BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	F I N A L D E T E R M I N A T I O N
	)	
	)	No. 95-088ER
. . .	)	
	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 193B, RULE 103; ETB 560: WHOLESALING B&O TAX -- OUT-OF-STATE VENDORS --INTERSTATE SALES OF GOODS TO PERSONS IN WASHINGTON -- DELIVERY IN WASHINGTON. Goods sold by an out-of-state vendor to its Washington customers were delivered in Washington and, therefore, are considered Washington sales when the vendor bore the expense of the shipment, even though the goods were sold f.o.b. vendor's out-of-state plant. Taxpayers must meet the requirements of ETB 560 before the Department of Revenue will allow tax treatment similar to the taxpayer in PACCAR, Inc. v. Department of Rev.

Headnotes are provided for the convenience of 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:

An out-of-state manufacturer (the taxpayer) petitions for reconsideration of Det. No. 95-088, which sustained the assessment of wholesaling business and occupation (B&O) tax on gross income from sales to Washington customers.[1]

\
\
\
\
\
\
\
\

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

\

FACTS:

De Luca, A.L.J. -- The facts are as stated in Det. No. 95-088 and will be restated only when necessary.[2] The taxpayer is a corporation headquartered outside Washington where it manufactures items of tangible personal property. The taxpayer makes sales nationwide to customers who are primarily original equipment manufacturers and distributors. It has three distributors and an office in Washington. The taxpayer concedes it has nexus with this state for purposes of this appeal.

The taxpayer publishes catalogs containing product information. Customers may order from the catalogs or request a quote for a particular product. The catalogs contain a copy of the taxpayer's "General Sales Policies" and its "Standard Conditions of Sale." The General Sales Policies declares:

---

[2] Much of the discussion in Det. No. 95-088 concerned Excise Tax Bulletin 560.04.193 (ETB 193), which provides in part:

> Former WAC 458-20-193A and 193B (Rules 193A and 193B) applied to interstate sales of tangible personal property for periods prior to January 1, 1992. Under these rules, the seller was not subject to the B&O tax if the seller delivered the goods outside Washington. Goods which originated outside Washington were considered to have been delivered by the seller into Washington if the for hire carrier transported the goods to a Washington destination at the expense of the seller.
>
> The Department generally considered the seller as having the expense of the shipment when the goods were shipped "freight prepaid" with the seller paying the carrier. "FOB", a term with significance for shipping and Uniform Commercial Code [U.C.C.] purposes, was not considered determinative in deciding where "risk" actually transferred from the seller to the buyer.
>
> The court concluded that under the very specific facts of PACCAR, [PACCAR, Inc. v. Department of Rev., Thurston County Superior Court, Docket No. 91-2-017595-3 (1991)] the goods were delivered outside Washington. Among those facts were the following:
>
> 1. There was a clear, unambiguous contract which provided that the place of delivery was an out-of-state location.
> 2. The transaction as finally completed (specifically performed) was completely consistent with the terms of the contract.
> 3. Purchasers were required to place orders on the seller's standard purchase orders.
> 4. The purchase orders clearly provided that all sales were "F.O.B. Designated Plant Of Manufacture".
> 5. The purchase order specifically indicated that all risk of loss passed to the purchaser upon delivery of the goods to the carrier at the designated F.O.B. point.
> 6. The purchase order provided that if the purchaser failed to provide the seller with shipping instructions then the seller could, at its option, deliver the goods to a carrier and select the routing without liability, or deliver the goods to a place of storage where they would be held at the purchaser's risk and expense.
>
> Although the superior court's decision in PACCAR is binding only on the parties in that case, the Department will allow similar treatment to taxpayers who can establish identical facts. A sales invoice which simply indicates "FOB Out-Of-State Location" is insufficient to assume that delivery occurred outside Washington. As indicated above, in addition to the sales invoice and shipping documents, a taxpayer must establish that its facts are identical to those in PACCAR, including a contract or purchase order which clearly indicates that risk of loss passed to the buyer at a location outside Washington. Actual performance must be consistent with the terms stated on the purchase order and/or contract.

"Our terms on approved credit are Net 30 Days, F.O.B. Factory, Los Angeles, California." The "Standard Conditions of Sale" provide in part:

> 1. Delivery: Unless otherwise agreed, [the taxpayer] will furnish its Product f.o.b. its factory. Delivery to the transporting carrier shall constitute delivery to the Purchaser. . . .
>
> If shipment. . . shall be delayed on account of Purchaser, payment shall become due when Purchaser is notified that [the taxpayer] is ready to ship, and the product shall thereafter be held at Purchaser's risk and expense.

Section 4 of the "Standard Conditions of Sale" requires the purchaser to insure the products from the time of delivery until the products are paid in full. The purchaser also assumes all losses not covered by insurance. Section 13 declares the provisions in the "Standard Conditions of Sale" supersede the purchaser's order form.

Customers submit orders either by telephone, mail, or facsimile. Customers choose the forms they use when ordering by mail or facsimile. The taxpayer ships its products by common carrier, nearly always by United Parcel Service (UPS). The taxpayer usually prepays the shipments and bills the customers. The taxpayer's invoices contain its "Standard Conditions of Sale" on the reverse side.

We ruled in Det. No. 95-088 that the taxpayer's sales to its Washington customers prior to January 1, 1992 were subject to Washington's taxes pursuant to Rule 193B. First, the taxpayer had nexus with Washington. Second, delivery of the goods occurred in Washington because the taxpayer had the duty and bore the expense of shipping the goods to its customers in Washington. Final Det. No. 86-161A, 2 WTD 397 at 402-03 (1987).

We also found in Det. No. 95-088 that the taxpayer failed to meet several of the requirements imposed by ETB 560. The first listed requirement of ETB 560 is not met when purchasers use their own purchase orders because there is not a clear, unambiguous contract that provides that the place of delivery is an out-of-state location. For example, a purchaser's forms could provide for delivery to occur in Washington instead of out-of-state. We further declared in Det. No. 95-088 that the taxpayer did not meet the ETB's first listed requirement because of the "unless otherwise agreed" language in its documents. The language creates an ambiguity by providing that delivery could occur at a place other than an out-of-state location where it states: "DELIVERY: Unless otherwise agreed, [the taxpayer] will furnish its Products f.o.b. its factory."

We also ruled in Det. No. 95-088 that the taxpayer did not meet ETB 560's third listed requirement. because the taxpayer's customers were not required to place orders on the taxpayer's standard purchase orders. Instead, the customers could telephone, mail, or send by facsimile their orders to the taxpayer. There was nothing to prohibit the customers from using their own purchase orders. The purpose of this requirement is to ensure that a seller's own "place of delivery" and "risk of loss" terms contained on its standardized purchase order are not countermanded, overruled, or renegotiated by a purchaser's order form. Moreover, the ETB's fourth and fifth listed requirements may not have been met as well, depending on the terms in the purchase orders that were or are used.

Moreover, in PACCAR, the purchaser designated which carrier would transport the trucks to the dealership. This fact supported PACCAR's contention that the carrier was acting on behalf of the purchaser, and not PACCAR. In this case, however, the taxpayer selected the carrier, almost always UPS. Therefore, we found the taxpayer also failed to meet the sixth listed requirement of ETB 560.

TAXPAYER'S EXCEPTIONS:

The taxpayer in its reconsideration petition contends there are two grounds for relief. First, it claims ETB 560 does not fairly reflect the superior court's decision in PACCAR. The taxpayer argues its products were delivered at its factory in Los Angeles. Second, the taxpayer states its facts actually satisfy the requirements of ETB 560.

In its first argument (out-of-state delivery), the taxpayer contends the court in PACCAR entered judgment based on a conclusion that, under WAC 458-20-103 (Rule 103), the place of delivery controls whether a taxpayer is liable for Washington taxes on its sales. In PACCAR, the court ruled the sales occurred at the place of delivery, which was PACCAR's out-of-state manufacturing plants.

The taxpayer asserts that the following three material facts were the basis for the court's conclusions that PACCAR's sales occurred outside Washington.

1. The parties entered into a clear unambiguous contract providing that the place of delivery was PACCAR's out-of-plant.

2. The contractual f.o.b. term (f.o.b. factory) and Washington law (U.C.C.) were consistent with the contractual delivery term.

3. The place of delivery in such case has been created out-of-state and delivery has, in fact, occurred out-of-state based on the contracts.

The taxpayer argues that its facts are the same as those considered material by the court in PACCAR for the following reasons. First, the taxpayer's product catalogs and invoices included a "standard conditions of sale" provision that provided for out-of-state delivery. The taxpayer contends its documents were the sole and, therefore, controlling contracts for its sales.

Second, under its conditions of sale, the taxpayer claims each of its products was sold "f.o.b. its factory." The taxpayer states that pursuant to Washington law the term "f.o.b. its factory" established that its delivery to the buyers took place at the taxpayer's plant for each product that it sold.

Third, the taxpayer declares that delivery occurred out-of-state because, pursuant to its conditions of sale, delivery to the transporting carrier constituted delivery to the purchaser. Furthermore, if the purchaser caused the delay of shipment, the product would be held at the purchaser's risk and expense.

The taxpayer asserts that instead of relying on these three material facts to determine where delivery takes place, the Department erred in ETB 560 by characterizing as "requirements" many details in PACCAR that the court did not consider important enough even to mention. The taxpayer cites two examples as non-material facts incorrectly required by ETB 560. One, the purchasers must use a seller's purchase order. Two, if the purchaser failed to provide shipping instructions, the seller could deliver the goods to a carrier without liability.

The taxpayer's second argument is that its facts actually satisfy the requirements of ETB 560, including the requirements that it contends are not based on the PACCAR decision. The taxpayer asserts Det. No. 95-088 erred in judging what it claims were "hypothetical facts" rather than actual facts. The taxpayer argues it meets ETB 560's first requirement that contracts provide for deliveries to occur at out-of-state locations.

Specifically, the taxpayer claims that Det. No. 95-088 erred in two ways regarding the ETB's first requirement. One, the determination erred by focusing on the "unless otherwise agreed" clause regarding the f.o.b. point and did not address the contractual "delivery" language. The taxpayer states it submitted uncontroverted evidence that there were no situations in which the f.o.b. point was other than at its factory. Two, the contract provided that delivery occurred when the goods were delivered to the carrier. The taxpayer argues the contract language regarding delivery is unambiguous and did not provide any other alternative. Thus, the taxpayer believes the first requirement of ETB 560 has been met.

The taxpayer contends it meets ETB 560's third listed requirement. The taxpayer admits that purchasers did not place their orders on its standard purchase order forms. Instead, the customers chose the forms they used if they submitted their orders by mail or fax. Otherwise, according to the taxpayer, most orders were received by telephone. The taxpayer contends that the determination erred because it found no specific situations in which the purchasers' forms provided for delivery in Washington. If it had, only those sales should have been taxable, but not the sales whose contract terms provided that delivery occurred outside Washington. Furthermore, the taxpayer argues that when purchasers telephoned their orders there could be no inconsistent delivery terms. According to the taxpayer only its delivery terms controlled. The taxpayer continues by stating that when customers did use their own purchase orders, it did not necessarily mean that their delivery terms were inconsistent with its own.

The taxpayer also cites RCW 62A.2-207(3), -308(a), and Hartwig Farms v. Pacific Gamble Robinson, 28 Wn. App. 539, 544, 625 P.2d 171 (1981) to support its claim that, even if the purchase orders were inconsistent with each other, Washington law provides that delivery is at the seller's place of business. The taxpayer concludes that the terms of the contract were adequately established to satisfy the third listed circumstance of ETB 560.

Finally, the taxpayer asserts it meets the sixth listed requirement of ETB 560. The taxpayer declares that the requirement does not mandate that the purchaser select the carrier. Rather, the taxpayer contends the ETB only states that if the purchaser does not provide shipping instructions, the seller has the option of storing the goods at the buyer's risk and expense. The taxpayer claims its

conditions of sale are consistent with the ETB's sixth listed requirement where its agreement allowed it to store the products at the buyer's risk and expense if there was a delay.

ISSUES:

1. Did the taxpayer's sales to its Washington customers occur within or without this state?

2. Did the taxpayer's sales to its Washington customers meet the requirements of ETB 560 for out-of-state vendors?

DISCUSSION:

We held in Det. No. 95-088, supra, the taxpayer's sales were subject to Washington's taxes for the following reasons: 1) the taxpayer had nexus with Washington; and 2) the delivery of the goods occurred in Washington because the taxpayer had the duty and bore the expense of shipping the goods to its customers in this state. Rule 193B; Final Det. No. 86-161A, supra.

We are not persuaded by the taxpayer's arguments that it delivered its products outside Washington because the terms in its 'General Sales Policies" and its "Standard Conditions of Sale" provided the taxpayer would furnish its products "f.o.b. its factory." The term "f.o.b. its factory" is not material. ETB 560. The fact that title passes to a buyer outside Washington does not control the place of sale for Washington tax purposes. The U.C.C. definitions of sale and passing of title are not controlling for B&O tax purposes. Inland Dairy v. Department of Rev., 14 Wn. App. 592 at 594, 544 P.2d 52 (1975). Instead, a sale takes place when the goods are delivered to the buyer in this state. WAC 458-20-103, Final Det. No. 86-161A, supra.

We find the case of Westinghouse Electric Corp. v. King, 678 S.W.2d 19 (Tenn. 1984), *appeal dismissed*, 470 U.S. 1075 (1985), to be instructive. In Westinghouse, the taxpayer Westinghouse Electric Corporation (Westinghouse) brought an action against the Tennessee Commissioner of Revenue seeking recovery of taxes and interest paid under protest. The Tennessee Supreme Court described Westinghouse as a nonresident electrical equipment company that agreed to design, manufacture, and sell nuclear steam supply systems and turbo-generator units to the Tennessee Valley Authority (TVA) for use in Tennessee. Westinghouse stipulated that it was doing business in Tennessee. The subject equipment was either manufactured or purchased by Westinghouse outside Tennessee. Title passed to TVA when it made payment and in all instances title passed outside Tennessee.

Westinghouse argued in the case that its sales to TVA were not taxable by Tennessee because the transactions were not sales in the state because their contracts provided that title to the equipment passed outside the state. In affirming the lower court's decision that the sales were subject to tax, the Tennessee Supreme Court cited General Motors Corporation v. Washington, 377 U.S. 436, at 442-445 (1964), *overruled in part by* Tyler Pipe Industries, Inc. v. Washington,

483 U.S. 232, 248 (1987).[3]. General Motors involved a corporation that manufactured automobiles outside Washington and then sold them to independent dealers within the state. The dealers sent their orders to an out-of-state office. General Motors accepted or rejected them out-of-state. The automobiles were shipped f.o.b. the out-of-state factory. Nonetheless, the U.S. Supreme Court upheld the B&O tax assessment by finding that General Motors' activities within Washington were substantial, "particularly with relation to the establishment and maintenance of sales, upon which the tax was measured." Id. at 447. See also Westinghouse, 678 S.W.2d at 25. Thus, the fact that title to the equipment sold in Westinghouse passed out-of-state, or that the automobiles in General Motors were sold f.o.b. the out-of-state factory, did not prevent Tennessee or Washington, respectively, from taxing the transactions when in each case the deliveries occurred in-state. We conclude that the products sold by the present taxpayer to its Washington customers were delivered in Washington even though they were sold f.o.b. its factory.

Moreover, we held in Det. No. 95-088, supra, that the taxpayer did not meet the requirements of ETB 560 necessary to avoid the tax assessment. The Department has announced in ETB 560 its position toward the PACCAR case by explaining:

> Although the superior court's decision in PACCAR is binding only on the parties in that case, the Department will allow similar treatment to taxpayers who can establish identical facts.

Thus, to be consistent, the Department will treat other taxpayers in a similar fashion when their facts are identical to those found in PACCAR. However, the Department does not view PACCAR as precedential because, as ETB 560 explains, it does not consider itself bound by the reasoning of that case for any taxpayer other than PACCAR. Instead, the Department's position in ETB 560 is based on the policy of treating taxpayers equally when identical facts arise.

Upon further review of Det. No. 95-088 and the taxpayer's arguments in its reconsideration petition, we again hold the taxpayer's gross income from its sales to customers in Washington is subject to Washington tax.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 20th day of March 1998.

[3] We note the part of General Motors that the Supreme Court overruled is not at issue in the present matter.