NO. 89849-9

SUPREME COURT OF THE STATE OF WASHINGTON

SPACE AGE FUELS, INC.,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Space Age Fuels, Inc. ("Space Age") sent its employees and licensed fuel-delivery trucks into Washington on a daily basis to make wholesale sales and deliveries of motor fuel and special fuel to Washington customers. Respondent Department of Revenue assessed a business and occupation ("B&O") tax on Space Age's wholesale sales of motor fuel and special fuel to those customers. The Court of Appeals upheld the assessment and rejected Space Age's argument that its activities within Washington were insufficient to meet the nexus requirement of the dormant Commerce Clause.[1]

This Court should deny Space Age's petition. The decision of the Court of Appeals is consistent with well-established principles of constitutional law, including this Court's decision in *Lamtec Corp. v. Dep't of Revenue*, 170 Wn.2d 838, 246 P.3d 788 (2011). The undisputed facts confirmed that Space Age was subject to wholesaling B&O tax on its sales to Washington customers. Because the case turns on the application of undisputed facts to well-established law, the petition does not raise an issue of substantial public importance warranting further review.

II. IDENTITY OF RESPONDENT

Respondent is the State of Washington, Department of Revenue.

[1] A copy of the published opinion is attached as Appendix A.

III. COUNTERSTATEMENT OF THE ISSUE

Were Space Age's regular in-state sales and deliveries of fuel to its Washington customers sufficient under the dormant Commerce Clause to establish substantial nexus between Space Age and Washington?

IV. COUNTERSTATEMENT OF THE CASE

Space Age is a Washington licensed motor fuel and special fuel dealer and has been engaged in the business of selling fuel in Washington since at least 1999. CP 351, 368. The company is incorporated in Oregon and has its principal place of business in Clackamas, Oregon. CP 54.

During January 2004 through June 2007, Space Age sold and delivered motor fuel and special fuel to roughly 40 different wholesale customers in Washington. *Id.* Space Age made at least 1,675 wholesale sales to its Washington customers during this period and received more than $48 million of gross income from these sales. CP 81 (¶ 7). This amounts to over $13.7 million per year on average.

The Washington wholesale sales occurred within Washington when Space Age employees transferred possession of the fuel to Washington customers using fuel delivery trucks owned by Space Age. CP 285; RCW 82.04.040(1) (defining when a sale occurs). On average, Space Age employees delivered fuel in Washington more than once each day during the three-and-one-half years at issue. CP 81 (¶ 7).[2]

[2] 1,675 deliveries ÷ 1,277 days during audit period = average of 1.31 deliveries per day.

Space Age obtained necessary licenses from the Washington Department of Licensing allowing it to lawfully sell and distribute motor fuel and special fuel to its Washington customers. CP 351. Space Age charged its Washington customers the Washington motor fuel tax or special fuel tax owed on the fuel being supplied. CP 177-78. However, Space Age did not report or pay Washington B&O tax on its Washington wholesale sales until after the Department assessed it for unpaid B&O taxes. CP 81-82 (¶¶ 4 and 14); CP 6 (¶¶ 7 and 11).[3]

From mid-2005 through the end of the audit period, Space Age employees drove 186,877 miles in Washington delivering fuel. CP 330-49. The delivery activities performed by Space Age were "another profit center" for the company, CP 297 (testimony of company president), and the price Space Age charged its customers for motor fuel and special fuel depended to some extent on the distance Space Age had to travel to deliver the fuel. CP 292. The fuel trucks owned and operated by Space Age had the capacity to make multiple fuel deliveries during a single trip. CP 295-96.

Space Age employees also provided substantial in-state services to its Washington customers with respect to each fuel sale. For sales to customers with below-ground tanks, a Space Age employee would "stick the tank" to determine whether the tank would hold the amount of fuel

[3] The Washington motor fuel and special fuel taxes are administered by the Department of Licensing, not the Department of Revenue. RCW 82.36.010(5), RCW 82.36.435 (motor fuel tax); RCW 82.38.020(7), RCW 82.38.260 (special fuel tax). Space Age has not asserted that it lacks nexus with Washington for purposes of its Washington motor fuel and special fuel tax payment obligations.

being delivered and then dispense a controlled amount of fuel from the Space Age truck into the customer's tank. CP 295. For sales to customers with above-ground tanks, the process required a truck capable of pumping fuel from the Space Age truck into the customer's tank. CP 292-93. Space Age had several trucks capable of pumping fuel in its fleet and used both types of trucks (gravity delivery and pump delivery) in its Washington business operations. CP 293.

The Department audited Space Age's business records for the January 1, 2004, through June 30, 2007, period. The audit resulted in an assessment of retail sales tax, retailing B&O tax, wholesaling B&O tax, and hazardous substance tax in the total amount of $238,157. CP 257. Of that total amount, $235,834 was for unpaid wholesaling B&O tax on sales of motor fuel and special fuel to Washington customers. CP 257; CP 82 (¶ 14). Penalties and interest were added to the unpaid taxes. CP 257.

Space Age paid the assessment and initiated a tax refund lawsuit under RCW 82.32.180, seeking a refund of the assessed wholesaling B&O tax it paid, plus associated penalties and interest. CP 6 (¶ 7).[4] Space Age alleged that its activities in Washington did not provide a sufficient nexus with Washington, and that Washington's tax violated the dormant Commerce Clause. CP 7 (¶ 13).

The trial court, on cross-motions for summary judgment, denied Space Age's refund claim, concluding that Space Age had substantial

[4] Space Age did not request a refund of the assessed retail sales tax, retailing B&O tax, or hazardous substance tax. CP 6.

nexus with Washington as a result of its regular in-state deliveries of fuel. CP 443-46; VRP, vol. 2 at 5. The Court of Appeals affirmed. *Space Age Fuels, Inc. v. State*, ___ Wn. App. ___, 315 P.3d 604 (2013).[5] The Court of Appeals concluded that (1) Space Age's regular in-state deliveries of fuel established a physical presence in Washington, (2) the regular deliveries were substantial, occurring on average more than once per day during the audit period, and (3) Space Age's physical presence and delivery activities within Washington were significantly associated with its ability to establish and maintain its share of the Washington wholesale motor fuel and special fuel market. *Id.*, 315 P.3d at 607-08.

V. REASONS WHY THE COURT SHOULD DENY REVIEW

Space Age's petition should be denied. The Court of Appeals correctly applied well-established law in holding that Space Age has substantial nexus with Washington. In addition, the court's decision is consistent with this Court's decisions in *Lamtec* and other cases, and does not raise an issue of substantial public importance. In short, nothing in the Court of Appeals decision warrants further review by this Court.

A. This Appeal Does Not Present A Significant Question Of Constitutional Law.

During the period at issue, Space Age had employees and fuel delivery trucks physically present within Washington on a daily basis making sales and deliveries of motor fuel and special fuel to Washington

[5] Pursuant to RAP 4.2, Space Age petitioned for direct review to this Court, docket number 86972-3. On October 30, 2012, the Court denied direct review and transferred the case to the Court of Appeals.

customers. Space Age had licenses allowing it to act as a fuel distributor in Washington, and its in-state activities helped Space Age carve out a $13.7 million per year slice of the Washington wholesale market. The Court of Appeals applied well-established law to these undisputed facts and correctly concluded that Space Age had sufficient in-state business activity to meet the dormant Commerce Clause "nexus" requirement.

The Commerce Clause of the United States Constitution gives Congress the power to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The United States Supreme Court has consistently interpreted this express grant of authority as also imposing certain limits on the power of the states to tax interstate commerce even in the absence of congressional action. Under current dormant Commerce Clause jurisprudence, a state tax on interstate commerce is valid if it: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977); *Quill Corp. v. North Dakota*, 504 U.S. 298, 311, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).

Space Age challenges the first prong of the four-part "*Complete Auto*" test as applied to its wholesale sales of motor fuel and special fuel to Washington customers.[6] That prong ("substantial nexus") has two

[6] Washington courts have previously addressed the second and third prongs of the *Complete Auto* test with respect to the Washington B&O tax on retail or wholesale

important components. *See generally* John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 Wm. & Mary L. Rev. 319, 328-29 (2003-04) (explaining the two meanings of the term "nexus" for purposes of state taxation). First, it limits the taxing power of the states to transactions, activities, or property connected with the state. *Id.* This component (often referred to as "transactional nexus") is not at issue in this case because all of the wholesale sales made by Space Age that are at issue in this case occurred within Washington. There is simply no dispute that Washington had sufficient "transactional nexus" to tax wholesale sales occurring within its borders.

The second important component of "substantial nexus" is the connection between the state and the taxpayer that owes the tax, or who is being asked to collect and remit the tax. *Id.* This component (often referred to as "entity nexus") is contested by Space Age and was the focus of the Court of Appeals' decision.

1. The Court of Appeals correctly concluded that Space Age had substantial nexus with Washington.

The concept of nexus with the taxpayer under the dormant Commerce Clause is best understood as "a means for limiting state burdens on interstate commerce." *Quill*, 504 U.S. at 313. States are not permitted to unduly burden interstate commerce by taxing a person that lacks sufficient nexus with the taxing state. However, "[i]t is not the

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sales, upholding the tax as non-discriminatory and inherently apportioned. *E.g., W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 596-97, 973 P.2d 1011, *cert. denied*, 528 U.S. 950 (1999).

purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing the business." *General Motors Corp. v. City of Seattle*, 107 Wn. App. 42, 50, 25 P.3d 1022 (2001) (internal quotes and citations omitted), *review denied*, 145 Wn.2d 1014 (2001), *cert. denied*, 535 U.S. 1056 (2002). *See also Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 748, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978) ("The Commerce Clause balance tips against the [state] tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity.").

This case involves application of the well-established nexus standard established by *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 105 Wn.2d 318, 715 P.2d 123 (1986), *reversed on other grounds*, 483 U.S. 232, 250 (1987). The *Tyler Pipe* Court held that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Id.* at 323. There can be no serious dispute that Space Age had sufficient nexus with Washington to satisfy the *Tyler Pipe* standard. Space Age established a significant business presence in Washington by obtaining Washington motor fuel and special fuel supplier licenses and making regular visits into Washington to sell and deliver fuel to its Washington customers. Space Age regularly used Washington roads and benefited financially from the motor fuel and special fuel market that Washington established. These

activities are substantial and enabled Space Age to compete for business with other fuel suppliers. And because Space Age delivered fuel within Washington, its customers did not have to engage in (or arrange for) the transportation or delivery of these hazardous substances themselves. As the Court of Appeals correctly concluded, these significant in-state commercial activities helped Space Age establish and maintain its market. *See Space Age Fuels*, 315 P.3d at 607-08.

Space Age, however, argues that the Court of Appeals "did not . . . offer any basis" to support its conclusion that in-state delivery and sales activities were substantial and significantly associated with its ability to establish and maintain its Washington market. Petition for Review at 12. This is incorrect. The Court of Appeals noted that Space Age admitted in discovery that delivery of fuel was "another profit center" for the business in addition to the sale of the commodity. *Id.* at 606 (citing CP 297). In addition, "Space Age charges more to make deliveries at longer distances, and it also charges more to pump fuel into aboveground tanks when necessary." *Id.* at 608. Finally, the court noted that "Space Age's vehicles drove extensively on Washington roads while delivering over $48 million of fuel to Washington customers." *Id.* at 607. These undisputed facts showed that Space Age's delivery of fuel to its Washington customers was a significant reason why Space Age was able to establish and maintain sales averaging $13.7 million per year in Washington. Conversely, it defies reason to suggest that Space Age could have

established or maintained its share of the Washington market if it had not regularly delivered fuel to customers at the customers' locations.

As the Court of Appeals noted, the Washington B&O tax on Space Age's in-state sales is presumed to be constitutional, and Space Age had the burden "of showing that a substantial nexus does not exist." *Id.* at 607 (citing *Lamtec*, 170 Wn.2d at 843). In light of the substantial activities that Space Age conducted in Washington, the petition presents no significant question of law to support Space Age's claim that the Washington tax violates the dormant Commerce Clause. Thus, its refund claim was correctly denied by the Department, by the trial court, and by the Court of Appeals.

2. Regular delivery of goods is the type of in-state activity that can establish substantial nexus.

Space Age argued to the Court of Appeals that its numerous activities in Washington are the wrong "type" of presence or activities to satisfy *Tyler Pipe*. According to Space Age, substantial nexus can exist only by virtue of in-state activities "designed to generate an original or subsequent sales." Br. of App. at 20-21. The Court of Appeals correctly rejected Space Age's narrow view of state taxing powers under the dormant Commerce Clause. *Space Age Fuels*, 315 P.3d at 608-09. Instead, the court applied the *Tyler Pipe* standard pragmatically, concluding that "generating sales is not the touchstone of all nexus-creating activity" and that substantial nexus exists when, as here, a company's extensive in-state delivery activities "make possible 'the

realization and continuance' of sales to its customers." *Id.* at 609 (quoting *Standard Pressed Steel Co. v. Dep't of Revenue*, 419 U.S. 560, 562, 95 S. Ct. 706, 42 L. Ed. 2d 719 (1975)).

The Court of Appeal's analysis presents no conflict with decisions of this Court such as *Lamtec*, decisions of the United States Supreme Court such as *Standard Pressed Steel*, and numerous decisions of other courts. These authorities all agree that in-state solicitation or acceptance of individual orders for goods is not required for an out-of-state seller to have nexus with the taxing state, and a state's power to tax an out-of-state business is not dependent on whether the nexus creating contacts occur before or after a sale of goods is completed.[7]

In *Lamtec*, this Court upheld the assessment of wholesaling B&O tax on an out-of-state seller that did not engage in any direct selling activity within Washington. Lamtec was a New Jersey company that manufactured vapor barriers and insulation facing, which it sold to Washington customers. Customers placed orders by phone to New Jersey

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[7] *See, e.g., General Motors Corp.*, 107 Wn. App. at 52 (substantial nexus has never turned on direct selling activity occurring within the taxing jurisdiction); *Dell Catalog Sales L.P. v. N.M. Taxation & Revenue Dep't*, 145 N.M. 419, 199 P.3d 863 (N.M. App.), *rev. denied*, 189 P.3d 1215 (N.M. 2008), *cert. denied*, 129 S. Ct. 1616 (2009) (post-sale warranty services performed on behalf of out-of-state vendor were sufficient to establish substantial nexus between the vendor and New Mexico); *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410, 665 N.E.2d 795, *cert. denied*, 519 U.S. 866 (1996) (regular deliveries by an out-of-state furniture retailer to customers within Illinois were sufficient to establish substantial nexus); *John Swenson Granite, Inc. v. State Tax Assessor*, 685 A.2d 425, 429 (Me. 1996) (180 deliveries per year in the taxpayer's own trucks helped create nexus); *Falcone v. Taxation Div. Director*, 12 N.J. Tax 75 (N.J. Tax 1991) (delivery of goods by an out-of-state seller in its own trucks was sufficient to establish nexus); *Rowe-Genereux, Inc. v. Vermont Dep't of Taxes*, 138 Vt. 130, 139, 411 A.2d 1345 (1980) (delivery of goods by an out-of-state business in its company owned trucks helped create nexus).

and the products were shipped to Washington by common carrier. In upholding the state's power to tax Lamtec's Washington sales, this Court explained that an established sales force in the state, while *sufficient* to create nexus under the dormant Commerce Clause, is not *required* to create nexus. *Lamtec*, 170 Wn.2d at 845. Likewise, the regular in-state solicitation of sales by an out-of-state seller, while *sufficient* to establish nexus, is not *required*. *Id.* at 846. Furthermore, an out-of-state seller's periodic in-state visits do not have to involve sales activity. Instead, the key inquiry is whether the in-state activities were substantial (more than de minimis) and "associated with the company's ability to establish and maintain the company's market within the state." *Id.* at 851.

Similarly, in *Standard Pressed Steel*, the United States Supreme Court held that Washington could tax an out-of-state manufacturer on sales it made to a Washington customer where the manufacturer employed one person who resided and worked in Washington. 419 U.S. at 561, 564. The single employee did not solicit sales nor receive orders. *Id.* at 561. Rather, his "primary duty was to consult with [the purchaser] regarding its anticipated needs and requirements for aerospace fasteners and to follow up any difficulties in the use of [the out-of-state manufacturer's] product after delivery." *Id.* Additional employees of the manufacturer visited Washington on occasion to assist in these tasks. *Id.* The U.S. Supreme Court explained that the tax was constitutional despite the fact that these employees did not solicit sales and did not receive orders for the sale of goods. *Id.*

In contrast to these cases that reject the "sales activity" distinction offered by Space Age, no relevant authority supports Space Age's claim that regular in-state delivery of goods by an out-of-state seller is insufficient to establish nexus for purposes of taxation. Instead, Space Age relies on two cases where a seller shipped goods from outside the state using a common carrier. Petition for Review at 12-14 (discussing *Quill* and *Sage V Foods, LLC v. Dep't of Revenue*, 2012 WL 4794242 (Wash. Bd. Tax Appeals 2012)). Neither case involved *delivery* of the goods by the seller using the seller's own employees and trucks. The Court of Appeals correctly recognized that these two cases were "unavailing to Space Age because it delivered fuel in its own vehicles, not by common carrier." *Space Age Fuels*, 315 P.3d at 610.

In short, the Court of Appeals applied well-established law in concluding that the dormant Commerce Clause did not bar application of the Washington B&O tax to sales Space Age made in Washington using its own employees and its own equipment. Accordingly, this case does not involve a significant question of constitutional law, and discretionary review under RAP 13.4(b)(3) is not warranted.

B. The Court of Appeals Decision Does Not Conflict With This Court's Decision In *Lamtec*.

Space Age also argues that this Court should accept review of this case to correct a supposed conflict with the Court's decision in *Lamtec*. Petition for Review at 17. But there is no conflict. As discussed above, the activities that established nexus in *Lamtec* were much less frequent

than the activities performed by Space Age. While Lamtec sent employees into Washington several times per year to meet with customers, Space Age employees and vehicles were present in Washington on a daily basis making sales and delivering fuel to Washington customers. Moreover, the Lamtec employees were not directly involved in any selling activities, while the Space Age employees were physically making sales of motor fuel and special fuel within the state by transferring possession of the fuel from the Space Age truck to the customer's tank. *See* RCW 82.04.040(1) (defining "sale" to include "any transfer of the ownership of, title to, *or possession of* property for a valuable consideration") (emphasis added). Thus, the in-state activities performed by Space Age were both quantitatively and qualitatively more significant than the in-state activities performed by Lamtec.

The purported conflict with *Lamtec* is non-existent. The *Lamtec* decision does not rely on a distinction between sales activities and other types of in-state commercial activities, which is the foundation for Space Age's misreading of *Lamtec*. Nor does any other case suggest that such a distinction affects whether there is a constitutionally sufficient nexus between the taxpayer and the taxing state. Consequently, discretionary review under RAP 13.4(b)(1) is not warranted.

C. This Appeal Does Not Present An Issue Of Substantial Public Importance That Requires Further Review By This Court.

Given the undisputed evidence establishing that Space Age was present within Washington on a daily basis competing against other

licensed motor fuel and special fuel distributors for a share of the Washington wholesale market, this case presents no issue of substantial public importance requiring review by this Court. Space Age argues that review should be granted so that this Court can "offer definitive principles by which businesses and the [Department] can be guided to assess if activities that touch upon Washington may constitutionally be taxed." Petition for Review at 17. Definitive principles already exist. Cases such as *Standard Pressed Steel*, *Complete Auto Transit*, *Tyler Pipe*, *Quill*, and *Lamtec* discuss the Commerce Clause nexus requirement both generally and as applied to the specific facts of those cases.

Outside of the physical presence requirement for sales and use taxes upheld by the United States Supreme Court in *Quill*, the dormant Commerce Clause offers no bright line rules that will apply mechanically in every case. This is due in large part to the fact that dormant Commerce Clause constraints are based on the Supreme Court's interpretation of the affirmative power of Congress to regulate interstate commerce and how that affirmative power also imposes certain limits on the several states even in the absence of congressional action. Since deciding *Complete Auto Transit* in 1977, the Supreme Court has consistently recognized that the concept of "nexus" under the dormant Commerce Clause is flexible and is determined by the practical operation of the subject tax to the specific facts of each case. *E.g.*, *D.H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24, 33, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988) (mail-order seller's activities held sufficient to establish "'nexus' aplenty"); *see generally*

John A. Swain, *Cybertaxation and the Commerce Clause: Entity Isolation or Affiliate Nexus?*, 75 S. Cal. L. Rev. 419, 427 (2001-02) ("*Complete Auto* and subsequent Supreme Court decisions have consistently reiterated that modern Commerce Clause jurisprudence is grounded in 'pragmatism' and 'economic realities,' and is disdainful of 'formalism,' 'magic words,' and 'labels.'").

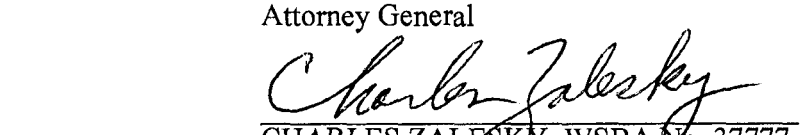
While the issue of nexus under the dormant Commerce Clause can be a close one at the margins, this case is not close and presents no issue of substantial public importance. Space Age had "nexus aplenty" by virtue of its regular in-state delivery and sale of fuel, and it is not constitutionally exempt from Washington's B&O tax on these in-state wholesale sales.

VI. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals does not merit review under RAP 13.4(b), and Space Age's petition should be denied.

RESPECTFULLY SUBMITTED this 28th day of March, 2014.

ROBERT W. FERGUSON
Attorney General



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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of March, 2014, at Tumwater, WA.

Carrie A. Parker

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APPENDIX A

315 P.3d 604
Court of Appeals of Washington,
Division 2.

SPACE AGE FUELS, INC., Appellant,
v.
STATE of Washington, Respondent.

No. 44195–1–II. | Dec. 31, 2013.

Synopsis

Background: Oregon fuel supplier sought refund of Washington State Department of Revenue's assessment of business and occupation tax. The Thurston Superior Court, Thomas McPhee, J., granted Department summary judgment. Supplier appealed.

[Holding:] The Court of Appeals, Worswick, C.J., held that assessment of business and occupation taxes on Oregon fuel supplier did not violate dormant commerce clause.

Affirmed.

West Headnotes (11)

[1] **Constitutional Law**
Taxation

Under the due process clause, an out-of-state taxpayer must have sufficient minimum contacts with the taxing state such that taxation does not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amend. 14.

[2] **Commerce**
Powers Remaining in States, and Limitations Thereon

The dormant commerce clause prohibits a state from discriminating against or unduly burdening interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[3] **Commerce**
Taxation in General

A state may tax interstate commerce if the tax (1) applies to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[4] **Appeal and Error**
Cases Triable in Appellate Court

Whether an out-of-state company has a substantial nexus with Washington is a question of law reviewed de novo.

[5] **Commerce**
Taxation in General

Taxation
Presumptions

Taxes are presumed valid, and the out-of-state taxpayer bears the burden of showing that a substantial nexus does not exist to support taxation of interstate commerce.

[6] **Commerce**
Taxation in General

A substantial nexus exists to support taxation of interstate commerce when a company's activities in Washington are both substantial and significantly associated with its ability to establish and maintain a market in Washington for its sales. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[7] **Commerce**
Taxation in General

A company's physical presence in Washington can establish a substantial nexus for purposes of taxation.

[8] **Commerce**

Taxation in General

Periodic visits can create a physical presence in Washington for purposes of taxation.

[9] **Commerce**

Gross receipts taxes

Licenses

States

Assessment of business and occupation taxes on Oregon fuel supplier did not violate dormant commerce clause since supplier had a substantial nexus with Washington; supplier's regular deliveries to Washington established its physical presence in Washington, and the deliveries were substantial because supplier's recorded sales to Washington customers occurred, on average, more than once per day and supplier's vehicles drove extensively on Washington roads while delivering over $48 million of fuel to Washington customers. U.S.C.A. Const. Art. 1, § 8, cl. 3; West's RCWA 82.04.220, 82.08.050.

[10] **Administrative Law and Procedure**

Deference to agency in general

An interpretive rule is not binding on the courts at all.

[11] **Administrative Law and Procedure**

Deference to agency in general

Administrative Law and Procedure

Permissible or reasonable construction

Court gives no deference to an agency's interpretative rule unless it reasonably interprets an ambiguous statute that the legislature has charged the agency with administering and enforcing.

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Opinion

WORSWICK, C.J.

¶ 1 Space Age Fuels, Inc., an Oregon corporation, appeals summary judgment dismissing its claim for a refund of business and occupation tax payments. Space Age argues that the dormant commerce clause [1] prohibits Washington from taxing its activities because they lack a substantial nexus with Washington. We disagree and affirm.

1 The "dormant" commerce clause is implied by article I, section 8, clause 3 of the United States Constitution. *Quill Corp. v. North Dakota*, 504 U.S. 298, 309, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992).

FACTS

¶ 2 Space Age Fuels, Inc. is a retail and wholesale seller of fuel. Space Age is incorporated in Oregon and maintains its principal place of business in Clackamas, Oregon. Although all of its retail fuel stations are in *606 Oregon, approximately 40 of its wholesale customers are in Washington.

¶ 3 Upon a wholesale customer's request, Space Age quotes fuel prices via telephone, fax, or email. Once it receives an order, Space Age delivers fuel to wholesale customers using vehicles it owns and operates. [2]

2 Rarely, Space Age delivers fuel by common carrier.

¶ 4 Because delivery is "another profit center," Space Age marks up its fuel prices to account for delivery costs. Clerk's Papers (CP) at 297. Thus, Space Age charges more for deliveries made at longer distances. Before transferring fuel from its delivery vehicle into a customer's storage tank, a Space Age employee will "stick the tank," i.e., measure its contents to ensure the tank can hold the fuel. When Space Age uses specialized vehicles to pump fuel into aboveground storage tanks for some customers, it charges more for this extra pumping service.

¶ 5 But Space Age's activities in Washington are limited. Space Age makes "no effort to secure new customers for its fuel in Washington" because it believes its wholesale customers base their purchases solely on price. CP at 54. Thus, no Space Age employees have visited Washington to solicit sales or assess a customer's needs. Further, Space Age does not own or lease any real property in Washington, and it has no Washington-based employees or assets. Instead, Washington customers contact Space Age.

¶ 6 The Washington State Department of Revenue audited Space Age's books and records for the period between January 1, 2004, and June 30, 2007. During that time, Space Age grossed over $48 million from 1,675 recorded sales to wholesale customers in Washington.[3] Between July 1, 2005, and the end of the audit period, Space Age's vehicles drove 141,491 miles on Washington roadways.

3 The number of actual deliveries "would likely be much higher" than the number of recorded sales because Space Age's books used a single sales entry to record all deliveries to a single customer in a given month. CP at 81.

¶ 7 The Department determined that Space Age owed $235,834 in unpaid business and occupation (B & O) taxes for its wholesaling activities in Washington during the audit period.[4] The Department also assessed interest and penalties.[5]

4 The B & O tax is imposed on "the act or privilege of engaging in business activities." Former RCW 82.04.220 (1961). After the audit period, the legislature amended RCW 82.04.220 to, inter alia, incorporate the constitutional requirement of a "substantial nexus with this state." LAWS OF 2010, 1st Spec. Sess., ch. 23, § 102; *see also* LAWS OF 2011, 1st Spec. Sess., ch. 20, § 101.

5 The Department further assessed nominal amounts of unpaid retail sales taxes, retail B & O taxes, and hazardous substance taxes. Space Age has not sought refunds of these amounts.

¶ 8 Space Age paid the tax assessment and then filed a claim for a refund in superior court, arguing that (1) there was no substantial nexus between Space Age and the State of Washington; and (2) without such a nexus, imposition of the B & O tax violated the dormant commerce clause. On cross motions for summary judgment, the trial court granted the Department's motion, denied Space Age's motion, and dismissed its refund claim.

¶ 9 Space Age sought direct review in our Supreme Court. But our Supreme Court transferred the case to us. Order, *Space Age Fuels, Inc. v. State*, No. 86972–3 (Wash. Oct. 30, 2012).

ANALYSIS

¶ 10 Space Age argues that the trial court erroneously granted the Department's motion for summary judgment because the dormant commerce clause prohibits the Department from taxing Space Age. We disagree.

¶ 11 We review an order granting summary judgment de novo and engage in the same inquiry as the trial court. *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wash.2d 273, 280–81, 242 P.3d 810 (2010). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We consider the evidence and draw all reasonable inferences in the light most favorable to the nonmoving ***607** party. *Schaaf v. Highfield*, 127 Wash.2d 17, 21, 896 P.2d 665 (1995).

[1] ¶ 12 Two clauses of the United States Constitution limit a state's power to tax interstate commerce: (1) the Fourteenth Amendment due process clause and (2) the "dormant" commerce clause implied by article I, section 8, clause 3. *Quill Corp. v. North Dakota*, 504 U.S. 298, 301, 305, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). Under the due process clause, an out-of-state taxpayer must have sufficient minimum contacts with the taxing state such that taxation "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (internal quotation marks omitted). Space Age does not challenge its tax liability on due process grounds.

[2] [3] ¶ 13 Next, the dormant commerce clause prohibits a state from discriminating against or unduly burdening interstate commerce. *Quill*, 504 U.S. at 312, 112 S.Ct. 1904. Yet a state may tax interstate commerce if the tax (1) applies to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

Space Age contests only the first element: it denies having a substantial nexus with Washington. [6]

6 Citing *Quill,* 504 U.S. at 313 & n. 7, 112 S.Ct. 1904, Space Age asserts that the dormant commerce clause's requirement of a substantial nexus is more stringent than the due process clause's minimum contacts requirement. Space Age then calls our attention to *Miller Brothers Co. v. Maryland,* 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 (1954), a case in which taxation of an out-of-state company violated due process. In *Miller Brothers,* a Delaware company's occasional delivery of products to Maryland customers via its own vehicles did not establish minimum contacts with Maryland. 347 U.S. at 345, 74 S.Ct. 535. But given more recent developments in the law of minimum contacts, "the continued authority of *Miller Brothers* is in considerable doubt." *Brown's Furniture, Inc. v. Wagner,* 171 Ill.2d 410, 426, 216 Ill.Dec. 537, 665 N.E.2d 795, *cert. denied,* 519 U.S. 866, 117 S.Ct. 175, 136 L.Ed.2d 116 (1996); *see Quill,* 504 U.S. at 307–08, 112 S.Ct. 1904 (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)).

[4] [5] ¶ 14 Whether an out-of-state company has a substantial nexus with Washington is a question of law reviewed de novo. *See Lamtec Corp. v. Dep't of Revenue,* 170 Wash.2d 838, 842, 246 P.3d 788, *cert. denied,* —— U.S. ——, 132 S.Ct. 95, 181 L.Ed.2d 24 (2011). Taxes are presumed valid, and the company bears the burden of showing that a substantial nexus does not exist. *Lamtec,* 170 Wash.2d at 843, 246 P.3d 788.

[6] [7] [8] ¶ 15 A substantial nexus exists when a company's activities in Washington are both substantial and significantly associated with its ability to establish and maintain a market in Washington for its sales. *Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue,* 483 U.S. 232, 250, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987); *Lamtec,* 170 Wash.2d at 851, 246 P.3d 788. A company's physical presence in Washington can establish a substantial nexus. *Lamtec,* 170 Wash.2d at 845, 246 P.3d 788; *see Nat'l Geographic Soc'y v. Cal. Bd. of Equalization,* 430 U.S. 551, 562, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977). Further, periodic visits can create a physical presence in Washington. *Lamtec,* 170 Wash.2d at 846, 246 P.3d 788. Thus, a company may have a physical presence in Washington even though it lacks a "brick and mortar address within the state." *Lamtec,* 170 Wash.2d at 851, 246 P.3d 788; *see Standard Pressed Steel Co. v. Wash. Dep't of Revenue,* 419 U.S. 560, 562, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975).

[9] ¶ 16 Space Age's regular deliveries establish its physical presence in Washington. *See Lamtec,* 170 Wash.2d at 845–46, 246 P.3d 788. These deliveries are substantial because Space Age's recorded sales to Washington customers occurred, on average, more than once per day during the audit period. In addition, Space Age's vehicles drove extensively on Washington roads while delivering over $48 million of fuel to Washington customers.

¶ 17 Further, Space Age conducts substantial activities in Washington because, as a wholesale fuel distributor, Space Age sells ***608** *both* the commodity of fuel *and* the service of delivery to customers in Washington. The commodity sales occur in Washington when Space Age employees stick the tank and transfer fuel into its Washington customers' storage tanks. *See* RCW 82.04.040(1). Space Age charges more to make deliveries at longer distances, and it also charges more to pump fuel into aboveground tanks when necessary.

¶ 18 Both Space Age's physical presence in Washington and its delivery activities are significantly associated with its ability to establish and maintain a market in Washington for its sales. *Tyler Pipe,* 483 U.S. at 250, 107 S.Ct. 2810. Because a substantial nexus exists, the Department's B & O tax assessment did not violate the dormant commerce clause. [7] *Complete Auto,* 430 U.S. at 279, 97 S.Ct. 1076.

7 We reject Space Age's assertion that this analysis "fails to acknowledge the difference between Due Process Clause analysis and Commerce Clause analysis." Reply Br. of Appellant at 17. We do not base our decision on whether Space Age has purposefully directed its activities at Washington residents so as to establish minimum contacts with this state. *See Quill,* 504 U.S. at 308, 112 S.Ct. 1904.

¶ 19 Arguing to the contrary, Space Age contends that delivery alone cannot establish a substantial nexus. In support of this contention, Space Age relies on (1) the example given in an interpretive rule published by the Department, (2) Space Age's own assertion that nexus-creating activities are activities designed to generate sales, and (3) the reasoning supporting the bright-line test applied in *Quill,* 504 U.S. 298, 112 S.Ct. 1904.

A. *The Department's Interpretive Rule*

¶ 20 Arguing that delivery alone cannot establish a substantial nexus, Space Age asserts that the Department took the same

view when promulgating an interpretive rule, WAC 458–20–193(11).[8] But this assertion lacks relevance to the issue before us for three reasons.

8 WAC 458–20–193(11)(a) provides:

> Company A is located in California. It sells machine parts at retail and wholesale. Company B is located in Washington and it purchases machine parts for its own use from Company A. Company A uses its own vehicles to deliver the machine parts to its customers in Washington for receipt in this state. The sale is subject to the retail sales and B & O tax if the seller has nexus, or use tax if nexus is not present.

[10] **[11]** ¶ 21 First, an interpretive rule such as WAC 458–20–193(11) is "not binding on the courts at all."[9] *Ass'n of Wash. Bus. v. Dep't of Revenue,* 155 Wash.2d 430, 447, 120 P.3d 46 (2005). Second, we give no deference to an agency's interpretative rule unless it reasonably interprets an ambiguous statute that the legislature has charged the agency with administering and enforcing. *Edelman v. State ex rel. Pub. Disclosure Comm'n,* 152 Wash.2d 584, 590, 99 P.3d 386 (2004). Even if WAC 458–20–193(11) interpreted the dormant commerce clause—and it does not do so—we would not defer to its interpretation because the Department does not administer or enforce the commerce clause of the United States Constitution.

9 WAC 458–20–193(11) is an interpretive rule because (1) its violation does not subject a person to a penalty and (2) it merely "sets forth the agency's interpretation of statutory provisions it administers." RCW 34.05.328(5)(c)(ii).

¶ 22 Third, WAC 458–20–193(11) illustrates only *what* taxes apply and *who* must pay them in interstate transactions. In the example of WAC 458–20–193(11)(a), an out-of-state seller uses its own vehicles to deliver products to an in-state buyer. The *seller* pays Washington *sales and B & O taxes* "if the seller has nexus"; otherwise, the in-state *buyer* pays Washington *use taxes.*[10] WAC 458–20–193(11)(a). Thus WAC 458–20–193(11)(a) shows merely that a substantial nexus is necessary to tax an out-of-state seller; it does not attempt to show whether a substantial nexus exists given a particular set of facts. We do not consider this provision further.

10 Sales and B & O taxes are paid to the Department by the seller. *See* RCW 82.04.220; RCW 82.08.050. In contrast, use taxes are paid by the buyer. *See* RCW 82.12.020.

B. *Activity Designed To Generate Sales*

¶ 23 Space Age next contends that a substantial nexus can exist *only* by virtue of an ***609** activity that is "designed to generate sales." Br. of Appellant at 22. Space Age then attempts to distinguish its activities from the nexus-creating activities in *Tyler Pipe, Standard Pressed Steel,* and *Lamtec.* We disagree because generating sales is not the touchstone of all nexus-creating activity. As stated above, a substantial nexus exists when a company's activities in Washington "are significantly associated with [its] ability to establish and maintain a market in this state for the sales." *Tyler Pipe,* 483 U.S. at 250, 107 S.Ct. 2810 (internal quotation marks omitted).

¶ 24 In *Lamtec,* an out-of-state company sent agents to Washington about two or three times per year to meet with major customers. 170 Wash.2d at 841, 246 P.3d 788. The agents shared information about the company's insulation and vapor barrier products, but they did not solicit sales directly. 170 Wash.2d at 840–41, 246 P.3d 788. Nonetheless, our Supreme Court held that the agents' visits created a substantial nexus because the visits were significantly associated with the company's ability to establish and maintain a market for its products in Washington. 170 Wash.2d at 851, 246 P.3d 788. Whether the agents' visits generated sales was not determinative.

¶ 25 Likewise in *Standard Pressed Steel,* a Pennsylvania company sold nuts and bolts to Washington customers, principally Boeing. 419 U.S. at 561, 95 S.Ct. 706. The company had a single Washington employee, and the employee operated out of his home. 419 U.S. at 561, 95 S.Ct. 706. The employee, along with a group of engineers who periodically traveled to Washington, consulted with Boeing about its needs and addressed any difficulties with the company's nuts and bolts. 419 U.S. at 561, 95 S.Ct. 706. However, the employee did not take Boeing's orders, accept its payments, or deliver nuts and bolts. 419 U.S. at 561, 95 S.Ct. 706. Yet the Court held that a B & O tax assessment did not violate the dormant commerce clause because the company's Washington employee "made possible the realization and continuance of valuable contractual relations" between the company and its Washington customers. 419 U.S. at 562, 95 S.Ct. 706.

¶ 26 *Lamtec* and *Standard Pressed Steel* take a broader view of establishing and maintaining a market than Space Age's narrow emphasis on generating sales would allow. Attempting to distinguish these cases as well as *Tyler Pipe,* Space Age appears to argue that (1) business relationships are essential to generating sales and (2) Space Age has no business relationship with any of its 40 Washington customers, each of whom buys fuel on the exclusive basis of its price. [11] But Space Age fails to account for *Lamtec*'s statement that a company's physical presence can establish a substantial nexus. 170 Wash.2d at 845, 246 P.3d 788. Moreover, Space Age ignores the extent to which its deliveries make possible "the realization and continuance" of sales to its customers. *Standard Pressed Steel,* 419 U.S. at 562, 95 S.Ct. 706. Space Age's argument is unpersuasive.

11 Unlike the companies selling specialized products in *Tyler Pipe, Standard Pressed Steel,* and *Lamtec,* Space Age sells a commodity: a commercial good (namely fuel) for which the quality does not vary from one source to another. Thus it is plausible that business relationships, advertising, and branding do not generate Space Age's sales. But Space Age's president stated that delivery is "another profit center," i.e., a service for which Space Age charges its customers. CP at 297. That statement belies Space Age's factual assertion that its customers make purchases based *solely* on price. In other words, Space Age's wholesale customers buy its fuel partly because Space Age delivers it to them.

C. *The Quill Bright–Line Test*

¶ 27 Lastly, Space Age argues that its deliveries did not create a nexus under the reasoning of *Quill,* 504 U.S. 298, 112 S.Ct. 1904. We disagree.

¶ 28 In *Quill,* the United States Supreme Court reaffirmed its prior holding that "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." 504 U.S. at 311, 317, 112 S.Ct. 1904 (citing *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.,* 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), *overruled on other grounds by Quill,* 504 U.S. at 308, 112 S.Ct. 1904). Thus *Quill* preserved the "safe harbor" protecting the mail-order industry ***610** from state sales taxes since *Bellas Hess.* 504 U.S. at 315–16, 112 S.Ct. 1904.

¶ 29 Space Age asserts that it would fall within this safe harbor if it had made its deliveries by common carrier. It then argues, "Given the Commerce Clause's structural concerns about the effects of state regulation on the national economy, there is no reason for the constitutionality of the tax to turn on the method by which the fuel is delivered." Br. of Appellant at 25. But this argument contradicts *Quill. Quill* fully considered the commerce clause's structural concerns and maintained a bright-line rule. [12] 504 U.S. at 312, 315, 112 S.Ct. 1904. That rule is unavailing to Space Age because it delivered fuel in its own vehicles, not by common carrier. [13]

12 *Quill* recognized, "Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges.... This artificiality, however, is more than offset by the benefits of a clear rule." 504 U.S. at 315, 112 S.Ct. 1904.

13 Because Space Age does not come within the safe harbor of *Quill* and *Bellas Hess,* we do not address the Department's assertion that the safe harbor protects a company *only* from sales and use taxes, and not from *all* taxes including the B & O tax. *See Lamtec,* 170 Wash.2d at 848–49, 246 P.3d 788.

¶ 30 Similarly unavailing is the Board of Tax Appeals's recent decision finding no substantial nexus in *Sage V Foods, LLC v. Dep't of Revenue,* No. 11–704, 2012 WL 4794242 (Wash. Bd. of Tax Appeals Aug. 31, 2012). In *Sage,* an out-of-state company engaged a common carrier to deliver its food product to Washington customers, using rail cars leased by the out-of-state company. *Sage,* 2012 WL 4794242 at *7–8. But unlike the company in *Sage,* Space Age did not deliver its fuel by common carrier.

¶ 31 Each of Space Age's arguments fails. Because Space Age has a substantial nexus with Washington, the Department's B & O tax assessment did not violate the dormant commerce clause.

¶ 32 Affirmed.

We concur: HUNT and JOHANSON, JJ.

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