BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| In the Matter of the Petition For Interpretation of | ) | D E T E R M I N A T I O N |
| | ) | No. 96-144 |
| . . . | ) | Registration No. . . . |
| | ) | FY. . ./Audit No. . . . |

[1] RULE 193; RCW 82.04.220; U.S. CONST. ART. I, § 8, CL. 3: B&O TAX -- COMMERCE CLAUSE -- NEXUS -- TRADE SHOWS -- DEALER TRAINING. In general, the Commerce Clause requires, inter alia, that there be substantial nexus before the state can impose B&O taxes on an out-of-state business that delivers goods from outside the state. While a presence of the vendor in Washington is required for substantial nexus, it need not be substantial, but only demonstrably more than the "slightest presence."

[2] RULE 193; RCW 82.04.220; U.S. CONST. ART. I, § 8, CL. 3: B&O TAX -- COMMERCE CLAUSE -- NEXUS -- TRADE SHOWS -- DEALER TRAINING. When a taxpayer's in-state activities are significantly associated with its ability to establish and maintain a market in this state, substantial nexus is established. A taxpayer who provides dealers with in-state training and promotional services at in-state trade shows is engaged in activities that are significantly associated with its ability to maintain a market in this state.

[3] RULE 193: INTERSTATE SALES OF GOODS TO WASHINGTON CUSTOMERS -- NEXUS -- DISASSOCIATION. An out-of-state business that has taxable nexus with Washington through out-of-state representatives visiting Washington customers may disassociate sales into this state where it demonstrates that

> its in-state activities are not significantly associated in any way with the sales.

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:

Out-of-state corporation that sells motor homes to dealers in Washington contends it does not have nexus with this state for business and occupation (B&O) tax purposes.[1]

FACTS:

Mahan, A.L.J. -- The taxpayer is an out-of-state corporation that manufactures and sells motor homes and travel trailers to various dealers located in the state of Washington. In 1993, the taxpayer completed a Master Business Application, applied to the Secretary of State for a Certificate of Authority to do business in Washington, and filed a Vehicle Manufacturer's License Bond with the Department of Licensing. In that same year, it wrote to the Department of Revenue (Department) and requested that it be listed as a "no nexus" account. It explained that it did not directly solicit sales in this state and that its dealers:

> attend industry or manufacturer trade shows to see the newest line of products, obtain brochures, and learn more about [the company]. . .[It] has obtained a majority of its dealers through these trade shows and general reputation. The largest trade shows are held in Los Angeles, California and Louisville, Kentucky. None are held in the State of Washington.

The Department responded by supplying the taxpayer with a copy of WAC 458-20-193 (Rule 193) and stated that, if the company met the requirements under the rule, it should ask the Department to close the taxpayer's account.

In 1994, the Department asked the taxpayer to complete a Washington business activities statement and, as a result, was informed that it must file returns and pay this state's B&O tax. The taxpayer then sought a ruling from the Department's Taxpayer Information and Education (TI&E)

[1]Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

section regarding nexus. Following an adverse ruling from TI&E, the taxpayer petitioned for a reversal of that ruling.

In its petition, the taxpayer states that it:

> sells motor homes to several independent dealers located in Washington. These independent dealers were obtained generally by inquiry from the dealers, contacts at dealer trade shows located outside of Washington, and phone call solicitation . . . to Washington dealers. Approved Washington dealers phone or mail orders to . . . headquarters in Indiana. No employees or independent contractors call on the dealers in Washington.
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> . . . .
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> During any given year, the motor home dealers who are not in any way related to [the taxpayer] may hold RV shows or participate in RV consumer shows in Washington. These dealers will contact [the taxpayer] and will ask that [the taxpayer] send an employee to the shows. If [the taxpayer] acts on the dealer's request, an employee attends the RV show in Washington and answers questions posed by persons who attend the RV show . . . . [T]he employee does not participate in any solicitation of the dealer for wholesale orders while present at the RV shows. The activities of the [taxpayer's] employee are solely to respond to questions about the motor homes in support of the dealer at the RV show.

According to the taxpayer, its employees also provide dealers, on the dealer's premises, with training on the taxpayer's products. In 1994, the taxpayer made seven trips into Washington. Six of those trips involved trade shows, for approximately three days each, and one of those trips involved a training session, which lasted one day. In 1995, it made four trips into Washington, for six days of training and for seven days of trade shows. The employees also bring with them brochures and other promotional and training materials.

Based on these limited contacts, the taxpayer contends that it does not have "substantial nexus" with this state in order for the state to impose a B&O tax on its income from in-state sales. In a Supplemental Petition, the taxpayer identifies the legal issue with respect to substantial nexus as follows:

> The Court [in Quill Corp. v. North Dakota, 504 U.S. 298 (1992)] did not elaborate on the scope of "substantial nexus" or the definition of physical presence. However, the Court did expressly reaffirm its rejection of the "slightest presence standard of constitutional nexus." Based on Quill, this discussion will be limited to an examination of "substantial nexus" under the Commerce Clause.

In support of its position that its presence in this state does not constitute substantial nexus, the taxpayer relies on recent cases from other jurisdictions, some of which are unreported. See, e.g., Ontario Trucking Assoc. v. New York State Dept. of Taxation and Finance, ___ Misc. 2d ___, 640 N.Y.S.2d 377 (Sup. Ct.), appeal transferred to appellate div., 88 N.Y.2d 831, 666 N.E.2d 1365 (1996); Florida Dept. of Revenue v. Share International, Inc., 667 So. 2d 226 (Fla. 1995); Care Computer Systems, Inc. v. Arizona Dept. of Rev., No. 1049-93-S (Ariz. Bd. of Tax Appeals 1994).

Alternatively, should we conclude that nexus exists, the taxpayer contends that it should be allowed to disassociate all of its sales in Washington.

ISSUES:

1. Whether a wholesaler of motor homes has substantial nexus with this state for B&O tax purposes when its only presence in this state occurs when it either attends in-state trade shows in support of its Washington dealers or provides in-state training to its Washington dealers.

2. Whether a wholesaler may disassociate some or all of its sales in this state when all orders allegedly originate from contacts outside Washington.

DISCUSSION:

1. Substantial Nexus.

The B&O tax is levied for the "act or privilege of engaging in business activities." RCW 82.04.220. In general, a state tax on the `privilege of doing business' is not unconstitutional under the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, subject to certain restrictions. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 289 (1977).

[1] In Complete Auto, the court adopted a four part test for sustaining a state tax against a Commerce Clause challenge, to wit:

> the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

Complete Auto, 430 U.S. at 279. We are concerned here only with the substantial nexus part of the Complete Auto test.

It is well settled that the nexus part of the test is satisfied by the in-state solicitation of orders by either an independent contractor or an employee of the out-of-state manufacturer or retailer. Scripto, Inc. v. Carson, 362 U.S. 207 (1960); Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232 (1987). Moreover, it is not necessary for the independent contractor or employee to be engaged in the direct solicitation of orders for nexus purposes. Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975); National Geographic Society. v. California Bd. of Equalization, 430 U.S. 551 (1977).

In Standard Pressed Steel an employee worked out of his home. He did not solicit business and only consulted with an in-state customer regarding its needs and requirements. The court held that this activity provided sufficient nexus for the imposition of the B&O tax on sales by an out-of-state manufacturer to its Washington customer. In National Geographic, the court upheld a use tax collection obligation with respect to mail order subscriptions sent to an out-of-state office based on the physical presence of two advertising sales offices located in the taxing state. The court held that the in-state activity did not have to be directly related to the activity being taxed, but that the vendor had to have a physical presence in the taxing state, which must be more than the "slightest presence." National Geographic, 430 U.S. at 556.

The physical presence aspect of the nexus requirement for use tax purposes was refined in Quill Corp. v. North Dakota, 504 U.S. 298 (1992). In that case, the company solicited business through catalogs and flyers, advertisements in national periodicals, and telephone calls, with delivery through the mails. Although abandoning a physical presence

requirement for Due Process Clause purposes, the Court retained the requirement for Commerce Clause purposes, at least in cases involving use tax obligations. It did so in order to provide a "bright-line" test with respect to interstate transactions. It also affirmed that more than the "slightest presence" was required to establish substantial nexus. Id. at 305 n.8.

However, once the activities of a company go beyond purely mail order activities and, as a result, it has more than the slightest presence in the state, substantial nexus may be established. See Matter of Orvis Co., Inc. v. Tax Appeals Tribunal, 86 N.Y.2d 165, 630 N.Y.S.2d 680, 654 N.E.2d 954 (1995). In that case, the court held that an average of four visits per year over three years by a mail order company's employees, who communicated with retailers about various problems and inspected the retail stores where products bearing the `Orvis' trademark were sold, created substantial nexus for use tax collection purposes. The court reasoned that a substantial presence was not required under Quill, but only more than the slightest presence.

> While a physical presence of the vendor is required, it need not be substantial. Rather it must be demonstrably more than a "slightest presence" [citations omitted] . . . . And it may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf.

654 N.E. 2d at 960-61; See also Ontario Trucking Assoc. v. New York State Dept. of Taxation and Finance, ___ Misc. 2d ___, 640 N.Y.S.2d 377 (Sup. Ct.), appeal transferred to appellate div., 88 N.Y.2d 831, 666 N.E.2d 1365 (1996) (imposition of privilege of doing business tax on a trucking company based on in-state mileage upheld where company made three in-state deliveries or pick-ups in a year).

[2] The importance of in-state economic activity in establishing substantial nexus was addressed in Tyler Pipe, supra. In that case, the court affirmed the imposition of B&O tax when the taxpayer's independent contractor solicited orders and visited with customers in Washington state, although the company maintained no office, owned no property, and had no employees within the state. The court concluded that:

> As the Washington Supreme Court determined, `the crucial factor governing nexus is whether the activities performed in the state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.' 105 Wash. 2d, at 323, 715 P.2d at 126.

483 U.S. at 250.

In a similar fashion, by administrative rule, WAC 458-20-193 (Rule 193), the Department defines the term "nexus" for B&O tax purposes to mean:

> the activity carried on by the seller in Washington which is significantly associated with the seller's ability to establish or maintain a market for products in Washington.

WAC 458-20-193(2)(f).

Rule 193 also provides examples of when sufficient local nexus exists for the purpose of imposing B&O tax, as follows:

> The following activities are examples of sufficient nexus in Washington for the B&O tax to apply:
>
> (i) The goods are located in Washington at the time of sale and the goods are received by the customer or its agent in this state.
>
> (ii) The seller has a branch office, local outlet or other place of business in this state which is utilized in any way, such as in receiving the order, franchise or credit investigation, or distribution of the goods.
>
> (iii) The order for the goods is solicited in this state by an agent or other representative of the seller.
>
> (iv) The delivery of the goods is made by a local outlet or from a local stock of goods of the seller in this state.
>
> (v) The 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, even though the seller may not have formal sales offices in Washington or the agent or

> representative may not be formally characterized as a "salesperson".
>
> (vi) The out-of-state seller, either directly or by an agent or other representative in this state, installs its products in this state as a condition of the sale.

WAC 458-20-193(7)(c) (emphasis added); see also Det. No. 93-281, 14 WTD 035 (1994).

In this context, we have held that irregular visits by nonresident employees who do not solicit sales can, under certain circumstances, establish substantial nexus with this state. For example, irregular visits by nonresident employees to provide advice on the safe-handling of products provided sufficient nexus. Det. No. 88-368, 6 WTD 417 (1988). Similarly, in Det. No. 91-213, 11 WTD 239 (1991), nexus existed where nonresident employees made irregular visits to this state to show product samples and to explain the company's policies.

Although the types of in-state activities by the taxpayer's employees may not involve the direct solicitation of orders from dealers, those employees nonetheless provide significant services in relation to the maintenance of sales into this state, both through dealer training and by supporting the dealers' promotional efforts at trade shows. Such local activity constitutes more than the slightest presence in Washington. Accordingly, we find that such in-state economic activity meets the Commerce Clause's substantial nexus requirement.[2]

2. Disassociation.

[3] Even if substantial nexus is established, the B&O tax is not imposed on sales where the taxpayer can establish that the nexus-creating activities are not significantly related to the in-state sales. Rule 193(7)(c)(v); See also Norton Co. v. Illinois Department of Rev., 340 U.S. 534 (1951); Det. No. 03-180, 13 WTD 334 (1994); Det. No. 91-213, 11 WTD 239 (1991).

[2]The decisions from other jurisdictions referred to by the taxpayer are either distinguishable on the facts or do not provide a precedent upon which we can rely.

In this case, the taxpayer claims that most of its sales are made at national trade shows outside this state and through national advertising, and that it has conducted no training or in-state trade shows for some of its dealers in Washington. As a consequence, it may be possible to disassociate some of those sales. The taxpayer, however, bears the burden to disassociate the sales. Instructive in this regard is Det. No. 91-213, supra, which also involved trade-show related sales. In that determination, we stated:

> [I]f 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.

We also recognized that even if some sales are disassociated, this does not mean that all subsequent sales to that dealer are disassociated if the taxpayer engages in activity in this state that maintains a market with that dealer. As explained in Det. No. 91-213:

> But, even if the taxpayer can disassociate some initial sales, it does not necessarily mean all subsequent sales to the same customers are also disassociated. If the taxpayer's former resident employee or its [Western]-based employee had subsequent instate contacts with those customers, sales following such contacts would presumably be taxable, unless the taxpayer can again disassociate them. Such contacts obviously are intended to maintain sales.

In that determination we also provided some general guidelines of the types of evidence that a taxpayer may use to substantiate the disassociation of sales, to wit:

> The following examples would be useful types of evidence to show whether or not sales are disassociated. They are not all-inclusive and not all are necessarily required: 1) the taxpayer's records

showing which of its representatives got credit for the sales and where the representatives are located (however, credit to an out-of-state representative does not necessarily mean there was no in-state activity); 2) a list of customers visited in the state by its representatives and when they were visited; 3) sales contracts or purchase orders showing the parties or their representatives who were involved and where the transactions occurred; 4) correspondence, letters and/or affidavits from the taxpayer's employees and their customers showing when, where and how the sales occurred and verifying the claims that there were no local activities involved in them; 5) shipping documents showing the consignor, the consignee, the origin and destination, and who bore the expense of shipping.

To the extent that the taxpayer elects to disassociate some of its sales, it must maintain suitable records. In particular, it should maintain records to identify the sales that it makes outside this state to in-state dealers for whom it has neither conducted in-state training nor participated in in-state promotional events.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 29th day of August, 1996.