

Cite as Det. No. 93-155, 13 WTD 297 (1994).

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

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment)	
of)	No. 93-155
)	
. . .)	Registration No. . . .
)	FY . . ./Audit No. . . .

[1] RULE 193B: SALES TAX -- USE TAX -- OREGON BUSINESS -- WASHINGTON REGISTRATION -- EFFECT OF. Even if a Washington-registered business sells to Washington customers from outside the state (Oregon) and can disassociate said sales for B&O tax purposes, it is still obligated to collect sales/use tax on the transactions. Accord: Det. 87-69, 2 WTD 347 (1987).

[2] RULE 193B: B&O TAX -- DISASSOCIATION -- NATIONAL RETAILER -- OREGON STORES -- SALES BY. Sales by Oregon outlets of a national retailer to Washington customers may be disassociated from Washington sales, for B&O tax purposes, when the retailer demonstrates there was no participation in the sales by taxpayer representatives in Washington.

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.

. . .

NATURE OF ACTION:

A national chain of stores protests Washington excise taxation of sales by Oregon outlets to Washington customers.

FACTS AND ISSUES:

Dressel, A.L.J. -- (Taxpayer) is a chain of stores. Its books and records were examined by the Department of Revenue

(Department) for the period April 1, 1988 through September 30, 1990. As a result, a tax assessment was issued. Taxpayer appeals the entire assessment.

Taxpayer is one of four related regional selling corporations in the U.S. Taxpayer is the corporation which makes sales in the West. It owns the [taxpayer] stores in Washington and Oregon. This is not the familiar franchise scenario where each store is independently owned.

While the Oregon and Washington stores share common ownership, their operations are somewhat separated, functionally, as well as, geographically. Vis-a-vis the western part of Washington state, there are no [taxpayer] stores south of Olympia. There are no [taxpayer] stores in Vancouver, Washington. In the Portland area of Oregon, there are four [taxpayer] stores. The marketing efforts of the two areas are separately organized. Although advertising is done by the same third-party national company, it is separately orchestrated for the Puget Sound and Portland areas. For example, taxpayer advertisements (ads) appearing in Seattle newspapers are not necessarily the same as those which appear in Portland papers. Additionally, ads appearing in Seattle papers make no reference to [taxpayer] stores in Oregon. Similarly, Portland ads make no reference to [taxpayer] stores in Washington.

Although the various stores are part of the same company, there is competition among them. Individual stores get credit for sales that they make. They do not get credit for sales made by other stores. As a consequence, referrals from one store to another are rare and, given the 110 mile separation between Portland and the nearest Washington store,¹ referrals from a Washington store to an Oregon store, or vice-versa, are extremely rare.

This appeal relates only to sales made by taxpayer's Oregon stores to Washington residents where delivery was made to Washington. In the typical transaction at issue, a Vancouver, Washington² resident will see a [taxpayer] ad in a Portland newspaper or a [taxpayer] commercial on a Portland television station. The Washington resident will drive to Oregon to a [taxpayer] store. (S)he will purchase and arrange with the store to have it delivered to the customer's residence in Vancouver. The Oregon [taxpayer] store will charge extra for the delivery.

¹The nearest Washington store is in Olympia.

²Vancouver, Washington is directly across the Columbia River from Portland, Oregon.

It will then hire an independent delivery service which will deliver the item(s) to the customer in Washington.

In the subject tax assessment, the Department's Audit Division has taken the position that a Washington sale has occurred for purposes of both the business and occupation (B&O) tax and the sales tax. It has assessed taxes accordingly.

Taxpayer, however, maintains that with respect to the described sales, the Oregon stores have no nexus to Washington. It opines that "taxpayer's Oregon stores do not carry on in Washington any local activity which is significantly associated with taxpayer's Oregon stores' ability to establish or maintain a market in Washington for the sales". Taxpayer further states that in no way do [taxpayer's] Washington stores contribute to [taxpayer's] Oregon stores' ability to make sales to customers in Washington. It concludes, therefore, that the Department is not empowered to impose the B&O tax on the sales in question. Because it may not do that, says taxpayer, it also may not impose upon taxpayer the duty to collect sales tax.

The issues are: 1) Are [taxpayer] stores in Oregon required to collect Washington state sales tax from customers when delivering into Washington from Oregon? 2) Do Oregon stores owe Washington B&O tax on deliveries into the state of Washington?

DISCUSSION:

WAC 458-20-193B, as it existed during the audit period,³ read, in part:

SALES AND USE TAX

. . .

All vendors who are registered with the department of revenue are required to collect use tax or sales tax from all persons to whom goods are sold for use in this state irrespective of the absence of local activity on any given sale.

[1] Notwithstanding the separateness of its Oregon and Washington operations, both are part of a single corporation. It is not challenged that that corporation does business in Washington, is required to be registered with the Department of Revenue, and is, in fact, registered with the Department.

³WAC 458-20-193B was replaced by WAC 458-20-193, effective January 1, 1992.

Therefore, under the quoted authority, taxpayer must collect sales/use tax on all sales for use in this state. The location of the selling operation is irrelevant.

Taxpayer has suggested that if the disputed transactions are not subject to B&O tax, they are, similarly, not subject to sales tax. We addressed that contention previously in Det. No. 87-69, 2 WTD 346 (1987), where we concluded: "the mere act of registration with the Department is sufficient to allow the state to require that the out-of-state business collect use tax or sales tax for goods to be used in this state". Id. at 351. Taxpayer is registered. It must collect sales tax. Assessment of sales tax in the audit under appeal was proper.

As to the first issue, taxpayer's petition is denied.

With respect to the B&O tax issue, the principle of disassociation is important. To disassociate certain sales, a taxpayer must meet

. . . the distinct burden of establishing that the instate activities [of the taxpayer] are not significantly associated in any way with the sales into this state [which are under consideration].

. . .

Under the foregoing principles, sales transactions in which the property is shipped directly from a point outside the state to the purchaser in this state are exempt only if there is and there has been no participation whatsoever in this state by the seller's branch office, local outlet, or other local place of business, or by an agent or other representative of the seller.

(Bracketed inclusions ours.)

Former WAC 458-20-193B (Rule 193B). In Determination 91-213, 11 WTD 239 (1991), we described two situations somewhat analogous to the one we face here in which we opined that disassociation would be warranted. We said, at page 244:

However, two situations described above would seem to disassociate some of the sales from the taxpayer's activities in this state. In particular, if a Washington customer attends an out-of-state trade show and places an order with the taxpayer there and the customer has not had prior contacts with the taxpayer's Washington sales representatives, it would appear, based on those facts alone, there have been no local activities significantly associated with the sale. Similarly, if some of the

taxpayer's sales are the result solely of national advertising with no instate participation or prior contacts by its representatives, there would not be a Washington sale because of a lack of local activity by the seller. Final Det. No. 86-161A, 2 WTD 347, (1987); Norton, 340 U.S. at 539, B.F. Goodrich, 38 Wn.2d at 674.

Here, taxpayer's sales are largely the result of regional, as opposed to national, advertising. The regional advertising, however, emanates out of Portland. It has in common with the national advertising to which reference is made in the quoted passage the fact that it comes from a source outside Washington. Further, vis-a-vis the sales at issue, there was no instate participation or prior contact with Washington customers by taxpayer representatives.

As we did in those situations described in Determination 91-213, supra, we find here that taxpayer has met its burden of establishing that its instate activities, viz., sales by its Washington stores, are unrelated to the sales by its Oregon stores to Washington customers. The sales efforts of the Washington stores have nothing to do with the Oregon sales. Oregon sales to Washington customers would likely be unaffected if the Washington stores did not exist.⁴ The sales are the result of the simple existence of the stores in Oregon as well as the Portland area marketing efforts which just happen to drift across the Columbia River into Vancouver.

With respect to the second issue, disassociation for B&O purposes, taxpayer's petition is granted.

DECISION AND DISPOSITION:

Taxpayer's petition is denied in part and granted in part. This case is remanded to the Department's Audit Division which will

⁴We do recognize that the presence of stores in Washington give taxpayer some name familiarity it might not otherwise have, such that a Puget Sound resident travelling in Oregon might be more likely to stop at a [taxpayer] store than (s)he would had (s)he never heard of taxpayer. We regard this, however, as an incidental consequence of the Washington marketing effort and not "significantly associated" with the Oregon sales into this state. See former Rule 193B. We further recognize that a Puget Sound area resident might shop at an Oregon [taxpayer] store to avoid Washington's sales tax. Sales involving deliveries to the Puget Sound region (Greater Seattle/Tacoma), however, are not at issue. The business activities "significantly associated" with the sales at issue take place in Oregon and result in deliveries to the Greater Vancouver area of Washington.

issue an amended assessment, bearing a new due date, consistent with this Determination.

DATED this 27th day of May 1993.