Cite as Det. No. 04-0208, 24 WTD 217 (2005)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 04-0208
	)	
. . .	)	Registration No. . . .
	)	Petition for Review of Audit
	)	Refund Denial Letter
	)	Docket No. . . .
	)	

[1] RULE 193: B&O TAX — NEXUS — DISSOCIATION — INDEPENDENT SOURCE. For a taxpayer to dissociate sales from its nexus creating activities in Washington, it must document that those sales are derived from an exclusively independent source and are not significantly associated, in any way, with any of the taxpayer's in-state activities that establish or maintain a market for its products.

[2] RULE 193: B&O TAX — NEXUS — DISSOCIATION — BRAND NAME PRODUCTS. An out-of-state taxpayer with taxing nexus in Washington cannot dissociate select sales of brand name products where the select sales are made pursuant to sales contracts negotiated and executed outside of Washington because the taxpayer cannot prove that the select sales are not significantly associated in any way with its in-state promotion and support activities for these brand name products.

Kreger, A.L.J. – . . . (Taxpayer), a manufacturer of consumer products, contends that the Department of Revenue (Department) erred in denying a request for refund of business and occupation tax paid on sales of consumer products in Washington. Taxpayer contends that some sales should be dissociated from its Washington activities[1]. . . .

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

ISSUES

1. Has the Taxpayer established that sales of its products sold by its . . . [A] Group may be dissociated from its in-state promotion and marketing activities under Rule 193?

2. Has the Taxpayer established that sales of its products sold by its [B] Group may be dissociated from its in-state promotion and marketing activities under Rule 193?

3. Has the Taxpayer established that sales of its products sold by the [C] Group may be dissociated from its in-state promotion and marketing activities under Rule 193?

FINDINGS OF FACT

The Taxpayer, a [State X] Corporation, manufactures and sells consumer products. The taxpayer groups its products into four lines . . . . The taxpayer sells its products throughout the United States and around the world.

<u>Sales Groups and Product Lines</u>:
The Taxpayer has established four different sales groups to sell and market its products: [A] Group, [B] Group, [C Group], and [D Group]. Each sales group focuses on a particular market sector and is responsible for sales of specific products that are tailored to the needs of that market sector.

The [A] Group sells to large retail stores, club stores, drug stores and grocery stores . . . . The majority of these accounts are serviced on a national basis. These large retailers do not generally retain local purchasing and buying agents. Instead, the stores (Taxpayer's customers) gather sales data and purchase requests from their individual branches and then negotiate with suppliers on a consolidated order. A Taxpayer's sales representative negotiates sales with the customer's purchasing representative, generally at the company's national headquarters. The sales representatives then coordinate the delivery of the products to particular stores. It is common for the Taxpayer's sales representatives' interactions with these national account customers to occur predominantly or exclusively at the customers' headquarters. Indeed, it is common for national sales representatives to take orders for and arrange for shipping to stores in regions they have never visited.

The sales representatives in the [A] Group strive to increase the total number of the Taxpayer's products that the customers' stores carry (*i.e.*, stocking six different [types] of a particular [product] as opposed to three and carrying four different [product] brands as opposed to two) and to negotiate the most prominent placement possible (*e.g.*, center shelf center aisle as opposed to higher or lower placement, and a higher number of special displays or end of aisle placements) for those products. Product range and placement are governed by the master contracts the sales representatives negotiate with the customers. These master contracts are supplemented by addenda to cover special promotions[2] and additions or substitutions to the product mix. The national account sales representatives' primary responsibility is managing order and delivery transactions. They receive customer complaints and are responsible for managing and resolving order and delivery problems but do not have responsibility for actual in-store promotion or verification work.[3] Common carriers actually deliver all of the Washington sales made by this sales group, and third party service providers, who are not representatives of Taxpayer, provide and direct in-store promotion and marketing work. These national sales representatives provide an important conduit for customer information to the Taxpayer's advertising and marketing staff and have some input into product promotion decisions. However, the national sales representatives do not make decisions on which products to promote or how to market those products. Promotion and marketing decisions are primarily driven by sales data and are made at a higher corporate level and then conveyed to the sales representatives.

A significant portion of the taxpayer's refund claim involves [A] Group sales to national retail stores where the Taxpayer's account representatives take orders at the customers' headquarters and then arrange for delivery of products to the customers' Washington stores. For these national sales, the Taxpayer asserts that the particular sales representatives responsible for the accounts never visit Washington on company business. The Taxpayer provided information on where these national sales representatives are based and work and asserts that detailed travel records, in the form of expense reports, for these employees substantiate that they did not visit Washington on company business. The Taxpayer particularly emphasizes that all of the sales representatives' work in supporting, maintaining, and soliciting the sales included in the dissociation claim occurs outside of Washington.

The next sales group is the [B] Group. This group makes sales to three market areas: hospital and health care organizations, the hotel and hospitality industry, and commercial enterprises and institutions (such as restaurants, businesses, government agencies, schools, etc.). The Taxpayer has specialized product lines tailored to meet the needs of these market areas.

All of the Washington [Group B] sales are delivered from points outside Washington by common carrier.

The [Group B] is subdivided into two divisions, [Division 1] and [Division 2], both of which are serviced by third-party brokers. A third party broker, located in [State Y], takes orders for the [Division 1] sales included in the refund claim. This broker primarily conducts business by telephone and does not personally visit any Washington customers. The Taxpayer asserts that the Washington [Division 1] accounts included in the dissociation claim are exclusively negotiated and serviced outside of Washington.

[2] One example of a promotion addendum would be an agreement to assure additional stocks of a particular product that will be featured in a national or regional coupon distribution in newspapers.
[3] The Taxpayer clarified that some customers actually limit by contract the extent and nature of in-store activities the Taxpayer can have.

Third-party brokers also service the [Division 2] accounts. (See employee information below.) The Taxpayer asserts that the [Division 2] accounts included in the dissociation claim are also negotiated out of state and that these customers are not visited in Washington by any of the Taxpayer's employees or agents.

In addition to the direct sales activities of these third-party brokers, the [B Group] also participates in trade shows to further support the sale of its product lines. . . . During the refund period the [B] group participated in two trade shows in Washington. . . .

[Taxpayer] has several military accounts that are serviced by a third-party broker located in Washington. This broker only visits military account customers and does not have any responsibility for or contact with customers serviced by the other sales groups. None of the sales to the [D] Group are included in the claim for refund, and the Taxpayer does not seek to dissociate any of these sales.

The final sales group is [C Group], which is an independent sales company located in [State G] specializing in telephone sales. The Taxpayer hired [C Group] to handle its smaller accounts, which are defined as accounts that annually purchase $. . . or less of the Taxpayer's products. Typical examples of such accounts are small, independent grocery stores, mini-marts, and independent gas stations. [C Group] manages existing accounts and engages in telephone canvassing soliciting new customers. All [C Group] sales to Washington customers are delivered from outside the state by common carrier. [C Group] only provides telemarketing services to the Taxpayer and does not send its sales associates or agents into Washington to support sales. The Taxpayer does not send any of its employees or representatives to visit Washington [C Group] accounts.

<u>In-state Employees</u>:
During the refund period the Taxpayer employed sales representatives living in Washington and also employed some resident independent contractors. None of these sales representatives or contractors was responsible for or personally serviced any of the sales that the Taxpayer is seeking to dissociate. The Taxpayer explains that the location of these employee sales representatives is generally fungible. They work from home and conduct a significant portion of their work by telephone, internet, and e-mail so the location where they live is largely discretionary.

[Ms. H] is the national sales manager for [products], which are produced at the [State H] plant. [Ms. H] lived in Washington for part of the refund period and worked from her home. She no longer resides in Washington as her spouse was transferred to [State K] and she now works from her home there.

[Ms. J] is the [company J] Region Distribution Manager and lives in . . . , Washington. [Ms. J] manages brokers who call on the . . . divisions of [company J]. [Ms. J] performs a significant amount of her work from her home office supplemented by regular visits to the [company J] regional corporate office in [State J]. Her work responsibilities do not include visiting local stores in a professional capacity; those activities are the responsibility of the brokers she supervises and independent marketing contractors who are hired to handle promotions. The refund claim does not include any sales made by [Ms. J] or the brokers and contractors she supervises.

[Contractor] is an independent contractor employed by the Taxpayer. [Contractor] is headquartered in [State F] and maintains over . . . offices serving the United States . . . . [Contractor] provides a diverse range of sales and marketing tasks, including in-store marketing to the Taxpayer. Two regional [contractor] employees, [Mr. K] in [Washington City 1] and [Mr. L] in [Washington City 2], are responsible for sales and marketing calls to Washington [company J division] stores. [Mr. K] also serves additional regional retail customer accounts for the Taxpayer. The dissociation claim does not include any sales to customers served by the Washington [contractor] representatives.

[Ms. R] is the National Account Manager for [Store R] and lives in Washington. [Ms. R] sells to buyers at [Store R] and frequently visits the company headquarters in . . . , Washington. She also is not responsible for visiting local or regional [Store R] stores in a professional capacity as those activities are handled by other brokers. The Taxpayer works with an independent broker, . . . , which is a Washington corporation that . . . provides manufacturer's representatives to [Store R]. None of the Taxpayer's sales to Washington [Store R] stores are included in the refund claim.

In July of 2002, the Taxpayer hired [Mr. D] of . . . , Washington to assume sales promotions activities for the Taxpayer's [B Group] Wholesale Distributor. [Mr. D] is the [B Group] broker referenced above and is responsible for distributors in . . . , Washington, [and several other states]. [Mr. D] personally makes sales calls to both distributors and end users and also manages other sales agents. He also provides the sales agents with market information developed by the Taxpayer through surveys that are distributed to both consumers and distributors and feedback received from trial distribution of potential products. The [B Group] also has a local marketing group that it works with in Washington, [Marketing Group]. The Taxpayer has indicated that this marketing firm uses "direct sales marketing" to market products to wholesale distributors and consumers. The [B Group] sales included in the dissociation claim do not include any of [Mr. D's] accounts. However, the Taxpayer has not indicated what Washington [B Group] accounts the [Marketing Group] serves or verified that the [B Group] accounts that are part of the dissociation claim were not visited or contacted by these in-state marketing agents.

ANALYSIS

<u>Elements of Dissociation</u>:

Washington imposes the wholesaling B&O tax on interstate sales of goods into Washington pursuant to RCW 82.04.220, RCW 82.04.270, and WAC 458-20-193 (Rule 193). These taxes may not be constitutionally imposed on interstate commerce unless a taxpayer has substantial nexus with the taxing state. *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 (1992). Taxpayer acknowledges substantial nexus with Washington and does not contest that it is responsible for reporting and remitting B&O tax to Washington. At issue here is whether some of Taxpayer's sales into Washington may be dissociated under Rule 193.

Limited Applicability of *Norton*:

The Taxpayer relies on *Norton Co. v. Department of Rev.*, 340 U.S. 534 (1951), and Rule 193 to argue that it should be allowed to dissociate select sales that are negotiated and supported by out-of-state sales representatives and marketing agents from its in-state activity. The sales included in the dissociation claim are select national sales made by three sales groups; the [A] Group, [B] group, and [C Group]. The sales identified by the Taxpayer as eligible for dissociation are sales where all contact between the sales agent responsible for the sale and the customer occurs outside of Washington.

The Department addressed its position regarding dissociation, *Norton*, and Rule 193 in recently-published Det. No. 00-098, 22 WTD 151 (2003). In that case, the taxpayer had also relied on *Norton* to support the dissociation of sales of electronics and computers sold to national accounts from its other Washington sales activities. In limiting that reliance, we stated:

> Taxpayer cites *Norton Co. v., Department of Revenue*, 340 U.S. 534 (1951) (*Norton*) for the principle that a seller may dissociate the sales of its national accounts from its activities of authorizing repair centers for its products in a state. Norton was a Massachusetts manufacturer of abrasive machines and supplies. It maintained a branch office and warehouse in Illinois from which it made local retail sales to over-the-counter customers. The branch office also serviced machines after they were purchased and gave engineering and technical advice. Other orders for sales were sent by Illinois residents directly to the home office of the Massachusetts company and were accepted and filled there. The Court allowed these latter sales to be dissociated from the taxpayer's other Illinois activities . . .
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> We doubt the continued validity of *Norton*. . . . [T]he premise in *Norton* was that states could not tax interstate commerce. And see *Id* at 536-37. That premise was overruled in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 289 (1977) (*Complete Auto*). No federal court has relied upon *Norton's* dissociation holding after *Complete Auto.* Second, *Norton* stated that merely sending solicitors (itinerant drummers) into the state would not provide nexus for any resulting sales. This holding has not been followed in numerous cases, *e.g. Scripto Inc. v. Carson*, 362 U.S. 207; 80 S.Ct. 619, 4 L.Ed. 2d 660 (1960). Today, sending sales personnel into a state and delivering the goods here is sufficient presence to create both Due Process and Commerce Clause nexus.
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> Nevertheless, Rule 193(7)(c) continues to allow dissociation where the taxpayer can meet its terms:
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>> If a seller carries on significant activity in this state and conducts no other business in this 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."

> It is the Rule, not *Norton*, that controls our discussion of dissociation. (Footnotes omitted.)

Id.. As the foregoing discussion illustrates, the holding in *Norton* relies on a far more restrictive interpretation of the boundaries of state taxation of interstate commerce than is applicable today.[4] The restrictive presumption that interstate commerce was beyond the reach of state taxing authority has been altered by modern nexus analysis based on the four factor analysis established by *Complete Auto.*[5] Delineating revenue that a state may tax from that which is beyond its reach involves determining the boundaries of a state's taxing authority. The world of permissible state taxation has added new territories since *Norton* was issued, and this expansion limits the utility of *Norton. Norton* does not detail how to navigate the current boundaries of state taxation because that boundary line is simply beyond the area it mapped. It is for this reason that our dissociation analysis focuses on the specific requirements of Rule 193 and case law that addresses the current boundaries of Washington taxation.

The Taxpayer cites *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977), for the premise that the Supreme Court "continues to follow the concept of dissociation." Taxpayer's Brief of April 19, 2004 at page 5. However, we read *National Geographic* differently. The lone reference to dissociation in that case is as follows:

> The Society argues in other words that there must exist a nexus or relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller's activity within the State. We disagree. However fatal to a direct tax a showing that particular transactions are dissociated from the local business . . ., *Norton Co. v. Illinois Rev. Dept.*, supra, at 537, 71 S.Ct. at 380; *American Oil Co. v. Neill*, supra; *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673 (1938), such dissociation does not bar the imposition of the use-tax-collection duty.

430 U.S. at 560. This single reference, citing authority from 1951, 1965, and 1938, does not support the assertion that *National Geographic* follows the concept of dissociation. Rather the court expressly declines to agree with the premise that taxing nexus is a transaction by transaction

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[4] *See, e.g.,* Arthur R. Rosen, Melissa A. Connell, *State Tax Nexus Issues--The Decades-Old Debate Continues in the Shadow of the Internet*, 95 J. Tax'n 303, 306 (2001) (The introduction examines the states' attempts during the last several decades to extend their tax jurisdiction to out-of-state businesses and addresses litigation arising our of those efforts and specifically refers to Washington as follows: "The argument that nexus is created where a business' activities are specifically directed towards creating or maintaining a market within the state has recently had a high degree of success in Washington State."); Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* §6 - § 13 (3d ed. 1998 & Supp. 2002).(Covering recent changes in commerce clause analysis with regard to taxation of interstate commerce.); William R. Jones, *Increasing State Taxing Power over Interstate Commerce*, 32 Tulsa Law Journal 75 (Fall 1996).

[5] The *Complete Auto* test requires that the tax must (1) be applied to an activity with a substantial nexus with the taxing state; (2) be fairly apportioned; (3) be nondiscriminatory towards interstate commerce; and (4) be fairly related to the services provided by the state. *Complete Auto*, 430 U.S. at 279. *Complete Auto* is extensively cited, and the four factor test it established still forms the foundation for current analysis of whether interstate commerce is subject to state taxation. *See e.g., Oklahoma Tax Com'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995); *General Motors Corp. v. City of Seattle*, 107 Wash. App. 42, 25 P.3d 1022, 1029 (2001).

analysis. Far more pertinent than this limited reference to dissociation is the court's central holding in *National Geographic* that:

> [T]he relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate "some definite link, some minimum connection, between the State and the person . . . it seeks to tax."

Id. at 561. *National Geographic* held that the presence of two California offices that solicited advertising sales for the company's magazine established the requisite taxing nexus to require the company to collect use tax on mail-order sales to California made by a different division of the company, despite the fact that the company's activities in California were not connected to and did not support those mail-order sales. The fact that in *National Geographic* taxing nexus was based on the totality of a company's in-state activities as opposed to only those activities directly connected to a particular sale, or particular line of business, is of greater relevance to our discussion than the tangential reference to dissociation.

The Taxpayer also asserts that Washington courts have "embraced dissociation," citing *B.F. Goodrich Co. v. State,* 38 Wn.2d 663, 231 P.2d 325 (1951) (Holding that sales made by an out-of-state manufacturer in Washington without aid or intervention of a Washington office were not subject to the tax, but that sales in any way channeled through local outlets were not entitled to immunities of interstate business.) It is significant that the single state case cited by the Taxpayer is more than 50 years old. As detailed above, the significant changes to nexus case law and analysis since then dramatically limit the utility and applicability of this analysis.

Similarly, the most recent departmental determination cited by the taxpayer is [nine] years old. Det. No. 94-209R, 15 WTD 100 (1996)(citing *Norton* and Rule 193 for the proposition that Alaska sales delivered to a Washington freight forwarder may be eligible for dissociation provided proof is provided that the customer relationship was derived from an exclusively independent source and that the Washington independent sales representatives were not involved "in any way" with the disputed sales). The provisions of Rule 193 still guide our analysis, and are addressed in detail below, but the reliance on *Norton*, is no longer persuasive.

<u>Dissociation Requirements under Rule 193:</u>

Rather than delving further into the evolution of dissociation, we will instead focus on the particular requirements for dissociation established by Rule 193 and the application of current case law addressing taxing nexus. For, as we stated in Det. No. 00-098, it is Rule 193 that controls dissociation analysis. Rule 193 provides that if a seller carries on significant activity sufficient to create nexus with this state, then the seller has the **distinct burden** of establishing that its in-state activities are not significantly associated ***in any way*** with the sales made into this state. Nexus for one sale is nexus for all sales unless some sales are specifically divorced from the activity which created the nexus. Det. No. 94-209, 15 WTD 96 (1994)(*citing* Det. No. 87-69, 2 WTD 347 (1987)).

The Taxpayer's dissociation analysis focuses on the physical location where sales are negotiated and places particular emphasis on the fact that interaction between the sales representative and customer occurs outside Washington. However, this emphasis on where particular sales are negotiated essentially inverts the dissociation analysis set forth by Rule 193. The question is not whether there is a direct link between the consummation of a particular sale and the Taxpayer's Washington activity but rather whether any of the Taxpayer's Washington activities are **in any way** associated with the sale. Dissociation requires proving that none of the Taxpayer's in-state activities are associated with, or contributed to, that sale.

The determination of whether in-state activities create nexus looks to the entire collection of a taxpayer's different activities, the totality of which creates substantial nexus. *GMC v. City of Seattle*, 107 Wn. App. 42, 25 P.3d 1022 (2001);[6] *see also General Motors Corp. v Washington,* 377 U.S. 436 (1964), o*verruled on other grounds, Tyler Pipe Indus., Inc. v. Department of Rev*., 483 U.S. 232, 250(1987) (Holding that it is the bundle of corporate activity that determines whether a taxpayer has nexus with a state); Rule 193 Thus, establishing taxing nexus requires consideration of the entire bundle of a taxpayer's in-state activities. Accordingly, establishing that a particular transaction may be dissociated requires proving a lack of association to **all** of the taxpayer's in-state activities that create substantial nexus.

Rule 193(7)(c) provides for dissociation where in-state activities "are not significantly associated in any way with the sales into this state." The rule does not define significantly associated activities, but nexus cases provide some guidance on what constitutes a significant activity. A significant activity is one performed by an agent or other representative. . . that establishes or maintains a market within this state. *See e.g.,* Det. No. 00-098 (*citing Chicago Bridge & Iron Co. v. Department of Rev., 98* Wn.2d 814, 822, 659 P.2d 463 (1983) ("[I]t is the corporation's burden to exempt itself from the local tax by showing no in-state activities were associated with the interstate business. . . . To meet this burden, a corporation must show that its in-state services were not

[6] In *GMC*, the Washington Court of Appeals recognized that it is the collective activities of a taxpayer within the state that may be used to support a finding of substantial nexus for B&O tax purposes. The court in *GMC* stated:

> In this case, both GM and Chrysler direct national advertising to the City of Seattle. They send sales, service, and parts managers to their dealers in Seattle on a monthly basis to discuss market conditions, new products, retail customer satisfaction levels, and the like. These representatives speak with dissatisfied customers and discuss problems that may be occurring with certain makes of automobiles. The representatives also train the dealers in sales and management techniques. Finally, the Seattle dealers actively market the automakers' warranties that accompany the sale of an automobile and make service repairs at the dealerships in Seattle on behalf of the automakers. These warranties serve an important marketing function because customers are unlikely to purchase a new vehicle without a warranty.
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> We are satisfied that in this case**, the collective activities** of each automaker are strategically designed to maximize their sales within the City and that the absence of these activities would significantly affect their ability to maintain a share of the Seattle market. Without these activities, their name recognition, goodwill, ability to obtain market data, customer feedback, and trends unique to Seattle, and their ability to compete with other automakers would be adversely impacted. We hold that substantial nexus exists to justify the City's imposition of its business and occupation tax upon the automakers. (Bolding added.)

GMC v. City of Seattle, 107 Wn. App. at *13 -17.*

decisive in establishing and holding the market.") In addition, the representative's activity does not have to be the most important factor. Instead, "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Tyler Pipe Indus., Inc. v. Department of Rev*., 483 U.S. 232, 250 (1987). So, significant activities are ones that establish or maintain a market for the taxpayer's products. Therefore, to be eligible for dissociation, a sale must not be in any way associated with any of the taxpayer's in-state activities that establish or maintain a market for its products.

The Taxpayer's dissociation argument, consistent with the older *Norton* based approach, focuses on procedural aspects of the sales process. This focus logically directs the Taxpayer to emphasize where its sales representatives and agents serve their customers. While this information remains pertinent to establishing dissociation, it is not the only factor at issue. Taxpayer's in-state activities that support and maintain a market for its products are not limited to the activities of sales representatives. Before addressing the particular sales at issue in the refund claim, we must first consider the full range of the Taxpayer's Washington activities that support and maintain a market for its products. For the Taxpayer to sustain its burden to dissociate, it must dissociate the sales at issue from the all of its in-state activities that support or maintain a market for its products.

The physical presence of the Taxpayer's employee sales representatives and third party sales and promotions agents in Washington unequivocally establishes taxing nexus. Rule 193(7)(iii)(iv). The activity of these employees and agents supports and maintains a market for the Taxpayer's products in Washington. The work of these employees is supported and enhanced by the Taxpayer's broader advertising and promotion activities discussed below. Dissociation is not restricted to consideration of the physical location and conduct of a specific sales representative who consummates a particular sale, but must also encompass consideration of all of the activities undertaken by the Taxpayer within Washington to establish and maintain a market for its products in Washington. For, in addition to the activities of its sales representatives and agents, the Taxpayer also engages in significant consumer marketing efforts.

The products at issue in this [determination] are [predominantly] brand name commercial goods. The Taxpayer expends considerable resources and effort to develop, maintain, protect, and promote its brand names and to establish a good reputation for its products. The activities of the sales representative and those directed towards consumers are interrelated and focus in large part on supporting and enhancing the brand name. The Taxpayer's promotional and advertising activities in or reaching into this state in support of its products are extensive in scope and reach. It uses traditional means of advertising such as television commercials, print advertisements in magazines and newspapers, coupon offers, and promotional distributions. The Taxpayer enhances this traditional advertising with an internet site . . . . The site contains information about the different product lines and brands, as well as the company. There is also an online store where customers can purchase products. Alternatively, customers can search on-line for local retail stores that carry particular products. In addition to broad based brand name advertising and promotion, the Taxpayer has also participated in trade shows in Washington, discussed in greater detail below, that target sales of specific commercial product lines. All of these activities reach Washington consumers and are undertaken for the purpose of encouraging current consumers to continue their purchasing habits and to solicit new consumers. Consumer focused promotion activities are supplemented by marketing and sales activities directed at the Taxpayer's customers.[7] These activities are clearly undertaken to establish, maintain and enhance the market for the Taxpayer's products, and we find that they are all significant in supporting sales.

Having addressed the general principles and necessary elements to support dissociation of sales, we now turn to consideration of the particular sales the Taxpayer is seeking to dissociate. We will address each of the product lines/sales groups in turn.

National Sales by the [A] Group:
The majority of these sales are sales of brand name products, and they are the same products that are sold by the Taxpayer's in-state employees to local and regional stores (such as [Store R] and [Company J Division]). While the customers are served by different sales representatives and different promotional agents, the Taxpayer's efforts to serve its wholesale customers are not the only activities at issue. To maintain its Washington market, the Taxpayer does not only focus on serving and supporting the retailer but also directs resources to develop and maintain a consumer base. In order to dissociate for B&O tax purposes, a taxpayer must dissociate the particular sale from the total collection of its Washington activities, and for its brand name products these activities include its advertising and promotional activities in addition to the work of its in-state sales representatives and agents. For example, Taxpayer must dissociate its national advertising campaigns from sales of its products promoted by those campaigns within the state of Washington.[8]

For, as noted above, under Rule 193 dissociation is not just a question of segregating the activities of specific sales representatives but rather of establishing that a sale negotiated out-of-state is not **in any way** associated with the Taxpayer's collective in-state activities that maintain a market for that product.

It is not possible to delineate the influence of brand name advertising and promotional efforts. In Det. No. 00-098, we disallowed dissociation of computer sales because the nexus-creating activity of having local warranty repair agents prevented the company from dissociating sales of the same brand of products.[9] Similarly, here the Taxpayer's in-state activity supports the sale of

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[7] Such as the efforts and work of the sales representatives, third-party brokers, and promotions agents detailed in the fact section.

[8] *But see*, Det. No. 96-144, 16 WTD 201 (1996); Det. No. 93-155, 13 WTD 297 (1994); Det. No. 91-279, 11 WTD 273 (1991); Det. No. 91-213, 11 WTD 239 (1991) (suggesting that dissociation might be allowed if the in-state activity related to the sale was limited **solely** to national advertising). We note that in the present case the Taxpayer's in-state activities are not limited solely to national advertising and so these cases are distinguishable. Furthermore, as discussed in detail above, these determinations rely primarily on *Norton*, which is not binding authority. Det. No. 00-098, 22 WTD 153 (2003).

[9] In that case we stated:

> The simple fact that some customers chose to use the service centers rather than mail in their products for repair supports our conclusion upholding the Audit division's assessment. The services performed by the independently operated service centers cannot be separated from the taxpayer's ability to establish and

all of its brand name products sold in Washington. For example, the Taxpayer engages in activities in Washington to create, maintain, and expand the market for [product]. These include the targeted efforts of its in-state sales representatives and marketing agents, national and regional advertising through a variety of media, on-line marketing, and local promotional activities. The fact that a sales contract between the Taxpayer with a particular retailer, store X, to sell [product] at its Washington branches was negotiated outside of Washington is insufficient to establish dissociation of those sales.[10] It is not possible to say that the Taxpayer's in-state activities did not in any way contribute to the sale of [product] at store X's Washington branches. We therefore find that dissociation will not be allowed for any brand name products and product lines that are supported by any of the Taxpayer's marketing and promotion activities in Washington. . . .

[B Group] Sales

To the extent that these sales involve the sales of brand name products the foregoing rationale applies and dissociation of those sales is disallowed. The Taxpayer's in-state activities to support and maintain sales of [B Group] brand name products, whether directed towards consumers or customers, help establish and maintain a market for all Washington [B Group] brand name sales. The Taxpayer's [B Group] web site includes repeated references to their brand recognition and consumer confidence in their products. . . .

As with the national retail sales, the Taxpayer employed a [B Group] broker who resided in Washington and also engaged in general marketing and promotion activities in Washington.

We find that these in-state activities in conjunction with marketing and advertising its brand names served to establish and maintain a market for all [B Group] brand name sales into Washington precluding dissociation. For, just as the collective brand name marketing and sales efforts of the taxpayer support sales to both retailers who are served by in-state sales representatives and those served by out-of-state sales representatives, the in-state support of these brand names also maintains a market for brand name sales made by the [B Group]. Again, for dissociation the Taxpayer must isolate a particular sales transaction from any association of in-state activities. For brand name products that includes not only specific [B Group] customer

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> maintain a market in Washington. The sales of all of taxpayer's electronic equipment through both its regional accounts and national accounts were subject to wholesaling B&O tax. . . .
>
> It is not necessary for the warranty service centers to service any or all of the computer hardware sold by the taxpayer for a significant association to exist between the presence of the service centers and the sales of computer hardware. Computer hardware is not so dissimilar from electronic goods to erase any linkage consumers might make with the taxpayer's name and products. Servicing of other electronic goods helps establish and maintain a market and good reputation for computer hardware sold by the Computer Division. Therefore, we conclude that taxpayer's sales of computers and computer monitors into the state may not be dissociated either prior to September, 1995 or thereafter.

[10] While the accounts may be served by different sales representatives, the Taxpayer's efforts in Washington to promote the sale of a particular brand of [product] at a [store] through the actions of its in-state employees and advertising and promotion will also promote sales of that same brand of [product] at other retail outlets such as . . . even though the sales representative for those accounts works exclusively outside Washington.

and consumer activities but any in-state activities that maintain a market for that brand name product.

Additionally, we find that Taxpayer promotion of [B Group] sales at local trade shows also served to help establish and maintain a market for these products and constitutes significant in-state activities preventing dissociation. The Taxpayer emphasizes that the Washington trade shows are national or regional meetings and events, which are regularly scheduled at various locations throughout the country. The Taxpayer asserts that its participation at such shows is not directed at supporting or maintaining Washington sales in particular. This argument again focuses on the consummation of the sale as the pivotal activity at issue. However, the fact that a particular [B Group] order may have ultimately been concluded by phone or mail from [another state] is insufficient to establish dissociation of that sale. As discussed in detail above, the pertinent inquiry is not limited to where negotiation for a sale is ultimately concluded but whether any of the Taxpayer's in-state activities (such as trade show participation, efforts of its in-state [B Group] [broker], and other advertising or marketing efforts) were undertaken to establish or maintain a market for [B Group] products. We therefore conclude that the trade show promotional efforts were significant and prevent dissociation of any [B Group] products marketed or sold at those trade shows. . . .

<u>[C Group] sales</u>:

As described by the Taxpayer, the products sold by the [C Group] agents exclusively involve brand name products. The Taxpayer's claim for dissociation on these brand name products is denied.

DECISION AND DISPOSITION

The Taxpayer's petition is denied for dissociation of any brand name products.

Dated this 31st day of August 2004.