods within Washington and the seller has nexus. We have previously found that each of the above taxpayers have sufficient nexus, and so we must now determine whether there has been receipt in Washington.

Rule 193(2)(d) defines "Receipt" or "received" to mean:

> . . . the purchaser or its agent first either taking physical possession of the goods or having dominion and control over them.

Rule 193(2)(e) further defines "Agent" to mean:

> . . . a person authorized to receive goods with the power to inspect and accept or reject them.

Based on the above excerpted language, Rule 193 provides that a sale takes place within the state of Washington and fully taxable, if the goods are located within the state and the purchaser or its authorized agent, with the power to inspect and accept or reject the goods, takes physical possession of the goods.

Applying the above requirements to Taxpayer's case, we believe that receipt of the goods did not occur until the actual purchaser took physical possession of the goods in Alaska. This is the first time that either the purchaser or its authorized agent was given the opportunity to inspect and accept or reject the goods in conjunction with taking physical possession. Delivery to the for-hire freight forwarder could not be receipt of goods because neither Taxpayer nor Audit has presented any evidence that the for-hire carrier was an authorized person who could receive the goods with the power to inspect or reject them. This limitation on who may be considered an authorized agent is clearly reflected in Rule 193(7)(a), which states:

> (a) Delivery of the goods to a . . . for-hire carrier located outside this state merely utilized to . . . transport the goods into this state is not receipt of the goods by the purchaser or its agent unless the . . . for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.

(Emphasis ours.)

Accordingly, absent evidence that the for-hire freight forwarder had express written authority to accept or reject the goods for the purchaser, complete with right of inspection, we find that the Alaska sales transactions were exempt from Washington's B&O taxes because they occurred outside the state.

DECISION AND DISPOSITION:

Taxpayer's petition is conditionally granted in part and remanded in part. Taxpayer's file shall be remanded to Audit for the proper adjustments consistent with this determination.

DATED this 24th day of May, 1995.