

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

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment)
of) No. 89-126
)
 . . .) Registration No. . . .
) Tax Assessment Nos. . . .
))
Registration No. . . .

-) Notice of Balance Due
- [1] **RULE 103 AND RULE 193B:** B&O TAX -- AIRPLANES --
SALE OF -- DELIVERY -- OUT-OF-STATE. The sale of an
airplane to a Washington buyer by an out-of-state
seller is not subject to B&O tax when the buyer
takes delivery of the plane at the seller's out-of-
state facility.
- [2] **RULE 103 AND RULE 193B:** B&O TAX -- AIRPLANE PARTS -
- DELIVERY OF -- OUT-OF-STATE -- COMMON CARRIER --
SHIPMENT BY. The shipment of airplane parts via
common carrier from an out-of-state seller to an in-
state buyer constitutes a Washington delivery and
sale.

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: September 24, 1986

NATURE OF ACTION:

This is a protest of the B&O taxation of sales in which
delivery of the goods allegedly took place outside Washington.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) sells airplanes and parts of airplanes. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1977 through September 30, 1985. As a result, Tax Assessments . . . and . . . were issued in the amounts of \$. . . and \$. . . respectively. Subsequently, based on new information supplied by the taxpayer, a post assessment adjustment was made to . . . which reduced the amount owed on that assessment to \$ In addition, the taxpayer is appealing a September 12, 1986 notice of balance due in the amount of \$ The total at issue in this action, then, is \$ Because the basis for appeal is the same in the various assessments, they are consolidated herein for the purpose of rendering a single decision applicable to all.

As noted above, this case involves two registration numbers. The original number is The notice of balance due was issued in the same name but under number Why there are two, we do not know, but inasmuch as we perceive that the numbers are irrelevant to the issues we are asked to decide, we will press ahead.

Those issues are not particularly difficult of description. All of the taxpayer's business facilities which are pertinent are located in the state of [Montana] in the cities of [Ronan¹] or [Polson]. There, the taxpayer manufactures airplanes and airplane parts. It also claims that is where it sells its products, and it is precisely that position that is in dispute here. As to the airplanes it sells, the taxpayer states that they are sold "FAF [Ronan]". "FAF", it explains, means "fly-away-field" which means, in effect, that the taxpayer does not deliver. If a customer buys a plane, she or he must come to [Ronan] to pick it up. The taxpayer has backed up its statement in this regard by providing numerous purchase order forms, delivery receipts, and other documentation.

The taxpayer's legal argument, summarized, is that such sales are not subject to Washington's B&O tax because delivery of the goods occurs in [Montana]. Only deliveries in Washington meet the Washington statutory definition of "sale". It is only that kind of sale that Washington has jurisdiction to tax.

¹These are not the cities and state at which the activity at issue took place. These names are being used to protect the identity of the taxpayer.

The second issue evolves out of the taxpayer's sale of airplane parts. Parts are sold to independent airplane dealers in Washington. The taxpayer says that the basis on which they are sold is F.O.B. [Ronan] or F.O.B. [Polson]. By that, it means that risk of loss and title to the parts passes to its customers at one of the two [Montana] shipping points. The expense of transporting the parts to Washington is always borne by the customer-dealers. According to the taxpayer, the customer is asked to select the particular trucking firm or other carrier it wishes to haul the parts. That carrier will collect the parts at one of the [Montana] locations and deliver them to the ordering dealer(s) in Washington. The shipments are sometimes made on a "freight collect" basis, meaning that the carrier collects its shipping fee from the Washington dealer at the time of delivery. In certain cases where the dealer determines that it would be advantageous to have the taxpayer prepay the freight, the taxpayer does so and bills the dealer. During 1986, the taxpayer prepaid the freight on about 75% of the orders. In 1982, the percentage was around 30%. Again, the taxpayer has supplied plenty of documentation including purchase order forms and dealer agreements which support its position on parts as above stated.

Also, again, the taxpayer contends that delivery effectively takes place in [Montana]. It argues that the customers as buyers, not the taxpayer as seller, shipped the parts to Washington. This is because risk of loss, title, and the expense of shipment all shifted to the buyer, based on the various agreements, before the parts left [Montana]. Counsel for the taxpayer cite WAC 458-20-193A (Rule 193A) which has to do with the sale of goods from a Washington seller to an out-of-state buyer. Under that authority, if goods are delivered by a Washington seller to a [Montana] buyer in [Montana], for instance, neither Retailing or Wholesaling B&O tax is applicable. The argument that a sale from a [Montana] seller to a buyer with delivery in [Montana] should not be subject to Washington's B&O tax is even more compelling.

The issues, then, are: 1) Is the sale of airplanes to a Washington buyer by a [Montana] seller, where the buyer collects the plane in [Montana], subject to B&O tax? 2) Is the sale of airplane parts between the same parties, but where the parts are shipped by common carrier from [Montana] to Washington, subject to B&O tax?

DISCUSSION:

The key to this matter is where did delivery to the Washington-based buyers take place. Rule 103, . . . , sets forth the criteria for establishing the "time and place of sale." In pertinent part, Rule 103 provides:

For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this state when the goods are delivered to the buyer in this state, irrespective of whether title to the goods passes to the buyer at a point within or without this state. (Emphasis supplied.)

Thus, under Rule 103, a sale takes place in this state when the goods sold are delivered in this state. Conversely, *if delivery to the buyer takes place outside this state, there is no sale in this state.* If the sale does not take place here, it will not be subject to tax here.

Rule 193B governs the taxability of sales by out-of-state sellers, such as the taxpayer, to persons in this state, such as the independent airplane dealers. It provides in pertinent part:

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

The converse of the rule statement is equally true concerning sales of goods originating here to buyers outside Washington. It is embodied in WAC 458-20-193A (Rule 193A), . . . , where it provides in pertinent part:

Where the seller agrees to and does deliver the goods to the purchaser at a point outside the state, neither retailing nor wholesaling business tax is applicable.

Thus, Rule 193B, pre-occupied with taxing jurisdiction (nexus) over out-of-state sellers, does not discuss the tax consequences, nor proof required where the out-of-state seller makes delivery to an in-state buyer at a point outside Washington. On the other hand, Rule 193A discusses the tax consequences and proof required where an in-state seller makes *delivery* to an out-of-state buyer at a point outside Washington, that is, the in-state seller must meet certain conditions to be entitled to the B&O tax exemptions.

Essentially, as provided in Rule 193A, the seller must (1) have an agreement to deliver the goods to the buyer outside the state, either with his own transportation equipment or by a carrier for hire, and (2) retain documentary proof of the agreement and out-of-state delivery that establish that delivery was in fact made outside the state by a carrier at the risk and expense of the seller.

[1] Thus, while Rule 193B does not speak expressly to the taxpayer's situation, the Department has recognized that there be consistency in the operation of Rules 193A and B, and has exempted from B&O taxation sales where the out-of-state seller has made delivery of the goods sold to an in-state buyer at a point outside this state under the conditions set forth in Rule 193A.

In this case, to qualify for exemption from the B&O tax, the taxpayer had to have an agreement to deliver the goods to buyers in [Montana] as well as evidence that delivery was actually made in [Montana].

With respect to the airplanes, those requirements appear to be satisfied. The purchase agreements submitted all say the delivery is to be FAF [Ronan]. The other requirement is evidence of actual delivery at the out-of-state location as per the purchase agreements. With its memorandum the taxpayer has submitted several "delivery receipts" which acknowledge delivery and which are signed and dated by suitable representatives of the buyers and seller. The taxpayer has represented that the receipts were executed at the time and place of delivery in [Montana]. Although we do not doubt the taxpayer's word, several of the receipts themselves do not indicate the place of delivery. The B&O tax will be deleted if the taxpayer produces affidavits of the buyers and seller or other suitable documentation, where necessary, to prove actual [Montana] delivery.

Subject to the aforementioned documentation, the taxpayer's petition is granted on the airplane issue.

[2] The sale of airplane parts is distinguishable from the sale of whole airplanes in that the buyers do not actually come to [Montana] to collect their purchases. Thus, a direct delivery is not made in [Montana] to the actual buyers of the parts. The sale of goods originating in other states to persons in Washington is covered in WAC 458-20-193B (Rule 193B). The first portion of the rule reads:

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...

That is what happens in the present case. The airplane parts are shipped from the seller in [Montana] to the buyer in Washington. Thus, according to the cited rule, the transaction is subject to Retailing B&O tax. The B&O tax is the responsibility of the seller. The seller in this case is the taxpayer.

Such a result is consistent with the Department's Rule 103 as well. It reads in part:

For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this state when the goods sold are delivered to the buyer in this state, irrespective of whether title to the goods passes to the buyer at a point within or without this state.

In the instant situation the airplane parts are delivered when the buyer receives them from the common carrier at the buyer's location in Washington. A Washington delivery means a Washington sale subject to Washington B&O tax. In further conformity with Rule 103, the fact that there may be a written agreement between the seller and buyer that title to the parts passes to the buyer in [Montana] is immaterial.

Similarly, the Uniform Commercial Code does not determine time and place of sale for purposes of Washington's B&O tax. That authority is not mentioned in either Rule 103 or Rule 193B as a factor to be considered in that regard. While the UCC, undoubtedly, is a major factor vis a vis the contractual relationship between the buyer and seller, it does not carry any weight in terms of where, when, or whether a Washington B&O taxable sale takes place. The relationship at issue here is that between the seller and a taxing authority, not one between a seller and a buyer.

Finally, we observe that Washington is the destination state of the goods sold. Where there is activity relating to sales transactions in interstate commerce, the destination state may nevertheless tax such sales. See, e.g., *Westinghouse Elec. Corp. v. King*, 678 S.W. 2d 19 (Tenn 1984), *dism'd* 53 USLW 3686

(1985). See also *Ariz. S. Tax Comm. v. Southwest Kenworth, Inc.*, 561 P.2d 757 (Ariz. 1977).

On the second issue, the sale of airplane parts, the taxpayer's petition is denied.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part. The Audit Section will reexamine the books and records of the taxpayer and will then issue an amended assessment in conformity with this decision to include the second quarter of 1986 which is covered in the notice of balance due. Such amended assessment will be due for payment on the date stated thereon.

DATED this 9th day of March 1989.