

Cite as Det. No. 94-209, 15 WTD 96 (1996).

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

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
for Correction of Assessment of)	
)	No. 94-209
)	
. . .)	Registration No. . . .
)	FY. . ./Audit No. . . .
)	
)	

[1] RULE 193: B&O TAX -- NEXUS -- DISSOCIATION -- DOCUMENTATION. A nonresident manufacturer's request to dissociate telephone sales from the nexus-creating activity of its independent sales agents was disallowed where taxpayer failed to submit documentation establishing an independent source for telephone customer relationships, and also failed to document that the local activities of its independent sales agents were not significantly associated with those sales.

) NATURE OF ACTION:

A nonresident manufacturer seeks to dissociate telephone orders made through its home office directly to Washington customers from the nexus creating activities performed by its independent sales representatives located in Washington.¹

FACTS:

Okimoto, A.L.J. -- Taxpayer is a nonresident manufacturer of heating and ventilation equipment. An audit of Taxpayer's books and records was conducted by a Department of Revenue (Department) auditor for the period January 1, 1990 through September 30, 1993, which resulted in an assessment being issued. Taxpayer made a partial payment, and the balance remains due.

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

Schedules II & III: Unreported Wholesaling and Retailing B&O Taxes

In these schedules, the Audit Division assessed Wholesaling and Retailing B&O taxes on Taxpayer's unreported sales to Washington customers. Although Taxpayer concedes that it is liable for business and occupation taxes on those sales made through its independent local sales agents, it states that some of its Washington sales are made directly by telephone from its out-of-state home office. Taxpayer explained that in these sales the Washington customer merely telephones Taxpayer's out-of-state office and places an order. Taxpayer contends that its Washington sales representatives are not involved in any way with these direct sales and that the sales representatives receive no commission. Taxpayer argues that because these telephone sales can be dissociated, they are exempt from tax.

ISSUE:

May Taxpayer dissociate telephone orders made directly with its home sales office from the nexus created by its independent local sales agents?

DISCUSSION:

WAC 458-20-193B (Rule 193B)² was the Department of Revenue's duly adopted rule concerning the taxability of sales of goods from outside of Washington to persons inside Washington. By virtue of RCW 82.32.300 it has the same force and effect as law. Rule 193B stated in part:

BUSINESS AND OCCUPATION TAX

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 in-state activities are not significantly associated in any way with the sales into this

²Rule 193B was incorporated into the newly promulgated Rule 193 as of January 1, 1992. For purposes of dissociation and nexus issues, however, no significant changes were made and therefore, we have referenced the language as it was stated in the prior Rule 193B.

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 in-state 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:

. . . .

(3) The order for the goods is solicited in this state by an agent or other representative of the seller.

. . . .

(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."

(Emphasis ours.)

After applying the above Rule 193B, we agree that the solicitation activities of Taxpayer's independent sales representatives establish sufficient nexus for Washington to tax sales made to Washington customers.

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 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 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. See Det. No. 87-69, 2 WTD 347 (1987).

In addition, when considering the issue of dissociation, the Department has considered evidence of the fact that the customer relationship was derived from an exclusively independent source to be pertinent, and has allowed dissociation if the local activity creating nexus is not significantly associated with the sales in any way. Det. No. 86-295, 2 WTD 11 (1986).

In this case, Taxpayer has both failed to establish an independent source for customer relationships between Taxpayer's home office and its telephone customers, and has also failed to present any evidence that the local activities of its independent sales agents were not significantly associated with those sales. Accordingly, we must deny Taxpayer's petition.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 14th day of October, 1994.