

Cite as Det. No. 15-0099, 34 WTD 505 (2015)

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. 15-0099
)	
...)	Registration No. . . .
)	

[1] RULE 193; RCW 82.04.067: B&O TAX – RETAIL SALES TAX – NEXUS. The activities of a nonresident, independent sales representative in Washington to create and maintain customer goodwill are sufficient to create the nexus required for Washington to assert tax.

[2] RULE 228; RCW 82.32.105(1): LATE PAYMENT PENALTY – CANCELLATION. Taxpayer did not present evidence that the late payment of tax was caused by a circumstance beyond the control of the taxpayer.

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.

Lewis, A.L.J. – Taxpayer derives income from the sale of garden supplies. Taxpayer protests the retailing business and occupation (“B&O”) and retail sales tax assessed on Washington sales based on a claimed lack of nexus. Taxpayer also protests a late-payment penalty assessed on the late payment of two assessments based on a delay in receiving the assessments. Taxpayer’s petition is denied.¹

ISSUES:

1. Under the provisions of WAC 458-20-193 (“Rule 193”) and RCW 82.04.067(6), do the activities in Washington of Taxpayer’s nonresident employee create . . . substantial nexus with Washington [sufficient] to require the out-of-state Taxpayer to pay B&O tax and collect retail sales tax on its sales into Washington?
2. Has Taxpayer satisfied the requirements of RCW 82.32.105(1) to allow cancellation and refund of the assessment penalty . . . ?

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

FINDINGS OF FACT:

The [Department of Revenue's (Department)] Compliance Division [(Compliance)] became . . . aware of Taxpayer's Washington sales and made an investigation. The investigation revealed that Taxpayer sells garden products to Washington retailers for resale and to end consumers via the internet.

The Department continued its investigation focusing on Taxpayer. On August 1, 2013, Taxpayer's controller stated to Compliance that Taxpayer employs an outside sales representative that lives [out of state] and visits Washington 10 times a year with each visit lasting two to three days. The representative visits approximately fifteen customers a day to maintain customer goodwill. In an August 7, 2013 email to Compliance, the Controller wrote:

The final piece is information you are needing was when did a salesman begin visiting the State of Washington. The date was February 1, 2008.

Based on the information gathered, the Department concluded that Taxpayer had nexus with Washington and had failed to register and report Washington income to the Department. On September 10, 2013, Compliance informed the Controller regarding the Department's appeals process. On December 13, 2013, the Department issued two assessments totaling \$. . . , which covered the period . . . ² The assessments stated:

This is your Tax Assessment
Pay on or Before January 13, 2014
If full payment is not made by the due date, additional penalties and interest will be added.

...

If you have any questions regarding this Assessment contact

On December 26, 2013, the revenue agent that issued the audit report telephoned Taxpayer's controller and informed him that the assessment had been issued and sent by the United States Postal Service ("USPS"). Taxpayer did not receive the assessment until January 8, 2014. Taxpayer did not pay the assessments by the due date. Taxpayer was told during subsequent conversations that the 30 day period to file an appeal had passed. On March 13, 2014, Taxpayer paid the assessments.

On April 17, 2014, Taxpayer filed a petition for refund of tax, interest, and penalties. Specifically, Taxpayer's petition maintained that Taxpayer had very little physical presence in Washington prior to 2011. According to Taxpayer's . . . regional sales manager, 100% of the orders received prior to 2011 were received via the internet or over the phone. Thus, no orders

² The Department issued . . . /Audit No. . . . , which covered the period . . . in the amount of \$. . . , which consisted of \$. . . tax and \$. . . interest. The Department issued . . . /Audit No. . . . , which covered the period . . . in the amount of \$. . . , which consisted of \$. . . tax, \$. . . audit interest, \$. . . late payment penalty, and \$. . . unregistered business penalty.

were taken by the employee coming into Washington during that time period. Accordingly, the tax, interest, and penalties assessed and paid for the period prior to 2011 should be cancelled. In addition, Taxpayer requested that the late-payment penalty assessed, because the assessments were paid late, should be cancelled because the assessment was received late because of circumstances beyond the control of the taxpayer. [Thus, Taxpayer argues, it was] not given a reasonable time to file an appeal.

ANALYSIS:

Washington imposes a B&O tax “for the act or privilege of engaging in business” in this state. RCW 82.04.220. 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 82.04.040 imposes the retailing B&O tax on sales of tangible personal property to consumers. RCW 82.08.020 imposes a retail sales tax on sales of tangible personal property to consumers. A seller who fails to collect retail sales tax for any reason may be personally liable for the tax. 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. Rule 193(7) reads, in pertinent part:

Inbound sales. Washington does not assert B&O [business and occupation] 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.

In addition, Rule 193(8) provides:

The retail sales tax must be collected and reported in every case where the retailing B&O tax is due as outlined in subsection 7.

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. See, e.g., Det. No. 01-074, 20 WTD 531 (2001); Det. No. 96-144, 16 WTD 201 (1996). [For Commerce Clause purposes, the] nexus limitation requires the activity taxed have “substantial nexus” with the taxing state. Nexus can be established by a taxpayer maintaining employees, offices, or other property in this state, regardless of whether the in-state activities of the taxpayer directly relate to the taxed activity. *National Geographic Soc. v. Bd. of Equalization*, 430 U.S. 560, 95 S. Ct. 1386 (1977). Nexus may also be established by third parties acting on behalf of the taxpayer where such activities are significantly associated with the seller’s ability to establish and maintain a market. *Tyler Pipe Industries, Inc. v. Dep’t of Revenue*, 483 U.S. 232, 250 (1987). Therefore, Washington [does] 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, 132 S.Ct. 95, 181 L.Ed.2d 24(2011).

The determination of 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 Indus., Inc. v. Dep't. of Revenue.*, 483 U.S. 232, 250 (1987) (Holding 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.

[The] standard for evaluating whether its activity in Washington is sufficient to establish nexus 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." Rule 193(7); *Tyler Pipe Indus., Inc. v. Dep't. of Revenue.*, 483 U.S. 232, 250 (1987); Det. No. 04-0148, 6 WTD 417 (1988). The Department has found a taxpayer's Washington activity created nexus in the following examples. In Det. No. 88-368, 6 WTD 417 (1988), the Department concluded the occasional visit to Washington by nonresident employees to explain safety considerations in the use of the product "were significant services in relation to the maintenance of sales into the state to create nexus. Similarly, in Det. No. 91-213, 11 WTD 239 (1991), the Department concluded infrequent visits to Washington by nonresident employees, who are not sales persons, but show new color and style product samples create sufficient nexus to allow B&O taxation of the sales income.

Washington determinations have been consistent with rulings by the United States Supreme Court. Nexus has been found in instances where the in-state activities of the out-of-state business did not involve the solicitation of sales or directly relate to the taxed activity. *National Geographic Soc. v. Bd. of Equalization*, 430 U.S. 560, 95 S. Ct. 1386 (1977). See also *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560, 95 S.Ct. 706 (1975), where 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.

In this case, Taxpayer's in-state activity was through the activities of a non-resident, independent representative that came into Washington to build and maintain customer goodwill.

On June 1, 2010, RCW 82.04.067 became effective. RCW 82.04.067(6) codifies the physical presence nexus standard as:

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. For purposes of this subsection, a person is physically present in this state if the person has property or employees in this state. 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.³

On numerous occasions, prior to the enactment of RCW 82.04.067, the Department found visits by a [taxpayer] to Washington to establish or maintain a market in Washington [created] nexus. See Det. No. 05-0174, 25 WTD 48 (2006) (twice-yearly visits to present new or existing products and demonstrate use of products), Det. No. 04-0208, 24 WTD 217 (2005) (participation in trade shows), Det. No. 00-003, 19 WTD 685 (2000) (regular and recurring in-state training and introducing and promoting new products), Det. No. 97-061, 18 WTD 211 (1999) (one or two visits per year to cultivate goodwill, obtain input on taxpayer products, address user concerns, resolve problems with accounts, and dispense information about taxpayer products), Det. No. 98-146, 18 WTD 175 (1998) (two or three visits per year to deliver catalog updates, provide technical advice, and explain new products), and Det. No. 91-213, 11 WTD 239 (1991) (occasional visits to show product samples and to explain the company's policies).

Under the cases cited, direct solicitation of sales is not necessary to create nexus. Nexus is established if the [in-state] activity is "significantly associated with the seller's ability to establish or maintain a market for its products in Washington." Rule 193(2)(f). Here, Taxpayer's physical presence in Washington was . . . [for the purposes of maintaining] relationships with . . . customers. Such activity is sufficient to create nexus. Accordingly, we conclude the Department correctly assessed tax on Taxpayer's sales into Washington.

Taxpayer also protested the late-payment penalty assessed on the late-paid assessments. RCW 82.32.090(2) provides for the mandatory assessment of a late-payment penalty:

If payment of any tax determined by the department to be due is not received by the department by the due date specified in the notice, or any extension thereof, there is assessed a total penalty of fifteen percent of the amount of the tax under this subsection; and if payment of any tax determined by the department to be due is not received on or before the thirtieth day following the due date specified in the notice of tax due, or any extension thereof, there is assessed a total penalty of twenty-five percent of the amount of the tax under this subsection. No penalty so added may be less than five dollars. . . .

RCW 82.32.105(1) allows for cancellation of penalties:

If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due . . . was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any penalties imposed under this chapter with respect to such tax.

³ The Legislature amended RCW 82.04.066 and RCW 82.04.067 in 2015 to specify that – beginning September 1, 2015 – physical presence of a taxpayer is not required to establish nexus for a taxpayer making wholesales sales. See Laws of 2015, 3d Ex. Sess., ch. 5, §§ 203 and 204, 501(2). Because the amendment is not retroactive, it does not apply in this appeal.

WAC 458-20-228 (“Rule 228”), the administrative rule that implements RCW 82.32.105 explains:

The circumstances beyond the control of the taxpayer must actually cause the late payment. Circumstances beyond the control of the taxpayer are generally those which are immediate, unexpected, or in the nature of an emergency. Such circumstances result in the taxpayer not having reasonable time or opportunity to obtain an extension of the due date or otherwise timely file and pay.

Taxpayer received the assessment before its due date. Taxpayer could have avoided the late-payment penalty if it had: 1) immediately paid the assessment; 2) filed a petition requesting correction of the assessment; or 3) requested an extension of time to pay the assessment or file an appeal. Taxpayer took none of those actions.

The assessment included a name and number for Taxpayer to telephone if there were any questions. In addition, Taxpayer had prior email and telephone communication with members of the Compliance Division and could have easily made contact. Instead, Taxpayer failed to take action until after the due date of the assessment had passed. Taxpayer’s delay in taking action triggered the late-payment penalty and prevented Taxpayer from filing an appeal without first paying the assessment. Taxpayer’s decision to delay in paying the assessment, filing an appeal, or requesting an extension of time is not a circumstance beyond the control of the taxpayer. Accordingly, Taxpayer’s petition for refund of late-payment penalty is denied.

DECISION AND DISPOSITION:

Taxpayer’s refund request is denied.

Dated this 15th day of April, 2015.