

Cite as Det. No. 16-0149, 35 WTD 613 (2016)

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

In the Matter of the Petition for Correction)	<u>D E T E R M I N A T I O N</u>
of Assessment of)	
)	No. 16-0149
)	
...)	Registration No. . . .
)	

[1] RCW 82.04.067, RULE 193: B&O TAX – NEXUS – OUT-OF-STATE MANUFACTURER/SELLER -- INDEPENDENT COMMISSIONED SALES REPRESENTATIVE. An independent commissioned sales representative establishes nexus when it acts on behalf of the seller in Washington to generate sales.

[2] RCW 82.32.730, RULE 193: B&O TAX – TITLE PASSES AT OUT-OF-STATE POINT OF MANUFACTURE – DELIVERY IN WASHINGTON. When product is received by purchaser in Washington, there is delivery in Washington, even though title may have passed at out-of-state point of manufacture.

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.

Bauer, T.R.O. – An out-of-state bakery objected to the imposition of business and occupation [(B&O)] tax on sales of baked goods delivered to its Washington customers, arguing that it lacked nexus and that its goods were not received in Washington. The assessment is sustained.¹

ISSUES

1. Under RCW 82.04.067 and Rule 193, did an out-of-state manufacturer and seller of baked goods have nexus with Washington in the absence of employees or property here, even though orders taken in Washington by its independent commissioned sales representatives were subject to its out-of-state approval?
2. Under RCW 82.32.730 and Rule 193, did Washington buyers receive product in Washington even though seller shipped product to its Washington customers and title passed at the out-of-state point of manufacture?

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

FINDINGS OF FACT

[Taxpayer] manufactures and sells baked goods such as pastries, croissants, and fast food cakes to retailers throughout the country. It runs its bakery operation [out-of-state], and has also opened a facility [out-of-state]. Taxpayer ships its goods by common carrier directly from either of these locations to its customers, including those in the state of Washington. Taxpayer [states that it] had no employees in Washington during the audit period, and neither owned nor rented property here.

Taxpayer contracts with independent commissioned sales representatives to broker sales of Taxpayer's products in this state. Taxpayer provided a copy of its contract with [Sales Company], a commissioned sales company in Washington that brokered sales in a territory that included the state of Washington. Taxpayer's contract requires [Sales Company] to enter Washington in order to "generate," "obtain," and "negotiate" sales of Taxpayer's products in this state. Orders solicited by [Sales Company] must be sent to the Taxpayer for approval.

The Compliance Division (Compliance) of the Department of Revenue (Department) issued the above-referenced estimated assessment on April 13, 2015, for the period January 1, 2011 through December 31, 2014 (audit period), in the total amount of \$. . . , which amount included penalties and interest. Taxpayer appealed that assessment on May 13, 2015.

After the teleconference in this matter, Taxpayer provided a complete list of sales by all of its representatives in Washington during the audit period. Based on the sales figures that Taxpayer provided, Compliance issued an amended audit assessment on January 7, 2016, as follows:

\$. . .	Wholesaling B&O Tax
. . .	Litter Tax
. . .	Total Debit
. . .	Delinquent Penalty
. . .	Interest
. . .	5% Assessment Penalty (Substantial Underpayment)
. . .	Additional Interest from 05-14-2015 to 02-08-2016
\$. . .	Total Assessed

The assessment has not been paid.

ANALYSIS

Washington imposes the B&O tax on every person with a substantial nexus with this state for the act or privilege of engaging in business activities in Washington. RCW 82.04.220. The tax is measured by applying particular rates against the value of products, gross proceeds of sales, or gross income of the business as the case may be. RCW 82.04.220. The gross proceeds from the sale of tangible personal property to consumers in this state at wholesale are taxable under the wholesaling classification of the B&O tax. RCW 82.04.270.

WAC 458-20-193 (Rule 193) explains Washington's B&O tax application to interstate sales of tangible personal property. Rule 193(1)(a) explains:

This rule explains the application of the business and occupation (B&O) and retail sales taxes to interstate sales of tangible personal property. In general, Washington imposes its B&O and retail sales taxes on sales of tangible personal property if the seller has nexus with Washington and the sale occurs in Washington.

Thus, in order for Washington to tax an inbound sale, the seller must first have nexus with Washington, and secondly, the sale must be sourced to Washington.

Nexus. The version of RCW 82.04.067(6) (2010) that was in effect during the audit period codified the Department's long standing position on nexus, stating in pertinent part:²

. . . 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, 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.

With respect to the duty to collect retail sales tax or use tax, courts have held that "substantial nexus" includes a requirement of some physical presence (more than the "slightest presence") in the state. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In Det. No. 96-144, 16 WTD 201 (1996), we concluded that, once the activities of a company go beyond purely mail order activities, and it has demonstrably more than the slightest presence in the state, substantial nexus is established. Nexus may be established through the activities of the seller's employees or independent contractor representatives. Rule 193(102); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Tyler Pipe Industries, Inc. v. Dep't of Revenue*, 483 U.S. 232 (1987). The Washington Supreme Court recently affirmed this in *Lamtec Corp. v. Dep't of Revenue*, 170 Wn.2d 838, 850-851 (2011), stating in part:

We conclude that to the extent there is a physical presence requirement, it can be satisfied by the presence of activities within the state. It does not require a "presence" in the sense of having a brick and mortar address within the state. We do not see a material difference whether the activities are performed by a staff permanently employed within the state, by independent agents contracted to perform the activity within the state, or persons who travel into the state from without.

² RCW 82.04.067 was amended, effective September 1, 2015. Under this legislation, wholesale businesses that lack physical presence but exceed the \$267,000 receipts threshold in any calendar year will be subject to B&O tax on wholesale sales in this state.

Furthermore, it is not necessary for the employee or independent contractor to be engaged in the direct solicitation of orders for nexus purposes. 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. Rule 193(102)(a)(iii) & (d); *Standard Pressed Steel Co. v. Dep't of Revenue*, 419 U.S. 560 (1975); *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977). For example, in Det. No. 00-098, 22 WTD 151 (2003), we held that an out-of-state computer retailer who contracted with independent service centers to provide warranty service in Washington established nexus for the retailer.

Rule 193 provides:

(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:

. . . (iii) 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 Washington.

...

(d) In-state activities. Even if a person does not have property or employees in Washington, the person is physically present in Washington when 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 Washington. It is immaterial that the activities that establish nexus are not significantly associated with a particular sale into this state.

For purposes of this rule, the term "agent or other representative" includes an employee, independent contractor, commissioned sales representative, or other person acting either at the direction of or on behalf of another.

A person performing the following nonexclusive list of activities, directly or through an agent or other representative, generally is performing activities that are significantly associated with establishing or maintaining a market for a person's products in this state:

(i) Soliciting sales of goods in Washington;

....

(103) **Effect of having nexus.**

(a) Retail sales. A person that makes retail sales of tangible personal property and has nexus with Washington is subject to B&O tax on that person's retail sales, and is responsible for collecting and remitting retail sales tax on that person's sales of tangible personal property sourced to Washington, unless a specific exemption applies.

(Emphasis added.)

Taxpayer argues that it did not have nexus with Washington because it had no employees or property within the state of Washington. Taxpayer's contract with [Sales Company], however, required [Sales Company] to enter Washington in order to "generate," "obtain," and "negotiate" sales of Taxpayer's products in this state.³ In other words, [Sales Company] was "soliciting sales of goods in Washington." The fact that Taxpayer reserved the right to "accept" the terms of all purchase orders at its out-of-state location, does not negate the fact that [Sales Company] was performing – within the state of Washington – significant services to establish and maintain Taxpayer's sales into this state. It was unnecessary that Taxpayer maintain employees or property within Washington for substantial nexus to [be established].

We find that Taxpayer, through its sales representative [Sales Company], had nexus with the state of Washington.

Sourcing of Sales. Rule 193 (202) provides:

(201) **Introduction.** RCW 82.32.730 explains how to determine where a sale of tangible personal property occurs based on "sourcing rules" established under the streamlined sales and use tax agreement.

(202) **Receive and receipt.**

(a) **Definition.** "Receive" and "receipt" mean the purchaser first either taking physical possession of, or having dominion and control over, tangible personal property.

(b) Receipt by a shipping company.

(i) "Receive" and "receipt" do not include possession by a shipping company on behalf of the purchaser, regardless of whether the shipping company has the authority to accept and inspect the goods on behalf of the purchaser.

(ii) A "shipping company" for purposes of this rule means a separate legal entity that ships, transports, or delivers tangible personal property on behalf of another, such as a common carrier, contract carrier, or private carrier either affiliated (e.g., an entity wholly owned by the seller or purchaser) or unaffiliated (e.g., third-party carrier) with the seller or purchaser. A shipping company is not a division or branch of a seller or purchaser that carries out shipping duties for the seller or purchaser, respectively. Whether an entity is a "shipping company" for purposes of this rule applies only to sourcing sales of tangible personal property and does not apply to whether a "shipping company" can create nexus for a seller.

(203) **Sourcing sales of tangible personal property – In general.** The following provisions in this subsection apply to sourcing sales of most items of tangible personal property.

(a) **Business location.** When tangible personal property is received by the purchaser at a business location of the seller, the sale is sourced to that business location.

³ Paragraphs 1, 2, and 3, Broker Agreement with [Sales Company] dated February 1, 2002.

....

(b) **Place of receipt.** If the sourcing rule explained in (a) of this subsection does not apply, the sale is sourced to the location where receipt by the purchaser or purchaser's donee, designated as such by the purchaser, occurs, including the location indicated by instructions for delivery to the purchaser or purchaser's donee, as known to the seller.

....

(iii) Commercial law delivery terms, and the Uniform Commercial Code's provisions defining sale or where risk of loss passes, do not determine where the place of receipt occurs.

(Emphasis added.) [See also RCW 82.32.730(1)(b) & (9)(f).]

Under Rule 193, then, “receipt” constitutes the customer either taking physical possession of, or having dominion and control over, tangible personal property. In this case, Taxpayer’s deliveries of bakery goods were made to buyers in this state via common carrier. Receipt does not include possession by the common carrier on behalf of the purchaser. Rule 193(202)(b). And, as subparagraph (203)(b)(iii) notes, the fact that title may have passed to the buyers outside of Washington is not dispositive of “receipt.”

Thus, we disagree with Taxpayer’s assertion that there was no delivery in Washington because title to Taxpayer’s product passed to the buyers at Taxpayer’s plants. Neither transfer of title nor Uniform Commercial Code definitions of delivery is dispositive for B&O tax purposes to determine where the place of “receipt” occurs. We hold that the sale of Taxpayer’s product occurred in the State of Washington upon receipt by Taxpayer’s Washington customers.

Because Taxpayer established nexus with the State of Washington through its representatives, and delivered products to its customers in this state, we hold that the assessment of Washington’s B&O tax on these sales was correct.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 21st day of April, 2016.