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

In the Matter of the Petition For Correction of) No. 89-471 . . .	) D E T E R M I N A T I O N Assessment of))) Registration No. . . .) . . . /Audit No. . . .)

[1] RULE 193B and RULE 193C: B&O TAX -- IMPORTS -- STREAM OF COMMERCE. Where taxpayer imports vehicles into Washington and prepares them for resale in this state, the activity is B&O taxable. Vehicles are not in unbroken stream of commerce, and taxpayer's activities in this state are sufficient to constitute nexus.

[2] RULE 100, RCW 82.32.160 and RCW 82.32.070: APPEAL PROCEDURES -- REFUSAL TO COOPERATE OR TO PRODUCE RECORDS. Taxpayer is required to inform himself of the tax ramifications of his business activities in this state. That other taxpayers fail to comply with this state's tax laws is immaterial with regard to this taxpayer, and his refusal to produce records or to cooperate bar him from questioning the assessment.

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 CONFERENCE: July 11, 1989; . . . , Washington

NATURE OF ACTION:

Taxpayer protests assessment of B&O tax on his activity of importing vehicles to Washington for sale at auction to buyers residing in this and other states.

FACTS AND ISSUES:

Johnson, A.L.J. -- Taxpayer is a resident of . . . , Canada. He imports vehicles to this state for resale at auction. He obtains Washington titles and license plates in this state to facilitate their sale to United States citizens. He contends that

> the State of Washington is used for titling purposes because of it's proximity to the southwest corner of Canada and it's efficiency and speed of titling a vehicle [sic]. (Brackets supplied.)

Taxpayer contends, without substantiation, that he has been told on several occasions that he was not liable for B&O tax on his activities. He additionally claims that he was first contacted by an auditor from the Spokane office and that this contact was prompted by a cross reference either from the Department of Licensing or from a Department of Revenue use tax waiver notification.

Taxpayer contends that he got use tax waivers "weekly" from a Department of Revenue office and that the Department was "lax" about requiring a waiver for the use tax. Additionally, he contends that the Department "doesn't understand" the tax or follow up when it claims that he owes it. As an example of this, he complained that a "big guy" in the Olympia Eastside office was among those with whom he spoke. During that encounter, taxpayer claims that the "big guy" told him he might be liable for tax but did not follow up that statement. When asked why he did not make an effort to obtain clear information on the taxability of his activities, he said "I'm not going to volunteer to pay taxes." Further, he never got any of the purported instructions in writing, because "I'm not in business in Washington; I'm not subject to your taxes," and because he didn't think that he would need to prove that he was told he was not subject to Washington's business tax.

Taxpayer also claims that the assessment is too high for two reasons: inflated values were assigned to the vehicles and some vehicles should have been exempt by virtue of being "in the stream of commerce." He claims that many of the vehicles are sold from Canada or travel straight through Washington to their final destinations in other states. However, he stated that he cannot produce documentation showing which cars actually stayed in the purported stream of commerce, because he may have shipped them FOB Washington and someone else may have hired or paid a shipper to move them to an ultimate out-of-state destination.

DISCUSSION:

[1] Taxpayer claims that he has suspended his activities in this state because of the above-captioned assessment. This discussion pertains to activities conducted during the audit period and to

taxpayer's conduct and assertions of nontaxability occurring during the audit process and this appeal.

Taxpayer contends that his activities were exempt from Washington's B&O tax under WAC 458-20-193C (Rule 193C), which addresses taxation of goods in interstate or foreign commerce. The rule provides that

> [a]n import is an article which comes from a foreign country (not from a state, territory or possession of the United States) for the first time into the taxing jurisdiction of a state.
>
> Taxation of such goods is impermissible while the goods are still in the process of importation, i.e., while they are still in import transportation. Further, such goods are not subject to taxation if the imports are merely flowing through this state on their way to a destination in some other state. (Emphasis supplied.)

However, the rule also states that

> [i]mmunity from tax does not extend: (1) To the sale of imports to Washington customers by the importer thereof or by any person after completion of importation whether or not the goods are in the original unbroken package or container; nor (2) to the sale of imports subsequent to the time they have been placed in use in this state for the purpose for which they were imported; nor (3) to sales of products which, although imports, have been processed or handled within this state or its territorial waters. (Emphasis supplied.)

In this case, the facts clearly show that the vehicles were processed and handled in this state. Taxpayer admittedly chose to avail himself of the benefits of this state's services when he licensed the vehicles here. He acknowledged that he could have retained the prior license plates but that he decided to license them here, because of this state's speed and efficiency in issuing Washington titling and registration documents and because doing so made it easier for him to sell the vehicles in this country.

Further, he admits that the vehicles are cleaned up and prepared for auction here or for shipping to another destination. When asked about a place of business that he allegedly maintained in . . . , Washington, taxpayer denied ever having had one. He then said that he had a "holding yard" where vehicles were "detailed," or cleaned, prior to being distributed at auctions. However, he claimed that he did not know where this holding yard was. He

then explained that he started using a holding yard because he originally used the auction yards to do the cleaning. He discontinued this practice, because it "wasn't fair" to the auction yards that many of the trucks went out of state and had been sold to the out-of-state customers prior to delivery to the auction yards, with the result that the yards did not get a commission on the sale but taxpayer was still using their yards for cleanup. Coincidentally, the . . . Auction yard, where many of the cars were sold, is located in . . . .

When asked about his or his representative's alleged activities at the . . . Auction yard, taxpayer claimed that he had no agent there. He then stated that he had worked this and other auctions.

We find that the above are clearly instances of processing and handling within this state sufficient to take taxpayer's activity out of the immunity granted under Rule 193C.

We find, in addition, that taxpayer performed many activities in this state sufficient to constitute nexus for taxing purposes under Rule 193B, which provides that

> 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. If a person carries on significant activity in this state and conducts no other business in this state except the business of making sales, this person has the distinct burden of establishing that the instate activities are not significantly associated in any way with the sales into this state. The characterization or nature of the activity performed in this state is immaterial so long as it is significantly associated in any way with the seller's ability to establish or maintain a market for its products in this state. The essential question is whether the instate services enable the seller to make the sales. (Emphasis supplied.)

As an example of activity sufficient to constitute nexus, the rule states that

> 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."

We find that the taxpayer has performed significant services in this state, some of which he freely admits made it easier for him to sell the vehicles. Among these activities were the following:

> admitted frequent visits to the Department of Licensing for the purpose of titling and registering the vehicles in this state;
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> purported frequent visits to the Department of Revenue during the audit period;
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> cleaning and preparing vehicles in this state for sale to Washingtonians or to residents of other states;
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> maintenance of a "holding yard" in this state, whether he can locate it or not; and
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> participation at auctions held at one or more yards in this state.

Taxpayer's petition is denied with regard to this issue.

[2] Taxpayer additionally complains that the values used by the auditor were "inflated." The auditor explains that the values assigned were used after repeated fruitless requests to the taxpayer to produce actual selling prices for the vehicles, and he explained his method for valuing the vehicles:

> he listed values taken from the use tax pink slip certificate used as of the date on which the vehicle was titled. Some were actually sold at the auctions, and some were sold at a later date; but all were titled in Washington, whether they were sold immediately or not. The pink slip shows no value for the vehicle. It is just evidence that the vehicle was titled in Washington.
>
> because the taxpayer refused to cooperate in any manner, the auditor used the NADA book ("blue book") to determine the fair market value for which the vehicle should have sold. The auditor stated that these values are "real artificial values," because they often do not represent the price which a seller is able to obtain.

Taxpayer has stated that he has not produced and will not produce records proving his case "if others are not paying." He

complains that the only difference between him and others is that he got

> picked up. Why pick me out of the bunch? If you people have a tax, tell someone about it. Get everybody; let's be fair about it.

He complains that "thousands" of people currently and formerly in business have been doing the same thing in Washington and not paying taxes and that "everyone else has told Washington to go fly a kite."

Further, he states that "no one ever told me in all this time, since 1983, that I would be subject to tax before [the Spokane auditor], and he could not even tell me for sure that the tax was really due."

We disagree with this interpretation of the facts. In response to numerous attempts to obtain accurate information and records from this taxpayer prior to the current appeal, the auditor encountered a complete refusal to cooperate, as well as vague assertions that other Department of Revenue employees had told the taxpayer that he is not subject to tax. Taxpayer steadfastly refused to supply records to the auditor proving his claim that he was not subject to the tax; it is not surprising that the auditor "could not even tell [him] for sure that the tax was really due." The auditor flatly stated that values given the trucks were "artificial;" however, we find that any inflation in value was caused purely by the taxpayer's actions, not by a lack of knowledge or by a mistake on the auditor's part.

During this appeal process, the taxpayer was uncooperative in making himself available for the hearing, which is granted as a matter of discretion, not as a matter of right. Upon being told that the hearing was being set for the date shown above and that a failure to appear would result in a determination being based on the information in the file, taxpayer finally agreed to make himself available. Upon a further request for supporting documentation so that the file could be remanded to the audit section for adjustment based on the factual dispute, the taxpayer, again, refused to produce any records and stated that he would appeal the assessment "all the way."

Consequently, in addition to the reasons cited previously, taxpayer's petition is also being denied because requests for cooperation and for records have been repeatedly met with taxpayer's assertions that

> he is not taxable;

> he will not pay the tax until Washington achieves compliance from other businesses operating in a manner similar to his;
> he has not kept records because he is not taxable;
> unnamed employees have told him he was not taxable;
> unnamed employees have hinted that he was taxable but have not "followed up" on those comments;
> he never asked about tax liability, because he was not going to "volunteer" to pay taxes; and
> the auditor did not know whether the taxpayer was taxable or not.

The Department has previously stated that, where a taxpayer has completely and continuously refused to report any tax liability, make any records available, or cooperate in any respect, its appeal will be denied with administrative prejudice. Where it is clear from the taxpayer's own actions and from the statements of Department personnel that the taxpayer is purposely taking an obstructionist position based on nonspecific factual and constitutional grounds, the Department does not have the responsibility to continue to deal with these matters at the administrative appeal level. Under the provisions of RCW 82.32.160, the granting of administrative appeals is discretionary with the Department. Moreover, under the provisions of RCW 82.32.070, any person who fails to comply with the recordkeeping and presentation requirements of the law shall be forever barred from questioning tax assessments made by the Department.

It is the responsibility of persons engaged in business in this state to inform themselves of the tax ramifications of those activities. Taxpayer's contentions that "no one told him" he was taxable, that "someone" told him he was not taxable, and that noncompliance by others justifies his own noncompliance are without merit.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 28th day of September 1989.