

Cite as Det. No. 13-0068R, 33 WTD 55 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of)	<u>D E T E R M I N A T I O N</u>
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)	No. 13-0068R
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RULE 193; RCW 82.04.067(6): NEXUS. Taxable nexus is created by the out-of-state’s Taxpayer’s use of exchanges, where its Washington State customers obtain fuel in Washington from a third-party fuel supplier, who notifies the Taxpayer, who then bills these Washington customers.

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.

Munger, A.L.J. – Out-of-state oil refinery and fuel seller (Taxpayer) petitions for reconsideration of Determination No. 13-0068, which ruled that Taxpayer has taxable nexus with Washington State through an exchange agreement with a [third-party supplier] fuel terminal in [City A, Washington]. Because the Taxpayer’s customers are receiving the fuel in Washington State, and a third party is assisting the Taxpayer in maintaining its Washington market, nexus is created and we reaffirm the Department’s finding.¹

ISSUE

Whether under RCW 82.04.067(6) and WAC 458-20-193 taxable nexus is created by the use of exchanges where the Taxpayer’s customers obtain fuel in Washington from a third-party fuel supplier, who notifies the Taxpayer, who in turn bills its Washington customers.

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

FINDINGS OF FACT

For reader convenience on reconsideration, we repeat the facts as described in Det. No. 13-0068. [The Taxpayer] is a fuel producing company with an oil refinery in [State A]. Taxpayer's sales office is in nearby [State B], with the corporate headquarters in [State C].² The majority of the Taxpayer's sales are made in [State A], [State B], and [State D]. For a number of years, the Taxpayer has sold fuel products to some Washington customers through an arrangement with [a third-party supplier's (Supplier's)] . . . , Washington, fuel terminal. It sells to these customers on a wholesale basis through an exchange agreement with [Supplier]. The customers receive refined fuel product at the [Supplier's Washington] terminal. The customers coordinate pickup and transportation with [Supplier's] personnel at the [Washington] facility. After the Taxpayer's [Washington] customers obtain the fuel, [Supplier] provides the Taxpayer with the fuel volume and customer information. The Taxpayer then bills the customers, and receives payment from them. The agreement with [Supplier] requires the Taxpayer to keep 5000 barrels of fuel in [Supplier's] name available in [State B].

In support of its claim that it has no nexus with Washington, the Taxpayer states that:

- [Taxpayer] has no employees in the State of Washington.
- [Taxpayer] does not make sales or service calls in the State of Washington.
- [Taxpayer] has no assets in the State of Washington.
- [Taxpayer] receives refined product on exchange from [Supplier] and immediately sells to the noted customers in . . . , Washington.
- In exchange for material provided to [the Taxpayers'] customers at the [Supplier's Washington] terminal, [Taxpayer] provides product to [Supplier] in [State B].

The Taxpayer appeals the Department's Taxpayer Information and Education's (TI&E) e-mailed opinion given in response to an inquiry from the Taxpayer. The February 8, 2012, TI&E opinion stated that:

The fact that you make delivery of fuel to a customer in this state from a stock of goods in Washington established that you have nexus with Washington. Therefore, you owe our business and occupation tax on such sales . . .

The opinion then went on to explain under which circumstances the wholesaling business and occupation (B&O) tax would apply to sales, and when the retailing B&O tax would apply, also necessitating the collection of the retail sales tax. The Taxpayer now seeks reconsideration of our Det. No. 13-0068 affirming the TI&E finding of taxable nexus.

On reconsideration, the Taxpayer provided a copy of its 2009 exchange agreement with [Supplier], the terms of which are consistent with the above facts, including the location of fuel in [Washington].

² No information was provided about the Taxpayer's new parent company . . . which purchased the Taxpayer in The TAA opinion letter did not address any circumstances that may have been impacted by that change.

ANALYSIS

The standards for what activity creates taxable nexus in Washington are contained RCW 82.04.067(6) (effective date 6/1/2010) and WAC 458-20-193.³ RCW 82.04.067(6) states that:

[A] person is deemed to have a substantial nexus with this state if the person has a physical presence in this state, *which need only be demonstrably more than a slightest presence*. For purposes of this subsection, *a person is physically present in this state if the person has property or employees in this state. A person is also physically present in this state if the person, either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in this state.*

(Emphasis added.) This statute largely codified the Department's prior practice. WAC 458-20-193(7)(c) further describes nexus and the issue of a Taxpayer's property being located in Washington:

(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.

* * *

(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 in-state activities are not significantly associated in any way with the sales into this state. . . . *The following activities are examples of sufficient nexus in Washington for the B&O tax to apply:*

(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.*

(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.

* * *

(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*

³ [Nexus requirements flow from limits 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, (1977); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); and in the Department's determinations. See, e.g., Det. No. 01-074, 20 WTD 531 (2001); Det. No. 96-144, 16 WTD 201 (1996).]

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."

(Emphasis added.)

On reconsideration the Taxpayer discusses two of the published determinations we cited in our original determination, Det. No. 94-074E, 14 WTD 085 (1994), and Det. No. 03-0250ER, 24 WTD 341 (2005). Taxpayer asserts that these determinations and WAC 458-20-193(11)(h) support its position that the fuel exchanges are the equivalent of the nontaxed drop shipments described in that rule.

...

In addition to the gasoline being located in [Washington], and being received by the Taxpayer's customers there, the agreement with [Supplier] satisfies the Rule 193(7)(c)(v) standards. We find that [Supplier] acts as an "other representative" under this rule by carrying out its contractual obligation to make the fuel available to the Taxpayer's customers in [Washington]. The exchange agreement with [Supplier] gives the Taxpayer ready and ongoing access to the Washington State gasoline market. [Supplier] "performs significant services in relation to establishment or maintenance of sales" by allowing access by the Taxpayer's customers at its [Washington] fuel terminal, and by providing the Taxpayer the identifying and volume information the Taxpayer needs for billing its Washington customers.

In summary, the present taxpayer's circumstances are addressed by RCW 82.04.067(6), the cited administrative rule, and prior cases.⁴ Nexus is created under Rule 193(7)(c)(i) and Rule 193(7)(c)(v). We reaffirm the TI&E finding of taxable nexus.

DECISION AND DISPOSITION

Taxpayer's petition is denied and the TI&E opinion letter of February 8, 2012 is upheld.

Dated this 27th day of September 2013.

⁴ [See also, *Shell Oil Co. v. Dir. of Revenue*, 732 S.W.2d 178 (1987) (holding that the delivery of fuel to one's instate customers via an exchange partner, in itself, establishes the requisite nexus for Commerce Clause purposes).]