

Cite as Det. No. 14-0062, 33 WTD 439 (2014)

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. 14-0062
... )	
)	Registration No. . . .
)	

[1] RULE 193; RCW 82.04.067: NEXUS. Taxable nexus is created by a taxpayer's representatives making four visits a year to trade shows in Washington, when those representatives displayed products, made contact with potential buyers, discussed its product models with potential buyers, and distributed catalogs. Those activities are significantly associated with establishing or maintaining a market for the sales of the taxpayer's products 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.

Weaver, A.L.J. – An out-of-state manufacturer and seller of custom sportswear protests the determination that its contacts with Washington solely through visits to trade shows are sufficient to establish taxing nexus. We affirm the existence of taxing nexus. Taxpayer's petition is denied.<sup>1</sup>

### ISSUE

Whether attendance at four annual trade shows every year from 2005 through 2010, and eight trade shows in 2011, is sufficient to establish taxing nexus with Washington under RCW 82.04.067 and WAC 458-20-193.<sup>2</sup>

### FINDINGS OF FACT

[Taxpayer] is a privately held company headquartered [outside of Washington]. Taxpayer sells custom apparel for college, school, and club sport and spirit teams over the Internet, by telephone, and by catalog. Taxpayer only offers one product line and its sales are a mixture of

<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

<sup>2</sup> . . .

retail sales and wholesale sales. All of Taxpayer's orders are shipped from locations outside of Washington to customers by common carrier.

Between 2005 and 2011, Taxpayer had no office, employees, representatives, or inventory located in Washington . . . . Every year between 2005 and 2010, Taxpayer's out-of-state employees would enter Washington . . . four times a year to attend trade shows. In 2011, Taxpayer's out-of-state employees entered Washington . . . eight times to visit trade shows. Taxpayer concedes that it has nexus in 2011 and beyond, because it hired an employee who is regularly in Washington . . . . The trade shows draw coaches and athletic directors from Washington, Oregon, California, and British Columbia. Taxpayer maintains that it did not sell any merchandise at the trade shows and did not write any orders at the shows. Taxpayer displayed its product at the trade shows, made contact with potential buyers, discussed its service model with potential buyers, and distributed its catalogs.

The Audit Division of the Department of Revenue ("Department") contacted Taxpayer in July, 2011, after being alerted that Taxpayer was sponsoring trade shows. Taxpayer's records were reviewed for the extended period of January 1, 2005 through October 31, 2011. A Statute of Limitations Non-Claim Period Waiver Agreement covering the period of January 1, 2005 through December 31, 2005 was signed by Taxpayer's Controller. The audit examination concluded that taxpayer had substantial nexus in Washington.

On August 19, 2011, Taxpayer completed a Washington Business Activities Questionnaire stating that Taxpayer's representatives attended trade shows five or fewer times per year during the period January 1, 2004 through June 11, 2011 to market its products. Taxpayer does make some of its sales at wholesale, for example, when it sells to dance studios that subsequently sell Taxpayer's merchandise. However, Taxpayer failed to collect resale certificates on its wholesale sales during the time period.<sup>3</sup> Taxpayer claims this failure was an oversight, as it was unaware it had taxable nexus with Washington.

On January 8, 2013, the Department issued Assessment No. . . . , totaling \$ . . . , for the period January 1, 2005 through December 31, 2008. This assessment consisted of \$ . . . in retail sales, \$ . . . in retailing business and occupation ("B&O") tax, \$ . . . in wholesaling B&O tax, a delinquency penalty of \$ . . . , interest totaling \$ . . . , a 5% assessment penalty of \$ . . . , and a 5% unregistered business penalty of \$ . . . . On January 8, 2013, the Department also issued Assessment No. . . . , totaling \$ . . . , for the period January 1, 2009 through October 31, 2011. This assessment consisted of \$ . . . in retail sales tax, \$ . . . in retailing B&O tax, \$ . . . in wholesaling B&O tax, a delinquency penalty of \$ . . . , interest totaling \$ . . . , a 5% assessment penalty of \$ . . . , and a 5% unregistered business penalty of \$ . . . . Taxpayer filed a timely appeal.

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<sup>3</sup> Despite Taxpayer's failure to collect resale certificates, the Audit Division did characterize certain of Taxpayer's sales as wholesaling sales.

## ANALYSIS

Washington imposes a business and occupation (“B&O”) tax “for the act or privilege of engaging in business” in this state. RCW 82.04.220.<sup>4</sup> The tax is measured by applying particular rates against the value of products, gross proceeds of sale, or gross income of the business as the case may be. RCW 82.04.220. RCW 82.04.270 imposes the B&O tax on entities making sales at wholesale, and RCW 82.04.250 imposes the B&O tax on entities making sales at retail. In addition, persons making sales at retail must collect and remit retail sales tax RCW 82.08.020 and RCW 82.08.050.

WAC 458-20-193 (Rule 193) sets out administrative guidance regarding application of the B&O and retail sales taxes to interstate sales, and requires that the seller have nexus and the goods be received in Washington.<sup>5</sup> In this case Taxpayer does not contest that the purchasers received goods in Washington. However, Taxpayer asserts that its visits to trade shows in Washington are not sufficient to establish taxing nexus.

Nexus requirements flow from limits on a state’s jurisdiction to tax found in the Due Process and Commerce Clause provisions of the United States Constitution. The limitations imposed by the two clauses are discussed in depth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); and in the Department’s determinations.<sup>6</sup> See, e.g., Det. No. 01-074, 20 WTD 531 (2001); Det. No. 96-144, 16 WTD 201 (1996). The nexus limitation requires that the activity taxed have “substantial nexus” with the taxing state. Consistent with this requirement, WAC 458-20-193 (Rule 193) defines “nexus” as “the activity carried on by the seller in Washington which is significantly associated with the

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<sup>4</sup> RCW 82.04.030 defines “person” to include corporations, limited liability companies, associations, and any group individuals acting as a unit, whether nonprofit, or otherwise. “Engaging in business” in Washington means “commencing, conducting, or continuing in business.” RCW 82.04.150. “Business” is defined as including all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or another person. RCW 82.04.140.

<sup>5</sup> Rule 193 reads, in pertinent part:

(7) Inbound sales. 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. There must be both the receipt of the goods in Washington by the purchaser and the seller must have nexus for the B&O tax to apply to a particular sale. The B&O tax will not apply if one of these elements is missing.

<sup>6</sup> RCW 82.04.067 codifies the substantial nexus standard, providing in part:

(6) . . . For purposes of the taxes imposed under this chapter on any activity not included in the definition of apportionable activities in RCW 82.04.460, a person is deemed to have a substantial nexus with this state if the person has a physical presence in this state, which need only be demonstrably more than a slightest presence. . . . A person is also physically present in this state if the person, either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in this state.

[RCW 82.04.067 went into effect starting June 1, 2010.]

seller's ability to establish and maintain a market for its products in Washington." Rule 193(1)(f). This definition was cited with approval in *Tyler Pipe Industries, Inc. v. Dep't of Revenue*, 483 U.S. 232, 250 (1987). Therefore, Washington may not assert B&O tax on revenue from sales of goods which originate outside the state unless the purchaser receives the goods in this state and the seller has nexus. See *Lamtec Corp. v. Dep't of Revenue*, 170 Wn. 2d 838, 246 P.3d 788 (2011); *cert. denied* — U.S. —, 132 S.Ct. 95, 181 L.Ed.2d 24(2011).

The determination whether in-state activities create nexus looks to the entire collection of a taxpayer's different activities, the totality of which creates substantial nexus. *GMC v. City of Seattle*, 107 Wn. App. 42, 25 P.3d 1022 (2001); see also *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), *overruled on other grounds*, *Tyler Pipe*, 483 U.S. at 250 (1987) (holding that it is the bundle of corporate activity that determines whether a taxpayer has nexus with a state); Rule 193. Thus, establishing taxing nexus requires consideration of the entire bundle of a taxpayer's in-state activities.<sup>7</sup>

We note that the standard is not whether the in-state activity directly solicits a sale, but rather whether this activity is "significantly associated with establishing or maintaining a market within this state." WAC 458-20-193(7); *Standard Pressed Steel Co. v. Dep't of Revenue*, 419 U.S. 560 (1975); *National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551 (1977); Det. No. 88-368, 6 WTD 417 (1988).<sup>8</sup> For example, the Department has held infrequent visits to Washington customers by nonresident employees constituted sufficient nexus to allow the taxation of sales, even though the employees were not salespersons. Det. No. 88-368, 6 WTD 417 (1988). Where employees provided advice to customers regarding the safe handling of a product, such activity was also found to be important in maintaining sales into the state. Det. No. 91-213, 11 WTD 239 (1991). In *Standard Pressed Steel*, taxable nexus was established through the presence of a resident employee engineer who was not involved in sales, but only consulted with the customer regarding the customer's product needs. 419 U.S. 560.

The Washington Supreme Court recently found that Commerce Clause requirements were satisfied by "the presence of activities within the state." *Lamtec Corp. v. Dep't of Revenue*, 170 Wn.2d 838, 850-51, 246 P.3d 788 (2011) (sending sales [employees] to Washington [to answer

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<sup>7</sup> For example, in Det. No. 96-144, 16 WTD 201 (1996), we concluded that, once the activities of a company go beyond purely mail order activities, and it has demonstrably more than the slightest presence in the state, substantial nexus is established. *Accord, Matter of Orvis Co. v. Tax Appeals Tribunal*, 86 N.Y.2d 165, 630 N. Y.S.2d 680, 686-87, 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.")

<sup>8</sup> As the U.S. Supreme Court emphasized in *National Geographic*:

[T]he relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate "some definite link, some minimum connection, between the State and the person . . . it seeks to tax. "

questions and provide information about products] two or three times a year during the period at issue is significantly associated with its ability to establish and maintain its market). The Court's holding in *Lamtec* is consistent with the Department's longstanding position regarding nexus that is now codified in RCW 82.04.067(6). *See, e.g.*, Det. No. 00-003, 19 WTD 685 (2000) (taxpayer had substantial nexus in Washington when the activities included in-state dealer training, supporting promotional efforts at in-state trade shows, introducing and promoting new products, and establishing a network of independent contractors for repair work), and Det. No. 96-144, 16 WTD 201 (1996) (out-of-state manufacturer of motor homes had substantial nexus with Washington based on its visits to Washington between four and seven times per year to attend trade shows and provide in-state training of vendors).

In this case, Taxpayer argues that trade show visits alone, without any additional connections to Washington, is insufficient to create taxable nexus. As an initial matter, we note that there is no "trade show" exemption in any Washington statute or rule. Taxpayer cited numerous statutes in other jurisdictions that carve out either partial or whole trade show exemptions. *See generally*, Cal. Rev. & Tax Code § 6203(e); Conn. Gen. Stat. § 12-407(a)(15)(D); Ga. Code § 48-8-2(8)(I)(iii); Me. Rev. Stat. tit. 36, §1754-B(1)(G)(2); Tenn. Code § 67-4-2004(14)(E). However, the existence of these statutes in other jurisdictions simply highlights the fact that there is no specific trade show exemption in Washington State. In Washington, nexus is established when a Taxpayer's in-state activities are "significantly associated with establishing or maintaining a market within this state." RCW 82.04.067(6).

In this matter, for a period of at least seven years, Taxpayer's representatives made at least four visits per year to trade shows in Washington in which it displayed its products, made contact with potential buyers, discussed its service model with potential buyers, and distributed its catalogs. We conclude that the direct presence of Taxpayer's representatives at the Washington trade shows was significantly associated with establishing or maintaining a market for the sales of its products in Washington. Taxpayer engaged in those activities to increase familiarity with its brand and, in turn, promote the sales of its products. Accordingly these activities are sufficient to establish taxing nexus for Washington sales.

#### DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 20<sup>th</sup> day of February, 2014.