Cite as 2 WTD 397 (1987)

BEFORE THE DIRECTOR
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessments of	)	F I N A L D E T E R M I N A T I O N
	)	No. 86-161A
. . .	)	Registration No. . . .

[1] **RULE 193B:** SALES OF GOODS ORIGINATING IN OTHER STATES -- NEXUS -- PLACE OF DELIVERY.
Out-of-state sellers with presence in this state (nexus) who are themselves obligated to get the goods sold to buyers within this state are subject to b&o tax upon such sales.

[2] **RULE 103:** TIME AND PLACE OF SALE -- DELIVERY -- PHYSICAL POSSESSION -- U.C.C.
Rule 103, rather than the Uniform Commercial Code, governs both the "time" and "place" of sale for tax purposes. Delivery of goods under the Rule 103 provisions connotes the transfer of physical possession of the goods to the buyer or another person on behalf of the buyer.

[3] **RULES 193B AND 103:** DELIVERY -- RISK OF LOSS -- TRANSFER OF POSSESSION.
Delivery of physical possession of goods sold, to the buyer in this state is dispositive of the question where a sale occurs for tax purposes, not the fact that "risk of loss" may pass to the buyer outside this state.

[4] **RCW 82.32.060:** STATUTE OF LIMITATION'S -- TAX REFUNDS -- CREDITS -- OFFSETS.
There is no distinction at law between a request for refund or credit of taxes overpaid and a request for offset or adjustment of deficient taxes assessed for

payment. All such requests are governed by the statute of limitations of RCW 82.32.060.

[5] INVENTORY TAX CREDITS -- STATUTE OF LIMITATIONS. The former provisions of RCW 82.04.442 (repealed in 1983) for the taking of inventory tax credits were governed by the provisions of RCW 82.32.060 establishing the period of limitation for using such credits.

[6] **RCW 82.32.060:** OFFSETS IN LIEU OF TAX CREDITS. RCW 82.32.060 formerly provided for offsets in lieu of unused tax credits against tax deficiencies discovered and assessed for periods beyond the statute of limitations, but was amended in 1979 to repeal such offset provisions.

NATURE OF ACTION:

The taxpayer was assessed for Wholesaling business and occupation tax measured by gross receipts from wholesale sales to buyers in this state for the periods from 1976 through 1979 and from 1980 through the first quarter of 1984 under separate, respective tax assessments. The taxpayer's request for a reduction of the tax deficiency for the period from 1976 through 1979, pursuant to RCW 82.04.442 (Inventory tax credit) was denied. Determination 86-161 sustained the b&o tax assessments in full and affirmed the denial of any adjustment for tax paid upon business inventory. The taxpayer has appealed.

FACTS AND ISSUES:

Faker, Sr. A.L.J.--We have now thoroughly reviewed your petition of June 4, 1986 which appeals from the findings and conclusions of Determination No. 86-161. That Determination was issued on May 20, 1986 after a hearing conducted in Seattle, Washington on October 24, 1985. Our review of the petition, and of the taxpayer's excise tax file, the audit report, and the original Determination reveals that sufficient information is available from which the issues can be finally resolved without recourse to a further hearing. Accordingly, pursuant to the discretionary provisions of RCW 82.32.160 and WAC 458-20-100, the request for further hearing is denied.

The controlling facts in this case are not in dispute. Those facts, together with the audit and tax assessment details are fully reported in Determination 86-161 and are not restated here. The sales sought for exclusion from business and

occupation tax are those designated by the taxpayer as "shipment contracts," where the taxpayer is not obligated to get the goods delivered to the buyers in this state.

The taxpayer paid tax upon business inventories in this state from 1976 through 1979, but because it was not registered with the Department of Revenue and reporting b&o tax during that period, no inventory tax credits were taken against b&o tax liability. The taxpayer now seeks such credits as an adjustment to the b&o tax assessed. There are two issues in this case.

Issue No. 1.

Does business and occupation tax apply to gross receipts from sales of goods shipped, f.o.b. seller's out-of-state location, to buyers in this state, where the buyer bears the risk of loss in transit, but the seller bears the expense of delivery?

Issue No. 2.

Does RCW 83.32.060 (the statute of limitation for tax refunds or credits) apply to prohibit the inventory tax credits of RCW 82.04.442, where there has been no overpayment of any excise tax resulting in any claimed refund or credit?

TAXPAYER'S EXCEPTIONS:

The taxpayer asserts that Determination No. 86-161 contains an inappropriate test for determining the "place of sale" when goods are shipped from out-of-state sellers' locations to buyers in this state. Determination 86-161 explains and applies the provisions of WAC 458-20-193B (Rule 193B) and WAC 458-20-103 (Rule 103). The taxpayer's petition contains the following relevant contentions:

> This appeal is based on the legal interpretation to be given to the undisputed facts concerning the sales made by . . . from its out-of-state warehouses to Washington customers where the goods are delivered by common carrier selected by . . . . . contends that under applicable provisions of the commercial law and the contract of sale, the sale occurs when . . . delivers the goods being sold to the common carrier. For all relevant purposes, the burdens and benefits of ownership pass at the loading dock of the out-of-state warehouse--not when the carrier completes transportation of the goods to the purchaser in Washington. Since Washington may

> not constitutionally tax sales taking place outside its borders, such sales are exempt from Washington excise taxes.
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> . . .
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> The heart of . . .'s appeal is that the administrative law judge employed the wrong standard to determine the place the sale in question occurred. The failure is perhaps understandable in light of the silence of the excise tax regulations on this issue. Rule 103 (WAC 458-20-103) merely states that a sale occurs in Washington "when the goods sold are delivered to the buyer in this state . . ." regardless of where title passes. Unfortunately, the rule fails to identify what constitutes delivery to the buyer. Clearly, physical transportation of the goods to a Washington site does not cause a sale to be taxable because such a rule would include cases where the buyer sends his own truck to pick up the goods or cases where the buyer engages the carrier--both examples that are clearly sales outside the State of Washington.
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> Delivery, then, must mean more. . . . submits that delivery must mean the transfer of the burdens and benefits of ownership of the goods being sold. . . .

The taxpayer then cites provisions of the Uniform Commercial Code concerning the liabilities of sellers and buyers, as between themselves, involved in sales and delivery transactions. It urges that the time and place of sale and delivery for taxation purposes are also controlled by the U.C.C. provisions. The petition then continues:

> The net effect of this statutory scheme is to make clear that the seller completes delivery to the buyer under a shipment contract at the point of shipment, even though the buyer has not yet physically received the goods.
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> In fact, this same test is used in Rule 193A (WAC 458-20-193A) in defining when a sale by a Washington seller to an out-of-state purchaser occurs in Washington. Under Rule 193A, a sale occurs outside of Washington--in the state of destination--only if th4e seller agrees to and does deliver the goods to

the purchaser outside the state. If the seller uses a common carrier to transport the goods, the contract must make clear that the goods are being transported at the seller's risk and expense. Failure to satisfy those requirements means the sale occurred in Washington--the state of origin--and is taxable under the retailing or wholesaling classification there. These requirements are referred to in the commercial law as "destination contracts," i.e., contracts under which the seller is required to transport the goods to a place and tender delivery there at the seller's risk and expense. See RCW 62A.2-319(1)(b) and RCW 62A.2-503(3).

Applying Rule 193A as if Washington were the destination state would make the sales at issue taxable in the state of origin--not in the state of destination. . . . submits that the Department must apply the same tax rule to sales to Washington customers by out-of-state sellers as it applies to sales to out-of-state customers by Washington sellers. It was in support of that contention that . . . cited and continues to cite the statement by the United States Supreme Court that "a tax must have 'what might be called an internal consistency--that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." Armco, Inc. v. Hardesty, ____ U.S. ____, 81 L.Ed.2d 540, 546-547 (1984). The administrative law judge apparently understood this citation as a challenge to the constitutionality of the excise tax. . . . is not challenging the tax's constitutional status. Rather, it simply argues for a consistent rule to determine when a sale occurs in the state of origin or in the state of destination.

. . .

The administrative law judge conceded that . . . shipped its goods at the risk of the buyer, but not at the buyer's expense. . . . submits that, except in destination contracts described in Rule 193A, who pays the expense is irrelevant in determining where a sale occurs. As discussed above, the real benefits and burdens of ownership are determined by the passage of risk of loss. Who bears the expense

> of shipping is simply a matter of negotiation of the ultimate price of the goods, since the seller will always pass the cost through. If the buyer agrees to pay the freight, the seller will charge less for the goods.
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> . . .
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> Secondly, the administrative law judge is confusing the issues. The issue here is not whether the buyer's payment of transportation expenses are taxable to the seller (as the Determination suggests by the citation of RCW 82.04.070 and Rules 110 and 111). Rather, the issue is whether seller's payment of those expenses converts a sale from one occurring at the place of origin to one in the state of destination where the risk of loss passes to the buyer at the state of origin. Under Rule 193A, the sale would be in the state of origin under such circumstances, because the benefits and burdens of ownership as well as risk of loss passed in the state of origin. . . . submits that the same result must obtain under Rule 193B.
>
> Rule 110 is consistent with this analysis. Delivery costs incurred by the seller prior to the completion of sale are the seller's expenses and if reimbursed by the buyer, the seller is taxable on the reimbursement. But reimbursement after completion of the sale of actual freight and delivery costs advanced after purchase are deductible from the selling price and thus not taxable. Rule 110 is clear authority that seller's payment of freight and delivery costs does not--of itself--determine when or where a sale has occurred. That issue can be decided only by reference to the passage of burdens and benefits of ownership.

With respect to the second issue, the taxpayer argues that it should not be barred by the statute of limitations (RCW 82.32.060) from claiming entitlement to inventory tax credits for property tax paid upon its business inventory for the years 1976 through 1979. The taxpayer contends that the statute of limitations applies only to claims for refund or credit because of overpayment of excise tax. It further contends that its entitlement to an adjustment of the b&o tax deficiency assessment by the offset of inventory tax credits for prior years is distinguishable from a claim for a refund

or credit of excise taxes "overpaid" for prior years. In the case of the former, the taxpayer argues that the statute of limitations does not apply on its face. The petition states, in pertinent parts:

> . . . Under RCW 82.32.060, a refund can be had only for taxes paid "in excess of that properly due." In the present case, no excise taxes at all had been paid at the time of examination. The only taxes paid were property taxes assessed under Title 84 of the Washington Revised Code by the Spokane County Assessor. Since no excise taxes have been paid, no refund or credit of excise taxes could be sought.
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> What is being sought here is a correct assessment of an excise tax deficiency for the years 1976 through 1979. It is apparent that the inventory tax credit afforded by RCW 82.04.442 (since repealed) was an amount necessary to compute the correct amount of excise taxes and had an effect similar to exemptions and deductions under Chapter 82.04. In other words, the inventory tax credit is a necessary part of the calculation of the amount of the deficiency. It is not a refund or credit contemplated by RCW 82.04.060 precisely because it is not a credit based on overpayment of excise taxes as required for the provisions of RCW 82.04.060 (including the four-year statute of limitations) to come into play.
>
> This proposition can be demonstrated by a simple hypothetical. If . . . had made no sales and had therefore paid no wholesaling tax in any of the years in question (1976 through 1979), . . . could not have recovered a refund or credit under RCW 82.32.060 even though it paid inventory tax. . . . would not have overpaid excise taxes in that year because if owed no taxes and paid none. The inventory tax credit would have been available--if at all--only against excise taxes imposed by Chapter 82.04 in the same year. If no excise taxes were due, the inventory tax credit would be wasted.
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> Since Section 82.32.060 does not apply to the credit provided by Section 82.04.442, it follows that the inventory tax credit is not barred by the four-year statute of limitations, but is available to reduce the amount of the tax computed for the years in question.

DISCUSSION:

Issue No. 1.

Determination 86-161 applies the provisions of Rules 193B and 103 to the controlling facts of this case. The first rule governs the taxability of sales of goods originating outside this state which are sold and delivered (shipped) by the seller to buyers within this state. The second rule governs both the time and place of sale for determining tax liabilities in Washington. These are the exclusively correct administrative rules for application in this case.

It is not the purpose of this Final Determination to analyze any theoretical inconsistency between the governing rules and other rules which have absolutely no application or relevance to the controlling facts. Rule 193A deals with sales of goods originating in this which are delivered to buyers outside this state. It is a rule which provides for the taking and retention of proofs or evidences of interstate delivery in order to perfect entitlement to exemption from tax. However, the tax assessment in question here does not include any tax upon sales of goods originating here which are shipped or delivered to buyers in other states.

[1] Determination 86-161 properly explains and applies the provisions of the governing rules in this case. They are Rule 193B and Rule 103. Rule 193B is a "nexus" rule which does not and need not provide for the proofs or evidences of interstate shipping or delivery. Rather, it explains that if an out-of-state seller has presence in this state and is itself obligated to get the goods sold to the buyer in this state then, under prevailing case law, such sales are taxable here. Conversely, if the buyer takes physical delivery, meaning possession, of the goods at a point outside this state, then the sales are tax exempt. As Determination 86-161 stresses, if the taxpayer can establish that any of its sales contracts or selling agreements provided for delivery of the goods to the buyers outside this state, then such sales could be excluded from the tax measure. No such sales are claimed or evidenced.

[2] The second rule, Rule 103, contrary to the taxpayer's assertions, does provide both "when" and "where" a sale occurs for tax purposes. This rule governs both the time and place of sale. It clearly prescribes that, "for determining tax liability," the sale of tangible personal property occurs in

this state (the where) when the goods sold are delivered to the buyer (the when) in this state. Under this rule, delivery clearly connotes possession. Such has been the uniform and consistent, longstanding position of the Department for application to all sellers similarly situated with the taxpayer here. For excise tax purposes the taxability of sales transactions is governed by the Revenue Act and the rules respecting that act, not the Uniform Commercial Code. The latter code controls the question of ownership of goods and the respective rights and liabilities of the seller, buyer, and third parties dealing with the goods, as between themselves.

[3] The taxpayer's assertion that, if "risk of loss" passes to the buyer outside this state, then the sale occurs outside this state is incorrect. If the out-of-state seller is obligated to get the goods sold to the buyer in this state, given the undisputed nexus contacts here, then the sale is taxable here notwithstanding any special arrangements relating to risk of loss or other indicia of the transaction which may dictate Uniform Commercial Clause applications. It is not the passing of "risk of loss" which is dispositive; rather, it is the transfer of possession of the goods to the buyer or another person on behalf of the buyer. Such transfer of possession outside this state is not evidenced in this case. Again, we are not inclined to engage in moot discussions of a form over substance nature concerning Uniform Commercial Code applications.

We are satisfied that Determination 86-161 contains the correct factual findings and legal conclusions in this case and that it correctly resolves the issues of taxation regarding sales of goods delivered into this state.

Issue No. 2.

The taxpayer asserts that its request for a reduction of the business and occupation tax assessed for the period from 1976 through 1979 is not tantamount to a request for a refund or credit of taxes overpaid for that period, limited by the provisions of RCW 82.32.060. We disagree.

[4] As a very real and practical matter, the only way a correction or downward adjustment of the taxpayer's deficiency assessment could be accomplished is by respecting the taxpayer's entitlement to a "credit" for periods beyond the statute of limitations. In other words, there is absolutely no legal or practical difference between (a) paying the

assessment in full and seeking a refund of the overpayment because of inventory tax credits, and (b) seeking a reduction of the assessment because of inventory tax credits which would have been available but were unclaimed during the period beyond the statute. In both cases the inventory tax credits were not utilized when they were available, precisely because the taxpayer was not registered and was not reporting any b&o tax at all. As Determination 86-161 properly explains, there are express statutory exceptions to the statute of limitations for assessing deficient taxes owed, but there are no such exceptions for seeking any tax credits or the indirect benefits of tax credits which are not timely requested or taken.

[5] The taxpayer's argument that the inventory tax credits formerly authorized under RCW 82.04.442 (repealed by Chapter 62, Laws of 1983, 1st ex. sess.) were not limited by RCW 82.32.060 relating to requests for tax refunds or credits, is incorrect. Under the express provisions of RCW 82.32.010 (application of chapter stated.) the provisions of chapter 82.32 RCW apply with respect to chapters 82.04 through 82.29A RCW. Thus, the time limitations of RCW 82.32.060 clearly govern the requests or claims for credits, refunds, offsets, or any other reductions to b&o tax payments or deficiency assessments resulting from the timely payment of property tax on business inventories. This result is not defeated by specious analogies or hypotheticals which merely elevate form over substance, viz: the taxpayer's statement that it has not "overpaid" any excise tax for the periods in question and therefore is not claiming any refund or credit because of such overpayment. Unquestionably, had the taxpayer been registered and reporting b&o tax from 1976 through 1979, any attempted claim for credit or refund now would be too late, as would be any claim that the taxes due for those periods should have been offset. Determination 86-161 properly applies the appropriate law in its DISCUSSION portion, which is fully incorporated herein by this reference.

[6] Most importantly. RCW 82.32.060 formerly provided for a direct "offset" against tax deficiency assessments in the amount of any refund or credit which would have been available but for the tolling of the statute of limitations. The statute, which was amended in 1979 to delete the "offset" provisions, formerly provided in pertinent parts as follows:

> Except as to the utilization by the taxpayer of the credits in computing tax authorized by RCW 82.04.435, application for which credits must be

> made within two years of payment of the taxes giving rise to such credits, no refund or credit shall be allowed with respect to any payments made to the department more than two years before the date of such application or examination. Where a refund or credit may not be made because of the lapse of said two year period, the amount of the refund or credit which would otherwise be allowable for the portion of the statutory assessment period preceding the two year period may be offset against the amount of any tax deficiency which may be determined by the department for such statutory assessment period. (Emphasis supplied.)

The 1979 amendment to the statute changed the running period of the statute of limitations to coincide with the statutory period for assessing any additional tax found to be due, but also repealed the offset language. Thus, though at one time the law contemplated the kind of offset adjustments sought by the taxpayer here, it no longer provides for such credits against past deficient tax liabilities. Moreover, it is clear that the only credits not time limited by this statute were those of RCW 82.04.435 (Manufacturer's tax credits) which were expressly excluded. All other kinds of tax credits authorized under chapter 82.04 RCW are governed by RCW 82.32.060.

DECISION AND DISPOSITION:

The taxpayer's petition is denied. Tax Assessment Nos. . . . and . . . in the combined amount of $ . . . , including extension interest, are due for payment by April 20, 1987.

DATED this 20th day of March 1987.