Cite as Det. No. 04-0148, 24 WTD 371 (2005)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 04-0148
. . .	)	Registration No. . . .
	)	Document No. . . .
	)	Audit No. . . .
	)	Docket No. . . .

RULE 193: B&O TAX – SUBSTANTIAL NEXUS –INDEPENDENT CONTRACTOR – CUSTOMER ASSISTANCE. Sending an independent contractor to a customer's plant in Washington to assist the customer in making certain the taxpayer's product will fit plant configuration and to assemble examples for the customer's assemblers to follow, when the customer potentially has an ongoing or recurring requirement for the taxpayer's products, is sufficient contact to establish nexus to tax the taxpayer's sales into the 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.

Prusia, A.L.J. – An out-of-state seller of [products], whose only physical contact with Washington was one visit by an independent design contractor to assist one long-time customer, by making sure [products] the customer was purchasing would fit into the configuration of the customer's facility and building two examples for the customer's installers to follow, protests the assessment of B&O tax and retail sales tax on its sales into the state. We conclude the activity was sufficient to create taxable nexus with Washington and deny the petition.[1]

ISSUE

Did a single visit to one customer by an independent contractor, under the facts of this case, establish sufficient nexus in Washington for the B&O tax and retail sales tax to apply to the taxpayer's Washington sales . . . ?

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

FINDINGS OF FACT

[Taxpayer], headquartered in [State A], is a distributor of [products] at wholesale and retail. Among the articles it sells are [the products at issue here]. Beginning in 2000, [Taxpayer's] activities expanded into the complete installation of [products] for . . . companies, including customers in Washington.

Before 2000, [Taxpayer] did not solicit any business in Washington, and made very few sales to customers in Washington. Delivery of products to customers in Washington was by common carrier. As part of its 2000 expansion, in February 2000, [Taxpayer] hired an employee to work as a full time sales representative from her home in [Washington]. At that time, Taxpayer registered with the Department of Revenue (DOR).

In 2002, DOR's Audit Division examined [Taxpayer's] books and records for the audit period January 1, 1999 through June 30, 2002. As a result of that examination, in May 2003, the Audit Division issued an assessment for additional excise taxes for the audit period, in the total amount of $ . . . . The bulk of the assessment was retail sales tax of $ . . . for the year 1999, the year before Taxpayer registered, on sales to one customer, . . . (hereinafter [Customer]). The assessment also included Retailing Business and Occupation (B&O) tax, and interest on the tax deficiency. . . . Taxpayer paid $ . . . on the assessment, which was approximately the amount of taxes and interest assessed for years other than 1999. [Taxpayer] petitions for cancellation of the taxes assessed for 1999, contending its activity in Washington in 1999 did not create sufficient nexus with Washington for the state to impose its excise taxes on [Taxpayer] for [Taxpayer's] 1999 sales into the state.

In 1999, [Taxpayer's] only physical contact with Washington was the following. A [State A] based client with which [Taxpayer] had a long business relationship, the above-referenced [Customer], was expanding into Washington and building a . . . facility . . . here. Based on its past relationship with [Taxpayer], [Customer] had asked [Taxpayer] to sell [Customer] the [products] for the new facility. [Customer] had decided to hire its own installation team, but requested that [Taxpayer] arrange to have an independent design contractor visit the new Washington facility to make sure the [products] would fit into the configuration of the facility and to build two [products] as an example for [Customer]'s installers to follow. [Taxpayer] contacted a [State A] engineering design firm, and arranged for one of the firm's engineers ([Engineer]) to perform that service. [Engineer] arrived in Washington from [State A] on . . . , 1999, assisted with configuration and built two [products] as examples, and left [three days later]. [Engineer] billed [Taxpayer] $ . . . for his services, and [Taxpayer] invoiced [Customer] $ . . . for the activity. [Taxpayer] retained the difference as compensation for arranging [Engineer]'s visit.

[Taxpayer] had no other physical contact with Washington in 1999. [Engineer] did not return to Washington in 1999 on behalf of [Taxpayer] or any of [Taxpayer's] clients. However, the audit workpapers show that subsequent to [Engineer]'s visit, [Taxpayer] made additional Washington sales to [Customer] during 1999. . . .

ANALYSIS

[Taxpayer] appeals both the B&O tax and the retail sales tax assessed for 1999. Washington imposes the B&O tax on every person for the act or privilege of engaging in business activities in Washington. 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. All sales of tangible personal property to consumers in the state of Washington are subject to retail sales tax, unless the state is prohibited from taxing the sale under the constitution of this state or the federal constitution or laws, or there is some other specific statutory exception or exemption from the tax. RCW 82.08.020; RCW 82.04.050; RCW 82.08.0254. The retail sales tax is required to be collected by the seller. RCW 82.08.050.

WAC 458-20-193 (Rule 193) explains Washington's B&O tax and retail sales tax applications to interstate sales of tangible personal property. It states, in relevant part:

> (7) **Inbound sales.** 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.
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> (c) If a seller carries on significant activity in this state and conducts no other business in the state except the business of making sales, this person has the distinct burden of establishing that the instate activities are not significantly associated in any way with the sales into this state. Once nexus has been established, it will continue throughout the statutory period of RCW 82.32.050 (up to five years), notwithstanding that the instate activity which created the nexus ceased. Persons taxable under the service B&O tax classification should refer to WAC 458-20-194. The following activities are examples of sufficient nexus in Washington for the B&O tax to apply:
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> (i) The goods are located in Washington at the time of sale and the goods are received by the customer or its agent in this state.
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> (ii) The seller has a branch office, local outlet or other place of business in this state which is utilized in any way, such as in receiving the order, franchise or credit investigation, or distribution of the goods.
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> (iii) The order for the goods is solicited in this state by an agent or other representative of the seller.
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> (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.

(v) The out-of-state seller, either directly or by an agent or other representative, performs significant services in relation to establishment or maintenance of sales into the state, even though the seller may not have formal sales offices in Washington or the agent or representative may not be formally characterized as a "salesperson".

(vi) The out-of-state seller, either directly or by an agent or other representative in this state, installs its products in this state as a condition of the sale.

(8) **Retail sales tax - inbound sales.** Persons engaged in selling activities in this state are required to be registered with the department of revenue. Sellers who are not required to be registered may voluntarily register for the collection and reporting of the use tax. 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. . . .

The nexus requirement comes from limitations 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 DOR determinations. *See, e.g.*, Det. No. 01-074, 20 WTD 531 (2001); Det. No. 96-144, 16 WTD 201 (1996). The nexus limitation requires that the activity taxed have "substantial nexus" with the taxing state.[2] Consistent with this requirement, Rule 193(2)(f) defines "nexus" as "the activity carried on by the seller in Washington which is significantly associated with the seller's ability to establish and maintain a market for its products in Washington." This definition was cited with approval in *Tyler Pipe Industries, Inc. v. Department of Rev.*, 483 U.S. 232, 250 (1987).

With respect to the duty to collect retail sales tax or use tax, "substantial nexus" includes a requirement of some physical presence (more than the "slightest presence") in the state. *Quill Corp., supra.* In Det. No. 96-144, *supra*, we concluded that, once the activities of a company go beyond purely mail order activities, and it has demonstrably more than the slightest presence in the state, substantial nexus is established.

Nexus may be established through the activities of the seller's own employees or independent contractor representatives. Rule 193(7); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Tyler Pipe Industries, Inc., supra.*[3]

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[2] In *Complete Auto Transit*, the Supreme Court articulated a four-pronged test that a state tax must satisfy to withstand a Commerce Clause challenge to its jurisdiction to tax. The decision held that the Commerce Clause requires that the tax: (1) be applied to an activity with a "substantial nexus" with the taxing state, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the state.

[3] In *Scripto*, a Georgia corporation's only connection with Florida was that it had ten wholesalers, jobbers, or "salesmen" conducting continuous local solicitation in Florida and forwarding the orders from Florida to the Georgia seller for shipment. The court held that Florida could constitutionally impose upon the Georgia seller the duty of collecting Florida's use tax upon goods shipped to customers in Florida. In *Tyler Pipe*, the court held that Washington had sufficient nexus with an out-of-state seller whose only connection with Washington was the use of

It is not necessary for the employee or independent contractor to be engaged in the direct solicitation of orders for nexus purposes. Any activity performed in this state on behalf of the seller that is significantly associated with the seller's ability to establish and maintain a market in this state for the sales establishes nexus over the seller. Rule 193(7); *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560 (1975); *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977).

The issue presented in this appeal is whether the one three-day visit by the one independent contractor to the one customer was sufficient to establish nexus to tax [Taxpayer's] sales into Washington [in 1999].

The only example of sufficient nexus listed under Rule 193(7)(c) that might apply in this case is example (v) -- "significant services in relation to establishment or maintenance of sales into the state." Services in the state in relation to sales that fit that description will also meet the demonstrably more than the slightest presence requirement of *Quill*.

The facts before us establish that [Engineer]'s activities were significant in relation to the establishment or maintenance of sales into the state. They were directly related to the actual sale of [products] to [Customer]. [Customer] had asked [Taxpayer] to sell [Customer] the [products] for the facility, but before concluding the purchase wanted to be certain the [products] would fit into the configuration of the facility. [Taxpayer] arranged for [Engineer] to come into Washington in part to assure the sale would be successfully concluded. The activities also were related to potential future sales into the state. [Customer] was a long-time customer, expanding its operations in Washington. In-state assistance to a customer with ongoing requirements, or likely to have repeat requirements, may be expected to have a positive impact on the maintenance of sales to that customer. It is reasonable to assume that factor was a reason for [Taxpayer's] assistance to [Customer]. [Taxpayer] in fact made additional Washington sales to [Customer] after [Engineer]'s visit.

Two published decisions the Audit Division cites, Det. No. 88-368, 6 WTD 417 (1988), and Det. No. 97-061, 18 WTD 211 (1999), support a conclusion that [Engineer]'s activities created sufficient nexus for the state to tax [Taxpayer's] 1999 sales activity. Det. No. 88-368 involved one or two visits by each of several employees annually, for two or three days on each occasion, during which four to six customers with ongoing needs for chemical ingredients were contacted to provide advice on the safe handling of products. Det. No. 97-061 involved one to four short, non-sales visits per year to resellers and independent dealers by employees of an out-of-state seller, for purposes of cultivating goodwill, obtaining input on taxpayer products, addressing user concerns, resolving problems with accounts, and dispensing information about taxpayer products.

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independent contractors in the state who acted daily on its behalf to solicit sales, call on customers, and maintain and improve the seller's goodwill, customer relations, and name recognition.

Taxpayer argues that those decisions are distinguishable, because they involved more than one visit per year, and the visits were recurring rather than one-time. The situations in those decisions do differ from [Taxpayer's] situation in that regard, but they are similar to [Taxpayer's] situation in the quality of the visits. The visits were to customers with ongoing or recurring requirements for products the taxpayer was in the business of selling, and therefore in relation to maintaining sales into the state. It is the purpose motivating the visits that establishes nexus, not the quantity of the visits. In Det. No. 97-061, *supra,* we stated:

> While, admittedly, this contact was minimal, we find it to be significant in that it had, or could have had, an impact on customer satisfaction and, thus, on sales. The employee's presence was, doubtless, "intended to establish or maintain and, hopefully, increase the taxpayer's sales" in Washington. Det. No. 91-279, [11 WTD 273 (1991)] at 277.

We conclude that [Engineer]'s activities in 1999 established sufficient nexus with Washington to allow Washington to tax [Taxpayer's] 1999 Washington sales to [Customer].

DECISION AND DISPOSITION

The taxpayer's petition for cancellation of taxes and related interest assessed for 1999 is denied.

Dated this 28th day of June 2004.