Cite as Det. No. 03-0250ER, 24 WTD 341 (2005)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	EXECUTIVE LEVEL RECONSIDERATION D E T E R M I N A T I O N
	)	No. 03-0250ER
. . .	)	Registration No. . . .
	)	Document No. . . . /Audit No. . . .
	)	Balance Due Notice(s) . . .
	)	Docket No. . . .

[1] RULE 159: AGENTS AND PRINCIPALS – PROOF OF AGENCY. A taxpayer cannot claim it bought tangible personal property as an agent where the purchase documents show the taxpayer bought the property in the taxpayer's name only without any indication that it made the purchase as an agent.

[2] RULE 193: NEXUS – DROP SHIPMENTS – STOCK OF GOODS. A taxpayer has nexus with Washington State where it maintains a stock of goods in Washington for distribution to its customers. Maintenance of a stock of goods is not the same as a drop shipment, because the latter involves a taxpayer who receives an order from its customer for certain items, places the order with its supplier for the items, and the supplier delivers the items directly to the taxpayer's customer.

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.

DIRECTOR'S DESIGNEE: Jeffrey B. Mahan, Appeals Review Manager

Gray, A.L.J. – In Det. No. 03-0250, we held that the taxpayer had substantial nexus with Washington and we held that it was subject to Washington's retailing business and occupation (B&O) tax. The taxpayer seeks reconsideration of Det. No. 03-0250, claiming it did not have nexus and asserting that Det. No. 03-0250 contained legal and factual errors. We affirm our

decision in Det. No. 03-0250 and sustain the assessment issued by the Department of Revenue (DOR).[1]

ISSUES:

1. Was the taxpayer acting as a broker of aviation fuel on behalf of airlines or did it purchase the fuel in Washington and resell it to airlines in Washington?
2. Does the taxpayer have substantial nexus in Washington based on its ownership of property in Washington, through its use of a representative in Washington acting on its behalf to help establish or maintain a market in Washington, or on other grounds?

FACTS:

DOR's Audit Division audited the taxpayer's books and records for the period January 1, 1996 through March 31, 2000. The Audit Division assessed retailing B&O tax and issued tax assessment number . . . on December 29, 2000. In assessing the tax, the Audit Division concluded the taxpayer had substantial nexus with Washington, established by the taxpayer's use of a representative in Washington. The taxpayer did not pay the assessment. The taxpayer appealed the tax assessment and the notices of balance due.

After the taxpayer filed its petition appealing the tax assessment, the taxpayer filed tax returns reporting its gross receipts but claiming a deduction for the entire amount of the gross receipts. The DOR issued notices of balance due based on the taxpayer's tax returns. The taxpayer appealed the notices of balance due.

The taxpayer has no offices or employees in Washington. The taxpayer argues that it has no agent or other representative in Washington. The taxpayer also argues that it has no stock of goods in Washington.

The taxpayer has three sets of business relationships that pertain in this tax appeal. First, the taxpayer purchases aviation fuel from various refiners, such as . . . . Second, the taxpayer contracts with various airlines to sell aviation fuel to them. Third, the taxpayer contracts with a company [Transport Co.] at [Washington] Airport to transport aviation fuel via trucks from the airport tank farm (jet fuel storage tanks, neither owned nor leased by the taxpayer) to the aircraft and to fuel the aircraft.

The Refiners: The taxpayer submitted four contracts between itself and various oil producers. The object of each contract is the sale of aviation fuel. In each contract, the oil producer is identified as the seller and the taxpayer as the buyer. The contracts, delivery points, and terms of passage of title and risk of loss are as follows:

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

[Fuel Co. 1]. The period covered was . . . , 1995, through . . . , 1995 (this contract predates the audit period). The delivery method was "to buyer's supplied tank trucks." Title to and risk of loss passed from the seller to the buyer "as the product enters the buyer's supplied truck tank at the delivery facility."

[Fuel Co. 2]. This was not a contract but a letter that constituted an offer to make a contract; nonetheless, it is the document supplied by the taxpayer. The period covered was . . . , 1996, through . . . , 1997. The delivery method was ". . . into buyer's aircraft wing via Buyer-designated into-plane or refueler truck."

[Fuel Co. 2]. The period covered was . . . , 1996, through . . . , 1997. . . . , the delivery point was "[State A Airport], into [Transport Co.] airport storage." The contract stated "title to and risk of loss shall pass from [seller] to [Fuel Co. 3] at [Fuel Co. 2] point of delivery . . . ."

[Fuel Co. 2]. The period covered was . . . , 2000, through . . . , 2001. The delivery point was "[Washington Airport] – into refueler truck." The page containing passage of title and risk of loss was missing, but the remainder of the contract appears to be identical to the other two [Fuel Co. 2] contracts, so it is reasonable to assume title and risk of loss passed the same way as with the other two [Fuel Co. 2] contracts.

[Transport Co.]: The [Transport Co.] contract described [Transport Co.] as "a corporation chartered to perform airport services of the kind and description set forth herein." The contract described the taxpayer as "a fuel supplier desirous of receiving services of the kind and description set forth herein."[2] The contract with [Transport Co.] contains no discussion of the point of delivery of the fuel. This contract required the taxpayer to pay [Transport Co.] "promptly upon the presentation of invoices for such charges to [the taxpayer.]" [Transport Co.'s] price for its services to the taxpayer was based upon a certain amount per gallon of aviation fuel; *e.g.*, $.015 per gallon.

The [Transport Co.] contract was signed by representatives of [Transport Co.] and the taxpayer. The contract refers twice . . . to an annexed schedule. The annexed schedule is marked as "schedule A." Schedule A is a one-page document that says "[Transport Co.] to provide on behalf of: [Airline Co.]." Following that statement is a list of services, rates, and other charges:[3] [On-site management and supervision;. . . and trained personnel; Adequate refueling equipment; Fuel product to be provided by Carrier's supplier into airport storage; Copies of all fueling and defueling tickets and the required reports necessary to meet Carrier's accounting requirements.]

Schedule A is signed by representatives of [Transport Co.] and the taxpayer. . . . [T]he contract . . . contains a reference to "[taxpayer's] aircraft." The taxpayer is not an airline and does not operate an airline. It has no aircraft, at least none used for the operation of an airline.

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[2] The taxpayer said that [Washington] Airport does not permit the taxpayer to operate a tank farm at the airport or to fuel aircraft.

[3] Schedule A also identifies the place where the services are to be performed as the [Washington] Airport and is dated . . . , 1995.

Finally, . . . the [Transport Co.] contract . . . states that charges for services rendered by [Transport Co.] shall be paid by "CARRIER." [The contract] contains several other references to rights and responsibilities of CARRIER. The agreement does not identify who the carrier is. Neither the agreement nor schedule A is signed by any carrier representative.

The Airlines: A contract between the taxpayer and an unscheduled air carrier [Airline Co.] was representative of these kinds of contracts during the audit period. The contract identified the taxpayer as the seller and [Airline Co.] as the buyer. The contract term was . . . , 1994 through . . . , 1995, but the taxpayer indicated it executed a subsequent contract identical to the earlier one except for the price per gallon. The taxpayer agreed to supply approximately . . . gallons of aviation fuel per month to [Airline Co.] at [Washington] Airport. The delivery point was "FOB [Washington Airport] Via Into Plane" [sic].

Although not contained in the documents supplied to us, the taxpayer said that its billing procedures are to combine the bills it receives from [Fuel Co. 2] and [Transport Co.] into one bill, which it presents to the airline for payment.

On reconsideration, the taxpayer provided us with a copy of a "master fuel agreement." The copy is a sample only; we were not provided any signed copies of master fuel agreements. The taxpayer also provided a balance sheet showing its inventory at various airports in the United States for 2002. Of the many airports listed, the list does not include [Washington] Airport.

On reconsideration, the taxpayer claims a factual error in our finding the taxpayer owns the aviation fuel in Washington. The taxpayer claims, as it did with the Audit Division, that it does not own the fuel. In the reconsideration hearing, the taxpayer argued that "it is implied that the taxpayer buys the fuel for airlines" and that it was acting as a broker.

On reconsideration, the taxpayer claims a legal error in that [Transport Co.] is not its agent or representative for nexus creating purposes and, accordingly, denies it has taxable nexus with Washington.

After issuance of the Proposed Executive Level Reconsideration Determination ("Proposed Determination"), the taxpayer provided us with additional documents. These documents included sample invoices to airlines for fuel and what the taxpayer calls "GL Detail" (presumably, "general ledger"). Each invoice is close in time to the audit period, but nonetheless is after the close of the audit period. Each invoice includes a separate charge for a ". . . fee." The taxpayer defines a ". . . fee" as "the charge by the owner or operator of the storage facility for the privilege of sending fuel through their system, via pipeline or terminal." The taxpayer's documents show invoices on the taxpayer's letterhead for fuel, including a separately stated amount for the . . . fee. The GL Detail contains a box marked "oil company" and lists the oil company as "[Fuel Co. 2]." The invoices show multiple deliveries on either the same date or on different dates for varying amounts of fuel being delivered to various aircraft.

ANALYSIS:

1. Was the taxpayer acting as a broker of aviation fuel on behalf of airlines or did it purchase the fuel in Washington and resell it to airlines in Washington?

[1] Under the terms of the contracts, the taxpayer was buying aviation fuel in its own name and reselling the fuel to airlines. Under Washington law, a person who sells tangible personal property in its own name has the burden to establish it is acting merely as a broker or agent. RCW 82.04.480 provides:

> The burden shall be upon the taxpayer in every case to establish the fact that he is not engaged in the business of selling tangible personal property but is acting merely as broker or agent in promoting sales for a principal. Such claim will be allowed only when the taxpayer's accounting records are kept in such manner as the department of revenue shall by general regulation provide.

By administrative rule, WAC 458-20-159 (Rule 159), DOR requires the following proof to show a taxpayer is acting as a broker or agent:

> Any person who claims to be acting merely as agent or broker in promoting sales for a principal or in making purchases for a buyer, will have such claim recognized only when the contract or agreement between such persons clearly establishes the relationship of principal and agent and when the following conditions are complied with:
>
> (1) The books and records of the broker or agent show the transactions were made in the name and for the account of the principal, and show the name of the actual owner of the property for whom the sale was made, or the actual buyer for whom the purchase was made.
>
> (2) The books and records show the amount of gross sales, the amount of commissions and any other incidental income derived by the broker or agent from such sales.

In none of the contracts is the taxpayer identified as "agent" or "broker" for a principal. There are no qualifications in the contracts to show that the taxpayer buys the jet fuel on behalf of anyone else, or sells the jet fuel in anything other than its capacity as the owner of the aviation fuel.[4]

Instead, the documentary evidence submitted to us by the taxpayer shows the taxpayer as the owner of jet fuel in Washington State at the [Washington] Airport.[5] The taxpayer buys jet fuel from the refiners and sells it to [Airline Co.], and other airlines.

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[4] The taxpayer's evidence of a broker relationship is slight. The master fuel agreement is a sample only. There is no proof that this agreement was used with any of the taxpayer's Washington customers. We make no finding about whether the taxpayer's books and records reflect the information required by Rule 159.

[5] The taxpayer argues that it "merely engages [Transport Co.] to fuel airplanes." At issue in this regard is whether [Transport Co.] was also acting on taxpayer's behalf in helping maintain a market in Washington, as discussed,

The additional documents submitted after issuance of the Proposed Determination do not assist the taxpayer. The invoices show the taxpayer bills the airlines for sales of aviation fuel. There is nothing on the invoices to indicate the taxpayer is acting as a broker or that the taxpayer is doing anything other than selling its fuel to the airlines. The GL Detail does not contain the information that the taxpayer claims is there. "Oil Company – [Fuel Co. 2]," for example, identifies an oil company as [Fuel Co. 2]. It says nothing about who owns the aviation fuel that is in question here. The contracts earlier submitted by the taxpayer continue to contradict its claims that it purchases aviation fuel in the capacity of broker for sale of the aviation fuel to principals.[6]

In support of its claim that it was acting as a broker and was not the owner of the fuel, the taxpayer cites *Wasser & Winters Co. v. Jefferson County*, 84 Wn.2d 597, 599, 528 P.2d 471 (1975):

> We have identified the chief incidents of ownership of property as the right to its possession, use and enjoyment and to sell or otherwise dispose of it according to the will of the owner.

The Court was not announcing that title to property minus possession of the property results in lack of ownership of the property, which is the point the taxpayer tries to make. To the contrary, the "right to its possession" and the right to "dispose of" property are chief incidents of ownership. Here, the taxpayer according to its contracts had the right to possession of the fuel when supplied to buyers' trucks and it had the right to dispose of it, which it did, as shown by its subsequent sale when the fuel was uplifted into its customer's planes.[7]

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infra. Although the contract is solely between the taxpayer and [Transport Co.], [the Contract] contains promises for performance between [Transport Co.] and an unnamed carrier, yet no one from any carrier signed either the contract or the annexed schedule A. Schedule A says that [Transport Co.] will provide certain services "on behalf of" [Airline Co.], which sounds like [Transport Co.] is [Airline Co.'s] agent. Further, at least one of the listed services in schedule A makes no sense if [Transport Co.] provides services to [Airline Co.]: "fuel product to be provided by Carrier's supplier into airport storage." One would think that [Transport Co.] would move the jet fuel from airport storage into the Carrier's airplanes' fuel tanks. Accordingly, we conclude this contract was only between the taxpayer and [Transport Co.] and [Transport Co.] was not acting on behalf of the Carriers.

[6] The taxpayer also supplied a copy of a "Master Fuel Agreement" and a list of inventory balances at various airports as of December 31, 2002, in support of its claims. The sample Master Fuel Agreement, apparently written after the audit period, was a blank form, and was not in use in Washington during the audit period. Our decision is based on the contracts in existence during the audit period. We also note that the Master Fuel Agreement contains language contradictory to the taxpayer's contracts and its billing practices in use during the audit period. The list of inventory balances is interesting because it shows the taxpayer has inventory at various airports but not at [Washington Airport]. It indicates that the taxpayer is generally not acting as a broker of aviation fuel. But it does not lead us to conclude the taxpayer was acting as broker in Washington simply because it does not list any inventory in Washington for the period covered by the list.

[7] We have no information from the taxpayer . . . regarding taxpayer's rights concerning the tank farm at [Washington] Airport, and make no findings on that point.

The petition for reconsideration is denied on the claimed factual error. We affirm our earlier finding that the taxpayer buys and sells jet fuel, and owns the jet fuel in Washington at [Washington] Airport.

2. Did the taxpayer have substantial nexus with Washington State?

[2] Washington imposes its B&O tax for the "act or privilege of engaging in business activities" in Washington. RCW 82.04.220. The taxpayer contends it lacks nexus with Washington State.

The Commerce Clause grants Congress the power "to regulate commerce among the several states." The United States Supreme Court in numerous decisions has interpreted the Commerce Clause to prohibit, by negative implication, state taxes that unduly burden or discriminate against interstate commerce. *See, e.g., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 289 (1977). In *Complete Auto* the court adopted a four-part test under the Commerce Clause for sustaining a state tax against a Commerce Clause challenge:

> [T]he tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

430 U.S. at 279. *See also American National Can Corp. v. Department of Rev.*, 114 Wn.2d 236, 241, 787 P.2d 545 (1990). We are concerned here only with the substantial nexus part of the *Complete Auto* test. The signal case on substantial nexus is *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). *Quill* did not establish a quantitative test to determining substantial nexus. However, the out-of-state company must have some level of physical presence in Washington in order that there be substantial nexus here. As stated in *Quill*, 504 U.S. at 314-15:

> In contrast, the bright-line rule of *Bellas Hess*[8] furthers the ends of the dormant Commerce Clause. Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. *Bellas Hess* followed the latter approach and created a safe harbor for vendors "whose only connection with customers in the [taxing] State is by common carrier or the United States mail." Under *Bellas Hess*, such vendors are free from state-imposed duties to collect sales and use taxes.[9]

[8 *National Bellas Hess, Inc. v. Department of Rev. of Ill.*, 386 U.S. 753 (1967).]

9 In addition to its common-carrier contacts with the State, Quill also licensed software to some of its North Dakota clients. See supra n. 1. **The State "concedes that the existence in North Dakota of a few floppy diskettes to which Quill holds title seems a slender thread upon which to base nexus."** Brief for Respondent 46. We agree. Although title to "a few floppy diskettes" present in a State might constitute some minimal nexus, in *National Geographic Society v. California Bd. of Equalization*, 430 U. S. 551, 556 (1977), we expressly rejected a "'slightest presence' standard of constitutional nexus." We therefore conclude that Quill's licensing of software in this case does not meet the "substantial nexus" requirement of the Commerce Clause.

> Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges: whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office. Cf. *National Geographic Society v. California Bd. of Equalization*, 430 U. S. 551 (1977); *Scripto, Inc. v. Carson*, 362 U. S. 207 (1960). This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes.

[Emphasis and first footnote added; second footnote original.] Unlike the facts in *Quill*, thousands of gallons of aviation fuel are more than a "slender thread" upon which to base nexus.

The DOR promulgated WAC 458-20-193 (Rule 193) regarding the tax consequences for outbound and inbound sales of tangible personal property. The taxpayer is aware of Rule 193 because it cites Rule 193(11)(h) to support its argument. Rule 193(11)(h) is an example of an inbound sale of tangible personal property with no B&O tax liability for the seller. The example provides:

> Company X is located in Ohio and has no office, employees, or other agents located in Washington or any other contact which would create nexus. Company X receives by mail an order from Company Y for parts which are to be shipped to a Washington location. Company X purchases the parts from Company Z who is located in Washington and requests that the parts be drop shipped to Company Y. Since Company X has no nexus in Washington, Company X is not subject to B&O tax or required to collect retail sales tax. Company X has not taken possession or dominion or control over the parts in Washington. Company Z may accept a resale certificate from Company X which will bear the registration number issued by the state of Ohio. Company Y is required to pay use tax on the value of the parts.

In Det. No. 03-0250 and here again, we disagree with the taxpayer's argument. Although we accept that the taxpayer is similar to Company X, in the example, in that the taxpayer has no office or employees located in Washington, it is unlike Company X because the fuel is not drop shipped. In Det. No. 95-134E, 15 WTD 149 (1996), we described drop shipments as follows:

> The taxpayer describes a "drop shipment" as follows: first, the taxpayer receives an order from its customer for certain items (e.g., disposable pie pans); second, the taxpayer places the order with its supplier for the items; third, the order directs the supplier to deliver the items directly to the taxpayer's customer. The taxpayer states that it takes title to the items, but does not have physical possession of them.

Similar to the facts in Det. No. 95-134E, the example in Rule 193(11)(h) posits that Company Y orders parts which Company X orders from Company Z. Company Z drop ships the parts to Company Y in Washington.

The facts in Det. No. 95-134E and the example in Rule 193(11)(h) are not the facts in this case. In this case, the taxpayer orders thousands of gallons each month which the refineries ship, via pipelines, to the [Washington] Airport. The fuel is stored in the airport tank farm until [Transport Co.] withdraws the fuel for later sale to the taxpayer's customers. By the terms of the taxpayer's contracts, title to and risk of loss to the fuel passes from the refineries to the taxpayer upon delivery into refueler trucks. The taxpayer's fuel is placed in [Transport Co.'s] trucks, and it is subsequently sold when [Transport Co.] pumps the fuel from its trucks into aircraft, as needed by the aircraft.

Rule 193(7) discusses the tax consequences of inbound sales. The general rule is stated as follows:

> 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.

Rule 193(7)(c)(iv) is an example of a situation where the DOR has declared that nexus exists:

> The following activities are examples of sufficient nexus in Washington for the B&O tax to apply:
> . . .
> (iv) The delivery of the goods is made by a local outlet or from a local stock of goods of the seller in this state.

We have previously concluded, *infra*, that the taxpayer buys the aviation fuel in its own name and resells the fuel, in its own name, to the airlines. The taxpayer contracted with [Transport Co.] to convey the aviation fuel from the [Washington Airport] tank farm to the aircraft because the taxpayer does not provide those services. Fuel is withdrawn from the tank farm for later sale to airlines. The fuel constitutes the taxpayer's stock of goods in Washington. . . .

The taxpayer's situation is similar to Det. No. 94-074E, 14 WTD 085 (1994), in which we considered whether a petroleum trading company had nexus with Washington. In that determination, the taxpayer bought, sold, and exchanged petroleum inside and outside of Washington. That taxpayer had no petroleum handling facilities such as barges, tanks, refineries, or retail outlets. Its employees did not travel to Washington to solicit sales or purchase products. It paid inspectors who certified the quantity and quality of the products it purchased and sold in Washington. That taxpayer also argued that it never held title to products purchased in Washington and that any purchases in Washington were simultaneously resold.

We concluded that its products and their receipt in Washington were not drop shipments. We said "[i]n the taxpayer's situation, the opportunity to purchase the products may precede finding

a buyer or arranging their sale. Arguably, the taxpayer has a stock of goods in Washington." We also said:

> Likewise, title held by the taxpayer, even for an instant, gives the taxpayer property purchased in Washington at the time of sale. Under example (7)(c)(i), when goods are located in Washington at the time of sale, this creates nexus unlike the drop shipment example where the goods were sold prior to the taxpayer arranging to have them drop shipped.

Similarly, we conclude the fuel withdrawn from tank farms constitutes the taxpayer's stock of goods in Washington, which was then resold to airlines.[10] We conclude that the taxpayer's gross receipts are subject to Washington's B&O tax because the elements of Rule 193(7) are met. Because we have decided that the taxpayer's aviation fuel constitutes a stock of goods for sale in Washington State (Rule 193(7)(c)(iv)), it is unnecessary to discuss whether [Transport Co.] is the taxpayer's agent or "other representative" in Washington (Rule 193(7)(c)(v)).[11]

DECISION AND DISPOSITION:

The petition for reconsideration is denied.

Dated this 31st day of January, 2005.

[10] In response to taxpayer's comments to the proposed decision, we continue to disagree with the taxpayer about the application of Det. No. 94-074E, 14 WTD 085 (1994). We have explained our position regarding nexus. The taxpayer's supply of fuel in Washington is the taxpayer's fuel, according to the contracts it provided to us for review. That supply of fuel is its stock of goods present in the state. The fuel is not a drop shipment to air carriers. Also, the taxpayer argued at length that our reliance on Det. No. 01-074, 20 WTD 531 (2001), was incorrect, citing numerous differences between the facts in that determination and the taxpayer's own facts. We cited Det. No. 01-074 only to provide an example of a situation where the concept of "other representatives" was used.

[11] The taxpayer has also asked for assurance that it is being treated fairly with regard to the taxpayer's competitors who may perform the same services in Washington. The question of nexus is a fact-driven analysis, depending on each taxpayer's particular set of facts. Even if we were to say that "Competitor A" is taxed differently than the taxpayer, the reason might be based on a different set of facts than those presented by the taxpayer, and we make no assertion here regarding how the taxpayer's competitors are taxed. We are also restricted from releasing this information by RCW 82.32.330. Accordingly, we are not in a position to provide the assurance requested.