Cite as 2 WTD 439 (1987)

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

In the Matter of the Petition For Correction of Assessments of)		D E T E R M I N A T I O N
	)	No. 87-98
	)	
. . .	)	Registration No. . . .
	)	Tax Assessment Nos. . . .
	)	

[1] **RULE 194:** BUSINESS AND OCCUPATION TAX -- NEXUS -- SERVICES PERFORMED FOR OUT-OF-STATE CLIENTS BY IN-STATE OFFICES OF A BUSINESS BASED OUT OF STATE. An out-of-state audience research firm is subject to tax on activities attributable to its in-state offices. The firm set up temporary offices in Washington from which it conducted telephone surveys for an out-of-state client. The data from the surveys was sent to the firm's home office for compilation, analysis and preparation of a report. The activities taking place in Washington are business and are sufficient nexus to tax.

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.

TAXPAYER REPRESENTED BY: . . .
. . .
. . .
. . .

DATE OF HEARING: November 20, 1985

NATURE OF ACTION:

As the result of an office audit, two tax assessments were issued against the taxpayer. The audit covered the period from April 1, 1977 through Decemberá31, 1984. The taxpayer has petitioned for a correction of the assessments.

FACTS AND ISSUES:

Potegal, A.L.J.--The taxpayer is in the business of studying audience reactions to proposed television commercials and programs. This is accomplished in part through the collection of test data by part-time workers at offices located throughout the country. Two of these offices are located in Washington. These offices operate on an intermittent basis.

The employees telephone subscribers to cable television systems to ask them if they will watch a particular program and answer a questionnaire. After the program has been shown, the employees telephone the subscribers who have agreed to participate and ask them questions from a questionnaire sent from the taxpayer's Los Angeles office. The raw responses to the questionnaire are sent back to Los Angeles. In Los Angeles the responses are compiled, analyzed and used to prepare a report to the taxpayer's client.

Sales of the taxpayer's services are procured only from its California and New York offices. The contracts that give rise to the interviewing activity which is conducted in Washington are solicited, negotiated and signed exclusively in New York and California. All marketing and administrative functions are likewise performed only in those two offices.

The taxpayer had three Washington clients during the audit period. The taxpayer's Washington offices had nothing to do with services performed for the Washington clients. The Washington offices were only used for one client. That client was based in New York.

The Department assessed Service classification business and occupation tax against the taxpayer. The amount of the taxpayer's income which was subjected to tax was determined by dividing the taxpayer's Washington expenses by its total expenses and applying that ratio, expressed as a percentage, to its total income.

The taxpayer contends that there is insufficient nexus between it and Washington to subject it to business and occupation tax. The taxpayer asserts that it is not providing services in Washington because, with the minor exception of three Washington clients, it has no clients in this state. Everything that takes place in Washington is for the benefit of a client in New York.

In support of its position the taxpayer relies on B. F. Goodrich v. State, 38 Wn.2d 663, 231 P.2d 325 (1951), Rule 193D, Rule 194 and Excise Tax Bulletin 133.04.194.

DISCUSSION:

The sweep of Washington's business and occupation tax is extremely broad. The tax is imposed on "every person . . . for the act or privilege of engaging in business activities." RCW 82.04.220. "Business" is defined by RCW 82.04.140 to be "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly."

Establishing offices, hiring employees and having those employees telephone cable subscribers are all activities. The taxpayer engages in these activities to enable it to provide to its client an analysis of audience reaction to the client's programming. The activities benefit the taxpayer's client because they contribute to a service which the client wants. The activities also benefit the taxpayer because it is paid for conducting them. Clearly, the taxpayer was engaged in business for purposes of the business and occupation tax under the terms of the statutes quoted above.

We believe that there is sufficient nexus to support taxation of the taxpayer's activities in this state. Nexus is a concept used to help determine if state taxation of an interstate business meets the requirements of the due process and commerce clauses of the United States Constitution. It requires that there be some minimal connection between the interstate taxing activities and the taxing state. Nexus exists if a corporation avails itself of the substantial privilege of carrying on business within a state. Only if the activities in a state are in no way connected with the business taxed is there an absence of nexus. See Chicago Bridge v. Dept. of Revenue, 98 Wn.2d 814, 659 P.2d 463 (1983). Here, by setting up an office, hiring employees and having those employees perform certain tasks, the taxpayer has availed itself of the substantial privilege of engaging in business in Washington. Furthermore, the activities within the state are exactly what are being taxed.

The taxpayer's reliance on B. F. Goodrich and Excise Tax Bulletin 133.04.194 is misplaced. Those authorities deal with the application of business and occupation tax to the business of making sales of goods to customers in Washington. The local activities discussed in the case and bulletin were found

not to be connected with the activity being taxed--the making of sales. On the other hand, the activity being taxed in this appeal is the provision of a service. The taxpayer's local activities are not merely connected with the provision of a service, they are in fact that service, or at least a portion of that service.

We also believe that the taxpayer has misinterpreted the meaning of Rules 193D and 194.

From Rule 193D the taxpayer quotes this example of exempt income:

> (3) Income from services rendered by an out-of-state branch or office of the taxpayer regularly maintained outside the state is exempt. (See WAC 458-20-194.)

The taxpayer contends that the services it rendered were all handled outside of Washington. We agree that some services were rendered outside of Washington by out-of-state offices of the taxpayer. The income from that portion of its services rendered out of state is not taxable under Rule 193D and in fact it has not been taxed. As explained earlier, however, a portion of the taxpayer's services were rendered from offices in Washington. Only income from that portion of its services which were rendered in this state was subjected to tax.
The amount subject to tax was determined in accordance with this portion of Rule 194:

> Persons engaged in a business taxable under the service and other business activities classification and who maintain places of business both inside and outside this state which contribute to the performance of a service, shall apportion to this state that portion of gross income derived from services rendered by them in this state. Where it is not practical to determine such apportionment by separate accounting methods, the taxpayer shall apportion to this state that proportion of total incomeáwhich the cost of doing business within this state bears to the total cost of doing business both within and without this state.

The taxpayer did not present information enabling the Department to apportion income based on separate accounting methods. Therefore, precisely as required by the rule, income was apportioned on a cost of doing business basis.

The taxpayer asserts that another portion of Rule 194 makes it clear that services must be provided to Washington residents in order for the tax to apply to persons domiciled outside of Washington. The language in question states:

> Persons domiciled outside this state who . . . render services to others herein, are doing business in this state. . . . (Emphasis added.)

Apparently, the taxpayer believes that "herein" modifies "others." We think "herein" refers to "render services." Thus, if the services are performed in Washington, regardless of the recipient's location, they are subject to tax. The taxpayer's interpretation would tax services even if they were performed out of state as long as the recipients were inside Washington. The Department's interpretation is consistent with the general intent of the business and occupation tax to tax business activities taking place inside the state.

DECISION AND DISPOSITION:

The taxpayer's petition is denied. Because the due dates of the assessments have been extended for the sole convenience of the Department, interest on the assessments will be waived for the period from Februaryá20, 1986 through the new due dates. Tax Assessment No. . . . in the amount of $ . . . , plus unwaived interest of $ . . . , for a total of $ . . . , is due for payment by April 30, 1987. Tax Assessment No. . . . in the amount of $ . . . , plus unwaived interest of $ . . . , for a total of $ . . . , is also due for payment by April 30, 1987.

DATED this 31st day of March 1987.