Cite as 9 WTD 286-55

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

In the Matter of the Petition For Correction of Assessment of	)	F I N A L D E T E R M I N A T I O N
	)	
	)	No. 88-366A
	)	
. . .	)	Registration No. . . .
	)	Assessment No. . . .
	)	. . ./Audit No. . . .
	)	

[1] RULE 193B: INTERSTATE SALES OF GOODS TO PERSONS IN WASHINGTON -- B&O TAX -- NEXUS -- DISASSOCIATION -- BURDENS OF PROOF. The burden to show jurisdiction to tax sales rests upon the state. Once this has been shown, then the burden shifts to the seller to prove that some or any of its sales were disassociated with the significant sales activity.

[2] RCW 62A.2-319(1)(b) and RULE 103: F.O.B. DESTINATION -- DELIVERY -- SALES -- TAX LIABILITY. Shipments are F.O.B. destination when an out-of-state taxpayer/seller bears the risk and expense of transport and tenders delivery in Washington. Under Rule 103, in determining tax liability of persons selling tangible personal property, a sale occurs in Washington if goods sold are delivered to the buyer in 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.

TAXPAYER REPRESENTED BY: . . .

DEPARTMENT REPRESENTED BY DIRECTOR'S DESIGNEE:
Edward L. Faker, Assistant Director

DATE OF HEARING: April 27, 1989

NATURE OF ACTION

The taxpayer, an . . . subsidiary of a [out-of-state] corporation, appeals Determination No. 88-366, which upheld Assessment No. . . . for Business and Occupation (B&O) taxes in the amount of $ . . . for the years . . . . The taxpayer also petitions for correction of the subsequent assessment of $ . . . . , Audit No. . . . . , contained in Document No. . . . , for the audit period . . . through . . . .

FACTS

Faker, A.D. -- The facts are as reported in Determination No. 88-366 and are restated as necessary to discuss the appeal. To begin, the Auditor's Detail of Differences refers to two separate Washington Business Activities Statements completed by taxpayer for the test year . . . . The taxpayer submitted one statement to show the specialized nature of its sales to . . . industry customers. Such sales are conducted by the taxpayer's " . . . " division.

The statement and the taxpayer's records show the division's manager makes about three to four trips per year into Washington. Each trip lasts from two to three days. The purpose is to make "sales calls on past and prospective customers" who number from ten to fifteen. According to the statement, the manager is "responsible for overall marketing and sales program for large fabricated . . . products, including advertising, proposal preparation, customer development and supervision of sales agencies."

During its telephone conference, the taxpayer admitted that its . . . salesperson attends on-site "pre-bid" meetings with purchasers, but it contended all negotiations for sales of equipment take place in Oregon. The taxpayer claims all sales are made F.O.B. seller's plant. However, the verification comments for Audit No. . . . state that carriers usually charge the taxpayer for freight. The taxpayer, in turn, will include the freight charges on the invoices it sends its customers. The verification comments reveal that in such instances the taxpayer bears the risk and expense of delivery. Finally, when the equipment is being installed, the taxpayer will send a representative to the site if requested by the purchaser. However, the taxpayer asserts that independent contractors do the installations.

The other Business Activities Statement pertains to the sale of . . ., parts and repairs. Much of this business involves . . . and . . . manufacturers. The audit and the determination found the taxpayer's activities in Washington are significantly associated with the sale of these . . . . Again, the taxpayer claims the equipment is shipped F.O.B. seller's plant. However, as explained above, the audit stated that the taxpayer usually bears expense and risk of transport to destination. In such situations, the taxpayer has been assessed tax on gross sales into Washington.

On appeal, the taxpayer claims the second Business Activities Statement actually involves two separate entities - the . . . Department and the . . . Department. The taxpayer failed to make this distinction in either the statement or during the telephone conference. The taxpayer now concedes the latter department has nexus with Washington. As for new sales, the taxpayer asserts its representatives in Washington are merely doing warranty follow-up and public relations. It admits, however, that when its employees are in Washington they sometimes take orders or "more accurately, request a quote from the [Oregon] office."

ISSUE

Whether the taxpayer can disassociate some sales of equipment to Washington customers from its business activities in this state.

TAXPAYER'S EXCEPTIONS

The taxpayer argues that Determination No. 88-366 "is critically imprecise in its treatment of facts." It contends the determination "appears to have made assumptions of facts rather than findings." The taxpayer further claims the determination is "devoid of any facts" which would indicate that visits by the taxpayer's managers to certain customers in Washington were a significant part in establishing or maintaining sales.

Moreover, the taxpayer asserts the determination does not reflect the disassociation of its divisions. Instead, the decision gives the impression that the regular solicitation by taxpayer's . . . Department is attributable to the business of the . . . Department and . . . Division which, the taxpayer claims, have "de minimis Washington contacts." Finally, the taxpayer urges that the facts are as found in the earlier Determination No. 83-63.

DISCUSSION

[1] The taxpayer concedes that its . . . Department has sufficient nexus with this state to subject the taxpayer to B&O taxes. Its sales representatives regularly contacted customers in Washington. Under WAC 458-20-193B (Rule 193B), a person "has the distinct burden of establishing that its instate activities are not significantly associated in any way with the sales into this state." See Det. 83-63 which states "...the burden to show jurisdiction to tax sales rests upon the state. Once this has been shown, then the burden shifts to the seller to show that some or any of its sales were disassociated with the significant sales activity."

Rule 193B further provides:

> Under the foregoing principles, sales transactions in which the property is shipped directly from a point outside the state to the purchaser in this state are exempt only if there is and there has been no participation whatsoever in this state...by an agent or other representative of the seller.

With the auditor's report and the taxpayer's concession, the state has met its burden of showing jurisdiction to tax sales. Accordingly, the taxpayer has the distinct burden of establishing that its instate activities are not significantly associated in any way with the sales at issue.

In overcoming its burden, the taxpayer must show error in Determination No. 88-366's finding that linked the special products manager's trips to its sales activities here. That finding was based upon the auditor's report as well as the taxpayer's records and telephonic and written statements. Furthermore, the determination found the same evidence clearly showed that the taxpayer's representatives from the . . ., parts and repairs division were engaged in business activities in Washington.

All that the taxpayer has done in attempting to meet the burden is claim in its letter of . . . that there are three separate divisions instead of two as it initially indicated. Mere assertions by counsel that the . . . and the . . . divisions are disassociated from the activities of the . . . department are not enough. Moreover, the taxpayer admits its managers and/or salespersons from . . . and . . . made trips to customers in Washington. The distinct burden of proving

disassociation requires more than a statement that such contacts with Washington were de minimis.

As for the argument that these contacts were just for public relations, Determination No. 88-366 correctly answered that it is without merit. Public relations figure in the taxpayer's good will with its customers, which in turn creates a motive to continue doing business with taxpayer.

The taxpayer also contends the facts are as found in Determination No. . . . rather than Determination No. 88-366. However, the latter determination reminded the taxpayer of the cautionary language of Determination No. . . .: "... this Determination should not be understood to rule that it [taxpayer] has no sales nexus in this state now, or for future periods."

Cases cited by the taxpayer do not add to its argument. McCloud v. J.E. Dillworth Co., 322 U.S. 327 (1944), simply held that an Arkansas law could not impose a retail sales tax on sales occurring in Tennessee. The Supreme Court did not reach the issue whether Arkansas could apply a use tax because the state law did not provide for one.

In contrast to McCloud, supra, the Supreme Court in General Trading Co. v. Tax Comm'n, 322 U.S. 335 (1944) held that Iowa could impose a use tax upon the use of goods in that state which were sold in Minnesota. The statute required the out-of-state vendor to collect the tax for Iowa.

The third case cited by the taxpayer is Goldberg v. Sweet, 109 S.Ct. 582 (1989) which addressed interstate telephone calls. The case is not helpful to the taxpayer. First, the court treated the tax as if it were a sales tax although the retail purchase was not a purely local event. Nexus was not at issue because all parties agreed that the taxing state had it. Instead, the main issue was apportionment, which is not before us. Goldberg involved the "intangible movement of electronic impulses through computerized networks." The court held that attempts to apportion the tax on a mileage or geographical basis "would produce insurmountable administrative and technological barriers" due to the difficulty of tracing and recording the actual paths of such calls.

Taxpayer cites Goldberg for the court's comments on nexus. The court doubted whether a state through which an interstate telephone call's signals either merely passed or terminated without more has substantial nexus to tax the call. Under its

analysis only two states could tax an interstate call. The first situation is where there is a charge for a call to a service address within either the state of origination or termination. The second one is the billing or payment of the call within either the originating or terminating state.

Unlike the cases cited by the taxpayer, in this appeal there is no sales or use tax issue. Furthermore, it is not difficult to trace the movements of the taxpayers' managers and salespersons within Washington. The sale of large tangible personal property to Washington customers does not present insurmountable administrative and technological barriers in applying the B&O tax.

The audits, the taxpayer's records and its statements have shown the taxpayer has sales representatives and managers conducting business in Washington. They make new sales calls on past and prospective customers. They attend pre-bid meetings in the state. They sell parts here and take orders for equipment repair. If requested, they attend on site installations of the equipment which their customers purchased from them. They maintain and improve their good will with periodic customer relations visits to the state.

[2] Finally, with the taxpayer bearing the risk of loss and the expense of transport, the shipments are actually F.O.B. destination with delivery occurring in Washington. RCW 62A.2-319(1)(b). Under WAC 458-20-103, in determining tax liability of persons selling tangible personal property, a sale occurs in Washington if goods sold are delivered to the buyer in this state. Det. No. 86-161A, 2 WTD 397 (1987).

In light of Rules 193B and 103, these local activities are significantly associated with the taxpayer's ability to establish or maintain a market in this state for its sales. Therefore, the taxpayer is subject to this state's taxing authority for all of its business activities pertaining to Washington.

DECISION AND DISPOSITION

The taxpayer's petition is denied.

DATED this 23rd day of April 1990.