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BEFORE THE DIRECTOR
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. 86-117A
. . .)	Registration No. . . .

[1] **RULE 145:** LOCAL SALES TAX -- NEXUS -- PLACE OF BUSINESS -- SOLICITATION. For purposes of determining local sales tax jurisdiction in situations where alternative nexus contacts exist at different places in this state, solicitation activities at the place where the goods are delivered to buyers will prevail over the mere presence of an office elsewhere in the state, from which mere credit checks are performed.

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:

By a timely written petition dated April 24, 1986 the taxpayer appealed to the Director of the Department from the findings and conclusions of Determination No. 86-117. That Determination was issued, without a hearing, on April 4, 1986. It sustained the assessment of local retail sales tax under chapter 82.14 RCW upon retail sales delivered by the taxpayer in southwest Washington from its division located at Portland, Oregon. The local tax rate pertinent for sales in Seattle, Washington, where the taxpayer's corporate headquarters is located, was applied and sustained. The taxpayer has appealed.

FACTS AND ISSUE:

Faker, Sr. A.L.J.--Determination 86-117 found probative evidence to establish that the taxpayer provided nexus for its sales in this state from two, independent sources. The Seattle located business office approved credit applications of the taxpayer's buyers in southwest Washington. Sales calls and other sales related activities were conducted in southwest Washington with customersáby nonresident employees of the taxpayer, working out of the Portland division. There is no factual dispute involved in this case.

Issue:

What is the appropriate local taxing jurisdiction for retail sales which result from independent, sales related nexus activities occurring in more than one local taxing jurisdiction of this state?

TAXPAYER'S EXCEPTIONS:

The taxpayer does not challenge the jurisdiction of this state to impose its b&o tax and retail sales tax upon the sales in question. Rather, the taxpayer asserts that the protested portion of Tax Assessment . . . results from the incorrect, and higher rated local tax prevailing in the City of Seattle being assessed, rather than the correct, lower rated local taxes prevailing in southwest Washington. The taxpayer asserts that Determination 86-117 misconstrues WAC 458-20-145 and argues that this rule was never intended to support the unreasonable result achieved by the Determination. The taxpayer's petition to the Director includes the following pertinent arguments:

> Rule 145 . . . provides illustrations of what should happen when goods originate outside the state. These illustrations are in (B)(1) and (2). The illustration in (B)(1) must be examined because it contains the basis for the conclusions reached in the Determination currently being appealed. The illustration in (B)(1) applies to sales where the state B&O tax is applicable but goods are delivered into Washington from outside the state. It is here that the intention of Rule 145 becomes extremely important. Illustration (B)(1) provides:
>
> > (1) When the state business and occupation tax applies to a sale in which the goods are delivered into Washington from a point outside the state this means a local in-

> state facility, office, outlet, agent or other representative even though not formally characterized as a "salesman" of the seller participated in the transaction in some way, such as by taking the order, then the location of the local facility, etc., will determine the place of sale for purposes of the local sales tax. However, if the seller, his agent or representative maintains no local in-state facility, office, outlet or residence from which business in some manner is conducted, the local tax shall be determined by the location of the customer.

It is the unstated assumption of Rule 145 in illustration (B)(1) that the taxpayer/seller is headquartered outside of the state of Washington. This illustration provides that for such taxpayers, if they have an in-state facility participating in the sales transaction then the location of that facility will determine the applicable local sales tax rate. However, if the taxpayer has no in-state facility from which business is conducted, then the location of the customer will determine the applicable local tax rate. The clear intention was to make state and local sales taxes applicable to in-state sales made by out-of-state taxpayers. This was to protect the local taxpayers from unfair competition resulting from tax rate differences. Clearly, Rule 145 did not contemplate the facts of the current case--a taxpayer headquartered in one part of the state that makes in-state sales in southwest Washington from its out-of-state division. The Department of Revenue has ignored the very important intention and purpose of Rule 145 in very strictly applying the language in illustration (B)(1) to the facts in this case. The Department of Revenue very simply concludes that first, goods originate out of state, second, . . . Company has an in-state facility in Seattle, and third, therefore Seattle local sales tax rates apply to sales made in southwest Washington originating in Portland. This rather simple conclusion has the awkward and unfair result of taxing an in-state company at a higher tax rate than an out-of-state company where both would be making sales in southwest Washington of goods originating out-of-state. Certainly this was not

> the intention of Rule 145. When one considers the intention of Rule 145, to equalize competition between in-state and out-of-state companies, the Department of Revenue has reached an erroneous conclusion. Quite frankly, it appears as if the current facts were not contemplated in the drafting of Rule 145.
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> Form Over Substance. A basic tenet of both federal and state tax law is that one must not exalt form over substance. In Determination 86-117 it appears that is happening. Two very slight and very empty changes in form would eliminate the tax issue here. As we understand the Department of Revenue's reasoning, if . . . Company opened a small office in southwest Washington, staffed with one of its people down there, then the Department of Revenue would agree that southwest Washington sales tax rates would apply to the sales here at issue. Likewise, if . . . Company incorporated its Portland division in Oregon as a separate company, then we understand the Department of Revenue would again agree the southwest Washington local sales tax rates would apply because that company would have no in-state facility, agent or other representative. That company could still hire . . . Company, for a fee as was the case during the period under audit, for certain accounting, clerical or credit services. However, these changes would be changes largely of form and not of substance, and significant tax changes should not result from such minor and formalistic changes in current . . . procedures. Instead, the true intent of Rule 145 should be examined as expressed above. If one makes such an examination, one concludes that the southwest Washington sales tax rate should apply to the sales at issue.

Because of our decision in this case it is unnecessary to expressly include the taxpayer's additional contentions with respect to (a) oral instructions purportedly provided by Department agents and (b) policy questions concerning the economic unfairness of the conclusions of Determination 86-117.

DISCUSSION:

The provisions of WAC 458-20-145 (Rule 145) are set forth, at length, in Determination 86-117 and need not all be restated here. The most pertinent provision is illustration (B)(1) included in the TAXPAYER'S EXCEPTIONS portion above. It says:

> When the state business and occupation tax applies to a sale in which the goods are delivered into Washington from a point outside the state this means a local in-state facility, office, outlet, agent or other representative even although not formally characterized as a "salesman" of the seller participated in the transaction in some way, such as by taking the order, then the location of the local facility, etc., will determine the place of sale for purposes of the local sales tax. (Emphasis ours.)

[1] The above underscored part of the rule, referring to "local facility, etc.," refers directly back to the nexus contacts mentioned earlier in the same provision, i.e., "local in-state facility, office, outlet, agent or other representative . . . ." The crux of this provision is that the jurisdiction for local tax purposes on sales delivered here from points outside this state will be determined by the place where nexus activity occurs within this state. However, the audit report in this case and Determination 86-117 ignore the "etc.," provision, and conclude that the "place of business" is always the controlling factor. In fact, Determination 86-117 states:

> It is the Department of Revenue's position that WAC 458-20-145, Rule 1: B.1., for purposes of local sales tax applies only when the out of state vendor has not established a place of business in the local jurisdiction in which delivery of the sold goods is made. (Emphasis ours.) Determination 86-117 p.3.

We find this to be an overly limiting conclusion and thus to be a misconstruction of the rule statement. The rule provision includes not only a place of business or office as being dispositive nexus contact, but also the activities of agents or sales representatives in the local jurisdiction. Thus, though the rule does not expressly deal with the factual situation, it contemplates that nexus can exist in more than one local jurisdiction relative to the same sales transactions. That is precisely what occurred in this case. There were sales solicitations and other activities in southwest Washington and also an office in Seattle from which credit applications were checked. Rule 145 could be more

artfully drawn to specifically treat such situations and will be further evaluated for amendment. In the interim, however, there is administrative precedent from unpublished appeal rulings by the Department supporting the conclusion that the sales solicitation and related activities prevail over a mere physical office location elsewhere in this state for determining local tax jurisdictions. It is the performance of these direct, stimulative sales activities which significantly enable the seller to make sales in this state. Within the spirit and intent of Rule 145, when alternative nexus contacts exist in this state in connection with the same sales, solicitation activities at the place where the goods sold are delivered to buyers will be prioritized over the mere location of an office elsewhere in this state from which minimal sales related functions (credit checks) are performed.

Grey areas abound in matters of nexus. As the Department's prior appeal ruling concludes:

> In interstate sale situations where an out-of-state vendor has widespread local activity or nexus, the existence of nexus, irrespective of degree, at point of delivery of the goods is dispositive of the local sales and public transportation tax rates as well as the recipient of such taxes. (Emphasis ours.)

Uniformity, consistency, and notice to taxpayers are the benchmarks of sound tax administration. They dictate the application of the above guidelines in this case and all cases of taxpayers similarly situated.

DECISION AND DISPOSITION:

The taxpayer's petition is sustained. The sales included in Schedule IV of the audit report will be adjusted to reflect the prevailing local tax rates for southwest Washington rather than Seattle for those sales in question. An amended balance due will be computed and the taxpayer will be notified in writing.

DATED this 7th day of April 1987.