Cite 8 WTD 83 (1989)

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. 89-355
)
. . .) Registration No. . . .
) . . . /Audit No. . . .

[1] **RULE 193A:** B&O TAX -- MANUFACTURING -- RAW SEAFOOD -- INTERSTATE SALE -- CARRIER AS AGENT OF SELLER. Where seller delivers sold goods to a carrier it has selected to deliver goods [to] an out-of-state buyer's location, the sale is taxed at the Manufacturing--raw seafood products B&O tax rate provided there was an agreement with the buyer to make such delivery and documentary evidence was retained by the seller showing that delivery was in fact made to the buyer outside this state. Shipment on a "freight collect" basis does not necessarily indicate that the carrier is an agent of the buyer, particularly where the seller remains liable upon failure of buyer to pay shipping charges. ACCORD: Determination No. 87-230, 3 WTD 423 (1987).

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 AND PLACE OF CONFERENCE: June 22, 1989; . . . , Washington

NATURE OF ACTION:

Taxpayer protests reclassification of its income from the Manufacturing--raw seafood products B&O tax rate to the higher wholesaling rate.

FACTS AND ISSUES:

Johnson, A.L.J. -- Taxpayer sells seafood products to customers in Washington, other states and foreign countries. Its books and records were examined for the period from January 1, 1984, through June 30, 1988, resulting in the above-captioned assessment.

Taxpayer protests the reclassification of its income. The auditor concluded that delivery to numerous out-of-state purchasers occurred in this state, because the sales documentation reflected that the product had been shipped freight collect.

The auditor and the taxpayer agreed upon the use of a "test" period from which a percentage of sales qualifying for the lower B&O tax rate was determined based on a comparison of properly-documented sales to total sales. The auditor found that most of taxpayer's sales were not qualified for the lower rate. Petitioner does not question the use of a test period in order to determine the percentage but requests that the period be reopened if the audit is upheld on the grounds that the three nonconsecutive months used do not accurately represent the entire audit period.

However, its primary argument is that a high percentage of its sales were disqualified because it marked the freight payment box on its forms "collect" rather than "prepaid." Its contention is that the disqualification of such sales is improper, because the goods were delivered to shippers hired by the taxpayer; because it retained liability for payment regardless of whether an attempt was to be made to first collect from the purchaser; and because it, at all times, bore the risk of loss on the shipments.

In taxpayer's business, sales to out-of-state purchasers are generally made on the basis of telephone orders. Taxpayer submitted as exhibits copies of documentation for three "collect" sales and for three "prepaid" sales. In each case, the telephone sales order listed an out-of-state purchaser. The billing invoice listed the same purchaser, cross-referenced the phone-order number, and named the carrier to be used. The bill of lading was signed by the carrier, listed the taxpayer as consignor, listed the out-of-state buyer as consignee, and matched the order and invoice detail as to the items shipped. The only difference between the three "collect" and "prepaid" exhibits was the fact that a different box was marked as to shipment payment obligation.

The bills of lading contain standard, "nonrecourse" language. To be relieved of liability for shipping in the event that the recipient of the goods fails to pay the charges, the consignor must sign in the space following the standard language. The paragraph states that freight charges are to be the sole responsibility of the recipient and that the consignor is relieved of all liability therefor. Taxpayer noted that, in no case, had it signed in that space.

Further, taxpayer states that the nature of its business is such that it bears the risk of loss in all cases. During the hearing, its president noted that taxpayer is in a unique situation, because a purchaser can be in control of both the funds (prior to payment) and the merchandise, leaving the taxpayer with no option other than to bear the loss where the shipment is rejected for reasons varying from spoilage and delays to purchasers' whims.

DISCUSSION:

[1] Rule 193A in pertinent part provides:

> 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. Such delivery may be . . . by a carrier for hire . . . [F]or proof of entitlement to exemption the seller is required to retain in his records documentary proof (1) that there was such an agreement and (2) that delivery was in fact made outside the state. Acceptable proof will be:
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> a. The contract or agreement AND
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> b. if shipped by a for hire carrier, a waybill, bill of lading or other contract of carriage by which the carrier agrees to transport the goods sold, at the risk and expense of the seller, to the buyer at a point outside the state; . . .

In Determination No. 87-230, 3 WTD 423, 426-427 (1987), the Administrative Law Judge representing this Department wrote that

> [w]hile in this case there was no written agreement requiring the taxpayer-seller to deliver the goods to the buyer at points outside this state, we are cognizant that as a custom of commercial trade many purchase orders are placed without any written memorandum as to the delivery details. Established customers may call in orders or have standing orders of which the delivery details are reflected only on billing invoices and/or shipping documents.
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> In essence, Rule 193A requires that a seller claiming an interstate exemption must factually establish that it delivered the goods to the purchaser at an out-of-state point. Where the goods are shipped by common carrier, it is required that the seller retain and furnish a bill of lading issued by the carrier constituting the contract of interstate carriage whereby the carrier agrees to transport the goods sold "at the risk and expense of the seller." The Department has always <u>presumed</u> that the

> party bearing the "risk and expense of shipment" is the one for whom the carrier acts as agent. Indeed, the May 10, 1983 revision of Rule 193A replaced the words "as agent of the seller" with the words "at the risk and expense of the seller" to remove the uncertainty inherent in determining agency status.
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> Essentially, then, in order for the taxpayer-seller to perfect its entitlement to the exemption for interstate delivered sales in this situation, the taxpayer must demonstrate that it caused the goods to be shipped to the buyer's out-of state location by a for hire carrier acting for the taxpayer-seller. Obviously, if the carrier is acting for the buyer, delivery to the carrier in this state is tantamount to delivery to the buyer itself in this state. Less obvious, however, is how to determine for whom the carrier is acting as agent, that is, for whose risk and expense. The documentary proof examples described in Rule 193A (waybill, bill of lading, etc.) are acceptable forms of proof, but not necessarily <u>the</u> acceptable form of proof. Where the documents do not strictly comply with the examples given in Rule 193A, the <u>Department closely examines the substance of the transaction to determine for whom the carrier was acting as agent.</u> (Emphasis in original.)

In this case, we find that taxpayer has complied with the intent of the statute, which is to ensure that products which escape state taxation are actually delivered to customers outside the state.

Here, taxpayer has demonstrated that its type of business is such that, regardless of whether an attempt is first made to collect the freight charges from the buyer, the taxpayer retains both the risk of loss on the goods and the risk of liability for nonpayment by the recipient of the goods, bearing the expense of those costs should they arise. Taxpayer generally takes the order, selects the shipper and arranges the logistics of the shipment with little instruction from the buyer. It is shown as shipper or consignor on the bills of lading, and the consignee is an out-of-state purchaser.

Additionally, none of the bills of lading submitted with the petition materials bore the taxpayer's signature in the space for disclaimer of liability for freight charges.

It is recognized that this industry is somewhat unique in that the volatility of the product requires quick action in handling and moving the product to ensure that the product reaches the end user in good condition. As a result, industry custom includes the use of telephone orders and prompt movement of products and often does not include the formality of written contracts governing such aspects of transactions as who is to pay for shipping costs. As taxpayer noted, it is in the unique and precarious position of selling to parties who are in control of both the highly-perishable product and the cash, unlike other industries where a seller has leverage against a buyer who will not or is likely not to perform.

Because taxpayer has demonstrated that it bears the risk and expense of loss until the goods are accepted outside this state by the purchaser, its petition is granted.

DECISION AND DISPOSITION:

Taxpayer's petition is granted. The file will be remanded to the Audit Section for a redetermination of the percentage of taxpayer's sales qualifying for the lower B&O tax rate.

DATED this 12th day of July 1989.