

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

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| 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. 89-509 |
| |) | |
| . . . |) | Registration No. . . . |
| |) | . . . /Audit No. . . . |
| |) | |
| |) | |

- [1] RULE 194: SERVICE B&O TAX -- SERVICES PERFORMED FOR OUT-OF-STATE CUSTOMER -- SERVICES RENDERED WITHIN WASHINGTON AND OUT OF STATE -- PLACES OF BUSINESS IN BOTH STATES -- APPORTIONMENT. Where taxpayer has places of business in Washington and Alaska which contribute to the performance of a service - selling goods on a commission basis - for an Alaskan customer, the commissions earned are taxable on an apportionment basis. The cost of business method is used unless there is a practical separate accounting method.
- [2] RULE 193B: RULE 193A -- RULE 103 -- WHOLESALING B&O TAX -- EXEMPTION -- INTERSTATE SALES -- DELIVERY TO BUYER. A sale takes place in this state when the goods sold are delivered to the buyer in this state. If delivery to the buyer takes place outside this state, there is no sale in this state.
- [3] RULE 193C: WHOLESALING B&O TAX -- EXEMPTION -- EXPORT SALES -- COMMENCEMENT OF MOVEMENT -- DOCUMENTATION. The export movement of goods sold for delivery in a foreign country may commence before the goods are placed upon foreign bound transportation vehicles, but such sales must always satisfy the documentation requirements of Rule 193C for tax exemption.

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 14, 1989

NATURE OF ACTION:

Petition protesting the assessment of Service business and occupation tax (B&O) on sales commissions without apportionment for out-of-state place of business and the assessment of Wholesaling B&O tax on alleged interstate and export sales. The petitioner also protests that in one instance an incorrect amount was subjected to tax.

FACTS AND ISSUES:

Krebs, A.L.J. -- [The taxpayer] is a " . . . " organized under the laws of Alaska. Its principal place of business is in . . . , Alaska. The taxpayer maintains a branch office in . . . , Washington. The taxpayer is a wholesaler of fish. The taxpayer also sells fish for other persons on a commission basis.

The Department of Revenue (Department) examined the business records of the taxpayer for the period from January 1, 1984 through March 31, 1987. As a result of this audit, the Department issued the above captioned tax assessment on May 31, 1988 asserting excise tax liability in the amount of \$. . . and interest due in the amount of \$. . . for a total sum of \$ The taxpayer made a payment of \$. . . on August 1, 1988 and the balance remains due.

The taxpayer's protest involves Schedule II of the audit report where Service business and occupation tax (B&O) tax was assessed on unreported commissions earned on sales made on behalf of a fish seller in Alaska. The taxpayer's protest also involves Schedule III of the audit report where Wholesaling B&O tax was assessed on disallowed deductions taken by the taxpayer on interstate sales and foreign export sales of fish, and where the taxpayer alleges the auditor taxed the wrong amount on an invoice to a customer, . . .
.

Item # 1: Schedule II, Sales Commission Apportionment.

The taxpayer employs an export sales manager, . . . , at its . . . office from September to April of each year. During the height of the fishing season from May to August, the sales manager is assigned to the taxpayer's office in . . . , Alaska for short periods of time to engage in selling, on a commission basis, the processed fish of . . . , located on the . . . Peninsula, Alaska.

. . . .

The sales manager used the taxpayer's [Alaskan] office to set up and organize forthcoming . . . export sales. The [Alaskan] office provided support services such as use of the telephone and telex systems, and sending out/receiving confirmations of sales. The taxpayer's [Washington] office documented (invoicing/accounting) the sales.

The Department's auditor subjected the commissions earned through the export sales activities of the sales manager to Service B&O tax and cited example 6 of WAC 458-20-194 (Rule 194) as holding taxable "a commodity broker upon commissions received from persons without the state". The auditor assessed the tax without apportionment because he concluded that the sales manager worked out of the taxpayer's [Washington] office with no assistance from the taxpayer's [Alaskan] office and that the salesman stayed and worked at [the customer]'s place of business while making the sales. The auditor by post-audit memorandum conceded that if there was documentation that the sales manager lived in [Alaska] and was supported by the taxpayer's [Alaskan] office in making the sales, then the auditor would adjust the assessment. The auditor believes the apportionment of the sales between the [Washington] office and [Alaskan] office should be based on the sales expenses.

The taxpayer contends that the out-of-state selling services performed by its sales manager while in Alaska should not be subjected to tax because it has a place of business in Alaska. The taxpayer argues that the auditor was incorrect in citing example 6 of WAC 458-20-194 (Rule 194) as the basis for taxation because the Rule states the example is limited to situations in which the taxpayer does not maintain a place of business outside Washington. The taxpayer points out that the taxpayer does maintain a place of business in both Alaska and Washington. The taxpayer further points out that the sales commission involved was earned from services in Alaska attributable mostly to its [Alaskan] office and in a smaller

degree to its Washington place of business. The taxpayer contends that if any of the . . . commission is taxable, then it should be apportioned in the majority to Alaska.

We now turn to Schedule III where the auditor assessed Wholesaling B&O tax on disallowed deductions taken by the taxpayer on 59 interstate sales and foreign export sales of fish during the audit period. The auditor took such action with respect to the interstate sales because he concluded that the fish sold were delivered to the buyer in this state. The auditor took such action with respect to the foreign export sales because he concluded that the taxpayer did not get the fish into the export stream.

The taxpayer protests the auditor's action by submitting the following described situations with supporting representative documentation as validating the deductions taken.

Item # 2: SCHEDULE III, Page 1, 8-29-85, . . . , Invoice B508-37.

The taxpayer's fish to be sold was in a cold storage warehouse operated by . . . in . . . , Washington. By a telephone transaction, confirmed by telex, on August 23, 1985, the taxpayer sold 14,850 pounds of salmon to . . . located in . . . , Florida for \$38,087.50. This sale was substantiated by Invoice No. B508-37 dated August 29, 1985 submitted at the conference and required taxpayer to deliver the fish at its expense to Florida. The taxpayer then contacted the warehouse to give them notice of withdrawal. The taxpayer contacted a carrier, . . . to pick up the fish at the warehouse. The carrier picked up the fish on August 30, 1985 at the warehouse and signed a Warehouse Release/Original Straight Bill of Lading (copy submitted at the conference) showing that the fish had been stored for the taxpayer and was to be shipped to . . . in Florida. . . .'s invoice to the taxpayer shows taxpayer as shipper and . . . as consignee. . . .

The taxpayer contends that this was a tax exempt interstate sale of goods originating in Washington which was delivered at its risk and expense to a Florida buyer.

Item # 3: SCHEDULE III, Page 2, 1-21-86, . . . , Invoice C601-17.

The taxpayer's fish to be sold was in a cold storage warehouse operated by . . . in . . . , Washington. By a telephone

transaction on January 20, 1986, the taxpayer sold 10,000 pounds of salmon to . . . , Inc. located in . . . , Florida for \$18,000 with delivery to be C.O.D. This sale was substantiated by Invoice No. C601-17 dated January 21, 1986 submitted at the conference. The taxpayer then contacted the warehouse to give them notice of withdrawal (copy of document submitted at the conference) which had the following "special instructions" typed on the notice: "ship via . . . collect." . . . is the carrier who picked up the fish at the warehouse which was transported to Florida. The carrier did not bill the taxpayer for the freight because it delivered C.O.D. The taxpayer also submitted the warehouse's "Releasing Manifest" (. . .) which describes the fish turned over to the carrier.

The taxpayer believes that because the delivery was C.O.D. it should not be held disqualified as a tax exempt interstate sale. The taxpayer points to the Department's published Tax Topics No. 13 for the period of October-December 1988 which in pertinent part states:

Sales where delivery is made via common carrier can still qualify for the interstate sales deduction, but only if shipment is at the risk and expense of the seller.

Until recently the Department's auditors have allowed the interstate sales exemption if the contract of carriage shows the seller as the shipper or consignor, regardless of which party bears the risk and expense of shipment. The Audit Division has now determined that this practice is contrary to WAC 458-20-193A, the Department's administrative rule on the subject. The rule clearly states that the contract of carriage must show that 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 other words, "freight collect" shipments will no longer qualify for the interstate sales deduction merely because the seller is shown as shipper or consignor. The waybill, bill of lading, or other contract of carriage must also show that shipment is at the risk and expense of the seller in order for the interstate sales deduction to apply.

This requirement will be given prospective application only, and the Department's auditors will not assess additional tax liability against businesses that relied upon the Department's prior practice.

Because the Tax Topics article, published in 1988, speaks of prospective application and the audit period here involves 1984 to 1987, the taxpayer asserts that its shipping C.O.D. should not be held to bar the interstate sales deduction.

Item # 4: SCHEDULE III, Page 1, 8-8-85, . . . , Invoice C508-08

The taxpayer's fish to be sold was in Alaska. On or about August 5, 1985, the taxpayer sold 17,817 pounds of salmon to . . . located in . . . , Washington for \$50,778.45. The submitted invoice dated August 21, 1985 states:

| | |
|----------------|------------------------|
| Ship Date: | August 8, 1985 |
| Payment Terms: | Cash upon shipment. |
| Sales Terms: | Ex- . . . Cold Storage |

The taxpayer explained that the sale was F.O.B. . . . , Alaska. The customer was unable to get containers for shipment because it was the height of the fishing season. The taxpayer, anticipating demand, generally reserves containers and carriers for that time of the year. The taxpayer then used its reserved containers and carrier, . . . to transport the sold fish to . . . Cold Storage, Inc. (. . .) located in . . . , Washington. The taxpayer submitted . . . 's bill of lading indicating the fish was being shipped from . . . 's storage premises "for the account of or shipper" of taxpayer to the buyer, . . . , via . . . a carrier.

The taxpayer asserts that the sale was a tax exempt interstate sale because the delivery from Alaska was at the "risk and expense" of the buyer in that the buyer was the owner of the fish when it left Alaska and was responsible for the cost of freight.

Item # 5: SCHEDULE III, Page 1, 5-20-84. . . . , Invoice C405-05.

The taxpayer's fish to be sold was in Alaska. On or about May 18, 1984, the taxpayer sold 32,185 pounds of salmon to . . . Inc. (. . .) located in . . . , Washington for \$102,633.35. The submitted invoice dated May 21, 1984 states:

Sales Terms: FOB Plant, . . . , Alaska - Loaded
into . . . Van # 29-191.
Ship Date: Loaded May 20, 1984
Payment Terms: Cash

Here again, similar to the . . . situation above, the taxpayer used its reserved containers and carrier, . . . to transport the sold fish to . . . Cold Storage located in . . . , Washington. The submitted bill of lading, dated May 19, 1984, issued by . . . declares the taxpayer to be the shipper and the shipment was consigned to . . . and bore the notation: "All freight charges collect to"

The taxpayer asserts that the sale was a tax exempt interstate sale because the delivery from Alaska was at the "risk and expense" of the buyer in that the buyer was the owner of the fish when it left Alaska and was responsible for the cost of the freight.

Item # 6: SCHEDULE III, Page 1, 5-16-84, . . . , Invoice C405-03.

The taxpayer's fish to be sold was in Alaska. On or about May 14, 1984, the taxpayer sold 26,000 pounds of salmon to . . . Inc. (. . .) located in . . . , Washington for \$65,000. The submitted invoice states:

Sales Terms: FOB Plant, . . . , Alaska
Ship Date: May 16, 1984
Payment Terms: Cash

Because it was the height of the fishing season, the taxpayer had also reserved Boeing 727 cargo planes which were otherwise hard to get for use by itself and by its customers. Submitted documentation shows that the taxpayer arranged for the trucking of the fish to the . . . airport, the buyer paid the truck carrier, and that the buyer arranged for air transportation of the fish with . . . Air Cargo and paid them.

The taxpayer asserts that by indicating that the sale was FOB . . . it showed its intent to pass risk in Alaska to the buyer especially because the fish could go bad. The taxpayer further asserts that the buyer arranged the air transportation out of Alaska at its expense and as owner of the fish. Thus, the taxpayer concludes that delivery was made to the buyer in Alaska and the sale was tax exempt.

Item # 7: SCHEDULE III, Page 1, 6-12-84, . . . , Invoice C406-14.

The taxpayer's fish to be sold was in Alaska. On or about June 12, 1984, the taxpayer sold 12,500 pounds of salmon to . . . , located in [Washington] for \$31,250. The submitted invoice states:

| | |
|----------------|----------------------------|
| Sales Terms: | FOB, Plant, . . . , Alaska |
| Ship Date: | June 12, 1984 |
| Payment Terms: | Cash |

In this transaction, the submitted documentation indicates that . . . Airporter transported the fish from . . . Cold Storage in . . . to Alaska Airlines at the . . . airport where Alaska Airlines issued an "Air Waybill" on June 12, 1984 to . . . c/o the taxpayer showing . . . designated as the consignee as well as the shipper. The taxpayer asserts that the buyer paid for the transportation costs directly to the carriers.

The taxpayer contends that this was a tax exempt interstate sale because the sale was FOB . . . the buyer used the carriers at its risk and expense, and the buyer thus took delivery of the fish in Alaska.

Item # 8: SCHEDULE III, Page 1, 6-11-85, . . . , Invoice C506-36.

The taxpayer's fish to be sold was in Alaska. On or about June 4, 1985, the taxpayer sold 26,421 pounds of salmon to . . . Company (. . .) located in . . . , Washington for \$81,853 which included \$2,370 for freight. The submitted invoice states:

| | |
|----------------|-----------------------|
| Ship Date: | June 11, 1985 |
| Payment Terms: | Net 20 days ship date |
| Sales Terms: | FOB . . . , Alaska |

In this transaction, the submitted documentation indicates that . . . transported the sold fish from . . . , Alaska to . . . , Washington and issued a Uniform Straight Bill of Lading which showed the taxpayer as shipper and . . . as consignee. The taxpayer paid . . . for the freight and billed . . . for the cost of the freight.

The taxpayer contends that this was a tax exempt interstate sale because the sale was FOB . . . , that the buyer took delivery in Alaska per taxpayer's intention as to what FOB . . . signified, and that delivery was made by the carrier at the buyer's risk and expense.

Item # 9: SCHEDULE III, Page 1, 7-6-84 . . . , Invoice C406-56.

The taxpayer's fish to be sold was in Alaska. On or about June 26, 1984, the taxpayer sold 19,531 pounds of salmon to . . . Company (. . .) located in . . . , New York for \$64,782.34 which included freight (\$1,757.79) for transportation from . . . , Alaska to . . . , Washington. The submitted invoice states:

| | |
|------------------|-------------------------------|
| Sales Terms: | FOB, . . . , Alaska |
| Ship Date: | Per . . . Van 28216, June |
| 26, 1984 | |
| Unloaded . . . : | July 5, 1984 |
| Payment Terms: | Cash upon receipt of invoice. |
| Payment | to be wired directly [to |
| taxpayer's | account in bank in |
| . . .] | |

In this transaction, the submitted documentation indicates that . . . transported the fish from . . . , Alaska to . . . , Washington where the fish was put in "short hold" at . . . 's cold storage warehouse for the account of the buyer. The taxpayer paid the freight charge to the carrier, . . . , and billed the buyer. The taxpayer asserts that the buyer was responsible for arranging transportation of the fish from [Washington] to New York and did so. The taxpayer explained that this delivery arrangement was done because there was no direct transportation from [Alaska] to New York.

The taxpayer contends that this was a tax exempt interstate sale because the sale was FOB . . . , that the buyer took delivery in Alaska per taxpayer's intention as to what FOB . . . signified, and that delivery was made by the carrier at the buyer's risk and expense.

Foreign/Export Sales.

Item # 10: SCHEDULE III, Page 2, 9-2-86, . . . , Inc. Invoice C608-29.

The taxpayer's fish to be sold was in Alaska. On or about August 28, 1986, the taxpayer sold 32,100 pounds of salmon to . . . , Inc. (buyer) located in . . . , Washington for \$48,250.50. The destination of the sold fish was . . . , Japan. The submitted invoice states:

Payment Terms: Cash within 48 hours of presentation
of documents.
Ship Date: ETD . . . , Alaska September 2,
1986 via
Sales Terms: FOB . . . , Alaska

In this transaction, the submitted documentation (. . . 's signed dock receipt at . . .) indicates that the buyer was the shipper/exporter and the consignee was . . . Ltd of . . . , [Japan] and the destination port was Tokyo. . . . transported the fish to Tacoma, Washington where the fish were loaded on a ship, "Freedom 68", for transport to Tokyo. The buyer made all arrangements for freight costs.

The taxpayer asserts that this was a tax exempt export sale because the goods entered the export stream when they left the taxpayer's plant in Alaska and were in actual movement in the export stream when they were routed via Washington to be loaded on a ship bound for Japan.

Item # 11: SCHEDULE III, Page 2, 8-26-86, . . . Corp., Invoice C608-34.

The taxpayer's fish to be sold was in cold storage at . . . in . . . , Washington. On or about August 25, 1986, the taxpayer sold 31,800 pounds of salmon to . . . Corporation . . . (buyer) located in . . . , Washington for \$90,117. The fish was to be transported to Japan by ship "Sea-Land Independence 88" with departure from Tacoma on September 1, 1986 and estimated time of arrival in Japan as September 13/14, 1986.

An affidavit, submitted by the taxpayer, from the manager of . . . gives the following description of its participation in the sale. The stored fish are specifically marked as belonging to the taxpayer. . . . receives a verbal confirmation followed by a fax confirmation of the taxpayer's sale to a foreign customer. The information received by . . . includes the lot numbers and pounds of the fish to be shipped, the destination of the export shipment, the truck and van number hauling the fish from the warehouse to the ship, the ship involved, the port marks, and the name of the export

customer. . . . will move the fish specified from the taxpayer's inventory to the loading area where the fish will be loaded into export containers after specially packaged for export. . . . prepares a manifest of the fish being loaded, a container loading plan, and a delivery order. The container is sealed at the final loading place in such a manner that the fish are irrevocably committed to the export process. The refrigerated export containers, to be later hitched to the back of semi-tractors, are put into the loading yard and plugged in. . . . then notifies a local trucking line to advise them that the export container is ready to be picked up. The local trucker signs the delivery order and drives the container to the export vessel. . . . treats the fish as if they are still the property of the taxpayer and under its control up to the point that the local trucker picks up the export container and drives away with it. Until the fish leave . . . 's premises, all costs associated with moving the fish about the premises and of loading and packing the fish in the export containers are borne by the taxpayer.

The foreign purchaser normally pays for the transportation of the fish by the local delivery truck and for the overseas transportation.

The taxpayer asserts that the standard that applies in this situation is that of Rule 193C that there must be an actual entrance of the goods into the export stream. The taxpayer cites Carrington Company v. Department of Revenue, 84 Wn 2d 444, 446 (1974) as stating "entry into the export stream must be the start of a continuity of movement." The taxpayer asserts that the "start of a continuity of movement" began when the fish were moved from the cold storage holding area to the loading area where they were specifically packaged, specially loaded, labeled and sealed for export, and irrevocably bound to be delivered to the foreign buyer. The taxpayer cites 1 WTD 323 (1986), Final Determination No. 86-283, as declaring "...it is not critical to establish the precise point or moment in time when the export movement begins for purposes of determining whether the sale of the goods is a tax exempt export sale." The taxpayer asserts that the relevant inquiry is whether there is a certainty of export, which it concludes is not an issue in this assessment, and whether the process of export has started, that is, whether there has been actual entrance of the goods into the export stream, which it concludes has occurred. Thus, the taxpayer contends that this sale is a tax exempt export sale.

Item # 12: SCHEDULE III, Page 2, 8-5-86, . . . , Invoice C608-04.

The taxpayer's fish to be sold was in cold storage at . . . in . . . , Washington. On or about July 25, 1986, the taxpayer sold 20,454 pounds of salmon to . . . Incorporated located in . . . , Washington for \$65,201.90. The fish was to be transported to Japan by ship with estimated departure in the first week of August.

In this transaction, the submitted documentation, a Uniform Straight Bill of Lading Withdrawal Notice, indicates that the fish were withdrawn from cold storage for delivery to . . . in . . . , [Japan]; and the submitted ship/carrier's "Container Load Plan" with cross reference to the submitted cold storage warehouse's releasing manifest indicates transportation to be on the vessel "Hiei Maru", voyage number 66, departing from Seattle for Tokyo.

For the same reasons stated in the above . . . sale, the taxpayer contends that this sale is a tax exempt export sale.

FACTUAL ERROR.

Item # 13: SCHEDULE III, Page 1, 6-30-85, . . . , Invoice M506-34.

In this situation, the taxpayer contends that the auditor taxed the wrong amount of \$5,402.76. The taxpayer has submitted the invoice, . . . which shows the amount to be \$2,706.36. The taxpayer has also submitted a copy (. . .) of the customer's check dated July 1, 1985 in the amount of \$2,706.36.

DISCUSSION:

The issues will be discussed in the order presented.

Item # 1: SCHEDULE II, SALES COMMISSION APPORTIONMENT.

[1] Rule 194 in pertinent part provides:

Persons domiciled outside this state who...(3) render service to others herein, are doing business in this state, irrespective of the domicile of such persons and irrespective of whether or not such persons maintain a permanent place of business in this state.

Persons domiciled in and having a place of business in this state, who...(3) render services to others outside this state, are doing business both inside and outside this state....

BUSINESS AND OCCUPATION TAX

...the tax applies upon the income received for services incidentally rendered to persons outside this state by a person domiciled herein who does not maintain a place of business within the jurisdiction of the place of domicile of the person to whom the service is rendered.

For example, persons domiciled herein, but having no place of business outside this state, are taxable upon the following types of income:

...

(6) A commodity broker upon commissions received from persons without the state.

...

Persons engaged in a business taxable under the service and other business activities classification and who maintain places of business both inside and outside this state which contribute to the performance of a service, shall apportion to this state that portion of gross income derived from services rendered by them in this state. Where it is not practical to determine such apportionment by separate accounting methods, the taxpayer shall apportion to this state that proportion of total income which the cost of doing business within this state bears to the total cost of doing business both within and without this state. (Emphasis supplied.)

We find that the above last paragraph excerpted from Rule 194 applies to the fact situation presented with respect to the taxability of the sales commissions earned by the taxpayer.

In this case, the taxpayer has places of business in both Washington and Alaska. Both places of business "contributed to the performance of a service" -- the selling services of the taxpayer's sales manager on behalf of . . . , located in

Alaska, which produced the commission income earned by the taxpayer. Accordingly, the earned commission income is subject to taxation in Washington, but limited to that portion of gross income derived from services rendered in Washington. Rule 194.

The taxpayer did not present information enabling the Department to apportion income based on separate accounting methods. Therefore, precisely as required by Rule 194, income subject to tax is to be apportioned to Washington on a cost of doing business basis, that is, "that proportion of total income which the cost of doing business within this state bears to the total cost of doing business both within and without this state". However, this method is not exclusive. The taxpayer and the auditor may use another accounting method which they mutually find practical under the circumstances.

[2] With respect to the taxpayer's interstate sales involving fish originating in Alaska that are sold to persons in Washington, the pertinent regulation is WAC 458-20-193B (Rule 193B) titled "Sales of goods originating in other states to persons in Washington." Rule 193B in pertinent part provides:

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....

The taxpayer does not dispute that under Rule 193B local business nexus exists sufficient to support excise taxation of sales made in Washington. However, the taxpayer maintains that the excise tax on its sales to Washington customers and customers in other states does not apply because the sales occurred outside Washington in that delivery to the customers occurred outside Washington.

The key to this matter is where did delivery to the customers take place. WAC 458-20-103 (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 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. (Emphasis supplied.)

Thus, under Rule 103, a sale takes place in this state when the goods sold are delivered to the buyer 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 in this state, it will not be subject to tax here.

The converse of Rule 193B's statement that "a sale takes place in this state when the goods sold are delivered to the buyer in this state" is embodied in WAC 458-20-193A (Rule 193A) which is titled "Sales of goods originating in Washington to persons in other states." 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.

Rule 193B, absorbed with taxing jurisdiction (nexus) over out-of-state sellers, does not discuss the proof required as to delivery where the sale is of goods originating in other states to persons in 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 exemption. 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.

In recognition of the requirement that there be consistency in the operation of Rules 193A and B, the Department has exempted sales from B&O taxation where the seller has made delivery at a point outside this state of the goods sold to an in-state buyer under the conditions set forth in Rule 193A.

In this case, to qualify for the interstate sales exemption from the B&O tax, the taxpayer had to have an agreement to

deliver the fish to the buyer at a point outside of Washington and the transportation of the fish out of Alaska and into Washington had to be by the buyer or a carrier on behalf of the buyer at the risk and expense of the Washington buyer.

The taxpayer, citing section 62A.2-319 of the Uniform Commercial Code (U.C.C.), has attached importance to the fact that its sales were F.O.B. . . . , Alaska as indicating that risk and expense of delivery passed to the buyer in Alaska and establishing that delivery was made to the buyer in Alaska. Final Determination 86-161A, 2 WTD 397 (1987), states the Department's position with respect to that matter by declaring:

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.... 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 [sic] 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.

In any event, "F.O.B. the place of shipment" merely places the "expense and risk" on the seller until the goods are in the possession of the carrier, that is, the seller has the expense for packing, crating, and transporting the goods to the carrier and such expense is included in the price of the goods. Generally, in arranging for shipment, the taxpayer/seller selected and notified the carrier. The taxpayer/seller either paid the carrier and charged the buyer for the freight or instructed the carrier to collect the freight cost from the buyer. In either case, delivery took place at the place where the carrier had transferred possession of the goods to the buyer or another person on behalf of the buyer. 2 WTD 397 (1987).

With the foregoing requirements of Rules 193A and B, the Department's recognition that consistency in their operation be observed, and prior Departmental rulings as instructive and fundamentally supportive, we will rule on the individual items (interstate sales) detailed in the Facts and Issues part of this Determination.

Item # 2: SCHEDULE III, Page 1, 8-29-85, . . . , Invoice B508-37.

The taxpayer's fish to be sold and delivered to a customer in Florida was in a cold storage warehouse in . . . , Washington. The selling price included the charge for delivery. The taxpayer's carrier picked up the fish at the warehouse and signed a Warehouse Release/Original Straight Bill of Lading showing that the fish had been stored for the taxpayer and was to be transported to the customer in Florida. The carrier invoiced the taxpayer who paid for the freight.

Because the taxpayer/seller agreed to and had its carrier deliver the fish to the buyer at a point outside Washington, as evidenced by supporting documentation, we hold this transaction to be exempt from B&O tax.

Item # 3: SCHEDULE III, Page 2, 1-21-86, . . . , Invoice C601-17.

The taxpayer's fish to be sold and delivered C.O.D to a customer in Florida was in a cold storage warehouse in . . . , Washington. The taxpayer's carrier picked up the fish at the warehouse and signed the withdrawal notice and manifest (waybill) which showed the freight to be C.O.D.

Because the taxpayer/seller agreed to and had its carrier deliver the fish to the buyer at a point outside Washington, as evidenced by supporting documentation, we hold this transaction to be exempt from B&O tax.

With reference to the taxpayer's concern about the 1988 Tax Topics No. 13 article on "freight collect" shipment (See Facts and Issues part of this Determination) which stated that "freight collect" shipments will no longer qualify for the interstate sales deduction merely because the seller is shown as shipper or consignor, it is noted Revenue Policy Memorandum (RPM) No. 89-2, . . . , issued September 1, 1989, declares in pertinent part:

Sales by sellers located in this state of goods delivered to buyers outside this state by carriers-for-hire are not subject to the wholesaling or retailing business and occupation tax...in any cases where the seller is shown as consignor and the buyer is shown as consignee on the delivery bill of lading or other contract of carriage under which the goods are shipped to the out-of-state destination. This interstate sales exemption...also applies regardless of whether the shipment is arranged on a "freight prepaid" or a "freight collect" basis. (Emphasis supplied.)

The RPM apparently sounds the death knell for the "risk and expense" criteria with respect to freight collect shipments. Furthermore, the 1988 Tax Topics article stated that there would be only prospective application as to non-eligibility of "freight collect" for tax exemption, whereas in this case the taxpayer's freight collect shipments occurred prior to 1987. Thus, the Tax Topics article favors the taxpayer with retroactive allowance of the interstate sales exemption.

Item # 4: SCHEDULE III, Page 1, 8-8-85, . . . , Invoice C508-08

The taxpayer's fish in Alaska was sold to a customer in Washington. The taxpayer shipped the fish using its reserved containers and hired a carrier to transport the fish to . . . , Washington where the fish went into cold storage. The submitted record, a bill of lading, of the cold storage warehouse indicated that the fish was held there "for the account of or shipper" of taxpayer for shipment to the Washington buyer and then released to a carrier for delivery to the buyer. The sale terms were "Ex- . . . Cold Storage" which indicated that the taxpayer was responsible for all delivery costs up to the time that the fish were released from cold storage.

Because the taxpayer had nexus in Washington and had its carrier deliver the fish into Washington for cold storage and later delivery to the Washington buyer, we find that the sale took place in Washington. Rule 103. We conclude that the sale was not exempt from the B&O tax per Rule 193B's declaration 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."

Item # 5: SCHEDULE III, Page 1, 5-20-84, . . . , Invoice C405-05.

The taxpayer's fish in Alaska was sold to a customer in Washington. The taxpayer shipped the fish using its reserved containers and hired a carrier to transport the fish to . . . , Washington where the fish went into cold storage. The submitted bill of lading issued by the carrier declares the taxpayer to be the shipper and the shipment was consigned to the customer with "freight charges collect."

Under RPM No. 89-2, supra, this sale would not be tax exempt because the bill of lading shows the taxpayer to be the shipper/consignor and the Washington buyer to be the consignee. This establishes that the delivery/sale was made in Washington regardless of the "freight collect" basis. However, because the 1988 Tax Topics article, supra, favors the taxpayer with retroactive allowance of the interstate sales exemption for this 1984 transaction, we will hold this sale to be tax exempt with the caveat that effective September 1, 1989 the policy set forth in RPM No. 89-2 will be controlling.

Item # 6: SCHEDULE III, Page 1, 5-16-84, . . . , Invoice C405-03.

The taxpayer's fish in Alaska was sold to a customer in Washington. The taxpayer had its truck carrier transport the fish to the . . . airport where the fish were loaded on a cargo transport airplane seasonally reserved by the taxpayer. The only document as to the transport was a printed memorandum form given by the truck carrier to the taxpayer as a receipt for the fish with the fish consigned to the air cargo carrier on behalf of the buyer. The buyer made arrangements with the air cargo carrier for the air transportation. The buyer paid the truck carrier for the trucking to the . . . airport and the air carrier for the air freight to Washington. Because the evidence satisfies us that the buyer's carrier for hire, that is, the air carrier, accepted delivery of the fish in Alaska on behalf of the buyer, and, in effect, transported the fish at the risk and expense of the buyer, we find that constructive delivery to the buyer occurred in Alaska. Accordingly, we conclude that the sale took place in Alaska and was tax exempt. Rules 103, 193A and 193B.

Item # 7: SCHEDULE III, Page 1, 6-12-84, . . . , Invoice C406-14.

The taxpayer's fish in Alaska was sold to a customer in Washington. The taxpayer had its truck carrier transport the fish to the . . . airport where the fish were loaded on a seasonally reserved Alaska Airlines cargo airplane for transport to . . . , Washington. Alaska Airlines issued an "Air Waybill" which showed the buyer to be the shipper as well as the consignee. The buyer paid the freight costs directly to the carriers.

Because the documentation shows that the buyer's carrier for hire, that is, the air carrier, accepted delivery of the fish in Alaska on behalf of the buyer, and, in effect, transported the fish at the risk and expense of the buyer, we find that constructive delivery to the buyer occurred in Alaska. Accordingly, we conclude that the sale took place in Alaska and was tax exempt. Rules 103, 193A and 193B.

Item # 8: SCHEDULE III, Page 1, 6-11-85, . . . , Invoice C506-36.

The taxpayer's fish in Alaska were sold to a customer in Washington. The taxpayer hired a carrier to transport the fish to . . . , Washington where the fish were put in cold storage. The carrier issued a Uniform Straight Bill of Lading which showed the taxpayer to be the shipper and the buyer to be the consignee. The taxpayer paid the freight costs to the carrier and billed the buyer for the cost of the freight.

Because the taxpayer had nexus in Washington and had its carrier deliver the fish into Washington for cold storage and later delivery to the Washington buyer, we find that the sale took place in Washington. Rule 103. We conclude that the sale was not exempt from the B&O tax per Rule 193B's declaration 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."

Item # 9: SCHEDULE III, Page 1, 7-6-84 . . . , Invoice C406-56.

The taxpayer's fish in Alaska was sold to a customer in New York. The taxpayer hired a carrier to transport the fish to . . . , Washington where the fish were put in cold storage on a "short hold" basis for the account of the buyer. The taxpayer paid the freight costs to the carrier and billed the buyer for the cost of the freight. The buyer was responsible

for arranging and paying for the transportation of the fish from [Washington] to New York and did so.

In this transaction, it is obvious that the buyer took constructive delivery in Washington when the fish were stored in Washington for the account of the buyer. We find that the sale took place in Washington. Rule 103.

Furthermore, Rule 193A in pertinent part provides:

BUSINESS AND OCCUPATION TAX

RETAILING AND WHOLESALING. Where tangible personal property in Washington is delivered to the purchaser in this state, the sale is subject to tax under the retailing or wholesaling classification, even though the purchaser intends to and thereafter does transport or send the property out of state for use or resale there,... It is immaterial that the contract of sale or contract to sell is negotiated and executed outside the state, that the purchaser resides outside the state, or.... (Emphasis supplied.)

The B&O tax is not a tax upon the goods in interstate transport, but upon the business activity of selling. The sale (selling activity) takes place where the goods are delivered to the buyer. In this case, the delivery to the buyer took place in Washington. Accordingly, we conclude that the sale was not exempt from the B&O tax. Rules 103 and 193A.

Foreign/Export Sales.

WAC 458-20-193C (Rule 193C) deals with sales of goods to persons in foreign countries. Rule 193C in pertinent part provides:

FOREIGN COMMERCE

...

EXPORTS. An export is an article which originates within the taxing jurisdiction of the state destined for a purchaser in a foreign country...

BUSINESS AND OCCUPATION TAX

WHOLESALING AND RETAILING.

...

EXPORTS. A deduction is allowed with respect to export sales when as a necessary incident to the contract of sale the seller agrees to, and does deliver the goods (1) to the buyer at a foreign destination; or (2) to a carrier consigned to and for transportation to a foreign destination, or (3) to the buyer at shipside or aboard the buyer's vessel or other vehicle of transportation under circumstances where it is clear that the process of exportation of the goods has begun, and such exportation will not necessarily be deemed to have begun if the goods are merely in storage awaiting shipment, even though there is reasonable certainty that the goods will be exported. The intention to export, as evidenced for example, by financial and contractual relationships does not indicate "certainty of export" if the goods have not commenced their journey abroad; there must be an actual entrance of the goods into the export stream.

In all circumstances there must be (a) a certainty of export and (b) the process of export must have started.

It is of no importance that title and/or possession of the goods pass in this state so long as delivery is made directly into the export channel. To be tax exempt upon export sales, the seller must document the fact that he placed the goods into the export process. That may be shown by the seller obtaining and keeping in his files any one of the following documentary evidence:

- (1) A bona fide bill of lading in which the seller is shipper/consignor and by which the carrier agrees to transport the goods sold to the foreign buyer/consignee at a foreign destination; or
- (2) A copy of the shipper's export declaration, showing that the seller was the exporter of the goods sold; or
- (3) Documents consisting of:
 - (a) Purchase orders or contracts of sale which show that the seller is required to get the goods into the export stream, e.g., "f.a.s. vessel;" and

- (b) Local delivery receipts, tripsheets, waybills, warehouse releases, etc. reflecting how and when the goods were delivered into the export stream; and
- (c) When available, United States export or customs clearance documents showing that the goods were actually exported; and
- (d) When available, records showing that the goods were packaged, numbered or otherwise handled in a way which is exclusively attributable to goods for export.

Thus, where the seller actually delivers the goods into the export stream and retains such records as above set forth, the tax does not apply. It is not sufficient to show that the goods ultimately reached a foreign destination; but rather, the seller must show that he was required to, and did put the goods into the export process. (Emphasis supplied.)

Item # 10: SCHEDULE III, Page 2, 9-2-88, . . . Inc., Invoice C608-29.

The taxpayer's fish in Alaska was sold to a customer in Washington with delivery to be made to an affiliated company in Japan. The customer hired a carrier in Alaska. Per documentation submitted, the customer was the shipper/exporter and its affiliate in Japan was the consignee. The carrier transported the fish to Tacoma, Washington where the fish were loaded on a ship for transport to Tokyo.

Because there was constructive delivery of the fish to the buyer in Alaska, the sale took place in Alaska. Rule 103. Furthermore, the fish were placed into the export stream in Alaska, and continued to be in the export stream when loaded on a ship in Tacoma with Tokyo as the destination. Accordingly, we conclude that the sale was tax exempt. Rules 103 and 193C.

Item # 11: SCHEDULE III, Page 2, 8-26-86, . . . , Invoice C608-34.

The taxpayer's fish, in cold storage in Washington, was sold to a customer in Washington. The fish was destined for Japan. At the cold storage warehouse, the fish were specially packaged and marked for export. The fish were put in a container and upon notification by the warehouse was hauled away by a local trucker.

[3] The taxpayer's cited 1 WTD 323 (1986), Final Det. No. 86-283, states the following:

...Our very limited purpose here is to rule, as we do now, that it is possible for the export movement of goods to commence and the export flow or stream to begin before goods are physically delivered into the possession of the transporting carrier who will, itself, move the goods outside of this state or country.

...

The dispositive criteria for tax exemption under Rule 193C are that the seller is itself obligated to get the goods to the buyer's foreign destination and that the delivery or shipping documents reveal that it has done so. If those criteria are satisfied, it is not critical to establish the precise point or moment in time when the export movement begins for purposes of determining whether the sale of the goods is a tax exempt export sale. (Emphasis supplied.)

In this case, our examination of the taxpayer's submitted documents reveals that a sale of fish was made to a customer based in . . . , Washington and that shipment was to be made to the customer in . . . , Japan in "export cases" on a named ship leaving Tacoma for Japan on September 1.

Rule 193C states the following which comports with the dispositive criteria of the cited determination:

To be tax exempt upon export sales, the seller must document the fact that he placed the goods into the export process.

The above statement is then followed by numerous examples of substantiating documentary evidence, and only one would suffice. Going down the list of bill of lading; shipper's export declaration; purchase order or contract showing the seller is required to get the goods into the export stream; local delivery receipt, etc. reflecting how and when the goods were delivered into the export stream; U.S. export or customs clearance documents; and records showing that the goods were packaged, numbered or otherwise handled in a way which is exclusively attributable to goods for export, we find that not

one of the foregoing is among the taxpayer's submitted documentation.

We recognize, under the circumstances present in this sale, that the taxpayer is somewhat limited in what documentation it would normally receive. However, it appears to us that the taxpayer could get records from the cold storage warehouse showing that the goods were packaged, numbered or otherwise handled in a way which is exclusively attributable to goods for export, or a copy of the receipt. showing a destination, given by the local trucker who hauled the fish away.

Because the taxpayer has not produced documentation to show that it "placed the goods into the export process", we find that the sale cannot be given tax exempt status. Rule 193C. If the taxpayer produces such documentation, the auditor will give tax exempt status to this sale.

Item # 12: SCHEDULE III, Page 2, 8-5-86, . . . , Invoice C608-04.

The taxpayer's fish, in cold storage in Washington, was sold to a customer in Washington. The fish was destined for Japan. At the cold storage warehouse, the fish were specially packaged and marked for export. The fish were put in a container and upon notification by the warehouse was hauled away by a local trucker.

The submitted documentation, a Uniform Straight Bill of Lading Withdrawal Notice indicated that the fish were withdrawn from cold storage for export delivery to Japan. The submitted ship/carrier's "Container Load Plan" with cross reference to the submitted cold storage warehouse's releasing manifest indicated transportation of the fish on a specific ship's voyage from Seattle to Tokyo.

We find that the taxpayer has documented the fact that the goods were placed into the export process with "records showing that the goods were packaged, numbered, or otherwise handled in a way which is exclusively attributable to goods for export." Rule 193C. Accordingly, we conclude that this sale was tax exempt.

FACTUAL ERROR.

Item # 13: SCHEDULE III, Page 1, 6-30-85 . . . , Invoice M506-34.

We agree with the taxpayer that the auditor incorrectly taxed the wrong amount of \$5,402.76 as evidenced by the submitted documentation . . . which shows the correct amount to be \$2,706.36. Accordingly, the tax assessment will be corrected.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part as indicated below. Where the taxpayer's petition is granted as to interstate and export sales, it may have other similar transactions with supporting documentation which are to be considered by the auditor for adjustment. Where the taxpayer's petition has been denied because of lack of supporting documentation, and the taxpayer submits the supporting documentation to the auditor, the auditor will make the appropriate adjustment.

Item # 1: SALES COMMISSION APPORTIONMENT. The taxpayer's petition is denied in part and sustained in part. The sales commission income is subject to Service B&O tax on an apportionment basis as indicated in this Determination.

Item # 2: The taxpayer's petition is granted.

Item # 3: The taxpayer's petition is granted.

Item # 4: The taxpayer's petition is denied.

Item # 5: The taxpayer's petition is granted.

Item # 6: The taxpayer's petition is granted.

Item # 7: The taxpayer's petition is granted.

Item # 8: The taxpayer's petition is denied.

Item # 9: The taxpayer's petition is denied.

Item # 10: The taxpayer's petition is granted.

Item # 11: . . . Corp. The taxpayer's petition is denied. However, if the taxpayer produces supporting documentation, as discussed, the auditor will make the appropriate adjustment.

Item # 12: The taxpayer's petition is granted.

Item # 13: The taxpayer's petition is granted.

This matter is being referred to the Department's Audit Section for action in line with the holding in this Determination. It will then issue an amended tax assessment which will be due for payment on the date indicated thereon.

DATED this 8th day of November 1989.