

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Review of a)	<u>F I N A L</u>
Prospective Ruling concerning)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 98-006E
)	
...)	Registration No. . . .
)	
)	

- [1] RULE 185, RCW 82.26.010(3)(a): TOBACCO TAX -- “CLASS (A)” DISTRIBUTORS -- OUT-OF-STATE SELLERS -- SALES TO WASHINGTON WHOLESALERS. Out-of-state companies selling tobacco products to Washington wholesalers are not taxable as class (a) distributors when selling from a stock of goods located outside this state, even though they may engage in nexus-producing sales activities in this state.
- [2] RULE 185, RCW 82.26.010(3)(a): TOBACCO TAX -- “CLASS (A)” DISTRIBUTORS -- OUT-OF-STATE SELLERS -- SAMPLES DISTRIBUTED IN WASHINGTON. Out-of-state companies distributing samples from a stock of goods located in this state are taxable as class (a) distributors liable for the tobacco products tax on samples brought into the state for distribution.
- [3] RULE 185, RCW 82.26.010(3)(c): TOBACCO TAX -- “CLASS (C)” DISTRIBUTORS -- OUT-OF-STATE SELLERS --SALES TO WASHINGTON RETAILERS. Out-of-state companies selling and shipping to Washington retailers from out-of-state stock of goods are class (c) distributors. If an out-of-state class (c) distributor maintains nexus-producing activities in this state, such as a sales force, it will be required to register with the Department and pay the tobacco products tax on its interstate sales to Washington retailers. If an out-of-state class (c) distributor does not maintain a sales force or otherwise engage in nexus-forming activities within this state, it cannot be forced to register and pay the tobacco products tax on its interstate sales to Washington retailers. Such class (c) distributors may elect to register and pay the tax. If a class (c) distributor elects not to register and pay the tax, the Washington retailers to whom it sells will be liable for the tax as class (a) distributors.

- [4] RULE 185, RCW 82.26.010(3)(c): TOBACCO TAX -- “CLASS (C)” DISTRIBUTORS -- OUT-OF-STATE SELLERS --SALES TO WASHINGTON DUAL RETAILERS/WHOLESALERS. A registered out-of-state seller whose Washington buyer is both a retailer and a wholesaler is a class (c) distributor to the extent the buyer sells the product at retail. If the products to be sold by the buyer at retail cannot be identified by the class (c) distributor, the Department will permit the class (c) distributor to shift its tax burden by written agreement as to these sales to the buyer as a class (a) distributor.

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:

An out-of-state seller shipping tobacco products from its out-of-state location to Washington retailers and wholesalers, and bringing tobacco products into the state as samples, challenges the Department’s position as to its taxability under the tobacco products tax as a distributor.¹

FACTS:

Bauer, A.L.J. -- Taxpayer’s parent company (parent) manufactures all forms of smokeless tobacco products² in . . .[the southeastern portion of the United States] The Audit Division (Audit) of the Department of Revenue (Department) audited the parent’s books and records for the period January 1, 1991 to June 30, 1994. As a result of this examination, Audit concluded that the parent was a taxable “distributor” of tobacco products in Washington because it maintained a sales force in Washington.³ Accordingly, the parent was given written future reporting instructions to pay the tobacco products tax on all tobacco products sold to Washington wholesalers and retailers.

After these instructions were issued, the parent formed Taxpayer as a wholly-owned subsidiary to purchase its tobacco products and to resell them and, as such, the future reporting instructions applied to Taxpayer. Taxpayer is the parent’s marketing arm and, like the parent, maintains a sales force within this state, but does not maintain any physical offices or warehouses in this state.⁴ Taxpayer appeals the future reporting instructions.

Taxpayer provides its salespersons with sample products from its out-of-state location, which samples are given away to individuals attending group events such as sportsmen’s shows,

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

²Smokeless tobacco products include moist snuff (to be used behind the lip), loose leaf (to be chewed), dry (powdered) snuff, and twist (handmade and rolled). Washington is primarily a moist snuff market, and twist is generally not sold in Washington.

³At this time, Taxpayer did not exist, and sales were made directly by the manufacturer (Taxpayer’s parent corporation).

⁴Because all parties agree that Taxpayer is an “out-of-state” company, we will not further consider herein what elements will render a company as “in-state” or “out-of-state” for purposes of the tobacco products tax.

rodeos, and car races. Except for these samples, Taxpayer does not ship any other of its tobacco products to its sales force. Taxpayer's sales force receives an allowance to purchase additional tobacco products from its Washington wholesale customers, and these purchases become a salesperson's "car stock" which is used to replace outdated stock on retailers' shelves.⁵

Taxpayer sells to wholesaler customers that sell to retailers, and also to a large membership warehouse chain that, in turn, sells the tobacco products both at wholesale and at retail.⁶ Customers' orders may be generated in different ways. The orders might be transmitted directly from the customer electronically or by phone to either the salesperson or Taxpayer, and, occasionally, if there is a special promotion, Taxpayer's salespersons might take the orders at the customer's location. The tobacco products, however, are shipped directly to Taxpayer's customers from Taxpayer's out-of-state stock of goods.

Taxpayer disagrees that it is taxable as a "distributor" under the tobacco products tax for its sales into this state, and requests a ruling as to its tax liability in this regard. Taxpayer additionally requests a ruling as to whether it is taxable on its distribution of samples in this state.

ISSUES:

1. Taxpayer, an out-of-state seller of tobacco products, has nexus for tax purposes because it has salespersons located in Washington. The seller does not maintain a stock of goods or place of business in Washington. For purposes of the tobacco products tax, is the out-of-state seller an RCW 82.26.010(3)(a) "distributor" when it ships tobacco products to its wholesale customers in Washington?
2. Taxpayer, an out-of-state seller of tobacco products, maintains salespersons in this state. The out-of-state seller provides its salespersons with sample products from its out-of-state location, which samples are given away to individuals attending group events such as sportsmen's shows, rodeos, and car races. Is the out-of-state seller a "distributor" under RCW 82.26.010(3)(a)?
3. Taxpayer, an out-of-state seller of tobacco products, sells to a membership-warehouse store in Washington. This warehouse store resells these tobacco products to retailers for resale, and to consumers for their own use. Is the out-of-state seller a "distributor" under RCW 82.26.010(3)(c)?

DISCUSSION:

Taxable "Distributors" under the Tobacco Products Tax

⁵The outdated products are then destroyed, and their destruction certified, in accordance with federal regulations pertaining to refunds of the federal excise tax and tobacco products tax.

⁶Taxpayer does not otherwise sell to businesses which sell solely at retail.

The tobacco products tax, codified as chapter 82.26 RCW, was first enacted in 1959. Its intent and purpose was articulated by RCW 82.26.030:

. . . to levy a tax on all tobacco products sold, used, consumed, handled, or distributed within this state and to collect the tax from the distributor as defined in RCW 82.26.010. It is the further intent and purpose of this chapter to impose the tax only once but nothing in this chapter shall be construed to exempt any person taxable under any other law or under any other tax imposed under Title 82 RCW.

(Emphasis added.) The tobacco products tax is paid by certain “distributors”, as defined by RCW 82.26.010, on the ‘wholesale price’⁷ of each tobacco product that enters this state for sale.

The effective date of the act was July 1, 1959. On that date the Tax Commission of the State of Washington (the Tax Commission, now the Department) collected a one-time “floor stocks tax”⁸ from all “distributors” on their stocks of tobacco products being held for sale. After that date, a “continuing tax”⁹ was to be collected from “distributors” who engaged in certain activities related to tobacco products brought into the state for sale.

Under RCW 82.26.010, the statutory definition of “distributor” has remained unchanged since the tobacco products tax was first enacted:¹⁰

(3) "Distributor" means (a) any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale, (b) any person who makes, manufactures, or fabricates tobacco products in this state for sale in this state, (c) any person engaged in the business of selling tobacco products without this state who ships or transports tobacco products to retailers in this state, to be sold by those retailers;. . .¹¹

To be taxable, a distributor must engage in certain activities enumerated in RCW 82.26.020¹²:

⁷“Wholesale price” is defined by RCW 82.26.010(7) as the established price for which a manufacturer sells a tobacco product to a distributor.

⁸The floor tax, initially codified as RCW 82.26.020(2), was repealed in 1985.

⁹Codified as RCW 82.26.020(1).

¹⁰RCW 82.26.010 was amended in 1961, 1975, and 1995 without changing the definition of “distributor”.

¹¹The Departmental regulation which concerns the tobacco products tax, WAC 458-20-185 (Rule 185), similarly provides:

(b) "Distributor" means

(i) Any person engaged in the business of selling tobacco products in this state who brings or causes to be brought into this state from without the state any tobacco products for sale, or

(ii) Any person who makes, manufactures, or fabricates tobacco products in state for sale in this state, or

(iii) Any person engaged in the business of selling tobacco products without this state who ships or transports tobacco products to retailers in this state.

¹²This language has been in effect since the tax’s enactment in 1959, having survived RCW 82.26.020’s amendment in 1993.

(1) There is levied and there shall be collected a tax upon the sale, use, consumption, handling, or distribution of all tobacco products in this state at the rate of forty-five percent¹³ of the wholesale sales price of such tobacco products.

(2) Taxes under this section shall be imposed at the time the distributor (a) brings, or causes to be brought, into this state from without the state tobacco products for sale, (b) makes, manufactures, or fabricates tobacco products in this state for sale in this state, or (c) ships or transports tobacco products to retailers in this state, to be sold by those retailers.

The three categories of taxable activities set forth in RCW 82.26.020(2) reflect and directly parallel the corresponding definitions of “distributor” in RCW 82.26.010(3).¹⁴ Therefore:

- 1) A “class (a)” distributor is defined by RCW 82.26.010(3)(a) as
 . . .any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale. . . .
 A class (a) distributor may be taxable under RCW 82.26.020(2)(a) when it
 . . .brings, or causes to be brought, into this state from without the state tobacco products for sale. . . .
- 2) A “class (b)” distributor is defined by RCW. 82.26.010(3)(b) as
 . . . any person who makes, manufactures, or fabricates tobacco products in this state for sale in this state. . . .
 A class (b) distributor will be taxable under RCW 82.26.020(2)(b) when it
 . . .makes, manufactures, or fabricates tobacco products in this state for sale in this state. . . .
- 3) A “class (c)” distributor is defined by RCW 82.26.010(3)(c) as
 . . .any person engaged in the business of selling tobacco products without this state who ships or transports tobacco products to retailers in this state, to be sold by those retailers. . . .
 A class (c) distributor may be taxable under RCW 82.26.020(2)(c) when it
 . . .(c) ships or transports tobacco products to retailers in this state, to be sold by those retailers. . . .

Thus, to be potentially taxable as a distributor under the tobacco products tax, a person must, first, be a distributor as defined in RCW 82.26.010(3)(a), (b), or (c), and, second, engage in at least one of the activities¹⁵ enumerated in the corresponding subsection of RCW 82.26.020(2).

¹³Additional taxes are imposed by other subsections, bringing the total percentage today to 74.9%.

¹⁴The trial court in Galvin v. Tax Commission, Docket No. 31454, 8 (Wash. Thurston Co. Super. Ct. Dec. 21, 1959), also noted the correlation between these two code sections, stating “Tobacco products consumed in the state of Washington originate from distributors both within and without the state. The legislature has declared its intention to tax all of such distribution. . . Portions of Sections 11 [RCW 82.26.010] and 12 [RCW 82.26.020]. . . attempt to accomplish that result under categories (a), (b), and (c), which are counterparts in the respective sections.

In this case, it is clear that Taxpayer is not a class (b) distributor because it does not fabricate or manufacture tobacco products in this state. Therefore, our inquiry will be confined to whether Taxpayer, an out-of-state company selling into this state using a combination of in-state sales representatives to cultivate sales, and delivering its product to Washington buyers in interstate commerce, is a class (a) or a class (c) distributor.

At first blush, it appears that Taxpayer might fulfill the criteria of being a class (a) distributor under RCW 82.26.010(3)(a) because, through its sales representatives, it is indeed “engaged in the business of selling tobacco products in this state”. However, the “brings, or causes to be brought, into this state” language in the class (a) distributor definition is ambiguous, particularly when compared with the markedly different “ships or transports . . . to retailers in this state” language used in the definition of class (c) distributor. Although sales activity by out-of-state sellers in this state undeniably creates nexus under current law -- nexus being that minimum connection between an entity and a state giving the latter tax jurisdiction over the former -- it is clear from the litigation that followed the statute’s enactment that the definition of a class (a) “distributor” in the tobacco products tax was never intended to extend to out-of-state companies based on a nexus analysis.

Galvin v. State Tax Commission

Immediately after its enactment in 1959, the tobacco products tax was constitutionally challenged in Thurston County Superior Court.¹⁶ At this time, constitutional law generally conferred nexus on sellers (thus permitting states to tax the sales of goods shipped through interstate channels to purchasers in the taxing state) only when sellers maintained and operated an office or other physical facility within the purchasers’ state.¹⁷ The mere presence of a sales force within the state was not an adequate presence to confer nexus on an out-of-state seller’s interstate sales absent such a physical facility.

In its memorandum opinion, the Superior Court held the tobacco products tax, in its entirety, to be unconstitutional, having interpreted the act to mean: (1) Washington retailers could not be taxed as class (a) distributors, rendering them untaxable; and (2) all out-of-state wholesalers selling to Washington retailers through interstate commerce were taxable as class (c) distributors. It stated:

. . .the manifest intent [of the act] is to tax goods in the hands of the out-of-state [class c] distributor at the moment he commits the goods to interstate movement destined to a Washington retailer. It requires no citation of authority to demonstrate that this cannot be done. If it could be argued that the taxable event occurs when the goods come to rest within the state of Washington, they are then in the possession of the consignee, and there is

¹⁵The “incidence” of the tax.

¹⁶Galvin v. Tax Commission, Docket No. 31454, (Wash. Thurston Co. Super. Ct. Dec. 21, 1959).

¹⁷See McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940), wherein the taxpayer maintained an office in the taxing jurisdiction; International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944), wherein sellers maintained manufacturing plants and sales offices in the taxing state; and Norton Co. v. Department of Revenue, 340 U.S. 534 (1951), wherein the tax was approved on sales which utilized the taxing state’s office either in receiving the purchase orders or in distributing goods to the purchasers in the taxing state.

no provision for taxing the retailer. The taxes imposed under category (c) cannot be collected. This results in these untaxed goods coming in competition with similar taxed goods in the Washington market, with manifest unequal treatment. The tax imposed upon out-of-state distributors under category (c) is repugnant to the Commerce Clause of the Federal Constitution and is therefore invalid.

The Tax Commission immediately appealed the trial court ruling to the Washington Supreme Court.¹⁸ The Court, noting the tax had never been enforced against them, dismissed the class (c) plaintiffs' claims for lack of standing, and thus did not directly reach the constitutional issues raised by them. However, the Tax Commission's trial brief (Brief of Appellant), reflects that agency's understanding of the structure and intent of the tobacco products tax statute commensurate to its enactment, and demonstrates why the tax was administered in the way it was for the next 35 years. This is important because, in interpreting a statute, courts

. . . accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period. . .¹⁹

In its brief, the Tax Commission argued the trial court had concluded erroneously that class (a) distributors could not include in-state retailers. It further challenged the trial court's holding that all out-of-state businesses selling to Washington retailers in interstate commerce were taxable as class (c) distributors, contending that this holding violated both the intent of the legislature and the Federal Constitution. Citing Sections 13 and 14,²⁰ the Tax Commission argued the act did not impose a tax on out-of-state distributors without nexus, unless such distributors elected to register and pay the tax., because such an imposition could not be constitutionally made.²¹

The Tax Commission's understanding of the tax, and arguments as to its constitutionality, was best summarized as follows:

. . . [I]f an out-of-state distributor ships tobacco products into this state to a retailer it can make not the slightest difference whether he pays the tax or not. When he ships to a retailer for resale, that retailer is a distributor under [RCW 82.26.010(3)(a)] and must pay the tax if the out-of-state seller has not. There is therefore no unequal treatment and no competition between taxed and untaxed goods. The trial court failed to grasp this fact when it said "there is no provision for taxing the retailer" . . . Certainly a retailer is a distributor as to those tobacco products he "brings, or causes to be brought, into this state from without the state . . . for sale."

¹⁸Galvin v. State Tax Commission, 56 Wn.2d 738, 355 P.2d 362 (1960) (Galvin).

¹⁹In re Sehome Park Care Center, 127 Wn.2d 774, 780, 903 P.2d 443 (1995); Bennett v. Hardy, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990); Newschwander v. State Teachers' Retirement System, 94 Wn.2d 701, 710, 620 P.2d 88 (1980).

²⁰Codified as RCW 82.26.030 and -.040.

²¹Emphasis added, pp. 78-79, Brief of Appellant.

* * * . . . the only logical and reasonable construction and analysis of the act is . . . [that] a retailer who purchases from a distributor outside the state is the distributor who must remit the tax but the out-of-state distributor-wholesaler is not required to remit the tax. Because the act makes it possible for out-of-state wholesalers to elect to register and remit the taxes on a voluntary basis does not justify declaring the act unconstitutional. . . .

22

In rendering its opinion in Galvin, the Supreme Court agreed with the Tax Commission:

. . . [A]ny wholesaler or any retailer who brings or causes to be brought into the state from an out-of-state source becomes liable for the tax when such tobacco products are brought into the state.²³

The Court, ascertaining that all tobacco products not previously subjected to tax by out-of-state wholesalers would be ultimately taxed in the hands of Washington retailers, determined that all tobacco products entering the state in order to be sold would be subject to the tax. Therefore, lacking a finding of discriminatory treatment between in-state sellers,²⁴ the Court found the act to be constitutional.

Construction of the Statute

There is nothing in the Brief of Appellant or either of the two Galvin decisions to indicate that the term “class (a) distributor” was understood or intended to include out-of-state companies selling from out-of-state stocks of goods. Further, the Brief of Appellant and the Supreme Court’s decision in Galvin specifically state that class (a) distributors properly include not only in-state wholesalers, but also in-state retailers. For 35 years after the tobacco products tax’s enactment, the Tax Commission, followed by the Department, assessed only in-state wholesalers and retailers as class (a) distributors, and never imposed the tax on out-of-state wholesalers selling and shipping their products to in-state wholesale buyers from out-of-states locations, even though they had nexus in this state through an active sales force. This interpretation -- that class (a) distributors do not include out-of-state companies -- persisted despite a number of legislative amendments to the tobacco products tax, suggesting legislative acquiescence to that construction.²⁵

Additionally, the bare language of the statute supports this long-standing interpretation. First, the difference in language between the definitions of class (a) and (c) distributors -i.e., “brings into . . . the state” v. “ships or transports. . . in[to] this state” -- suggests that the location of class (a) and (c) distributors and their stocks of goods are, respectively, in-state and out-of-state. The use of different statutory language in these comparable statutory provisions clearly indicates a difference in the legislature’s intent.²⁶

²²Page 84, Brief of Appellant, emphasis added.

²³Galvin at 740, emphasis added.

²⁴And having dismissed the out-of-state plaintiffs for lack of standing.

²⁵See Newschwander v. State Teachers’ Retirement System, *supra* at 711.

²⁶See Van Dyk v. Department of Rev., 41 Wn. App. 71, 702 P.2d 472 (1985).

Second, if the definition of class (a) distributors were to include out-of-state sellers selling into Washington, this would necessarily include out-of-state sellers selling to Washington retailers. Such sellers are already described as class (c) distributors. Any construction of the statute which would include (c) distributors also in the definition of (a) distributors would render the definition of (c) distributors superfluous. The statute should be construed so that there is no superfluous, void, or insignificant language.²⁷

Not until the Department issued the reporting instructions to Taxpayer's parent in 1994 did the Department adopt the position that out-of-state companies could be taxed as class (a) distributors. This change in position originated under the theory that an out-of-state seller making interstate wholesale sales into Washington using in-state salespersons has nexus with this state, and is a class (a) distributor because it, by virtue of its local salespersons, "brings, or causes to be brought, into this state from without the state tobacco products for sale." Thus, it was not until the prospective audit instructions here at issue that Taxpayer's parent had ever been advised it would be taxable under the tobacco products tax for its sales to Washington wholesalers as a class (a) distributor.

Is Taxpayer a Class (a) Distributor on its Sales into the State?

[1] In this instance, Taxpayer is selling and shipping the bulk of its tobacco products from its out-of-state stock of goods to wholesalers within Washington, who in turn will resell the products to retailers. Taxpayer's Washington wholesaler customers, by virtue of their orders, are causing the tobacco products to be shipped into Washington for sale. Taxpayer is not "bringing" the products into the State of Washington "for sale", but is instead delivering the products to its Washington customers for resale by them.

The long-standing interpretation of the class (a) distributor provisions, buttressed by the language of the statute itself, and the apparent acquiescence of the Legislature, leads us to conclude the prospective reporting instructions issued to Taxpayer's parent to pay the tobacco products tax on its sales to wholesalers in this state were incorrect. We conclude the term "class (a) distributor" was never intended to, and in fact does not, include out-of-state companies selling to Washington wholesalers from stocks of goods located outside the state, despite the establishment of nexus here through the presence of a sales force.

When products are purchased by Washington wholesalers from out-of-state sellers, the Washington wholesalers are class (a) distributors because they are the entities "bringing" the products into the state for further²⁸ sale. Thus, the first wholesaler bringing the tobacco product into this state becomes liable for the tax as a class (a) distributor.

²⁷See *United Parcel Service Inc. v. Department of Revenue*, 102 Wn.2d 355, 361-62, 687 P 2d 186 (1984).

²⁸This determination describes the term "sale" in RCW 82.26.010(3)(a) as a "further sale". This description is used to clarify that an out-of-state seller is not "bringing the product into the state for sale" merely because its Washington sales force facilitates or negotiates a sale to a Washington customer who receives its order via interstate commerce from the seller's out-of-state stock of goods. The term "sale" (or "further sale", as used herein) includes

Is Taxpayer a Class (a) Distributor when it distributes Samples in this State?

[2] When an out-of-state company's sales force brings a stock of tobacco products into this state for further use and distribution as samples, this activity is a "sale" as defined in RCW 82.26.010(6):

"Sale" means any transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, and includes and means all sales made by any person. It includes a gift by a person engaged in the business of selling tobacco products, for advertising, as a means of evading the provisions of this chapter, or for any other purposes whatsoever;

(Emphasis added.). As a result, the company qualifies as a class (a) distributor liable for the tobacco tax on these samples because it is a

. . . person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale.²⁹

Taxpayer's salespersons bring stocks of tobacco products into the state for further distribution to individuals as samples. To that extent, Taxpayer, even though an out-of-state company, qualifies as a class (a) distributor that actually "brings . . . into this state from without the state any tobacco products for sale." This is because it is "selling" from a stock of goods located within this state. This interpretation is supported by the legislative intent "to levy a tax on all tobacco products . . . distributed within this state." RCW 82.26.030. Because individual consumers are not liable for the tobacco products tax, the tax must be paid by Taxpayer if it is to be paid at all. Therefore, we hold that, to the extent Taxpayer brings tobacco products into the state for further distribution as samples to individual consumers, it is a class (a) distributor liable for the tobacco products tax.

Is Taxpayer a Class (c) Distributor?

[3] One of Taxpayer's Washington customers is a nationwide warehouse store which sells to its members, who include both retail businesses and individual consumers. This member-warehouse store is thus both a retailer and a wholesaler. Taxpayer urges that the member-warehouse store resells its tobacco products only to other retail businesses, and never to individual consumers, because the product is packaged in quantities too large to interest individual consumers. The warehouse store is not before us in this ruling, but we take administrative notice that it is highly unlikely that consumer sales of these products are never made. Therefore, it is appropriate to review Taxpayer's tax liability as to its sales to the member-warehouse store in that store's capacity as a retailer. In doing so, it is again important

only a sale, as broadly defined by RCW 82.26.010(6), made by a distributor generally maintaining such a stock of goods in this state.

²⁹RCW 82.26.010(3)(a).

to examine the statute's original intent in the context of constitutional law as it then existed, and as it exists today.

The Appellant's Brief, and the Tax Commission's actual practice of not enforcing the tax against unregistered out-of-state companies without nexus, demonstrate that the majority of class (c) distributors envisioned in the legislation -- those out-of-state distributors who shipped or transported their tobacco products into this state to Washington retailers -- were initially meant to be taxable only if they elected to register and pay..

Thus, under the statute's initial intent, if an out-of-state seller of tobacco products which merely sent salespersons into this state, sold to Washington retailers without electing to register with the Tax Commission, it was not required to pay the tax. In such instances, Washington retailers purchasing from these class (c) distributors were liable for the tobacco products tax as class (a) distributors.

The Washington Supreme Court in Galvin dismissed the unregistered out-of-state class (c) plaintiffs' complaints for lack of standing, so there was no final ruling on whether they could be constitutionally taxed. However, today there is little doubt the tobacco products tax would be constitutionally valid as to out-of-state class (c) distributors sending only a sales force into this state. Commerce clause law has evolved since the tax's enactment in 1959. Today there is no question Washington's tax can be imposed on the receipts from sales of goods shipped through interstate channels to purchasers in Washington if an out-of-state company engages here in activities -- whether rendered by employees or independent contractors -- that are related to its ability to establish and maintain an in-state market for its sales.³⁰

Under current constitutional law, out-of-state companies with salespersons in this state - - whether employees or independent contractors - - have nexus and are required to register and pay the tobacco products tax in accordance with RCW 82.26.100. When the tax is paid by these class (c) distributors, their retailer customers³¹ are relieved of payment. Conversely, out-of-state class (c) distributors who do not engage in nexus-producing activities here cannot be required to register and pay the tobacco products tax on their interstate sales into this state. RCW 82.26.100. If these class (c) distributors do not elect to register and pay the tax, the class (a) retailers "bringing the product into the state for sale" become liable.

In this case, to the extent Taxpayer's tobacco products are purchased by the member-warehouse store for further resale directly to consumers, Taxpayer qualifies as an out-of-state class (c) distributor selling to a class (a) Washington retailer. Because Taxpayer maintains a sales force presence in this state, it is required to register with the Department and pay the tobacco products tax.

³⁰See Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975); Tyler Pipe v. Department of Revenue, 105 Wn.2d 318, 715 P.2d 123 (1986); Chicago Bridge v. Department of Revenue, 98 Wn.2d 814, 659 P.2d 463 (1983).

³¹Who would otherwise be liable as class (a) distributors if their out-of-state vendors had no nexus with this state.

[4] However, when an out-of-state company with nexus sells and ships tobacco products from out-of-state to a dual wholesaler/retailer such as the member-warehouse in this case, the extent to which the purchaser will act as a retailer will be unknown at the time of sale. We recognize that requiring the out-of-state company to register and pay the tax as a class (c) distributor on an undetermined portion of its sales to a dual wholesaler/retailer customer could pose an onerous administrative burden on all parties, including the Department. In such an instance, an out-of-state seller may enter into an agreement with the Department and its dual wholesaler/retailer customer ensuring that the entire tobacco products tax burden will be assumed by that customer as a class (a) distributor on all of the tobacco products it purchases from that out-of-state seller.

Accordingly, we hold that an out-of-state seller is a class (c) distributor on that portion of its sales to a dual wholesaler/retailer to the extent the dual wholesaler/retailer sells tobacco products directly to consumers. Because of the unique difficulty in administering the tax in this circumstance, the Department will permit such a class (c) distributor to shift its tobacco products tax liability, as to those particular sales, to the dual wholesaler/retailer by entering into a written agreement with it and the Department clearly delineating the dual wholesaler/retailer's responsibility to pay the tax as a class (a) distributor.

RULINGS:

1. Out-of-state sellers of tobacco products selling to Washington wholesalers are not included in the RCW 82.26.010(3)(a) definition of distributors when selling from a stock of goods located outside this state, even though they may conduct nexus-producing sales activities in this state. When out-of-state sellers sell to Washington wholesalers from an out-of-state stock of goods, the Washington wholesalers are the class (a) distributors liable for the tax because they are "bringing" the products into the state for further sale.

2. When tobacco products are distributed to individuals in this state as samples, this activity falls within the RCW 82.26.010(6) definition of "sale." An out-of-state company distributing samples from a stock of goods located in this state qualifies as a class (a) distributor liable for the tobacco tax on samples it brings into the state for distribution because it is a "person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale."

3. Out-of-state sellers selling and shipping to Washington retailers from an out-of-state stock of goods are class (c) distributors. Whether they are liable for the tax will depend on the following:

- If an out-of-state class (c) distributor maintains nexus-producing activities in this state, such as a sales force, it will be required to register with the Department and pay the tobacco products tax on its interstate sales to Washington retailers.
- If an out-of-state class (c) distributor does not maintain a sales force or otherwise engage in nexus-forming activities within this state, it cannot be forced to register and pay the tobacco products tax on its interstate sales to Washington retailers. Such class (c) distributors may elect to register and pay the tax. If the class (c) distributor elects not to register and pay the

tax, the Washington retailers to whom it sells will be liable for the tax as class (a) distributors.

- If an out-of-state seller with nexus sells and ships tobacco products from out-of-state to a dual wholesaler/retailer located in Washington, the seller will be a class (c) distributor liable for the tobacco tax on this sale to the extent the product is resold at retail by that buyer. Because this amount is not likely to be immediately known, requiring such a class (c) distributor to pay the tax on an undetermined portion of its sales to a dual wholesaler/retailer customer would pose an onerous administrative burden on all parties, including the Department. In such an instance, the out-of-state seller may enter into an agreement with the Department and its dual wholesaler/retailer customer ensuring that the entire tobacco products tax burden will be assumed by that customer as a class (a) distributor on all of the tobacco products it purchases from that out-of-state seller.

Therefore, under the facts as set forth above, Taxpayer:

- . . . to the extent it sells to Washington wholesalers, is not a class (a) distributor because it is an out-of-state company and sells from a stock of goods outside this state, even though it maintains a sales force within this state and therefore has taxable nexus.
- . . . to the extent it brings its tobacco product stock into this state for further distribution as samples by its sales force, is properly considered to be taxable as a class (a) distributor because it is distributing from a stock of goods located in this state.
- . . . to the extent Taxpayer sells and ships its tobacco products from out-of-state to a dual retailer/wholesaler located in Washington, it is taxable as a class (c) distributor on that portion of its product which will be resold in the buyer's capacity as retailer. For the administrative convenience of all parties, however, Taxpayer and the dual wholesaler/retailer may elect to shift this particular liability by entering into an agreement with the Department designating the dual wholesaler/retailer as the responsible party for payment of the tobacco products tax on all of the tobacco products it purchases for resale at retail.

This ruling will be effective on April 1, 1998, and will operate prospectively.

This legal opinion may be relied upon for reporting purposes and as support of the reporting method in the event of an audit. This ruling is issued pursuant to WAC 458-20-100(9) and is based upon only the facts that were disclosed by the taxpayer. In this regard the department has no obligation to ascertain whether the taxpayer has revealed all of the relevant facts or whether the facts disclosed were actually true. This legal opinion shall bind this taxpayer and the department upon those facts. However, it shall not be binding if there are relevant facts which are in existence but not disclosed at the time this opinion was issued; if, subsequently, the disclosed facts are ultimately determined to be false; or if the facts as disclosed subsequently change and no new opinion has been issued which takes into consideration those changes. This opinion may be rescinded or revoked in the future; however, any such rescission or revocation shall not affect prior liability and shall have a prospective application only.

Dated this 30th day of January, 1998.