Cite as 1 WTD 323 (1986)

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

In the Matter of the Petition For Ruling and Refund of	)	F I N A L D E T E R M I N A T I O N
	)	No. 86-283
. . .	)	Registration No. . . .
	)	Tax Assessment No. . . .
and	)	
. . .	)	Unregistered Petition for Refund

[1] RULE 193C - EXPORTS - COMMENCEMENT OF MOVEMENT - STREAM OF EXPORT COMMERCE. The export movement of goods sold to foreign buyers may commence before the goods are placed upon foreign bound transportation vehicles, but such sales must always satisfy the criteria of Rule 193C in order to be tax exempt. Determination 83-203 clarified.

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.

On September 3, 1986 pursuant to your timely petition, a conference was conducted in Olympia, Washington with respect to the above-referenced tax assessment and petition for refund. Because of the common, single issue for consideration and because the resolution of that issue will incur further records examination, in both cases, by the Department's Audit Section, this joint appeal was granted. The unique nature of the question for our consideration and resolution at this time justifies this conditional ruling through a formal Determination.

This legal opinion may be relied upon for reporting purposes and as support of the reporting method in the event of an audit. This ruling is issued pursuant to WAC 458-20-100(18) and is based upon only the facts that were disclosed by the taxpayer. In this regard, the Department has no obligation to ascertain whether the taxpayer has revealed all of the relevant facts or whether the

facts disclosed are actually true. This legal opinion shall bind this taxpayer and the Department upon these facts. However, it shall not be binding if there are relevant facts which are in existence but have not been disclosed at the time this opinion was issued; if, subsequently, the disclosed facts are ultimately determined to be false; or if the facts as disclosed subsequently change and no new opinion has been issued which takes into consideration those changes. This opinion may be rescinded or revoked in the future, however, any such rescission or revocation shall not affect prior liability and shall have a prospective application only.

NATURE OF ACTION:

Tax Assessment No. . . . has been issued to the taxpayer, . . ., as a result of the tax audit covering the period from October 1, 1981 through March 31, 1985. That assessment, in the amount of $432,107, includes business and occupation (B&O) tax measured by claimed tax exempt, export sales. The Audit Section denied the claimed export sales exemption on grounds that the taxpayer had not delivered the goods into the export stream of commerce. That position was based upon the findings and conclusions of Determination No. 83-203 issued to the same taxpayer on August 16, 1983, covering a prior audit period tax assessment.

The taxpayer, . . . , seeks a refund of retail sales tax paid, also pursuant to the findings and conclusions of Determination 83-203. As a foreign purchaser from . . . , this taxpayer was billed for and paid retail sales tax on certain purchases because the Determination ruled them to be local sales and deliveries to . . . or its forwarding agent in this state.

FACTS AND ISSUES:

Faker, Sr. A.L.J.--Both taxpayers seek a clarification and resolution of the same question, to wit: under export commerce law, case law, and WAC 458-20-193C, is it possible for the export movement of goods sold to begin at some point before delivery of those goods into the hands of the carrier who will transport the goods outside this country?

The seller, . . . , sells the goods (off shore drilling machinery) to buyers with business presence in foreign countries. It is not disputed that the goods are ultimately bound for destinations outside the U.S. The goods are delivered by the seller to packers/freight forwarders, in this state, for further packaging, preparation, and consolidation for shipment abroad. These packer/forwarders are independent companies separate from either the seller or the buyers. They are selected by the buyers.

TAXPAYERS' EXCEPTIONS:

The taxpayers assert that the Department's Audit Section has focused upon a statement contained in Determination 83-203, and concluded that the movement of goods into the export stream of commerce can never commence until the goods are delivered to a carrier for actual transport out of this country. Thus, the Audit Section has refused to examine shipping and delivery proofs (documents) proffered to substantiate the export, tax exempt, nature of the sales in question. In other words, the taxpayers assert that the sales in question are export exempt sales but simply because . . . delivered to a local packer/consolidator, the taxpayer has not been allowed to present its proofs of export transactions as provided for under Rule 193C and prevailing case law.

The taxpayers seek a limited ruling that the exportation of goods sold--the movement into the stream of foreign commerce--can begin at the seller's plant or some other point and place before physical delivery to the final overseas carrying vehicle or vessel.

The taxpayers' petition contains the following:

> Both matters involve sales for export. Off shore oil drilling equipment is a typical example. The sale occurs at the point when the goods are delivered to a packer or forwarder who specializes in packaging for export. The packer is selected by the buyer to package for the overseas journey and receives with the goods instructions for their export.
>
> . . .
>
> The issue in both matters is whether the delivery to the specialty packer for export packing is a commencement of the export journey. The taxpayers will also provide proof of certainty of export but our suggestion is that this be handled, initially at least, at the Audit Division level by document review once the threshold issue of commencement of the export journey has been resolved.
>
> . . .
>
> The taxpayers rely upon Rule 193(c) and the decision of the Washington Supreme Court in Carrington Co. v. Department of Revenue, 84 Wn.2d 444, 527 P.2d 74 (1974).
>
> In Carrington the court described the key facts as follows: (84 Wn.2d at 447)
>
> > "Turning to the facts, we find that the plaintiff was the successful bidder to supply parts and equipment

> of a specified make to the General Services Administration of the United States (GSA). From the invitation to bid to the accomplished fact, all such items were destined for and delivered to military installations in southeast Asia, Korea and Japan . . . pursuant to the purchase order requirements, the shipments were trucked from Seattle to GSA's Tacoma packing facility. The Tacoma facility had been established for the sole purpose of packing items for overseas shipment to United States military establishments."

The Carrington court held that the packing in Tacoma was not a break in the stream of export, but was in furtherance of it--because the purpose of sending the goods to the packing facility was to package for overseas shipment. The court explained: (84 Wn.2d at 448)

> "From these facts, the court concluded that when the items were loaded on the trucks in Seattle it was certain that they were destined for export, that they then entered the export stream and that the packing in Tacoma was not a break in the stream of export, but in furtherance of it. We agree. . . . The delivery, without exception, was to a facility designed solely to package the goods for overseas shipment. Under these facts it is conclusive that there was a meshing of the certainty of export with the commitment to and actual commencement of transportation in the export stream."

The Carrington court went on to reconcile its holding with Rule 193C: (84 Wn.2d at 448)

> "Finally the State's own administrative rule, WAC 458-20-193C(3) acknowledges that something short of delivery at dockside will constitute entry into the export stream. It states that it is sufficient if there is delivery to

> "other vehicles of transportation under circumstances where it is clear the goods will be taken to a foreign destination."
>
> In short, under Carrington, goods destined for export are deemed to have commenced the export journey when they leave the place of manufacture and travel to a packing house for the purpose of being packaged for the overseas journey.
>
> . . .
>
> Applying Carrington principles, one packing house specializing in export packaging is like another in terms of function. The function of putting the goods in crates or other packages specially designed for overseas shipment is the controlling factor of the Export Clause. In other words, the function of the packing facility, not its ownership, controls.
>
> In Carrington the purchaser (USA) owned the facility. In the instant cases the facilities are independently owned but are selected by the purchasers. Carrington obviously involved a delivery within Washington, but the controlling principle was that the export journey had started because the goods were delivered for special packaging in furtherance of the journey. Thus, even if it should develop that the packers have accepted the goods on behalf of the purchasers in the instant matters, the Carrington principle applies to protect the sale from tax under the export clause.
>
> In summary, no meaningful distinction can be drawn between the special export packing facilities involved in Carrington and those of the instant case. Even if Carrington is limited to its facts, the export journey must be considered to have commenced in the instant matters.

At the September 3, 1986 hearing the taxpayers stressed that it is necessary to have the sales transactional delivery documents examined to determine that they satisfy Rule 193C requirements supporting tax exemption of export sales.

With respect to the tax refund request by . . . Drilling Co., the specific delivery documents are available for examination but the threshold issue must first be resolved.

DISCUSSION:

We have not been requested to rule upon the specific export exempt or taxable nature of any of the sales by . . . assessed for tax, or the sales upon which . . . has remitted sales tax. Neither have we been requested for a ruling that the deliveries of goods in these cases to freight packer/consolidators occurred after the goods entered the export stream of commerce. We expressly decline to rule upon those questions at this time. The complete transactional records have not been presented or examined and we have not seen evidence to weigh for purposes of comparing the Carrington decision, supra, or applying other controlling law. Our very limited purpose here is to rule, as we now do, 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.

We said in Determination 83-203, in pertinent part,

> Concerning the taxpayer's claimed exempt export sales, the requirements for proof of entitlement to tax exemption for export sales are less stringent than for interstate sales. (See Carrington Co. v. Department of Revenue, supra). It is not required, under constitutional concepts or under WAC 458-20-193C, that the seller of goods for export retains a bill of lading showing itself as shipper or consignor. It is sufficient if the sales and delivery documents make it clear that there is (a) certainty of export, and (b) the seller has started the export process. Starting the export process means actually getting the goods into the export stream. This, of course, is not done merely by delivering the goods to a local hauling firm for delivery to some freight consolidator for later delivery to the actual export carrier. The seller can start the export process (get the goods into the export stream) only by delivering them to the export carrying mode (ship, plane, etc.). In short, exports become exports only when they start their actual export movement by being delivered to the export channel. (Emphasis supplied).

[1] It may be that some readers have taken the statement underscored above to mean that an export sale can be perfected only by the seller itself actually and physically transferring possession of the goods directly on board or alongside the carrier vehicle for immediate further movement to the foreign destination. However, the intent in using the phrase "to the export carrying mode" was only to convey that the entire delivery movement of the goods toward the foreign destination should be continuous and unbroken except for any reason, in transit so to speak, to facilitate further movement of the goods, e.g., temporary delay awaiting the foreign bound transporting vehicle. It was not the meaning of this statement in the Determination that the export

movement only begins at that point of transfer to the foreign bound carrier vehicle. In fact, the intervening hauler to the dock or airport may be part of the export carrying "mode." Clearly, and as consistently and uniformly ruled by the Department, the export movement or flow can begin at the seller's plant and can continue on through numerous intermediate handlers and carriers until the goods arrive at their ultimate foreign destination. To rule otherwise would make it nearly impossible for an inland seller to ever make a tax exempt export sale by waterborne carriage.

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. See Tacoma v. General Metals, 84 Wn.2d 560 (1974), and most recently, Coast Pacific Trading, Inc. v. Department of Revenue, 105 Wn.2d 912 (1986).

Accordingly, in the matter of . . . , we refer the assessment to the Audit Section for an appropriate examination of all of the pertinent sales and delivery documents. It may be that these documents will reveal tax exempt export sales. It may be that they will not. In any event it is not appropriate to refuse their submission simply because the taxpayer delivered the goods to an intervening freight packer/consolidator rather than directly to a transporting carrier. Again, however, we do not decide here that the taxpayer has met the Rule 193C criteria in this case. That conclusion must still be proven.

With respect to the . . . matter the same principle of law pertains. We note here that the only documents offered with respect to the . . . sale, examined during the audit and appeal proceedings in 1983, did not satisfy the criteria of Rule 193C for exemption. Those criteria and the rule itself were expressly approved by the Court in Coast Pacific Trading, supra. The taxpayer now indicates that records may be available which meet the rule criteria. Because this is a tax refund request under RCW 82.32.170, the Department stands ready to examine any other sales and delivery documents which may establish the entitlement to tax refund, within the statutory period for such requests.

Conclusion

The taxpayers' limited ruling request is granted. The export movement of goods may commence before the goods are placed upon foreign bound transporting vehicles. Nonetheless, the criteria of Rule 193C must be satisfied for tax exemption on behalf of either sellers or buyers.

DISPOSITION:

The Audit Section will examine the documents of sale and delivery to confirm their compliance with Rule 193C.

DATED this 7th day of November 1986.