

Cite as Det. No. 16-0342, 36 WTD 301 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of ) Assessment of ) ) ) . . . ) )	<u>D E T E R M I N A T I O N</u>  No. 16-0342  Registration No. . . .
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[1] RCW 82.04.067(6); Rule 193; Rule 19401 – SUBSTANTIAL NEXUS – ENGAGING IN BUSINESS: Prior to September 1, 2015, the physical presence standard in RCW 82.04.067(6) (2010) is the applicable statute for the nexus standard of wholesaling activities in Washington. Effective September 1, 2015, the economic nexus standard under RCW 82.04.067(1) to (5) applies to wholesale sales in Washington. Under RCW 82.04.067(6) (2010) and Rule 193(102)(d), the taxpayer has established substantial nexus with Washington State prior to September 1, 2015, where the taxpayer employed a nonresident employee to visit Washington State once a year for a few days per visit to discuss possible sales with its Washington customers. Effective September 1, 2015, under the economic nexus standard pursuant to RCW 82.04.067(6) (2015), the taxpayer has established substantial nexus with Washington State where it exceeded the gross receipt threshold provided in the statute.

[2] RCW 82.32A.020 – RIGHTS - The published information with respect to the wholesaling economic nexus standard on the Department’s website the taxpayer relied on is consistent with the Department’s interpretation of RCW 82.04.067(6) (2015), as reflected in the updated Rule 193. RCW 82.32A.020(2) does not apply here because there were no specific, official written advice and written tax reporting instructions” to the taxpayer to not report tax.

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.

Callahan, T.R.O. – An out-of-state corporation (“Taxpayer”) that manufactures and sells natural ingredients and botanical extracts to Washington customers protests the Department of Revenue’s (the “Department”) tax assessment, arguing that it does not have substantial nexus with Washington State. We deny the petition.<sup>1</sup>

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

## ISSUES

1. Under RCW 82.04.067(6) and WAC 458-20-193(“Rule 193”), does Taxpayer have substantial nexus with Washington State where Taxpayer employs a nonresident employee to visit Washington State once a year for a few days per visit to discuss possible sales with its Washington customers?
2. Whether, under RCW 82.32A.020, the Department is precluded from assessing wholesaling business and occupation (“B&O”) where Taxpayer claims that it relied on the Department’s published information on economic nexus to conclude that it did not have substantial nexus with Washington State until September 1, 2015.

## FINDINGS OF FACT

Taxpayer is an out-of-state corporation that manufactures and sells natural ingredients and botanical extracts. In February 2015, the Department’s Compliance Division sent a letter to Taxpayer inquiring about Taxpayer’s business activities in Washington State and enclosing a Washington Business Activities Questionnaire ([Questionnaire]) for Taxpayer to complete. Taxpayer was not registered with the Department at the time of Compliance’s contact.

Compliance received Taxpayer’s completed [Questionnaire] dated August 24, 2015, which provided that Taxpayer distributes food ingredients in Washington State. Taxpayer acknowledged in the [Questionnaire] that it does not have employees in Washington but it hires a nonresident employee to visit Washington State once a year for a few days per visit. Taxpayer responded in the [Questionnaire] that the nature of the visits is to “visit clients to discuss possible sales transactions, new or existing.”<sup>2</sup>

Taxpayer does not have an office or stocks of goods in Washington. For year 2014, Taxpayer provided in the [Questionnaire] that its gross sales in Washington State were \$ . . . , and the value of its account receivables in Washington was \$ . . . . Taxpayer provided in the [Questionnaire] that it “distributes food ingredients, mainly Gum Arabic. A natural powdered gum as well as well small volumes O Natural Plant Extracts. Products are manufactured in France.” Taxpayer delivers its products to Washington via common carriers.

Based on Taxpayer’s answers in [the Questionnaire], Compliance determined that Taxpayer’s nonresident employee’s activities in Washington State are sufficient to establish substantial nexus with the State. On December 23, 2015, Compliance issued two assessments against Taxpayer that covered the period of January 1, 2008, through September 30, 2015. The assessment with document number . . . covered the period of January 1, 2008, through December 31, 2010, for \$ . . . , which consisted of wholesaling B&O tax of \$ . . . , a delinquent penalty of \$ . . . , interest of \$ . . . , a 5% assessment penalty of \$ . . . , and a 5% unregistered business penalty of \$ . . . .

The other assessment with document number . . . covered the period of January 1, 2011, through September 30, 2015, for \$ . . . , which consisted of wholesaling B&O tax of \$ . . . , a delinquent penalty of \$ . . . , interest of \$ . . . , a 5% assessment penalty of \$ . . . , and a 5% unregistered

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<sup>2</sup> [Questionnaire], answer 8.

business penalty of \$ . . . . Part of the period in the assessment, i.e., from the period of September 1, 2015, to September 30, 2015, is under the new economic nexus standard. Taxpayer does not dispute that it has economic nexus with Washington State from September 1, 2015. However, Taxpayer disputes that it has substantial nexus with the State prior to September 1, 2015. Taxpayer did not pay the assessments and petitioned the Department's Administrative Review and Hearings Division for correction of the assessments.

Taxpayer asserts that its nonresident employee's activities in Washington State are not sufficient to create substantial nexus with the State because the employee only engaged in "de minimis type of sales solicitation" in the State. Taxpayer argued at the hearing that the Department is also precluded from assessing wholesaling B&O tax because it relied on the guidance the Department provides on the Department's website to conclude that out-of-state wholesalers do not have economic nexus with Washington State until September 1, 2015. The guidance from the Department, which Taxpayer claims it relied on, states:<sup>3</sup>

## Nexus

### Physical Presence - Retail Sales

For businesses making retail sales into Washington, 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 nexus purposes, 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. See RCW 82.04.067(6).

A few examples of nexus-creating activities include, but are not limited to:

- Soliciting sales in this state through employees or other representatives
- Installing or assembling goods in this state, either by employees or other representatives
- Maintaining a stock of goods in this state
- Renting or leasing tangible personal property
- Providing services
- Constructing, installing, repairing, maintaining real property or tangible personal property in this state
- Making regular deliveries of goods into Washington using the taxpayer's own vehicles

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<sup>3</sup> The Department of Revenue, Out-of-state Businesses, [http://dor.wa.gov/content/doingbusiness/business/types/doingbus\\_outofstbus.aspx#Nexus](http://dor.wa.gov/content/doingbusiness/business/types/doingbus_outofstbus.aspx#Nexus).

Until September 1, 2015, this physical presence nexus standard also applies to out-of-state businesses making wholesale sales into Washington. Effective September 1, 2015, nexus for most out-of-state wholesalers (as defined in RCW 82.04.257(1) and RCW 82.04.270) is based on economic nexus standards as described below.

### **New Economic Nexus Standard – Wholesale Sales**

Effective Sept. 1, 2015, economic nexus standards apply to businesses making wholesale sales taxable under RCW 82.04.257(1) or 82.04.270. This means that most out-of-state businesses making wholesale sales into Washington will be subject to the wholesaling business and occupation (B&O) tax on wholesale sales into this state for the current year if they meet any of the following economic nexus thresholds during the prior calendar year:

- More than \$267,000 of gross income in Washington
- More than \$53,000 of payroll in Washington
- More than \$53,000 of property in Washington
- At least 25 percent of total property, payroll, or income in Washington

These thresholds are adjusted periodically based on changes to the Consumer Price Index for all urban consumers.

(Emphasis added.)

Taxpayer also contends that it is not subject to excise tax under Public Law 86-272.

### ANALYSIS

#### *Substantial Nexus with Washington State under RCW 82.04.067(6)*

Washington imposes a B&O tax “for the act or privilege of engaging in business” in this state. RCW 82.04.220. Persons engaged in making sales at wholesale are subject to the wholesaling B&O tax. RCW 82.04.060; [RCW 82.04.270]. “Sale at wholesale” or “wholesale sale” means “[a]ny sale, which is not a sale at retail, of (a) Tangible personal property...” RCW 82.04.060(1)(a).

Taxpayer’s sales of its products to Washington customers will be subject to Washington taxes if it has substantial nexus with the State and the sales occur in Washington. RCW 82.04.067(6); Rule 193(1)(a). Laws 2015, 3rd sp.s. ch. 5, § 204, amended RCW 82.04.067, effective September 1, 2015. RCW 82.04.067 (2015), in relevant part, provides:

- (1) A person engaging in business is deemed to have substantial nexus with this state if the person is:
  - (a) An individual and is a resident or domiciliary of this state;
  - (b) A business entity and is organized or commercially domiciled in this state; or
  - (c) A nonresident individual or a business entity that is organized or commercially domiciled outside this state, and in the immediately preceding tax year the person had:
    - (i) More than fifty thousand dollars of property in this state;

- (ii) More than fifty thousand dollars of payroll in this state;
- (iii) More than two hundred fifty thousand dollars of receipts from this state; or
- (iv) At least twenty-five percent of the person's total property, total payroll, or total receipts in this state.

...

(6)(a) Subsections (1) through (5) of this section only apply with respect to the taxes on persons engaged in apportionable activities as defined in RCW 82.04.460 or making wholesale sales taxable under RCW 82.04.257(1) or 82.04.270. For purposes of the taxes imposed under this chapter on any activity not included in the definition of apportionable activities in RCW 82.04.460, other than the business of making wholesale sales taxed under RCW 82.04.257(1) or 82.04.270, a person is deemed to have a substantial nexus with this state if the person has a physical presence in this state during the tax year, which need only be demonstrably more than a slightest presence.

(b) For purposes of this subsection, a person is physically present in this state if the person has property or employees in this state.

(c)(i) A person is also physically present in this state for the purposes of this subsection 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.)

Rule 193 is the administrative rule the Department adopted to administer RCW 82.04.067. The Department amended Rule 193 in 2015 to provide further guidance on how Washington's B&O tax and retail sales taxes apply to interstate sales of tangible personal property under the amended statute. Rule 193(101) provides:

(101) **Introduction.** Except as provided in this subsection (101)(a) of this rule, the nexus standard described here is used to determine whether a person who sells tangible personal property has nexus with Washington for B&O and retail sales tax purposes.

(a) **Application to wholesale sales.** The nexus standard described in this Part I, commonly referred to as the physical presence nexus standard, applied to both retail and wholesale sales for periods prior to September 1, 2015. Effective September 1, 2015, wholesale sales taxable under RCW 82.04.257 and 82.04.270 are subject to the economic nexus standard under RCW 82.04.067 (1) through (5), and not the physical presence nexus standard under RCW 82.04.067(6). Retail sales and those wholesaling activities not taxable under RCW 82.04.257 and 82.04.270 remain subject to the physical presence nexus standard as of September 1, 2015. For more information on how the economic nexus standard applies to wholesaling activities, see WAC 458-20-19401.

(Emphasis added.)

WAC 458-20-19401(3) (“Rule 19401”) mirrors the thresholds for economic nexus standard provided in RCW 82.04.067(1), (6) (2015).

Therefore, prior to September 1, 2015, the physical presence standard in RCW 82.04.067(6) (2010) is the applicable statute for the nexus standard of wholesaling activities in Washington. Effective September 1, 2015, the economic nexus standard under RCW 82.04.067(1) to (5) applies to wholesale sales in Washington. RCW 82.04.067(6) (2015).

RCW 82.04.067(6) (2010) provided the following with respect to the nexus standard for wholesaling activities:

[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.

([E]mphasis added). *See* Rule 193(102).

This provision is also consistent with the law for periods prior to 2010. *See also* Det. No. 15-0151, 35 WTD 182 (2016). Nexus may be established through the activities of the seller’s own employees, or the activities of independent contractor representatives. RCW 82.04.067(6); Rule 193(102); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Tyler Pipe Indus., Inc. v. Washington Dep’t of Revenue*, 483 U.S. 232 (1987). The activities of the seller’s employees or representatives need not involve the solicitation of sales. Det. No. 14-0383, 34 WTD 265 (2015); Det. No. 00-003, 19 WTD 685 (2000). 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, [and] whether the activities generate sales is not determinative. *Space Age Fuels, Inc. v. Washington*, 315 P.3d 604, 178 Wn. App. 756 (2013); *Lamtec Corp. v. Dep’t of Revenue*, 170 Wn.2d 838, 850-51, 246 P.3d 788, 795 (2011); *Standard Pressed Steel Co. v. Dep’t of Revenue*, 419 U.S. 560 (1975).

Here, Taxpayer has no offices or Washington employees in this State. However, Taxpayer acknowledged in its [Questionnaire answers] that it employs a nonresident employee to visit Washington State each year to make sales to its Washington customers. Under RCW 82.04.067(6) (2010) and Rule 193(102)(d), when a person’s representative solicits sales of goods in Washington, substantial nexus is established for B&O tax purposes. Further, when the representative performs significant activities “designed to establish or maintain customer relationships,” such as meeting with customers in Washington or being available to provide services associated with the products sold, substantial nexus is established for the same excise tax purposes. Rule 193(102)(d). It is clear that the nonresident employee’s sales activities, i.e., making sales to Washington customers, are “significantly associated with [Taxpayer’s] ability to establish or maintain a market for [Taxpayer’s] products in Washington.” [This] creates substantial nexus with the State under RCW 82.04.067(6) (2010); Rule 193(102)(d). *See* Det. No. 98-134, 18 WTD 85 (1999).

For the period of September 1, 2015, to September 30, 2015, covered in the assessment, the calculation of minimum nexus thresholds applies to the immediately preceding tax year under the economic nexus standard. RCW 82.04.067(6) (2015). Taxpayer answered in the [Questionnaire] that its gross sales in Washington State for year 2014 were \$ . . . , which exceeded the gross receipt threshold (\$250,000) provided in the statute. *Id.* Therefore, Taxpayer has substantial nexus with Washington State for the period of September 1, 2015, to September 30, 2015.

Taxpayer argues that it relied on the Department's published information to conclude that it did not have nexus with the State prior to September 1, 2015. Taxpayers have the right to rely on "specific, official written advice and written tax reporting instructions" from the Department ["to that taxpayer."] RCW 82.32A.020(2). The Department may waive the tax, penalties, and interests assessed, if the taxpayer has relied on the specific, official written advice and written tax reporting instructions to its proved detriment. *Id.*

Here, the published information on the Department's website Taxpayer relied on is consistent with the Department's interpretation of RCW 82.04.067(6) (2015), as reflected in the updated Rule 193. RCW 82.32A.020(2) does not apply here because there were no "specific, official written advice and written tax reporting instructions" to Taxpayer to not report tax. *See* Det. No. 16-0039, 35 WTD 301 (2016). In addition, Taxpayer could not possibly rely on the published information because the period in dispute concerned January 1, 2008, through August 31, 2015. [This] was prior to the Department's tax reporting instructions, [which were] published after the Washington Legislature amended RCW 82.04.067 in 2015, effective September 1, 2015. Accordingly, we deny relief on this basis.

*Public Law 86-272:*

Taxpayer also argues that it is not subject to excise tax under Public Law 86-272. [*See generally* 15 U.S.C. § 381.] 15 U.S.C. § 381 (Public Law 86-272) is not applicable here because that federal law applies only to taxes that are based on net income. [*See*] Rule 193(101). Rule 193(101) provides "Public Law 86-272 (15 U.S.C. Sec. 381 et seq.) applies only to taxes on or measured by net income. Washington's B&O tax is measured by gross receipts. Consequently, Public Law 86-272 does not apply." *See* Det. No. 01-9915, 22 WTD 202 (2003).

We conclude that Taxpayer's sales made to Washington are subject to the wholesaling B&O tax in Washington. RCW 82.04.060; RCW 82.04.067(6) (2010); Rule 193(101). We deny Taxpayer's petition.

#### DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 26th day of October 2016.