

Cite as Det. No. 98-148, 19 WTD 748 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 98-148
)	
...)	Registration No. ...
)	FY. . . /Audit No. ...

[1] RULE 193B: B&O TAX -- INTERSTATE DEDUCTION -- PACCAR -- ETB 560. An out-of-state manufacturer was not entitled to a refund of selling B&O taxes previously paid on sales of goods shipped from its out-of-state plant when the good were sold F.O.B. shipping point and shipped freight pre-paid.¹

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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:

An out-of-state computer manufacturer protests additional business and occupation taxes (B&O) ... assessed on sales made to Washington customers.²

FACTS:

Okimoto, A.L.J. -- ... (Taxpayer) manufactures computer hardware and software in [outside Washington]. Taxpayer originally petitioned for a refund of overpaid B&O taxes in a letter dated December 28, 1992 for the period January 1, 1988 through December 31, 1991. Taxpayer based its refund claim on the recent case of PACCAR Inc. v. Dept. of Revenue, Thurston County Superior Court, Docket No. 91-2-01795-3 (1991). Taxpayer's refund was granted subject to future audit verification and a check was issued for overpaid taxes and interest on November 2, 1993 in the amount of \$. . . .

¹ Nonprecedential portions of this determination have been deleted. See RCW 82.32.410.

² Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

During verification of the refund request, the Audit Division (Audit) of the Department of Revenue (Department) performed a partial audit of Taxpayer's records covering the refund period. Audit disallowed Taxpayer's refund claim by referring to ETB 560.04.193 (ETB 560). Audit stated that Taxpayer's substantive facts were not identical to those found in the PACCAR case and therefore concluded that Taxpayer's situation was not controlled by that ruling. Audit then re-assessed previously refunded B&O taxes and interest and issued Doc. No. FY. . . for additional taxes and interest due . . . on December 1, 1995. Taxpayer appealed the assessment and it remains due.

Taxpayer explains in its petition:

. . .[Taxpayer] sells its products primarily to dealers and educational institutions throughout the world. For the sales at issue, product was shipped by common carrier from [Taxpayer's] [out-of-state], warehouse.

The pertinent '[Taxpayer] Authorized Dealer Sales Agreement' provides: 'All risk of loss or damage in transit shall be borne by Dealer.' (Exhibit 1) The pertinent '[Taxpayer] Education Purchase Agreement' provides that: 'All orders hereunder are shipped F.O.B. [Taxpayer's] shipping location best way by common carrier, minimum insurance, unless otherwise directed by Purchaser in writing.' (Exhibit 2) The associated 'Terms & Conditions of Sale' (Exhibit 3). found on the reverse of each invoice similarly provides in pertinent part:

TITLE AND DELIVERY. (a) Unless otherwise expressly provided herein, title passes to Buyer when the products ordered hereunder are delivered to the carrier F.O.B. point of shipment. In all cases, risk of loss or damage to any such product in transit shall fall upon Buyer, whose responsibility it shall be to file claims with the carrier, which shall be deemed Buyer's agent.

In addition, we note that the 'Terms & Conditions of Sale' contains an override clause that states that the terms and conditions contained in the contract control, notwithstanding any different or conflicting terms contained in Buyer's purchase order form.

Taxpayer further relies on WAC 458-20-103 (Rule 103) in stating that a sale takes place in this state when the goods are delivered to the buyer in this state. Taxpayer further argues in its petition:

The documents quoted above constituted the controlling contracts between [Taxpayer] and its Washington customers. There were no other agreements or contracts. Each product was sold F.O.B. shipping point. Taxpayer's obligation was to deliver the goods to the buyer at the point of shipment -- in [outside of Washington].

In this case, the parties' agreements determine where delivery and the sale take place. If the buyer agrees to take delivery of the product in [outside of Washington], then

the sale occurs there and is not taxable by Washington. If the seller brings the goods from [outside of Washington] and delivers them in Washington to the buyer, then the sale occurs in Washington and is taxable by this state. Where, as here, the parties agree that goods 'are delivered to the carrier F.O.B. point of shipment,' no tax applies. In all cases, risk of loss or damage to the product in transit falls upon buyer. Thus, the parties established where the delivery of the goods occurred. Because the product was delivered in [outside of Washington], those sales occurred outside this state.

In addition, each product was sold F.O.B. shipping point. The Washington law governing these commercial transactions confirms that this F.O.B. term establishes that the seller's delivery to the buyer takes place at the seller's plant.

Taxpayer further points out that the other sales documents i.e. the sales invoices, purchase orders, and bills of lading do not alter Taxpayer's conclusion that delivery occurred in [outside of Washington].

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ISSUES:

- 1) Is an out-of-state manufacturer entitled to a refund of selling B&O taxes paid on sales of goods shipped from its out-of-state plant and sold F.O.B. shipping point?

...

DISCUSSION:

Taxpayer's petition for refund of taxes paid during 1988, 1989, 1990, and 1991 covers only periods prior to January 1, 1992, the effective date of WAC 458-20-193 (Rule 193). Prior to that time the Department applied WAC 458-20-193B (Rule 193B). Under Rule 193B, the Department normally allowed out-of-state manufacturers an interstate deduction if the items were both shipped F.O.B. out-of-state plant and the goods were shipped freight collect. Det. No. 91-213, 11 WTD 239, (1991). Where the out-of-state manufacturer used a common carrier to deliver the products and also pre-paid the freight, however, the Department considered that the sale occurred in Washington even though the contract specified F.O.B. out-of-state plant. Det. No. 91-213, Supra.

In this case, Taxpayer concedes that the disallowed interstate sales were shipped freight pre-paid, F.O.B. out-of-state origin point. Taxpayer indicates that shipments were made through a common carrier. Taxpayer argues that the terms of its individual contracts with buyers, the corresponding purchase orders, invoices, and bills of lading all show that title to the goods passed to the buyer at a point outside the state. Therefore, Taxpayer contends that these transactions are exempt under the PACCAR ruling.

We disagree. ETB 560.04.193 (ETB 560) explains the Department's position on PACCAR-type appeals and states:

The court concluded that under the very specific facts of PACCAR, the goods were delivered outside Washington. Among those facts were the following:

1. There was a clear, unambiguous contract which provided that the place of delivery was an out-of-state location.
2. The transaction as finally completed (specifically performed) was completely consistent with the terms of the contract.
3. Purchasers were required to place orders on the seller's standard purchase orders.
4. The purchase orders clearly provided that all sales were "F.O.B. Designated Plant Of Manufacture".
5. The purchase order specifically indicated that all risk of loss passed to the purchaser upon delivery of the goods to the carrier at the designated F.O.B. point.
6. The purchase order provided that if the purchaser failed to provide the seller with shipping instructions then the seller could, at its option, deliver the goods to a carrier and select the routing without liability, or deliver the goods to a place of storage where they would be held at the purchaser's risk and expense.

Although the superior court's decision in PACCAR is binding only on the parties in that case, the Department will allow similar treatment to taxpayers who can establish identical facts. A sales invoice which simply indicates "FOB out-of-state Location" is insufficient to assume that delivery occurred outside Washington. As indicated above, in addition to the sales invoice and shipping documents, a taxpayer must establish that its facts are identical to those in PACCAR, including a contract or purchase order which clearly indicates that risk of loss passed to the buyer at a location outside Washington. Actual performance must be consistent with the terms stated on the purchase order and/or contract.

Based on our review of Taxpayer's petition, purchase invoices, contracts, and bills of lading, we find that Taxpayer is not entitled to a refund of business and occupation taxes for items shipped freight pre-paid during the years 1988 through 1991. For reasons similar to those stated in enclosed executive level determination, Det. No. 95-088ER, 17 WTD 25 (1998), we find Taxpayer's reliance on PACCAR Inc. v. Department of Rev., Thurston County Superior Court, Docket No. 91-2-017595-3 (1991) to be misplaced. Taxpayer's facts are not identical to those in the PACCAR case and therefore it does not warrant similar treatment. Taxpayer's petition for refund of B&O taxes is denied.

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DECISION AND DISPOSITION:

Taxpayer's petition is remanded in part and denied in part.

Dated this 14th day of August, 1998.