Cite as Det No. 08-0117, 27 WTD 239, (2008)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund/Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 08-0117
. . .	)	Registration No. . . .
	)	Document No. . . .
	)	Docket No. . . .

RULE 193; RCW 82.04.220: B&O TAX -- OUT-OF-STATE MANUFACTURER – NEXUS. An out-of-state manufacturer's employee in Washington for only a day to sell the manufacturer's products to Washington distributors was clearly here to help the manufacturer market its products in Washington, and that contact creates substantial nexus with this state.

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.

Pree, A.L.J. – An out-of-state manufacturer, who sent a salesman into Washington to call on customers, protests an assessment of business and occupation tax, penalties, and interest. The taxpayer claims that the salesman's trips to Washington every two or three years were insufficient contact to create taxable nexus. We deny the taxpayer's petition.[1]

ISSUE

Under WAC 458-20-193, was an out-of-state manufacturer subject to business and occupation tax on its sales to two Washington customers, when its only in-person contact with Washington were one-day sales calls by an employee every two to three years?

FINDINGS OF FACT

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410. Nonprecedential portions of this determination have been deleted.

[Taxpayer] is a . . . company headquartered outside of Washington. The taxpayer manufactures food packaging materials. Two Washington distributors buy the taxpayer's products, which the distributors resell to other Washington customers. The taxpayer was not registered to do business in Washington, and did not file Washington excise tax returns or pay Washington taxes.

A revenue agent from the Compliance Division of the Department of Revenue investigated the taxpayer's Washington activities. The Compliance Division assessed $. . . in wholesaling business and occupation (B&O) taxes, plus penalties and interest . . . for the period from January 1, 2006 through September 30, 2007. The taxpayer appealed the entire $. . . assessment. . . . The taxpayer contends it does not have sufficient contact (nexus) to require it to register and pay taxes to Washington.

In 2001, a Washington [products] distributor called the taxpayer and expressed an interest in the taxpayer's products. The taxpayer sent a sales employee to Washington to call on the customer. In 2005, the taxpayer's salesman traveled to Washington and spent another day calling on customers here. . .

The taxpayer states that other than its sales calls into Washington, it has done nothing to support or maintain a market for its products here. Consequently, the taxpayer contends it lacked sufficient nexus with Washington to be subject to business and occupation tax here.

ANALYSIS

Business and occupation (B&O) tax is imposed "for the act or privilege of engaging in business activities." RCW 82.04.220. For businesses engaged in wholesale or retail sales, the tax is computed by applying the applicable B&O tax rate against the "gross proceeds of sales of the business." RCW 82.04.250 and 82.04.270. To incur B&O tax, the seller must have sufficient contact or "nexus" with Washington. This appeal involves B&O tax assessed on wholesale sales of goods by an out-of-state seller to Washington customers. "Washington does not assert B&O tax on sales of goods which originate outside this state unless the goods are received by the purchaser in this state and the seller has nexus." WAC 458-20-193 (Rule 193).

Rule 193(2)(f) defines "nexus" as "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 its product in Washington." The nexus requirement comes from federal constitutional limitations on a state's jurisdiction to tax out of state businesses. Under the Due Process Clause and the "dormant" Commerce Clause of the United States Constitution, an out of state business must have certain minimum contacts or "nexus" with a state before that business is required to comply with the tax laws of that state. The nexus requirements under the Due Process and Commerce Clauses are closely related but not identical. *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992). The limitations imposed by the two clauses are discussed in depth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *Quill Corp. v. North Dakota*, supra, and in several of the Department's prior determinations. *See, e.g.*, Det. No. 01-074, 20 WTD 531 (2001); Det. No. 96-144, 16 WTD 201 (1996).

In *Complete Auto Transit*, the Supreme Court established a four-pronged test that is used to determine the validity of a state tax under the dormant Commerce Clause. The first prong of the four-part test requires that the state tax must be applied to a taxpayer or taxable activity that has a "substantial nexus" with the taxing state. The "substantial nexus" inquiry includes the company's physical contacts with the forum states. All of the company's activities, to the extent they are focused on creating and maintaining a market for its products and services within the state, are to be considered. *See, e.g ., Matter of Orvis Co. v. Tax Appeals Tribunal*, 86 N.Y.2d 165, 630 N. Y.S.2d 680, 654 N.E.2d 954, 960-61 (N.Y. 1995), *cert. denied*, 516 U. S. 989, 116 S.Ct. 518 (1995) ("While a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a 'slightest presence' . . . . 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.").

It is this idea of "in-state market exploitation" that is the touchstone in the U.S. Supreme Court's more recent non-use tax cases. *See, e.g., Tyler Pipe Industries v. Dep't of Revenue*, 483 U.S. 232, (1987); *Standard Pressed Steel Co. v. Dep't.of Rev*., 419 U.S. 560, (1975). "As the Washington Supreme Court determined, 'the crucial factor governing nexus is whether the activities performed in this 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.'" *Tyler Pipe* at 250, (quoting *Tyler Pipe Industries v. Dep't of Revenue*, 105 Wn.2d 318, 323, 715 P.2d 123, 126 (1986)). . . .

We have held on prior occasions that infrequent in-state visits by employees of an out-of-state business can be sufficient to support a finding of nexus. For example, in Det. No. 88-368, 6 WTD 417 (1988), we upheld a finding of nexus where the taxpayer sent employees into Washington to make sales calls and to provide non-sales related customer support. In that case the taxpayer's employees "each made one or two trips into Washington per year. Each trip would last two or three days during which four to six customers would be contacted." *Id*. at 418. These infrequent, albeit reoccurring, visits were sufficient to create nexus.

Likewise, in Det. No. 97-061, 18 WTD 211 (1999), we upheld a finding of nexus where an out-of-state computer products manufacturer sent employees into this state on an infrequent basis. In that case the "Washington visits by taxpayer employees would occur once or twice a year and would be of a duration of no more than two days." *Id.* at 212. "No sales were solicited on these visits." *Id*. Rather, the visits "were for purposes of obtaining input on the taxpayer's products, addressing concerns of users, resolving any problems with its accounts, dispensing information about its products, and maintaining goodwill with its customers." *Id*. In upholding the finding of nexus, we emphasized that it is the purpose motivating the in-state visits that is key to the nexus inquiry, not the number or duration of the visits. "While, admittedly, this contact was minimal, we find it to be significant in that it had, or could have had, an impact on customer satisfaction and, thus, on sales. The employee's presence was, doubtless, 'intended to establish or maintain and, hopefully, increase the taxpayer's sales' in Washington." *Id*. at 214. In accord, Arizona *Dep't of Revenue v. Care Computer Systems, Inc.*, 4 P.3d 469, 472 (Ariz. App. Div. 2000) ("Although Care's Arizona activity was of relatively low volume, 'the volume of local activity is less significant than the nature of its function on the out-of-state taxpayer's behalf.'") (Quoting

Arizona Dep't of Revenue v. O'Connor, Cavanaugh, et. al., 963 P.2d 279 (Ariz. App. Div. 1997)). In short, occasional visits by employees of an out-of-state business can establish nexus so long as those visits are significantly associated with the ability of the business to establish and maintain a market in this state for its goods or services. Det. 88-368; Det. 97-061; *Tyler Pipe Industries v. Dep't of Revenue*, 483 U.S. 232 (1987).

In the present case the taxpayer sent an employee into this state to meet with its Washington customers. While the visits lasted only a day, the salesman intended to sell the taxpayer's products to the distributors. They represented activity that was clearly designed to help the taxpayer market its products in Washington. They established a market for the taxpayer's products in Washington. We conclude that the in-state activities of taxpayer's salesman is more than sufficient to create substantial nexus with this state. In accord, Det. No. 00-003, 19 WTD 685 (2000); Det. No. 98-146, 18 WTD 175 (1999); Det. No. 97-061, 18 WTD 211 (1999); Det. No. 88-368, 6 WTD 417 (1988). The nature and extent of the taxpayer's activities within Washington satisfy both the Due Process and the Commerce Clause nexus requirements. As a result, we deny the taxpayer's Petition on this issue. . . .

DECISION AND DISPOSITION

Taxpayer's petition is denied

Dated this 29th day of April, 2008.