

Cite as Det. No. 14-0104, 33 WTD 591 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 14-0104
)	
...)	Registration No. ...
)	

[1] RULE 193; RCW 82.04.220: B&O TAX — NEXUS — IN-STATE SOLICITATION OF BUSINESS: By way of administrative rule, the Department of Revenue has compiled a list of examples of what activities provide sufficient local nexus. Included within those examples is the in-state solicitation of orders by an employee or independent contractor.

[2] RULE 193 RCW 82.04.220: NEXUS — TRAILING NEXUS B&O TAXES & RETAIL SALES TAX: Effective June 1, 2010, there is a change in reporting obligations of a business that ceases its nexus-creating activities. For B&O tax a person who stops the business activity that created nexus continues to have nexus for the remainder of the calendar year, plus one additional year, but the trailing nexus period for retail sales tax is still four years, plus the current year.

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.

Kreger, A.L.J. – An out-of-state company protests the denial of a request for refund of Business and Occupation (B&O) tax for the period of October 1, 2007 through May 31, 2010, because it did not maintain a place of business in Washington during that time. We affirm the denial, because until 2006 the company employed a sales representative who visited Washington on its behalf, establishing nexus under RCW 82.06.067 and WAC 458-20-194.¹

ISSUE

Does the lack of a permanent place of business in Washington preclude the application of the five-year trailing nexus provisions [under WAC 458-20-193] for periods prior to June 1, 2010?

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

FINDINGS OF FACT

[Taxpayer] is [an out of state] corporation engaged in the business of providing [. . .] services to Washington customers. The Taxpayer is headquartered and operated [out of state]. The Taxpayer was reporting tax on its Washington business activities under the Service and Other Activities (Service) B&O tax classification. The Audit Division conducted an Audit of the Taxpayer's Washington business activities for the period of January 1, 2008 through December 31, 2011. The Audit did not result in any adjustment to the returns filed by the Taxpayer.

In December of 2012, the Taxpayer filed a refund request, seeking the refund of \$. . . in Service B&O attributable to the period of October 1, 2007, through May 31, 2010.

Between February 27, 2006, and June 23, 2006, the Taxpayer employed a sales person who made sales calls on the Taxpayer's behalf in Washington during this time period. The Taxpayer severed their business relationship with this employee due to inaccuracies on the employee's employment application.

The Taxpayer acknowledges that for periods after June 1, 2010, it is subject to the economic substantial nexus standards under RCW 82.04.067, and concedes that its economic activities establish nexus under those standards.

The basis for the Taxpayer's refund request was that it did not maintain a place of business in Washington.

ANALYSIS

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Rule 194 provides Washington's nexus standards for service taxable activities, applicable to tax liability incurred during the period January 1, 2006, through May 31, 2010. "Nexus" is defined in Rule 194(2)(a) as "the minimum level of business activity or connection with the state of Washington which subjects the business to the taxing jurisdiction of this state." *Id.* A taxpayer creates nexus in this state when it "is engaged in activities in the state, either directly or through a representative, for the purpose of performing a business activity. It is not necessary that a taxpayer have a permanent place of business within a state to create nexus." *Id.* The Department has held that a seller of services has taxable nexus with a state by entering its marketplace to sell its services. Det. No. 98-196, 19 WTD 19 (2000). Performing services in a state for accounts located in that state, or at customer locations in that state, usually creates nexus with that state. See, e.g., Det. No. 87-186, 3 WTD 105 (1987); Det. No. 89-553, 9 WTD 039 (1989); Det. No. 93-276, 13 WTD 392 (1994).

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The question here is how long the nexus established in 2006 continued. In 2006, the rule for trailing nexus was that once nexus has been established, it will continue throughout the statutory period of RCW 82.32.050 (up to five years), notwithstanding that the in-state activity which

created the nexus ceased. Rule 193(7)(c). Effective June 1, 2010, there was a change in the length of time a business continues to have reporting obligations for B&O tax. With the change, a person who stops the business activity that created nexus continues to have nexus for the remainder of the calendar year, plus one additional year. RCW 82.04.220. The legislation only changed trailing nexus for B&O taxes. The trailing nexus period for retail sales tax is still four years, plus the current year, under Rule 193. Here the 2010 change does not directly impact our analysis because the refund period at issue concludes prior to this change taking effect.

In this case the activities of the in state sales representative are a business activity sufficient to establish nexus for the Taxpayer, and in this case but for the change in law the trailing nexus period after the instate activities ceased would have continued through 2011. Thus, covering the full refund period at issue here, . . . we affirm the decision that the Taxpayer continued to have trailing nexus and a tax reporting liability for October 1, 2007, through May 31, 2010. We note that the Department issued a Special Notice on September 10, 2010, providing additional guidance and information on the changes to trailing nexus. http://dor.wa.gov/docs/pubs/specialnotices/2010/sn_10_trailingnexus.pdf.

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We affirm the denial of the Taxpayer's refund request.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 25th day of March 2014.