NO. 92080-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent,

v.

AVNET, INC.,

Petitioner.

DEPARTMENT OF REVENUE'S ANSWER TO BRIEFS OF AMICUS CURIAE COUNCIL ON STATE TAXATION AND ASSOCIATION OF WASHINGTON BUSINESS

ROBERT W. FERGUSON
Attorney General

Rosann Fitzpatrick, WSBA No. 37092
Joshua Weissman, WSBA No. 42648
Assistant Attorneys General
Revenue Division, OID No. 91027
P.O. Box 40123
Olympia, WA 98504
(360) 753-5528

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Regulations

Treatises

Other Authorities

I. INTRODUCTION

The amicus briefs filed by the Council on State Taxation (COST) and the Association of Washington Business (AWB) in support of Avnet's petition for review make two faulty assumptions: (1) the Court of Appeals "ignored" the Department's rule on interstate sales, WAC 458-20-193 (Rule 193), and (2) *Norton Co. v. Dep't of Revenue*, 340 U.S. 534, 71 S. Ct. 377, 95 L. Ed. 517 (1951), controls the determination of nexus.

First, amici contend the decision below gives the Department license to "pick and choose" which rules to apply. The specter raised by amici is simply not present. Neither the Department nor the Court of Appeals disavowed or ignored the Department's rules. Under Rule 193, the contested sales are subject to Washington's business and occupation (B&O) tax because Avnet's instate activities establish nexus with Washington and the goods it sold were delivered here. The Court of Appeals correctly rejected Avnet's broad reading of Rule 193, and correctly interpreted and applied the rule consistent with Washington's B&O tax statutes and settled commerce clause nexus principles.

Taxpayers' disagreement with the Court of Appeals' interpretation of Rule 193 does not warrant review by this Court. Moreover, there is no important policy reason for this Court to grant review to address amici's claim that the Department is bound by its own rules or prior interpretations

even when they contravene the taxing statutes. This Court repeatedly has rejected the argument that the Department's rules can expand or contract tax liability and need not take review to do so again.

Second, this case does not present a genuine issue of constitutional law. Rather, the Court followed well-established law in holding that Avnet can not carve out categories of its inbound sales from the measure of the State's wholesaling B&O tax. Consistent with the Supreme Court's decisions in *Tyler Pipe Industries, Inc. v. Dep't of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), *Standard Pressed Steel Co. v. Dep't of Revenue*, 419 U.S. 560, 95 S. Ct. 706, 42 L. Ed. 2d 719 (1975), and *General Motors Corp. v. State*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964), the Court of Appeals correctly rejected Avnet's attempt to revive *Norton's* restrictive view of "transactional nexus."

Both COST and AWB repeat the same arguments set out by Avnet in its petition for review. For the reasons discussed below and in the Department's Answer to Avnet's petition, this case does not merit review.

II. ARGUMENT

A. This Case Does Not Involve The "Disavowal" Of An Agency Rule.

COST and AWB do not explain what they mean when they argue the Department ignored its own rules; nor do they identify any rule

language that was ignored or disavowed. Instead, amici simply disagree with the Court's interpretation of Rule 193.[1] The Court of Appeals correctly interpreted Rule 193 in holding that "the central facts establishing the location of sale" is "where the buyer took delivery and possession." *Avnet, Inc. v. Dep't of Revenue*, 187 Wn. App. 427, 438, 348 P.3d 1273 (2015). Further, the Court correctly found nothing in the language of Rule 193 allowing a taxpayer to "dissociate" sales based on the lack of a direct connection to a specific instate activity. *Id.* at 441.

1. Under Rule 193, an interstate sale of goods is deemed to occur at the shipping destination, regardless of where the order was placed.

An interstate sale is deemed to occur in Washington State for tax purposes "when the goods sold are delivered to the buyer in this state, irrespective of whether title to the goods passes to the buyer at a point within or without this state." WAC 458-20-103. Rule 193 defines "delivery" as "the act of *transferring possession* of tangible personal property," including the transfer of goods from a common carrier to a "consignee." WAC 458-20-193(2)(c) (emphasis added). "Received" means "the purchaser or its agent first either taking possession of the goods or having dominion and control over them." WAC 458-20-

[1] All references to Rule 193 in this brief address the version of the rule in effect during the tax period at issue, former WAC 458-20-193 (1991) (copy provided as Appendix A). The current version of Rule 193 went into effect August 7, 2015. Wash. St. Reg. 15-15-025, § 458-20-1093, filed 7/7/15, effective 8/7/15.

193(2)(d). "Agent" is a person "authorized to receive goods" with the power to accept or reject them. WAC 458-20-193(2)(e).

If the taxpayer's records "indicate the goods are to be shipped to a buyer in Washington" the seller has the burden to prove the goods actually were delivered outside the state in order to establish the transaction is not a taxable sale. WAC 458-20-193(7)(b). Delivery to or between common carriers used to transport goods "is not receipt by the purchaser" within the meaning of the rule. WAC 458-20-193(4), (7)(b). Thus, when goods are shipped by common carrier, they are not "received by the purchaser or its agent" until the final "delivery" at the shipping destination, when possession transfers from the "for hire carrier to consignee."

The Court of Appeals correctly interpreted and applied these provisions in holding that Avnet's drop-shipment sales occurred in Washington for tax purposes:

> Avnet did not deliver the products to its own buyer outside Washington. Instead, it delivered the products to its buyer's customer in this state. Thus, the only delivery to any buyer that occurred was within the state of Washington. Under both the definitions of "sale" in RCW 82.04.040's and WAC Rule 103's criteria for determining when a sale takes place in Washington, the drop-shipped sales took place in Washington.

Avnet, 187 Wn. App. at 436.

Under AWB's proposed interpretation of Rule 193, a drop-

shipment sale is deemed to occur in the state where the customer places the order. AWB reasons, "Avnet's purchaser obtained constructive possession of the goods when it exercised dominion and control over them by instructing Avnet to ship the goods to a third party." AWB Br. at 9. This is not a reasonable reading of the "receipt" provisions of Rule 193. It would open the door wide to tax avoidance because a customer can place an order from virtually anywhere. Moreover, AWB's interpretation fails to give effect to related rule provisions, including those specifically addressing the shipment of goods by common carrier.

The Court of Appeals correctly read the contested "receipt" provisions in the context of Rule 193 as a whole in holding that "the central facts establishing the location of sale" are "where the buyer took delivery and possession." *Avnet,* 187 Wn. App. at 438. Under Rules 103 and 193, the transfer of physical possession is the touchstone for determining where a sale occurred for tax purposes.[2]

---

[2] Rule 193's place of sale standard follows the "destination rule," so-called because it allows the state of destination to tax an interstate sale of goods. Locating an interstate sale in the destination state serves multiple tax policy objectives. Most importantly, it ensures the State has the requisite nexus with the taxable transaction required by the Commerce Clause. *See Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 54, 156 P.3d 185 (2007) ("[A] long line of precedent sanctions using the gross proceeds from wholesale sales delivered into a jurisdiction as the measure of a B&O tax when the taxpayer is engaged in the business of fostering wholesale sales within the taxing jurisdiction."). The market state is considered to have a fair claim to tax the transaction because it provides the environment that supports consumer demand for the goods sold. Paul J. Hartman, *Federal Limitations on State and Location Taxation* 2d, § 9.4, at 235 (2003). Moreover, allowing the market state to tax the sale places out-of-state sellers on

The Court of Appeals' interpretation of Rule 193 is consistent with the published determination AWB relies on in support of its erroneous argument that the customer "received" the goods in the state where the order was placed. AWB Br. at 9 (citing Det. No. 14-0157, 33 WTD 539 (2014)). In that determination, the Department explained that "receipt" of goods occurred outside the state when physical possession transferred to a third party, hired by the Washington buyer, who later shipped the goods into Washington in a repackaged form. The receipt of physical possession by the buyer's agent was determinative. Those are not the facts here. This case involves delivery of goods in the state without any intervening receipt by the buyer or its agent at a point outside the state. Thus, AWB's reliance on Det. 14-0157 is unavailing.

2. Rule 193 does not allow a taxpayer to avoid B&O tax based on the absence of an instate activity directly tied to specific sales.

Amici add nothing to Avnet's incorrect argument that Rule 193 somehow binds the Department to *Norton's* outdated view of the state's power to tax interstate sales. They fail to identify any language in Rule 193 that purportedly allows a taxpayer to dissociate a subcategory of

---

an equal competitive footing with local sellers. *Id.* The destination rule helps to avert tax avoidance, since the place of physical delivery is not readily susceptible to manipulation, unlike other elements of a sale transaction. Finally, the destination rule furthers national uniformity in state taxation because it is the nearly universal standard taxing jurisdictions follow nationwide.

inbound sales to Washington from the measure of the B&O tax.

AWB merely points to a list of published determinations addressing dissociation arguments raised by taxpayers. AWB Br. at 7. What those determinations illustrate is the practical impossibility of proving "dissociation" under the *Tyler Pipe* nexus standard. None of the published determinations that applied the version of Rule 193 the Department adopted after the Supreme Court's decision in *Tyler Pipe* ruled that a taxpayer had met its burden of proving dissociation. *See* DOR Resp. Br. at 34-35. Moreover, ten years ago, the Department issued a published determination (which amici ignore) that clearly explained that the Department applies the *Tyler Pipe* nexus standard to dissociation claims. *See* Det. No. 04-0208, 24 WTD 217 (2005). CP 377-89.

In any event, there is no merit to the claim the Department (let alone a court) is bound to a published determination that reflects an outdated interpretation of a tax statute or rule. Courts glean legislative intent from the text of the statute, "regardless of incidental or contrary agency decisions." *Tesoro Ref. and Mktg., Inc. v. Dep't of Revenue,* 173 Wn.2d 551, 557-58, 269 P.3d 1013 (2012). Thus, any purported inconsistency in the Department's prior decisions applying Rule 193 does not create an issue of public importance justifying this Court's review.

3. It is well settled that the Department's rules cannot operate to expand or contract tax liability.

Amici claim the Court of Appeals erred by relying on *Association of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 120 P.3d 46 (2005) (*AWB*) in rejecting Avnet's argument that Rule 193 exempts its drop shipment sales from B&O tax even if the commerce clause does not. Amici urge this Court to take review to clarify that *AWB* does not permit the Department to "disavow" its rules. COST Br. at 5; AWB Br. at 6-7.

The central premise advanced by amici is false. The Department applied its rule; it did not "disavow" it. What amici characterize as "disavowing" or "ignoring" agency rules actually is the Department's and the Court's proper adherence to the principles that (1) the Department's rules must be applied consistently with the legislative intent of the taxing statutes, and (2) that absent an applicable statutory exception, the B&O tax is to be applied to the fullest extent constitutionally permissible.

"Rules must be written within the framework and policy of the applicable statutes." *Kitsap-Mason Dairymen's Ass'n v. State Tax Comm'n*, 77 Wn.2d 812, 815, 467 P.2d 312 (1970). It is well settled that the Legislature intended to impose the B&O tax as broadly as possible. *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 357 P.3d 59, 62 (2015) (internal citations omitted). The Department may not create tax

exemptions that are not enacted by statute or required by the constitution.

Thus, Washington courts will not endorse a reading of an interpretive rule that would provide a broader tax exemption than statutorily authorized or constitutionally required. *See, e.g., Tesoro Ref. and Mktg., Inc. v. Dep't of Revenue,* 164 Wn.2d 310, 323-24, 190 P.3d 310 (2008) (rejecting taxpayer's "plausible interpretation" of language in a rule because it reflected an "outdated" view of the applicable tax statute); *Budget Rent-A-Car v. Dep't of Revenue*, 81 Wn.2d 171, 500 P.2d 764 (1972) (rejecting taxpayer's interpretation of the Department's rule on "casual sales" exemption as unduly broad); *Wasem's, Inc. v. State*, 63 Wn.2d 67, 68-69, 385 P.2d 530 (1963) (rejecting taxpayer's "liberal interpretation" of language in Rule 193 relating to interstate sales).

If the Court of Appeals had found that Rule 193 created a stricter nexus standard than the tax statutes or constitution required, the applicable statutes and constitutional law still would control. *See Coast Pac. Trading, Inc. v. Dep't of Revenue*, 105 Wn.2d 912, 916, 719 P.2d 541 (1986). In *Coast Pacific*, this Court squarely rejected the argument that a taxpayer could avoid B&O tax in reliance on language in a former version of Rule 193 that had not been updated to reflect case law expanding the state's power to impose the B&O tax consistently with the Import-Export Clause of the federal Constitution. *Coast Pacific*, 105 Wn.2d at 916. The Court

of Appeals correctly followed *Coast Pacific* in holding that Avnet's attempt to avoid the B&O tax on its drop shipment sales must "succeed or fail on the merits of its constitutional arguments." *Avnet*, 187 Wn. App. at 442 (citing *Coast Pacific,* 105 Wn.2d at 916).

B. The Court of Appeals' Decision Does Not Conflict With Any Decision Of This Court Or The U.S. Supreme Court.

Contrary to assertions by amici, the Department did not argue, nor did the Court of Appeals hold, that *Norton* has been impliedly overruled. As the Supreme Court explained in *Standard Pressed Steel*, the "governing principle" of *Norton* was never in dispute. 419 U.S. at 563. The governing principle on which the justices agreed was that a taxpayer "can avoid state taxation on its direct sales[3] only 'by showing that...(they) are dissociated from the local business and (are) interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption.'" *Norton*, 340 U.S. at 541 (J. Clark, dissenting in part). *Norton's* "general rule" remains valid.

What has changed is the nature and extent of the activities deemed sufficient to support the state's taxing jurisdiction over an interstate sale. Following *General Motors* and *Standard Pressed Steel,* the instate activities that support the *market* for the seller's goods are sufficient to

[3] By "direct sales," the Court was referring to transactions in which a customer orders goods directly from an out-of-state business, which ships the goods directly to the customer, such as mail order sales or those made by telephone.

establish nexus over all its inbound sales. The focus then shifts to determining whether the state treats inbound and outbound sales equally. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 186, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995). That standard is met here because the Department does not assess B&O taxes on drop shipment sales in which a Washington buyer orders goods for delivery to a point outside the state, regardless of whether the seller handled the transaction within the state.

1. In *General Motors*, the Supreme Court reformulated *Norton's* "test" for evaluating claims of dissociation.

In *General Motors*, this Court rejected *Norton* as controlling authority, holding that a taxpayer cannot meet its burden of proving disassociation by showing "the mechanical aspects of the wholesale sales" occurred outside the state. *General Motors Corp. v. State*, 60 Wn.2d 862, 875-76, 376 P.2d 843 (1962), *aff'd* 377 U.S. 436 (1964). The United States Supreme Court agreed with this Court's analysis and affirmed Washington's right to tax the proceeds of all General Motors' wholesale sales of goods shipped into the state, including those ordered directly from out-of-state offices and warehouses, without any direct participation by instate personnel. This Court had reasoned, "the substance of each transaction" occurred in Washington, "where the demand for the manufactured product exists, in very large degree, as a result of General

Motors promotional activities." *Id.*

In support of its argument that *Norton* is controlling authority, AWB misleadingly asserts, "*General Motors* explicitly applied *Norton*" in holding that certain sales "were not dissociated from the company's Washington activities." AWB Br. at 4. AWB fails to recognize that the *General Motors* court transformed "the test" for evaluating dissociation claims from an inquiry into whether there was an instate activity directly tied to specific sales into an examination of whether "the bundle of corporate activity" a taxpayer undertakes within the state is important in establishing and maintaining the market for its sales. 377 U.S. at 447-48. Having concluded that such a nexus existed, the Court rejected the premise that a taxpayer could avoid tax on particular sale transactions based on the lack of an instate activity related to a particular sale. Notably, the *General Motors'* dissenters accused the majority of silently overruling *Norton* and "adopt[ing] a test there rejected." *Id.* at 454.

2. In *Standard Pressed Steel* and *Tyler Pipe*, the Supreme Court did not permit the taxpayers to dissociate any sales transactions.

COST states that in *Standard Pressed Steel*, "there was no attempt by the taxpayer to dissociate its salesperson's activity from the actual sales made to a customer in Washington." COST Br. at 8. To the contrary, the taxpayer argued, and the trial court found, that its sole employee in the

state "had nothing to do with" the disputed sales transactions. *Standard Pressed Steel v. Dep't of Revenue*, 10 Wn. App. 45, 47-48, 516 P.2d 1043 (1973). Still, the Supreme Court rejected the taxpayer's dissociation argument, stating it "verges on the frivolous" in light of the analysis adopted in *General Motors*. *Standard Pressed Steel*, 419 U.S. at 232.

COST contends that *Tyler Pipe* "simply affirmed that a person assisting an out-of-state business in establishing and maintaining the marketplace can create substantial nexus for a taxpayer." COST Br. at 7. *Tyler Pipe* did much more. As the Court of Appeals correctly stated, "in the portion of its opinion affirmed by the United States Supreme Court, our Supreme Court rejected an argument very similar to Avnet's, that the portion of Tyler Pipe's sales attributable to orders placed directly with its main office were exempt from tax." *Avnet*, 187 Wn. App. at 447 (citing *Tyler Pipe Industries, Inc. v. Dep't of Revenue*, 105 Wn.2d 318, 326-27, 715 P.2d 123 (1986); *Tyler Pipe*, 483 U.S. at 250-51).

In *Tyler Pipe*, the taxpayer argued that even if its instate activities created nexus with Washington, *Norton* allowed it to dissociate approximately one-third of its Washington sales in which the buyer ordered goods directly from an out-of-state office, with no involvement by a local representative. *Tyler Pipe*, 105 Wn.2d at 326-27. In affirming this Court's rejection of that argument, the United States Supreme Court cited

to *Standard Pressed Steel,* in which the Court specifically recognized Washington's right to impose its fairly apportioned B&O tax on the entire proceeds of a taxpayer's sales of goods delivered into the State. *Tyler Pipe*, 483 U.S. at 251-52.

Notably, in its 1987 decision in *Tyler Pipe*, the Supreme Court did not even consider *Norton* worthy of mention.

3. Following *Complete Auto Transit*, "direct" and "indirect" taxes are subject to the same nexus standard.

COST asserts *Norton* remains controlling because a stricter nexus standard applies to a "direct tax," including the B&O tax, than to an "indirect tax," such as sales or use taxes. COST Br. at 9. It is true the *Norton* majority relied on a distinction between "direct" and "indirect" taxes when it declined to follow prior Supreme Court cases affirming the right of a state to require an out-of-state seller to collect and remit use taxes on mail-order sales. *Norton*, 340 U.S. at 537. But the Supreme Court subsequently repudiated that distinction. *See Department of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 750, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978) ("With the distinction between direct and indirect taxation of interstate commerce thus discarded, the constitutionality" of Washington's B&O tax "depends upon the practical effect of the exaction."). *Complete Auto Transit* replaced the

direct/indirect burdens analysis with a four-pronged test does not distinguish direct from indirect taxes. *Id.* (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977)).

4. *Norton* no longer has any relevance in determining nexus.

COST argues that if *Norton* no longer controlled, the Supreme Court would have overruled it when it issued *Complete Auto Transit.* COST at 9. The Supreme Court in that case had no need to overrule *Norton* because in *General Motors* and *Standard Pressed Steel*, the Court already had reformulated *Norton's* test for evaluating dissociation claims consistently with the "functional approach" formally embraced by the Court in *Complete Auto Transit. Tyler Pipe*, 105 Wn.2d at 323.

Courts and commentators nationwide have understood that *General Motors* and *Standard Pressed Steel* expanded the states' taxing power over interstate sales, limiting the ability of out-of-state sellers to meet their burden of proving dissociation. *See* Paul J. Hartman, *Federal Limitations on State and Location Taxation 2d*, § 9.4, at 231-41 (2003) ("The thinking that the *General Motors* decision pioneered the way for more and more power of the state of destination to impose taxes on unapportioned gross income, derived from interstate sales, was fortified by the unanimous opinion of the Court in *Standard Pressed Steel Co. v. Dep't*

of Revenue. This view was confirmed in *Tyler Pipe*.

The Court of Appeals' decision is entirely consistent with well-established law. Amici would have this Court take review in order to revive a "dissociation" test that Washington courts were instrumental in eliminating from the dormant commerce clause case law. *Tyler Pipe*, not *Norton*, sets forth the constitutional test for determining nexus. This Court should decline the invitation to revisit the issue.

III. CONCLUSION

The Court of Appeals correctly applied both the Department's rules and the *Tyler Pipe* nexus standard in holding that the wholesaling B&O tax applies to all Avnet's sales of goods shipped into Washington, including the contested drop shipment transactions. Amici's arguments in support of Avnet's petition for review do not withstand scrutiny. Review is not warranted under RAP 13.4(b).

RESPECTFULLY SUBMITTED this 6th day of November, 2015.

ROBERT W. FERGUSON
Attorney General

Rosann Fitzpatrick

ROSANN FITZPATRICK, WSBA #37092
JOSHUA WEISSMAN, WSBA #42648
Assistant Attorneys General
Attorneys for the Respondent

PROOF OF SERVICE

I certify that I served a copy of this document, via electronic mail, per agreement, on the following:

Scott M. Edwards
Daniel A. Kittle
Ryan McBride
Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338
edwardss@lanepowell.com
kittled@lanepowell.com
mcbrider@lanepowell.com
Mitchell@lanepowee.com

I certify that I also served a copy of this document, via U.S. Mail, postage prepaid, through Consolidated Mail Services, and via email, on:

Gregg D. Barton
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
gbarton@perkinscoie.com

Robert A. Battles
Association of Washington Business
1414 Cherry Street SE
Olympia, WA 98507
bobb@awb.org

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

DATED this 6th day of November, 2015, at Tumwater, WA.

Carrie A. Parker

Carrie A. Parker, Legal Assistant

APPENDIX A

Graphic Version | *[No disponible en español]*

WAC 458-20-193
Inbound and outbound interstate sales of tangible personal property.

(1) **Introduction.** This section explains Washington's B&O tax and retail sales tax applications to interstate sales of tangible personal property. It covers the outbound sales of goods originating in this state to persons outside this state and of inbound sales of goods originating outside this state to persons in this state. This section does not include import and export transactions.

(2) **Definitions:** For purposes of this section the following terms mean:

(a) "State of origin" means the state or place where a shipment of tangible personal property (goods) originates.

(b) "State of destination" means the state or place where the purchaser/consignee or its agent receives a shipment of goods.

(c) "Delivery" means the act of transferring possession of tangible personal property. It includes among others the transfer of goods from consignor to freight forwarder or for-hire carrier, from freight forwarder to for-hire carrier, one for-hire carrier to another, or for-hire carrier to consignee.

(d) "Receipt" or "received" means the purchaser or its agent first either taking physical possession of the goods or having dominion and control over them.

(e) "Agent" means a person authorized to receive goods with the power to inspect and accept or reject them.

(f) "Nexus" means the activity carried on by the seller in Washington which is significantly associated with the seller's ability to establish or maintain a market for its products in Washington.

(3) **Outbound sales.** Washington state does not assess its taxes on sales of goods which originate in Washington if receipt of the goods occurs outside Washington.

(a) Where tangible personal property is located in Washington at the time of sale and is received by the purchaser or its agent in this state, or the purchaser or its agent exercises ownership over the goods inconsistent with the seller's continued dominion over the goods, the sale is subject to tax under the retailing or wholesaling classification. The tax applies even though the purchaser or its agent intends to and thereafter does transport or send the property out-of-state for use or resale there, or for use in conducting interstate or foreign commerce. It is immaterial that the contract of sale or contract to sell is negotiated and executed outside the state or that the purchaser resides outside the state.

(b) Where the seller delivers the goods to the purchaser who receives them at a point outside Washington neither retailing nor wholesaling business tax is applicable. This exemption applies even in cases where the shipment is arranged through a for-hire carrier or freight consolidator or freight forwarder acting on behalf of either the seller or purchaser. It also applies whether the shipment is arranged on a "freight prepaid" or a "freight collect" basis. The shipment may be made by the seller's own transportation equipment or by a carrier for-hire. For purposes of this section, a for-hire carrier's signature does not constitute receipt upon obtaining the goods for shipment unless the carrier is acting as the purchaser's agent and has express written authority from the purchaser to accept or reject the goods with the right of inspection.

(4) **Proof of exempt outbound sales.**

(a) If either a for-hire carrier or the seller itself carries the goods for receipt at a point outside Washington, the seller is required to retain in its records documentary proof of the sales and delivery transaction and that the purchaser in fact received the goods outside the state in order to prove the sale is tax exempt. Acceptable proofs, among others, will be:

(i) The contract or agreement of sale, if any, **And**

(ii) If shipped by a for-hire carrier, a waybill, bill of lading or other contract of carriage indicating the seller has delivered the goods to the for-hire carrier for transport to the purchaser or the purchaser's agent at a point outside the state with the seller shown on the contract of carriage as the consignor (or other designation of the person sending the goods) and the purchaser or its agent as consignee (or other designation of the person to whom the goods are being sent); or

(iii) If sent by the seller's own transportation equipment, a trip-sheet signed by the person making delivery for the seller and showing:

The seller's name and address,

The purchaser's name and address,

The place of delivery, if different from purchaser's address,

The time of delivery to the purchaser together with the signature of the purchaser or its agent acknowledging receipt of the goods at the place designated outside the state of Washington.

(b) Delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier merely utilized to arrange for and/or transport the goods is not receipt of the goods by the purchaser or its agent unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection. See also WAC 458-20-174, 458-20-17401, 458-20-175, 458-20-176, 458-20-177, 458-20-238 and 458-20-239 for certain statutory exemptions.

(5) **Other B&O taxes - outbound and inbound sales.**

(a) **Extracting, manufacturing.** Persons engaged in these activities in Washington and who transfer or make delivery of such produced articles for receipt at points outside the state are subject to business tax under the extracting or manufacturing classification and are not subject to tax under the retailing or wholesaling classification. See also WAC 458-20-135 and 458-20-136. The activities taxed occur entirely within the state, are inherently local, and are conducted prior to the commercial journey. The tax is measured by the value of products as determined by the selling price in the case of articles on which the seller performs no further manufacturing after transfer out of Washington. It is immaterial that the value so determined includes an additional increment of value because the sale occurs outside the state. If the seller performs additional manufacturing on the article after transferring the article out-of-state, the value should be measured under the principles contained in WAC 458-20-112.

(b) **Extracting or processing for hire, printing and publishing, repair or alteration of property for others.** These activities when performed in Washington are also inherently local and the gross income or total charge for work performed is subject to business tax, since the operating incidence of the tax is upon the business activity performed in this state. No deduction is permitted even though the articles produced, imprinted, repaired or altered are delivered to persons outside the state. It is immaterial that the customers are located outside the state, that the work was negotiated or contracted for outside the state, or that the property was shipped in from outside the state for such work.

(c) **Construction, repair.** Construction or repair of buildings or other structures, public road construction and similar contracts performed in this state are inherently local business activities subject to B&O tax in this state. This is so even though materials involved may have been delivered from outside this state or the contracts may have been negotiated outside this state. It is immaterial that the work may be performed in this state by foreign sellers who performed preliminary services outside this state.

(d) **Renting or leasing of tangible personal property.** Lessors who rent or lease tangible personal property for use in this state are subject to B&O tax upon their gross proceeds from such rentals for periods of use in this state. Proration of tax liability based on the degree of use in Washington of leased property is required.

It is immaterial that possession of the property leased may have passed to the lessee outside the state or that the lease agreement may have been consummated outside the state. Lessors will not be subject to B&O tax if all of the following conditions are present:

(i) The equipment is not located in Washington at the time the lessee first takes possession of the leased property; and

(ii) The lessor has no reason to know that the equipment will be used by the lessee in Washington; and

(iii) The lease agreement does not require the lessee to notify the lessor of subsequent movement of the property into Washington and the lessor has no reason to know that the equipment may have been moved to Washington.

(6) **Retail sales tax - outbound sales.** The retail sales tax generally applies to all retail sales made within this state. The legal incidence of the tax is upon the purchaser, but the seller is obligated to collect and remit the tax to the state. The retail sales tax applies to all sales to consumers of goods located in the state when goods are received in Washington by the purchaser or its agent, irrespective of the fact that the purchaser may use the property elsewhere. However, as indicated in subsection (4)(b), delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier arranged either by the seller or the purchaser, merely utilized to arrange for and/or transport the goods out-of-state is not receipt of the goods by the purchaser or its agent in this state, unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.

(a) The retail sales tax does not apply when the seller delivers the goods to the purchaser who receives them at a point outside the state, or delivers the same to a for-hire carrier consigned to the purchaser outside the state. This exemption applies even in cases where the shipment is arranged through a for-hire carrier or freight consolidator or freight forwarder acting on behalf of either the seller or the purchaser. It also applies regardless of whether the shipment is arranged on a "freight prepaid" or a "freight collect" basis and regardless of who bears the risk of loss. The seller must retain proof of exemption as outlined in subsection (4), above.

(b) RCW 82.08.0273 provides an exemption from the retail sales tax to certain nonresidents of Washington for purchases of tangible personal property for use outside this state when the nonresident purchaser provides proper documentation to the seller. This statutory exemption is available only to residents of states and possessions or Province of Canada other than Washington when the jurisdiction does not impose a retail sales tax of three percent or more. These sales are subject to B&O tax.

(c) A statutory exemption (RCW 82.08.0269) is allowed for sales of goods for use in states, territories and possessions of the United States which are not contiguous to any other state (Alaska, Hawaii, etc.), but only when, as a necessary incident to the contract of sale, the seller delivers the property to the purchaser or its designated agent at the usual receiving terminal of the for-hire carrier selected to transport the goods, under such circumstance that it is reasonably certain that the goods will be transported directly to a destination in such noncontiguous states, territories and possessions. As proof of exemption, the seller must retain the following as part of its sales records:

(i) A certification of the purchaser that the goods will not be used in the state of Washington and are intended for use in the specified noncontiguous state, territory or possession.

(ii) Written instructions signed by the purchaser directing delivery of the goods to a dock, depot, warehouse, airport or other receiving terminal for transportation of the goods to their place of ultimate use. Where the purchaser is also the carrier, delivery may be to a warehouse receiving terminal or other facility maintained by the purchaser when the circumstances are such that it is reasonably certain that the goods will be transported directly to their place of ultimate use.

(iii) A dock receipt, memorandum bill of lading, trip sheet, cargo manifest or other document evidencing actual delivery to such dock, depot, warehouse, freight consolidator or forwarder, or receiving terminal.

(iv) The requirements of (i) and (ii) above may be complied with through the use of a blanket exemption certificate as follows:

Exemption Certificate

We hereby certify that all of the goods which we have purchased and which we will purchase from you will not be used in the State of Washington but are for use in the state, territory or possession of. . . . . .

You are hereby directed to deliver all such goods to the following dock, depot, warehouse, freight consolidator, freight forwarder, transportation agency or other receiving terminal:

. . . . . .

. . . . . .

for the transportation of those goods to their place of ultimate use.

This certificate shall be considered a part of each order that we have given you and which we may hereafter give to you, unless otherwise specified, and shall be valid until revoked by us in writing.

DATED . . . . . .

. . . . . .

. . . . .

(Purchaser)

By . . . . . .

. . . .

(Officer or Purchaser's

Representative)

Address . . . . . .

. . . .

(v) There is no business and occupation tax deduction of the gross proceeds of sales of goods for use in noncontiguous states unless the goods

are received outside Washington.

(d) See WAC 458-20-173 for explanation of sales tax exemption in respect to charges for labor and materials in the repair, cleaning or altering of tangible personal property for nonresidents when the repaired property is delivered to the purchaser at an out-of-state point.

(7) **Inbound sales.** Washington does not assert B&O tax on sales of goods which originate outside this state unless the goods are received by the purchaser in this state and the seller has nexus. There must be both the receipt of the goods in Washington by the purchaser and the seller must have nexus for the B&O tax to apply to a particular sale. The B&O tax will not apply if one of these elements is missing.

(a) Delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier located outside this state merely utilized to arrange for and/or transport the goods into this state is not receipt of the goods by the purchaser or its agent unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.

(b) When the sales documents indicate the goods are to be shipped to a buyer in Washington, but the seller delivers the goods to the buyer at a location outside this state, the seller may use the proofs of exempt sales contained in subsection 4 to establish the fact of delivery outside Washington.

(c) If a seller carries on significant activity in this state and conducts no other business in the state except the business of making sales, this person has the distinct burden of establishing that the instate activities are not significantly associated in any way with the sales into this state. Once nexus has been established, it will continue throughout the statutory period of RCW 82.32.050 (up to five years), notwithstanding that the instate activity which created the nexus ceased. Persons taxable under the service B&O tax classification should refer to WAC 458-20-194. The following activities are examples of sufficient nexus in Washington for the B&O tax to apply:

(i) The goods are located in Washington at the time of sale and the goods are received by the customer or its agent in this state.

(ii) The seller has a branch office, local outlet or other place of business in this state which is utilized in any way, such as in receiving the order, franchise or credit investigation, or distribution of the goods.

(iii) The order for the goods is solicited in this state by an agent or other representative of the seller.

(iv) The delivery of the goods is made by a local outlet or from a local stock of goods of the seller in this state.

(v) The out-of-state seller, either directly or by an agent or other representative, performs significant services in relation to establishment or maintenance of sales into the state, even though the seller may not have formal sales offices in Washington or the agent or representative may not be formally characterized as a "salesperson."

(vi) The out-of-state seller, either directly or by an agent or other representative in this state, installs its products in this state as a condition of the sale.

(8) **Retail sales tax - Inbound sales.** Persons engaged in selling activities in this state are required to be registered with the department of revenue. Sellers who are not required to be registered may voluntarily register for the collection and reporting of the use tax. The retail sales tax must be collected and reported in every case where the retailing B&O tax is due as outlined in subsection 7. If the seller is not required to collect retail sales tax on a particular sale because the transaction is disassociated from the instate activity, it must collect the use tax from the buyer.

(9) **Use tax - Inbound sales.** The following sets forth the conditions under which out-of-state sellers are required to collect and remit the use tax on goods received by customers in this state. A seller is required to pay or collect and remit the tax imposed by chapter 82.12 RCW if within this state it directly or by any agent or other representative:

(a) Has or utilizes any office, distribution house, sales house, warehouse, service enterprise or other place of business; or

(b) Maintains any inventory or stock of goods for sale; or

(c) Regularly solicits orders whether or not such orders are accepted in this state; or

(d) Regularly engages in the delivery of property in this state other than by for-hire carrier or U.S. mail; or

(e) Regularly engages in any activity in connection with the leasing or servicing of property located within this state.

(i) The use tax is imposed upon the use, including storage preparatory to use in this state, of all tangible personal property acquired for any use or consumption in this state unless specifically exempt by statute. The out-of-state seller may have nexus to require the collection of use tax

without personal contact with the customer if the seller has an extensive, continuous, and intentional solicitation and exploitation of Washington's consumer market. (See WAC 458-20-221).

(ii) Every person who engages in this state in the business of acting as an independent selling agent for unregistered principals, and who receives compensation by reason of sales of tangible personal property of such principals for use in this state, is required to collect the use tax from purchasers, and remit the same to the department of revenue, in the manner and to the extent set forth in WAC 458-20-221.

(10) **Examples - outbound sales.** The following examples show how the provisions of this section relating to interstate sales of tangible personal property will apply when the goods originate in Washington (outbound sales). The examples presume the seller has retained the proper proof documents and that the seller did not manufacture the items being sold.

(a) Company A is located in Washington. It sells machine parts at retail and wholesale. Company B is located in California and it purchases machine parts from Company A. Company A carries the parts to California in its own vehicle to make delivery. It is immaterial whether the goods are received at either the purchaser's out-of-state location or at any other place outside Washington state. The sale is not subject to Washington's B&O tax or its retail sales tax because the buyer did not receive the goods in Washington. Washington treats the transaction as a tax exempt interstate sale. California may impose its taxing jurisdiction on this sale.

(b) Company A, above, ships the parts by a for-hire carrier to Company B in California. Company B has not previously received the parts in Washington directly or through a receiving agent. It is immaterial whether the goods are received at either Company B's out-of-state location or any other place outside Washington state. It is immaterial whether the shipment is freight prepaid or freight collect. Again, Washington treats the transaction as an exempt interstate sale.

(c) Company B, above, has its employees or agents pick up the parts at Company A's Washington plant and transports them out of Washington. The sale is fully taxable under Washington's B&O tax and, if the parts are not purchased for resale by Company B, Washington's retail sales tax also applies.

(d) Company B, above, hires a carrier to transport the parts from Washington. Company B authorizes the carrier, or another agent, to inspect and accept the parts and, if necessary, to hold them temporarily for consolidation with other goods being shipped out of Washington. This sale is taxable under Washington's B&O tax and, if the parts are not purchased for resale by Company B, Washington's retail sales tax also applies.

(e) Washington will not tax the transactions in the above examples (a) and (b) if Company A mails the parts to Company B rather than using its own vehicles or a for-hire carrier for out-of-state receipt. By contrast, Washington will tax the transactions in the above examples (c) and (d) if for some reason Company B or its agent mails the parts to an out-of-state location after receiving them in Washington. The B&O tax applies to the latter two examples and if the parts are not purchased for resale by Company B then retail sales tax will also apply.

(f) Buyer C who is located in Alaska purchases parts for its own use in Alaska from Seller D who is located in Washington. Buyer C specifies to the seller that the parts are to be delivered to the water carrier at a dock in Seattle. The buyer has entered into a written contract for the carrier to inspect the parts at the Seattle dock. The sale is subject to the B&O tax because receipt took place in Washington. The retail sales tax does not apply because of the specific exemption at RCW 82.08.0269. This transaction would have been exempt of the B&O tax if the buyer had taken no action to receive the goods in Washington.

(11) **Examples - inbound sales.** The following examples show how the provisions of this section relating to interstate sales of tangible personal property will apply when the goods originate outside Washington (inbound sales). The examples presume the seller has retained the proper proof documents.

(a) 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.

(b) Company A, above, ships the parts by a for-hire carrier to Company B in Washington. The goods are not accepted by Company B until the goods arrive in Washington. The sale is subject to the retail sales or use tax and is also subject to the B&O tax if the seller has nexus in Washington. It is immaterial whether the shipment is freight prepaid or freight collect.

(c) Company B, above, has its employees or agents pick up the parts at Company A's California plant and transports them into Washington. Company A is not required to collect sales or use tax and is not liable for B&O tax on the sale of these parts. Company B is liable for payment of use tax at the time of first use of the parts in Washington.

(d) Company B, above, hires a carrier to transport the parts from California. Company B authorizes the carrier, or an agent, to inspect and accept the parts and, if necessary, to hold them temporarily for consolidation with other goods being shipped to Washington. The seller is not required to collect retail sales or use tax and is not liable for the B&O tax on these sales. Company B is subject to use tax on the first use of the

parts in Washington.

(e) Company B, above, instructs Company A to deliver the machine parts to a freight consolidator selected by Company B. The freight consolidator does not have authority to receive the goods as agent for Company B. Receipt will not occur until the parts are received by Company B in Washington. Company A is required to collect retail sales or use tax and is liable for B&O tax if Company A has nexus for this sale. The mere delivery to a consolidator or for-hire carrier who is not acting as the buyer's receiving agent is not receipt by the buyer.

(f) Transactions in examples (11)(a) and (11)(b) will also be taxable if Company A mails the parts to Company B for receipt in Washington, rather than using its own vehicles or a for-hire carrier. The tax will continue to apply even if Company B for some reason sends the parts to a location outside Washington after the parts were accepted in Washington.

(g) Company W with its main office in Ohio has one employee working from the employee's home located in Washington. The taxpayer has no offices, inventory, or other employees in Washington. The employee calls on potential customers to promote the company's products and to solicit sales. On June 30, 1990 the employee is terminated. After this date the company no longer has an employee or agent calling on customers in Washington or carries on any activities in Washington which is significantly associated with the seller's ability to establish or maintain a market for its products in Washington. Washington customers who had previously been contacted by the former employee continue to purchase the products by placing orders by mail or telephone directly with the out-of-state seller. The nexus which was established by the employee's presence in Washington will be presumed to continue through December 31, 1994 and subject to B&O tax. Nexus will cease on December 31, 1994 if the seller has not established any new nexus during this period. Company W may disassociate and exclude from B&O tax sales to new customers who had no contact with the former employee. The burden of proof to disassociate is on the seller.

(h) Company X is located in Ohio and has no office, employees, or other agents located in Washington or any other contact which would create nexus. Company X receives by mail an order from Company Y for parts which are to be shipped to a Washington location. Company X purchases the parts from Company Z who is located in Washington and requests that the parts be drop shipped to Company Y. Since Company X has no nexus in Washington, Company X is not subject to B&O tax or required to collect retail sales tax. Company X has not taken possession or dominion or control over the parts in Washington. Company Z may accept a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a Streamlined Sales and Use Tax Agreement Certificate of Exemption or a Multistate Tax Commission Exemption Certificate (WAC 458-20-102) for sales made on or after January 1, 2010, from Company X which will bear the registration number issued by the state of Ohio. Company Y is required to pay use tax on the value of the parts. Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by Company Z for five years from the date of last use or December 31, 2014.

(i) Company ABC is located in Washington and purchases goods from Company XYZ located in Ohio. Upon receiving the order, Company XYZ ships the goods by a for-hire carrier to a public warehouse in Washington. The goods will be considered as having been received by Company ABC at the time Company ABC is entitled to receive a warehouse receipt for the goods. Company XYZ will be subject to the B&O tax at that time if it had nexus for this sale.

(j) P&S Department Stores has retail stores located in Washington, Oregon, and in several other states. John Doe goes to a P&S store in Portland, Oregon to purchase luggage. John Doe takes physical possession of the luggage at the store and elects to finance the purchase using a credit card issued to him by P&S. John Doe is a Washington resident and the credit card billings are sent to him at his Washington address. P&S does not have any responsibility for collection of retail sales or use tax on this transaction because receipt of the luggage by the customer occurred outside Washington.

(k) JET Company is located in the state of Kansas where it manufactures specialty parts. One of JET's customers is AIR who purchases these parts as components of the product which AIR assembles in Washington. AIR has an employee at the JET manufacturing site who reviews quality control of the product during fabrication. He also inspects the product and gives his approval for shipment to Washington. JET is not subject to B&O tax on the sales to AIR. AIR receives the parts in Kansas irrespective that JET may be shown as the shipper on bills of lading or that some parts eventually may be returned after shipment to Washington because of hidden defects.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. 10-06-070, § 458-20-193, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. 91-24-020, § 458-20-193, filed 11/22/91, effective 1/1/92. Formerly WAC 458-20-193A and 458-20-193B.]

OFFICE RECEPTIONIST, CLERK

To: Parker, Carrie (ATG)
Cc: Weissman, Joshua (ATG); Fitzpatrick, Rosann (ATG); Johnson, Julie (ATG); Zilinskas, Candy (ATG)
Subject: RE: Dep't of Revenue v. Avnet, Inc., Supreme No. 92080-0

Received 11-6-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Parker, Carrie (ATG) [mailto:CarrieP@ATG.WA.GOV]
Sent: Friday, November 06, 2015 3:30 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Weissman, Joshua (ATG) <JoshuaW@ATG.WA.GOV>; Fitzpatrick, Rosann (ATG) <RosannF@ATG.WA.GOV>; Johnson, Julie (ATG) <JulieJ@ATG.WA.GOV>; Zilinskas, Candy (ATG) <CandyZ@ATG.WA.GOV>
Subject: Dep't of Revenue v. Avnet, Inc., Supreme No. 92080-0
Importance: High

Attached for filing is the Motion of Department of Revenue to File Overlength, Consolidated Responses to Amici Curiae and Department of Revenue's Answer to Briefs of Amicus Curiae Council on State Taxation and Association of Washington Business.

Carrie A. Parker
Lead Support
Revenue Division
(360) 586-9675