

Cite as 5 WTD 315 (1988)

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
For Correction of Assessment of)	
)	No. 88-185
)	
. . .)	Registration No. . . .
)	Tax Assessment No. . .
.	
)	

[1] **RULE 193B:** B&O TAX -- SALES -- EXEMPTION -- INTERSTATE COMMERCE -- NEXUS -- 15 U.S.C. 381. 15 U.S.C. 381 (Public Law 86-272) by its terms applies only to taxes on or measured by net income. The criteria prescribed therein for nexus are, therefore, inapplicable to Washington's business and occupation tax, since it is measured by gross receipts.

[2] **RULE 193B:** B&O TAX -- SALES -- INTERSTATE COMMERCE -- NEXUS -- WHAT CONSTITUTES -- LOCAL SOLICITATION. Sales to persons in this state are B&O taxable when the order for the goods is solicited in this state by an agent or other representative of the seller.

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: May 20, 1987

NATURE OF ACTION:

Petition protesting B&O tax assessment on the basis that Washington does not have nexus against this out-of-state manufacturer.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) manufactures and sells refrigeration equipment and truck parts. The Department of Revenue (Department) on August 12, 1986 issued the above-referenced tax assessment against the taxpayer for excise tax and interest totalling \$ The period covered by said assessment was January 1, 1982 through March 31, 1986. The assessment was based on the sales figures for those years which were submitted from the taxpayer's home office in . . . , Michigan. On the assessment the Department's excise tax examiner cited WAC 458-20-193B as authority for her statement to the effect that the taxpayer was engaged in local activity sufficient to incur liability for the business and occupation tax. In its petition for correction, the taxpayer cites Public Law 86-272 and states that under that authority it performs no activity which would give the state of Washington nexus to tax it. It explains that all it has in Washington are two resident salespeople who solicit orders only. It has no place of business in Washington. All product is shipped into the state by common carriers. All credit is approved outside the state. The taxpayer does not advertise in the state of Washington. It conducts no retail activities or promotions in Washington. All of its activities that touch the state of Washington should be considered as being in interstate commerce and, therefore, exempt of Washington tax under the State Constitution. The resident salespeople only spend about 25% of their time in Washington. The rest is spent in neighboring states. The salespeople only solicit orders. The orders are sent outside of Washington for approval and, if approved, are filled outside the state of Washington. The taxpayer acknowledges that the salespeople do have some function in the area of goodwill in that they occasionally call on Washington customers with whom the taxpayer has previously dealt.

The issue is whether or not the taxpayer has sufficient business contacts with the state of Washington for the latter entity to invoke its taxing jurisdiction for purposes of the business and occupation tax.

DISCUSSION:

Public Law 86-272, as cited by the taxpayer, was codified in the federal interstate income tax act, 15 U.S.C. Section 381 et seq. Washington's Supreme Court has recently spoken on this very subject. In *Tyler Pipe v. Department of Revenue*, 105 Wn.2d 318, 327, 715 P.2d 123 (1986) (reversed on other grounds) it said:

Finally, Tyler Pipe raises the issue of whether the federal interstate income tax act, 15 U.S.C. Section 381 et seq. (1982), exempts Tyler Pipe from Washington's B&O tax. This argument is without merit. The federal statute applies only to "net income tax"; Washington's B&O tax is not a net income tax or a net tax on anything. Rather, "B&O taxes are for the privilege of engaging in business during a certain time frame, measured by applying a rate of tax to some tax base." *Puyallup v. Pacific Northwest Bell Tel. Co.*, 98 Wn.2d 443, 451, 656 P.2d 1035 (1982).

[1] The cited case controls. Because the B&O tax is measured by gross sales rather than net income, Public Law 86-272 and 15 U.S.C. Section 381 et seq. are inapplicable.

[2] What is applicable is WAC 458-20-193B (Rule 193B) which is titled, "Sales of goods originating in other states to persons in Washington." This administrative rule reads in part:

BUSINESS AND OCCUPATION TAX

RETAILING, WHOLESALING. Sales to persons in this state are taxable when the property is shipped from points outside this state to the buyer in this state and 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. . . .

Applying the foregoing principles to sales of property shipped from a point outside this state to the purchaser in this state, the following activities are examples of sufficient local nexus for application of the business and occupation tax:

. . . .

3. The order for the goods is solicited in this state by an agent or other representative of the seller.

. . .

5. 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."

This taxpayer's Washington activities precisely fit numbered paragraph 3. as cited above. An agent or other representative of the taxpayer solicits the orders for goods in this state. That is all that is required to invoke this state's B&O taxing jurisdiction. Such activity is deemed "significantly associated with the seller's ability to establish or maintain a market in this state for the sales." The assessment of business and occupation tax is, therefore, proper.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 13th day of April 1988.