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

In the Matter of the Request)	D E T E R M I N A T I O N
For Ruling of Tax Liability of)	
)	No. 87-69
)	
)	Registration No. . . .
. . .)	
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)	
and)	
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. . .)	Registration No. . . .

[1] **RULE 193B and RCW 82.12.040:** NEXUS -- DISASSOCIATION -- B&O TAX -- RETAIL SALES TAX -- USE TAX. An out-of-state business which is registered in Washington and has a resident agent here is required to collect retail sales tax on all retail sales. B&O tax is due on all sales, except those which can be disassociated.

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.

INTRODUCTION:

The taxpayer, an out-of-state business, has requested a written opinion and ruling of tax liability. It believes that it has no obligation to collect Washington retail sales tax. It also believes that its business and occupation tax liability is limited to those sales where the orders were taken and written in Washington State.

FACTS:

Normoyle, A.L.J.--The taxpayer, an out-of-state company which is registered to do business in Washington, sells lamps and other items to Washington individuals and businesses.

According to the taxpayer, it does not have a place of business or a warehouse in Washington.

Sales are generated from three sources:

1) An agent resides in Washington. Another resides in Oregon. Both visit customers in Washington and accept orders. Both also accept orders by telephone; or

2) A Washington customer calls the taxpayer at its out-of-state office and places an order; or

3) The Washington customer visits a taxpayer's showroom, out of state, and places an order there.

The taxpayer's request for an interpretation of its tax liability, dated October 31, 1986, was answered by the Taxpayer Information and Education section of the Department of Revenue. In short, the taxpayer was advised that, regardless of the presence or absence of an in-state activity on any given sale, the taxpayer was required to collect sales or use tax from all persons to whom goods are sold for use in this state. The taxpayer disagrees with that interpretation and requests a ruling by this Department. We do so under the authority of Washington Administrative Code (WAC) 458-20-100(18). We infer from the taxpayer's correspondence that it makes both wholesale and retail sales.

ISSUE:

Is a nonresident taxpayer who is registered to do business here and has a resident agent in Washington, but stores no goods here and has no business office here, required to collect retail sales or use tax on all goods sold for use in this state?

DISCUSSION:

We answer the above question in the affirmative, based on the language of WACá458-20-193B (Rule 193B) and RCW 82.12.040.

The legislature has directed the Department of Revenue to enact administrative rules to implement certain tax statutes. Rule 193B sets forth the tax consequences of the sale of goods originating out of state to persons in Washington. It is a duly adopted rule and has the force of law unless declared invalid by a judgment of a court of record, from which the Department does not appeal. RCW 82.32.300. Ruleá193B sets

the limits, under the United States Constitution, on this state's ability to impose excise taxes upon sales of goods originating in other states.

The rule has two sections, the first dealing with business and occupation ("B&O") tax liability for wholesalers and retailers under RCW Chapter 82.04, and the second with retail sales and use taxes under RCW Chapters 82.08 and 82.12. In order to understand this Determination, it is important to recognize the distinction between the two sections of the rule. A copy of the rule is attached.

B&O TAX--Under the "B&O Tax" section, retailing or wholesaling B&O liability is determined by analyzing the connection with or "nexus" to this state by the out-of-state business. The rule states that the seller subjects itself to Washington taxing jurisdiction, that is "nexus" is established, if 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." Six specific examples of activities which establish nexus are given. Any one of them is sufficient. Numbers three and five clearly apply to this taxpayer. The third example reads: "The order for the goods is solicited in this state by an agent or other representative of the seller." The fifth example reads: "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'."

Because there is sufficient nexus with this state, we conclude that the taxpayer was properly required to register with the Department of Revenue.

Once nexus is established, the general rule is that all sales transactions are subject to B&O tax liability. Put another way, nexus for one sale is nexus for all sales. An exception to this general rule applies only to those particular sales where the seller can establish that the sale was not associated in any way with the in-state activity which created the nexus. This burden of proof was addressed by the United States Supreme Court in Norton Co. v. Illinois, 340 US 534, at 537-538 (1951), where the court stated:

> 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. This burden is never met by showing a fair difference of opinion which as an original matter might be decided differently. . . . (Emphasis added.)

In summary, the taxpayer must pay B&O tax on its wholesale sales, except only those sales which the taxpayer can affirmatively show were disassociated from the activity which created the nexus. To the extent that specific sales cannot be "disassociated," the taxpayer's statement in its letter of October 31, 1986, that "it appears that only orders taken and written in the state of Washington are (B&O) taxable," is not correct.[1] As examples only, we provide the following:

No disassociation (taxable): Because of prior contacts between a customer in Washington and the in-state agent (or the traveling Oregon agent), the customer calls the main office, out of state, and places an order.

Disassociation (not taxable): Without any prior contacts with an agent or other representative of the taxpayer, a Washington customer attends a showroom in Oregon and places an order there.

It should be kept in mind that these examples relate only to the B&O tax liability. Under each example, and in fact on all sales at retail, this taxpayer must collect and remit retail

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[1] The taxpayer's agents do not appear to qualify as "direct seller's representatives," under RCW 82.04.423 and WAC 458-20-246, copies of which are attached. If all sales in Washington were through "direct seller's representatives," no B&O tax would be due. Even if that were the case, however, the retail sales tax would still have to be collected, either by the taxpayer or the direct seller's representative. See Rule 246

sales tax, as it is shown in the next section of this Determination.[2]

RETAIL SALES TAX--The second section of Rule 193B is the "sales and use tax" section. It is this section which has caused confusion by the taxpayer. There are three main parts, which we will label "collection of retail sales tax where B&O tax applies," "jurisdictional standards," and "duty to collect retail sales tax even if no local activity on any given sale." Each will be discussed in turn.

The "collection of retail sales tax where B&O tax applies" portion of the rule is as follows:

> Retail sales tax must be collected and accounted for in every case where business and occupation tax is due as outlined above.

This part of the rule is somewhat confusing, if not read in conjunction with the rest of the rule. It is a true statement, but retail sales tax is also due in some circumstances even if no B&O tax is due. An example is a sale which is "disassociated" for B&O tax purposes. Retail sales tax collection may still be required, due to the "jurisdictional standards" and "collection of retail sales tax where B&O tax applies" sections, discussed below.

The rule provides as follows, under the heading "JURISDICTIONAL STANDARDS":

> A vendor is required to pay or collect and remit the tax imposed by Chapter 82.08 or 82.12 RCW if within this state he directly or by any agent or other representative:
>
> (1) Has or utilizes an office, distribution house, sales house, warehouse, service enterprise, or other place of business; or
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> (2) maintains a stock of goods; or
>
> (3) regularly solicits orders whether or not such orders are accepted in this state, unless the activity in this state consists

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[2] See also, RCW 82.12.040, which requires retailers to collect the use tax.

solely of advertising or of solicitation by direct mail; or

(4) regularly engages in the delivery of property in this state other than by common carrier or US mail; or

(5) regularly engages in any activity in connection with the leasing or servicing of property located within this state.

Note that this paragraph is in the disjunctive, in that the word "or" is used. A taxpayer whose activities fall within any of the examples meets the jurisdictional standard. Because example number three applies to this taxpayer, it is unimportant that some or all of the other examples do not apply.

The third section in our analysis, the "collection of retail sales tax where B&O tax applies" part, states as follows:

> All vendors who are registered with the Department of Revenue are required to collect use tax or sales tax from all persons to whom goods are sold for use in this state irrespective of the absence of local activity on any given sale.

Thus, the mere act of registration with the Department is sufficient to allow the state to require that the out-of-state business collect use tax or sales tax for goods to be used in this state.

When all parts of Rule 193B are read together, a taxpayer must collect retail sales tax if:

a) B&O is due; or

b) any one of the jurisdictional standards applies; or

c) the taxpayer is registered with this state.

CONCLUSION:

Based on the information supplied by the taxpayer, we conclude that there is sufficient nexus with this state to impose B&O tax, except on those particular sales which can be shown to be disassociated from the activity which created the nexus. We

also conclude that the retail sales tax must be collected by the taxpayer for all goods sold for use in Washington.

DATED this 6th day of March 1987.