

Cite as Det. No. 19-0003, 40 WTD 093 (2021)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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>
Assessment of)	
)	No. 19-0003
)	
...)	Registration No. . . .
)	

Rule 458-20-193; RCW 82.04.067 – B&O TAX – APPORTIONMENT. An out of state retailer providing sales through a third-party online marketplace facilitator has substantial nexus with Washington and is subject to B&O 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.

McBryde, T.R.O. – An out-of-state corporation engaging in online sales to customers in Washington State through a third-party online marketplace facilitation service and through their own website disputes assessments by the Department of Revenue based on lack of nexus. Taxpayer contends it has no physical presence or inventory storage in Washington, and it has never maintained a stock of goods in Washington. We deny Taxpayer’s petition.¹

ISSUE

Does an out-of-state business selling products in Washington State through an online marketplace facilitator maintain enough ownership rights over the products stored in this state to establish nexus under RCW 82.04.067 and WAC 458-20-193 (“Rule 193”)?²

FINDINGS OF FACT

. . . (“Taxpayer”), is an out-of-state corporation engaged in the business of online retailing. Taxpayer’s business activities include retail sales of furniture, bedding and other household products. Taxpayer sells its products using both its own website and the website of an e-commerce company . . . [which has a distribution center and other facilities] in Washington (“Facilitator”).

Facilitator provides . . . an online marketplace [with facilitation services] for seller products that is accessible via the internet to customers in all states nationwide. Taxpayer, like all other sellers wishing to enter into this arrangement, must agree to and enter into a . . . (“Agreement”)

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

² [This determination applies the governing nexus statutes and regulations in effect from December 22, 2014, through June 30, 2017 (the period at issue). Effective January 1, 2018, RCW 82.08.053 and RCW 82.08.0531 would apply to these issues.]

with . . . Facilitator, which allows Taxpayer to make sales through Facilitator’s [facilitation services]. Sales of Taxpayer’s goods made through Facilitator’s website are filled from goods stored in Facilitator’s distribution centers (“Distribution Centers”). Facilitator receives a . . . fee from Taxpayer on each transaction completed and sold through its website.³ Taxpayer is responsible for collecting and reporting any taxes due.⁴ When Facilitator sells Taxpayer’s products (labelled as “Your Product” in the Agreement) through Facilitator’s Distribution Centers, the listing states “sold by [Taxpayer] and fulfilled by [Facilitator].”⁵

Under the Solutions Agreement, Taxpayer is required to deliver its inventory to a Distribution Center determined by Facilitator to fulfill orders. Facilitator charges Taxpayer storage fees and Facilitator will keep electronic records that track inventory by units stored in particular Distribution Centers.⁶ Facilitator provides Taxpayer with an electronic “Inventory Event Detail” schedule, which shows Taxpayer the location of the Distribution Center where a particular good is located. Once Facilitator receives Taxpayer’s goods, it is free to move the goods to other Distribution Centers.⁷ The Agreement, in relevant parts, provides the following:

7. Disclaimer & General Release.

...

b. Because [Facilitator] is not involved in transactions between customers and sellers or other participant dealings, if a dispute arises between one or more participants, each participant releases [Facilitator] (and its agents and employees) from claims, demands, and damages . . . in any way connected with such disputes.

...

18. Miscellaneous

...

Because [Facilitator] is not your [Taxpayer’s] agent . . . or the customer’s agent for any purpose, [Facilitator] will not act as either party’s agent in connection with resolving any disputes between participants related to or arising out of any transaction.

...

³ See Agreement, S-5 Compensation.

⁴ See Agreement, 10. Tax Matters. [Under current law, a marketplace facilitator is required to collect and remit sales tax for marketplace sellers with physical presence (such as Taxpayer). RCW 82.08.053; RCW 82.08.0531.]

⁵ See petition response dated February 14, 2018, from the Department’s Compliance Division. The Agreement defines “Your Product” as “any product or service (including Optional Coverage Plans) that you [Taxpayer]: (a) have offered through the Selling on [Facilitator] Service; (b) have made available for advertising through the [Facilitator] Clicks Service; or have fulfilled or otherwise processed through the Fulfilment by [Facilitator] Service.” Agreement, p. 8.

⁶ See Agreement, F-4 Storage.

⁷ See Agreement, F-4 Storage.

Fulfillment by [Facilitator] Service Terms

Fulfillment by [Facilitator] provides fulfillment and associated service for Your Products.

...

F-5 Fulfillment

As part of our [Facilitator's] fulfillment services, we [Facilitator] will ship Units from our [Facilitator's] inventory of Your Products to the shipping addresses in the Elected Country included in valid customer orders, or submitted by you [Taxpayer] of a Fulfillment Request.

...

F-7.1 You [Taxpayer] may, at any time, request that [Units be] returned to you [Taxpayer] or that we [Facilitator] dispose of Units.

...

F-14 Tax Matters

You [Taxpayer] understand and acknowledge that storing Units at [Distribution] Centers may create tax nexus for you [Taxpayer] in any country, state, province, or other localities in which your [Taxpayer's] Units are stored, and you [Taxpayer] will be solely responsible for any taxes owned as result of such storage.

After observing Taxpayer selling products using Facilitator's online marketplace, the Compliance Division (Compliance) of the Department of Revenue (Department), began an investigation of Taxpayer's business activities to determine Taxpayer's potential tax obligations in Washington.

Compliance mailed Taxpayer a letter of inquiry along with a Washington Business Activities Questionnaire, which Taxpayer completed and returned. On June 22, 2017, Compliance reviewed the completed Questionnaire, which indicated that products [were sold] through an online marketplace and on Taxpayer's own website and were shipped by common carrier. . . . The Questionnaire also indicated that Taxpayer maintained a stock of goods in Washington-based warehouses owned by the Facilitator.

On June 22, 2017, Compliance received inventory event detail reports (inventory reports) for the years 2012 through 2017. The inventory reports showed that Taxpayer's products began to be stored in Washington State on December 22, 2014, at the Facilitator's Distribution Centers. On June 27, 2017, Compliance mailed a commencement of audit letter to Taxpayer. As a part of the audit, Compliance received a completed Business License Application and Taxpayer was registered and issued an account number (UBI).

On July 31, 2017, Compliance received sales data from the Taxpayer. Compliance reviewed the Taxpayer's sales data, inventory reports, along with the Agreement, and determined that Taxpayer established substantial nexus with Washington State. On December 8, 2017, Compliance issued a tax assessment for the tax period of December 22, 2014, through June 30, 2017. The assessment is comprised of retail sales tax of \$. . . , retailing business and occupation tax of \$. . . , late payment penalties of \$. . . , interest of \$. . . , substantially underpaid penalties of \$. . . , and unregistered business penalties of \$ The issued assessment is for \$. . . and includes a small business credit of \$

Taxpayer timely filed for review, seeking cancellation of the assessment. Taxpayer contends in its petition that:

[Taxpayer] does not have a physical presence in the state. [Taxpayer] is based in Indiana with all employees and inventory residing in [out-of-state]. Inventory is sent to [Facilitator] for fulfillment through their network of facilities, but [Taxpayer] does not send inventory directly to Washington State. [Facilitator], at its sole discretion, sends inventory to Washington State. Additionally, the inventory sent to [Facilitator] does not meet the standard of ownership as [Facilitator] bears risk of loss for the property in its possession. As such, [Facilitator] should be responsible for collecting sales tax in the State, not [Taxpayer].

Taxpayer did not provide any documentation to support its assertions.

ANALYSIS

Washington imposes a B&O tax on “every person that has a substantial nexus with this state . . . for the act or privilege of engaging in business activities” in this state. RCW 82.04.220. The tax is measured by applying particular rates against the value of the products, gross proceeds of sale, or gross income of the business, as the case may be. RCW 82.04.220. RCW 82.04.250 imposes the retailing B&O tax on entities making sales at retail. In addition, persons making sales at retail must collect and remit retail sales tax. RCW 82.08.020; RCW 82.08.050.

Substantial Nexus

RCW 82.04.067 establishes the statutory “substantial nexus” thresholds that apply to persons engaging in business. For persons engaged in the business of making retail sales of tangible personal property, substantial nexus exists if the person has a physical presence in this state, which need only be demonstrably more than a slightest presence. RCW 82.04.067(6).⁸ A person is physically present in this state if the person has property or employees in this state. *Id.*

...

⁸ As of July 1, 2017, a business engaging in retailing activity has nexus with Washington State if it has a physical presence in this state or if it exceeds the economic nexus thresholds under RCW 82.04.067. *See* WAC 458-20-19401.

Rule 193 sets forth administrative guidance regarding the application of the B&O tax and retail sales tax to interstate sales. The Rule explains that in order for Washington to impose these taxes, a seller must have nexus with Washington and the sale must occur in Washington. Rule 193(2).

Rule 193(102) discusses nexus, in pertinent part, as follows:

(102) **Nexus.** . . . a person who sells tangible personal property is deemed to have nexus with Washington if the person has a physical presence in this state, which need only be demonstrably more than the slightest presence. RCW 82.04.067(6).

(a) **Physical presence.** A person is physically present in this state if:

(i) The person has property in this state;

. . .

(b) **Property.** A person has property in this state if the person owns, leases, or otherwise has a legal or beneficial interest in real or personal property in Washington.

Although we are dealing primarily with the statutory “substantial nexus” thresholds set out in RCW 82.04.067, those thresholds flow from and are consistent with 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 other court opinions, as well as in numerous Department determinations. *See, e.g.,* Det. No. 01-074, 20 WTD 531 (2001); Det. No. 96-144, 16 WTD 201 (1996). . . .

The nexus limitation imposed by the Due Process Clause is satisfied if “a foreign corporation purposefully avails itself of the benefits of an economic market in the forum state.” *Quill Corp.*, 504 at 307.⁹

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); *see also General Motors Corp. v. Washington*, 377 U.S. 436 (1964), *overruled on other grounds, Tyler Pipe*, 483 U.S. at 250 (1987) (holding that it is the bundle of corporate activity that determines whether a taxpayer has nexus with a state); WAC 458-20-193. Thus, establishing taxing nexus requires consideration of the entire bundle of a taxpayer’s in-state activities.

⁹ In questioning the state’s assertion of nexus in this case, Taxpayer’s arguments do not specifically address potential differences between the nexus limitations pertaining to the Due Process Clause as opposed to the Commerce Clause. [Because Taxpayer does not address whether there are differences between the two nexus limitations under the Due Process Clause and the Commerce Clause, we assume without deciding there are no differences in the analysis for the purposes of this administrative review.]

Here, Taxpayer concedes that sales of tangible personal property to Washington customers occurred in this state and that the sales in question here were the result of its products being displayed on Facilitator's website to customers in Washington. [However], Taxpayer asserts that it did not maintain any inventory nor have any employees within Washington and therefore did not establish nexus with the state of Washington. Taxpayer also asserts that Taxpayer did not directly send inventory to Washington, but rather that it was sent to the Facilitator for fulfillment and through their network of facilities, Facilitator sent Taxpayer's inventory into Washington. Lastly, Taxpayer argues that it did not meet the standard of ownership of the property held in Washington and, therefore, did not have nexus with Washington.

Seller Inventory in Washington

Essentially, Taxpayer argues that the goods it entrusts to Facilitator outside of Washington should not be a basis for establishing nexus because Taxpayer did not ship the goods into Washington, Facilitator has complete control over the goods once it receives them, and Facilitator processes all sales activity. We disagree.

First, as Rule 193 makes clear, maintaining a stock of goods within the state is sufficient to establish a physical presence. Rule 193(102)(a)(i).

Second, even if Facilitator did have complete physical control over the goods once it received them at its out-of-state Distribution Centers, this does not affect the outcome. By signing the Agreement, Taxpayer was aware that those goods could be relocated to Distribution Centers in other states. According to the Agreement, Facilitator is to provide Taxpayer with a digital "Inventory Event Detail" schedule that informed Taxpayer of the locations of the Distribution Centers where particular goods were located. Thus, Taxpayer is unable to show that its goods were sent to, and stored in, this state without its knowledge and consent.

Taxpayer also argues that the inventory sent to the Facilitator does not meet the standard of ownership. However, under the Agreement, Facilitator does not take title to the goods. Rather, the goods remain the property of Taxpayer until delivered to the purchaser. The Agreement specifically states that Taxpayer is availing itself of Facilitator's digital marketplace and marketplace services and that Taxpayer agrees it is the seller of record, and by agreeing to use the Facilitator's services, it may create nexus in other localities. Taxpayer [also agreed to be] solely responsible for any taxes owed on account of using Facilitator's services.

Additionally, the Taxpayer asserts in essence that it is no longer the owner of the products since the Facilitator bears the risk of loss for the property in its possession. "The chief incidents of ownership of property are the right to its possession, use and enjoyment of the property and the right to sell or otherwise dispose of it." *In re Estate of Eckert*, 14 Wn.2d 497, 128 P.2d 656 (1942). The obligation of bearing the risk of loss is merely a contractual obligation and not a standard or incident of ownership. Thus, even though the Facilitator might have contractually agreed to bear the risk of loss for Taxpayer's inventory in its possession, this does not mean that the Facilitator acquired any ownership rights over Taxpayer's property. In fact, the Agreement clearly states that ownership of the inventory remains with Taxpayer.

Thus, Taxpayer owns the goods pre-sale, the goods are undoubtedly physically present in the state [of Washington] at the time of sale, and Taxpayer, not Facilitator, is the seller and is responsible for [collecting retail sales taxes from customers and paying retailing B&O taxes on the gross proceeds of the sales].

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 4th day of January 2019.