

Cite as 9 WTD 286-49

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

In the Matter of the Petition) D E T E R M I N A T I O
N
For Correction of Assessment)
of) No. 90-169
)
 . . .) Registration No. . . .
) . . . /Audit No. . . .
)

[1] **RULE 193A:** B&O TAX -- EXEMPTION -- OUT-OF-STATE SALES -- DELIVERY. The shipment of goods from a taxpayer's Oregon facility to Alaska via Seattle is found B&O taxable. Delivery of the goods occurred in Washington when they were turned over to common carriers hired by the buyers to transport the goods to Alaska.

[2] **RULE 243 AND RCW 82.32.070:** LITTER TAX -- EXEMPTION
--NON-TAXABLE PRODUCTS -- SEGREGATION OF. A
taxpayer claiming that certain of its Washington
sales are exempt of litter tax must prove it with
records which segregate the sales claimed as exempt
from the ones which are not exempt.

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: . . .
. . .

NATURE OF ACTION:

Protest urging the interstate status of certain sales as well as the inapplicability of the litter tax.

FACTS AND ISSUES:

Dressel, A.L.J. -- [The Taxpayer] sells food and restaurant supplies. Its books and records were examined by the Department of Revenue (Department) for the period . . . through As a result a tax assessment, identified by the above-captioned numbers, was issued for \$ The taxpayer protests.

During the audit period the taxpayer sold food and other supplies to several Alaskan buyers. The items were taken by the taxpayer's own trucks from its primary location in . . . , Oregon to Seattle and then shipped from Seattle to Alaska. Two of the primary Alaskan buyers were . . . and . . . which both also have Seattle locations. Representative bills of lading show the taxpayer as the shipper/consignor and the two mentioned buyers plus . . . and . . . as the consignees. We presume the latter two entities to be shipping companies or common carriers. The location listed for all four consignees is Seattle.

The taxpayer claims that these should be considered interstate sales. It states that the goods were trucked to Seattle to be loaded on board ships for transport to their Alaskan destinations. The goods were effectively just passing through the state of Washington.

The Department's auditor says the goods were delivered in Washington which makes them subject to this state's business and occupation (B&O) tax notwithstanding the fact that thereafter they were sent to Alaska.

He also assessed litter tax against some taxpayer sales into Washington because they were of food products which are one of the items subject to Washington's litter tax under RCW 70.93.120 and WAC 458-20-243 (Rule 243). The taxpayer objects, saying some of the litter taxed sales were of "equipment" rather than food.

The issues are: 1) are goods shipped from Oregon to Alaska via Seattle subject to B&O tax, and 2) were items other than food subjected to litter tax?¹

DISCUSSION:

¹Nexus is not an issue. Regardless of the transactions contested, the taxpayer has it based on other activities within Washington.

WAC 458-20-193A (Rule 193A) reads in part:

BUSINESS AND OCCUPATION TAX

RETAILING AND WHOLESALING. Where tangible personal property in Washington is delivered to the purchaser in this state, the sale is subject to tax under the retailing or wholesaling classification, even though the purchaser intends to and thereafter does transport or send the property out of state for use or resale there, or for use in conducting interstate or foreign commerce. It is immaterial that the contract of sale or contract to sell is negotiated and executed outside the state, that the purchaser resides outside the state, or that the purchaser is a carrier.

Where the seller agrees to and does deliver the goods to the purchaser at a point outside the state, neither retailing nor wholesaling business tax is applicable. Such delivery may be by the seller's own transportation equipment or by a carrier for hire. In either case for proof of entitlement to exemption the seller is required to retain in his records documentary proof (1) that there was such an agreement and (2) that delivery was in fact made outside the state. Acceptable proof will be:

(a) The contract or agreement AND

(b) If shipped by a for hire carrier, a waybill, bill of lading or other contract of carriage by which the carrier agrees to transport the goods sold, at the risk and expense of the seller, to the buyer at a point outside the state; or

(c) If sent by the seller's own transportation equipment, a tripsheet signed by the person making delivery for the seller and showing the (1) buyer's name and address, (2) time of delivery to the buyer, together with (3) signature of the buyer or his representative acknowledging receipt of the goods at the place designated outside the state of Washington.

[1] From the first quoted paragraph it is apparent that if the goods are delivered to the buyer in this state, it doesn't make any difference for taxation purposes whether thereafter

the goods are taken and used outside Washington. As indicated previously the Washington consignees included the two buyers. Thus, the tangible personal property at issue has been delivered to the purchasers in this state, so the B&O tax applies.

As to the goods delivered to the common carriers, we have no indication that the common carriers were hired by the taxpayer/seller. In fact, we're confident the reverse is true, that the carriers were hired by the buyer. In a prior audit the auditor stated that "the delivery to Alaska from Seattle is made by agents of the purchasers." By that we presume the buyer hired the boats that took the goods to Alaska. In any event Rule 193A requires documentary proof of an out-of-state delivery by a seller in order for that sale(s) to be exempt as interstate. If the goods are shipped by a common carrier, a bill of lading or similar document must be produced showing that delivery to the out-of-state destination was at the risk and expense of the seller. We haven't seen, in this case, a bill of lading on which Alaska is listed as the destination, let alone one which shows the taxpayer as the consignor to Alaska. The only documentation we have indicates that the seller's risk and expense for transportation of the goods ended in Seattle. Nothing has been proffered to establish that the seller paid for the voyage to Alaska or that it would have to replace the goods if the boat went down on its way to Alaska.

There is additional language in Rule 193A which is pertinent. It is:

A statutory exemption [from retail sales tax] (RCW 82.08.0269) is allowed in respect to sales for use in states, territories and possessions of the United States which are not contiguous to any other state (Alaska, Hawaii, etc.), but only when, as a necessary incident to the contract of sale, the seller delivers the property to the purchaser or his designated agent at the usual receiving terminal of the carrier selected to transport the goods, under such circumstance that it is reasonably certain that the goods will be transported directly to a destination in such noncontiguous states, territories and possessions.

. . .

No deduction is allowed under the business and occupation tax of the gross proceeds of sales made in the manner hereinabove described. . . .

Bracketed inclusion ours.

It is the business and occupation tax which is at issue here, so even if certainty of transport was established, the B&O tax would still apply.

As to the first issue, B&O tax on sales allegedly interstate, we deny the taxpayer's petition.

[2] With regard to the litter tax issue, the auditor has said and our examination of the audit schedules confirms that the tax was not asserted against items sent to Alaska. Our examination indicates, however, that all Washington sales reported by the taxpayer were litter taxed. We are under the impression that the taxpayer sells some non-food products like restaurant supplies and equipment which may not fall into one of the thirteen categories of items which are subject to litter tax. See WAC 458-20-243 (Rule 243). We do not know, though, which, if any, of the litter taxed sales were of exempt items. A taxpayer must keep records sufficient to determine its state excise tax liability. RCW 82.32.070. If it has records in which its litter taxable sales are segregated from its non-taxable sales according to the type of item sold, we haven't seen them. If it is able to produce such records within the statutory period for refunds,² it should present them to the Audit Division which will give credit as appropriate.

In the meantime, as to the second issue, litter tax, the taxpayer's petition is also denied.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this the 20th day of April 1990.

²See RCW 82.32.060.