

Cite as 5 WTD 137 (1988)

BEFORE THE INTERPRETATION AND APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition )	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u>
<u>O</u> <u>N</u>	
For Correction of Assessment and)	
Refund of )	No. 88-144
)	
. . . )	Registration No. . . .
)	Tax Assessment No. . . .
.	
)	

- [1] **RULE 193B:** BUSINESS AND OCCUPATION TAX --  
INTERSTATE COMMERCE -- NEXUS -- DISASSOCIATION --  
ABSENCE OF CUSTOMER CONTACT.

A taxpayer who has taxable nexus with Washington may disassociate sales where it has demonstrated the absence of contact with customers in this state. ETB 506, 2 WTD 11 (1986).

- [2] **RULE 193B:** BUSINESS AND OCCUPATION TAX --  
INTERSTATE COMMERCE -- NEXUS -- DISASSOCIATION --  
MARKETING ACTIVITY. Where a taxpayer had a representative in this state marketing a line of products it was unable to disassociate sales from that line in which the representative was not directly involved from those in which the representative was involved. The activities of the representative helped to establish and maintain a market in Washington for the products.

- [3] **RULE 178:** USE TAX -- PROMOTIONAL MATERIAL SENT BY  
OUT-OF-STATE TAXPAYER TO CUSTOMERS IN WASHINGTON. Taxpayer is not liable for use tax on promotional material such as catalogs and price lists which it sends from out of state directly to customers in Washington. There is no use by the taxpayer in Washington. Sears v. Dept. of Revenue, 97 Wn. 2d 260, 643 P.2d 884 (1982).

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: December 17, 1985

#### NATURE OF ACTION:

The taxpayer petitioned for a correction of an assessment issued as the result of a routine audit. The taxpayer also petitions for a refund of business and occupation taxes from 1980 through 1984.

#### FACTS AND ISSUES:

Potegal, A.L.J. -- The taxpayer is an out-of-state manufacturer who sells goods to Washington customers. It does this through several divisions which operate independently of each other.

The taxpayer first seeks a refund of all business and occupation taxes paid to Washington since the beginning of 1980. The basis for this request is that such taxes were imposed in violation of the United States Constitution. See Tyler Pipe Industries, Inc. v. Depart. of Revenue, 483 U.S. \_\_\_\_, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987).

Second, the taxpayer challenges the tax assessment on grounds that

a. Business and occupation tax was assessed on sales which either did not take place in Washington or were disassociated from any local activity.

and

b. Use tax was assessed on materials which the taxpayer did not use in Washington.

#### DISCUSSION:

##### Refund

With respect to the refund request based on Tyler Pipe we are denying the request as to 1980 and are deferring action for the years from 1981 through 1984.

The statutory period for applying for refunds for 1980 had expired at the time the taxpayer petitioned. RCW 82.32.060 states in part:

No refund or credit shall be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

The taxpayer applied for the refund on December 17, 1985. Four years prior to the beginning of 1985 is January 1, 1981. Therefore the earliest year for which the refund application is effective is 1981.

For 1981 through 1984 no action will be taken now because of continuing litigation. We are making note of the taxpayer's request. When the litigation is resolved the taxpayer's claim will be resolved in the same manner as for similarly situated claimants.

#### Correction of Assessment

##### a. Business and Occupation Tax.

1. [A] Division. This division has two product groups, commercial products and consumer products.

The commercial market is maintained through the efforts of an Oregon resident employee who travels into Washington each month to contact distributors, contractors, and architects. The taxpayer acknowledges that there is sufficient nexus to subject its sales to business and occupation tax. However, for part of 1982 and 1983 the taxpayer was not represented in Washington. It contends that it should not be subject to tax for sales of commercial products of the [A] Division which took place during that period.

[1] We agree with the taxpayer. The 1982 and 1983 commercial sales are disassociated from the sales outside of that period because of the absence of customer contact. See ETB 506.04.193B ( . . . ) and 2 WTD 11 (1986).

The consumer market consists of two lines, [X's] and independent consumer sales. There is no local contact at all involving the sale of [X's]. The independent consumer sales involve items such as [Y's]. One representative markets the independent consumer items in Washington. Only a small

proportion of the independent consumer items are sold through this representative.

[2] Because there has been no local activity in connection with the [X] sales those sales are not subject to business and occupation tax. Conversely, there has been local activity connected with the independent consumer sales. Although not all of the independent consumer sales were consummated through the representative the taxpayer has not met the burden of showing that the representative's activities are not significantly associated with its ability to establish and maintain a market for these products. See WAC 458-20-193B, . . . . Therefore, the sales of independent consumer items are subject to tax.

2. [B] Division. The taxpayer concedes that sales into Washington are taxable because of local activity. During the audit period there was only one distributor of [B] products in the Northwest. This distributor had two outlets from 1980 through mid-1984. One was in Oregon, one was in Washington. From mid-1984 there was no Washington outlet. Thus, there were no [B] sales by the taxpayer into Washington after mid-1984. The taxpayer believes that the Department may have taxed some of the sales to the Oregon outlet.

This is strictly a factual matter which will be referred back to the Audit Section for verification. Sales to Oregon outlet will be deleted.

3. [C] Division. The auditor did not assess additional tax for sales by this division. However, the taxpayer believes it may have overreported its liability when filing its regular returns.

The Department will take no action on this issue. It is up to the taxpayer to request and justify, with specificity, any refund request. The taxpayer must do this within the statutory period for seeking refunds.

b. Use Tax.

The auditor assessed use tax on promotional materials such as catalogs, price sheets, and displays which were sent into Washington from out of state. The taxpayer shipped the majority of items directly to customers at no charge. A small amount was given to the taxpayer's representatives in Washington who then personally delivered the items to customers.

The taxpayer agrees that use tax was properly assessed on those materials which its representatives had possession of in this state. With respect to the materials sent directly from out of state to its customers the taxpayer contends that it is not liable for use tax because it has not used those materials in Washington.

[3] We agree with the taxpayer. The taxpayer's position is consistent with the current posture of the Department on this issue. See Sears & Roebuck v. Dept. of Revenue, 97 Wn.2d 260, 643 P.2d 884 (1982). In Sears the court does not really discuss this question other than to state that the Department did not appeal from a lower court ruling against it. The Department may in the future wish to pursue its prior position. Any such change in position by the Department would only have prospective effect.

The taxpayer stated that over 90 percent of the materials upon which use tax was assessed were sent directly to customers in Washington. If the Audit Section finds this to be consistent with the records and documents it examined in connection with this issue it will reduce the amount of use tax liability by 90 percent.

#### DECISION AND DISPOSITION:

##### Refund

The petition is denied as to 1980. Action is deferred for the years 1981 through 1984 pending the outcome of litigation.

##### Correction of Assessment

#### a. Business and Occupation Tax.

1. [A] Division. The petition is granted with respect to 1982 and 1983 commercial product sales and the [X] segment of the consumer product line. The petition is denied with respect to other [A] Division sales. The Audit Section will contact the taxpayer for verification of the amounts involved.

2. [B] Division. This matter is referred back to the Audit Section for verification.

3. [C] Division. No action will be taken as discussed above.

b. Use Tax.

The petition is granted subject to verification by the Audit Section.

DATED this 4th day of March 1988.