Cite as Det No. 11-0292, 31 WTD 73 (2012)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 11-0292
. . .	)	
	)	Registration No. . . .
	)	Document No. . . ./Audit No. . . .
	)	
	)	Docket No. . . .
	)	

RULE 194 – NEXUS FOR SERVICE PROVIDERS: Out of state continuing education provider has nexus because its independent contractor speakers who make presentations at live seminars in Washington are "representative third parties" under Rule 194(g)(i).

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.

Sohng, A.L.J. – Out-of-state provider of continuing professional education whose independent contractor speakers provide live seminars in Washington protests assessment of . . . business and occupation tax on the grounds that it lacks nexus in Washington. The petition is denied.

ISSUE

Does an out-of-state continuing education provider have nexus with this state under WAC 458-20-194 when its independent contractor speakers provide live continuing education services to the provider's customers in Washington?[1]

FINDINGS OF FACT

[Taxpayer] is [an out-of-state] corporation engaged in the business of providing continuing . . . education. Taxpayer provides . . . seminars throughout the United States, including the State of Washington, and also provides . . . programs and webcasts through its website. In addition, Taxpayer sells seminar materials . . . through its website and by telephone.

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

Taxpayer does not have any employees in the state of Washington. Taxpayer contacts potential speakers, asking if they would volunteer to speak at upcoming seminars. The speaker volunteers are independent contractors and are not paid, other than a nominal "honorarium" . . . . The speakers agree to volunteer in order to market themselves as experts in a particular field and thereby generate business from seminar attendees.

Taxpayer provides the general topic for each of its seminars, but the speakers are given the freedom to develop the topics in any manner that they wish. The speakers control all aspects of their presentations, including the substance of the materials presented, the manner in which they are presented, the depth and breadth of coverage, and how much time is spent on each topic. Taxpayer does not exercise any control over the content of the speakers' presentations. The speakers do not solicit any sales on Taxpayer's behalf from seminar attendees or other parties. Attendees register for seminars either online or by completing the registration order form contained in Taxpayer's brochures. Taxpayer processes all registrations at its [out-of-state] headquarters.

For the live seminars held in Washington, Taxpayer contracts with a local temporary staffing agency to supply personnel at the seminar location to check attendees in and distribute course materials. Registration personnel are employees of the staffing company and play no role in soliciting registration for Taxpayer's seminars, soliciting sales of Taxpayer's products, or marketing Taxpayer's seminars and/or products in any way. Their duties are strictly limited to checking in seminar attendees and disseminating materials prepared by the speakers.

The Audit Division examined Taxpayer's books and records . . . . On January 11, 2011, the Audit Division issued Assessment No. . . .in the amount of $. . ., including $. . . in taxes, $. . . in penalties, and $. . . in interest.

ANALYSIS

Washington imposes a business and occupation ("B&O") tax "for the act or privilege of engaging in business" in this state. RCW 82.04.220. The tax rate varies based on the type of business activity the taxpayer engages in and the statute provides numerous classifications of activities. Taxpayers engaging in service businesses in this state not otherwise classified are subject to the service and other activities B&0 tax. RCW 82.04.290.

The B&O tax is "extensive and is intended to impose . . . tax upon virtually all business activities carried on in the State." *Analytical Methods, Inc. v. Dep't of Revenue*, 84 Wn. App. 236, 241, 928 P.2d 1123 (1996) (quoting *Palmer v. Dep't of Revenue*, 82 Wn. App. 367, 371, 917 P.2d 1120 (1996)). "Business" is defined broadly to include "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140.

Notwithstanding the broad definition of "business" in RCW 82.04.140 that essentially includes all business activities that benefit a taxpayer, a state cannot tax transactions that do not have

sufficient connection or "nexus" with the state. *See Complete Auto Transit v. Brady*, 430 U.S. 274 (1977); *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); Det. No. 05-0376, 26 WTD 40 (2007). Nexus and apportionment 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. Det. No. 01-188, 21 WTD 289 (2002); *see also* RCW 82.04.4286.

The Constitutional nexus limitation requires that the transaction being taxed have "substantial nexus" with the taxing state. *Complete Auto Transit*, 430 U.S. at 279. In *Complete Auto Transit*, the U.S. Supreme Court articulated a four-pronged test that a state tax must satisfy to withstand a Commerce Clause challenge to its jurisdiction to tax. The Court held that the Commerce Clause requires that the tax: (1) be applied to an activity with "substantial nexus" with the taxing state, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the state. 430 U.S. at 279.

For substantial nexus to exist, a person need not send employees into Washington. Det. No. 05-0376, 26 WTD 40 (2007). Rather, nexus may be created through independent contractors. *Id.* (citing *Tyler Pipe*, 483 U.S. 232 (1987) (holding that a showing of sufficient nexus cannot be defeated by the argument that the seller's representative was properly characterized as an independent contractor instead of as an agent)); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960) (holding that nexus was established by a seller's in-state solicitation performed through independent contractors); and Det. No. 01- 074, 20 WTD 531 (2001).

[For periods prior to June 1, 2010,] Rule 194 sets forth Washington's nexus standards for taxpayers that are subject to the service and other activities B&O tax.[2] "Nexus" is defined in Rule 194(2)(a) as:

> [T]hat minimum level of business activity or connection with the state of Washington which subjects the business to the taxing jurisdiction of this state. Nexus is created when a taxpayer 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.

Rule 194(2)(b) provides the following examples to demonstrate Washington's nexus principles:

> (v) Assume an architectural firm maintains its only physical office in Washington, and when the firm needs a presence in Idaho, it contracts with nonemployee architects in Idaho instead of maintaining a physical office in Idaho. Employees of the Washington firm do not travel to Idaho. Instead, the contract architects interact directly with the clients in Idaho, and perform the services the firm contracted to perform in Idaho. The architectural firm has nexus with both Washington and Idaho.
>
> (vi) Assume the same facts as the example in (b)(v) of this subsection except the

[2 WAC 458-20-19401 applies to determine the existence of substantial nexus for periods after 5/31/10.]

> contracted architects never meet with the firm's clients and instead forward all work products to the firm's Washington office, which then submits that work product to the client. In this case, the architectural firm does not have nexus with Idaho. The mere purchase of services from a subcontractor located in another state that does not act as the business' representative to customers does not create nexus.

Taxpayer maintains that its volunteer speakers are not "representatives" as that term is used in Rule 194(2)(a) because (i) such volunteers make presentations only "to further their own practices or business, not to further the business of [Taxpayer];" (ii) Taxpayer maintains no control or authority over the speakers; and (iii) the speakers have no authority to speak for or bind Taxpayer.[3] Taxpayer further claims that by hiring the independent contractor speakers to present at its seminars in Washington, it is doing no more than merely purchasing the services of an out-of-state service provider. Taxpayer relies on the last sentence of example (vi) of Rule 194(2)(b) as support that it does not have nexus in Washington because "the mere purchase of services from a contractor located in another state that does not act as the business' representative to customers does not create nexus."

Taxpayer's reliance on Rule 194(2)(b)(vi) is misplaced. Taxpayer is not merely purchasing the services of a subcontractor who is not acting as Taxpayer's representative to customers. Rule 194(4)(g)(i) provides that a "representative third party" includes:

> An agent, independent contractor, or other representative of the taxpayer who provides services on behalf of the taxpayer directly to customers.

(Emphasis added.) The volunteer speakers who make presentations at the live seminars in Washington are undoubtedly providing services on Taxpayer's behalf, directly to Taxpayer's customers, the seminar attendees. The speakers are "representative third parties" as that term is defined in Rule 194. Because Taxpayer is engaged in activities in this state through its speaker representatives for the purpose of performing a business activity, it has nexus with Washington under Rule 194(2)(a).

Moreover, Taxpayer's situation is analogous to example (v) of Rule 194(2)(b). Taxpayer maintains its [out-of-state] physical office . . ., and when it needs a presence in Washington, it contracts with nonemployee speakers in Washington instead of maintaining a physical office in Washington. Employees of the [out-of-state] firm do not travel to Washington. Instead, the contract speakers interact directly with the clients in Washington, and perform the services the firm contracted to perform in Washington. Taxpayer has nexus with both [the state where its physical office is located] and Washington.

Furthermore, our holding is supported by Department precedent. Det. No. 92-262E, 12 WTD 431 (1992), involved a Washington pension plan manager with over $1 billion in assets under management. This taxpayer hired various independent investment advisers located out-of-state to provide advice on investing the pension funds. Taxpayer was one of many clients whose funds

[3] Taxpayer's Supplemental Petition, dated August 11, 2011, at 2.

the investment advisers helped manage. We stated that for substantial nexus to exist, a taxpayer has to intend to use independent contractors "to enter the marketplace of the taxing jurisdiction, i.e., to do business in that state's marketplace." *Id.* at 437. We found that the independent investment advisers were chosen not for the purpose of the taxpayer entering the market of that state, but rather, for their expertise in providing investment management advice. We held that the third party service providers at issue were performing services directly for the taxpayer and were not acting in a representative capacity by providing services to the taxpayer's customers.

In contrast, Taxpayer's use of independent contractors is decidedly different. The speakers and registration personnel do not perform services directly to Taxpayer. They provide services directly to Taxpayer's customers in Washington by making the live presentations and distributing seminar materials to attendees. Even though Taxpayer has no employees in this state, it generates revenue in Washington by providing educational seminars through its independent speakers. The phrase "to enter the marketplace of the taxing jurisdiction, i.e., to do business in that state's marketplace" as used in 12 WTD 431, does not mean that the taxpayers must be using the independent contractors to seek new business opportunities for a taxpayer in the jurisdiction where services are performed. Rather, the language means simply that the independent contractors must be performing the activities of the taxpayer in that jurisdiction. It is immaterial that Taxpayer has no control or authority over the speakers' presentations or that the speakers do not solicit business opportunities on behalf of Taxpayer.

We conclude that because Taxpayer contracted with its independent contractor speakers to deliver the services that Taxpayer is in the very business of providing (namely, live continuing education seminars), it is "engaged in activities in the state, either directly or through a representative, for the purpose of performing a business activity" and has sufficient nexus with Washington for imposition of the tax.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 12th day of October 2011.