No. 92080-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent,

v.

AVNET, INC.,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

None of the reasons this Court requires before granting discretionary review are present here. RAP 13.4(b). The decision of the Court of Appeals relates to a settled issue of constitutional law, does not conflict with any decision of this Court or any other court, and presents no issue of substantial public importance. The Court of Appeals applied the correct dormant commerce clause nexus standard in concluding that Avnet was not permitted to avoid Washington's business and occupation (B&O) tax on sales of goods it shipped into Washington, regardless of whether a particular sale was channeled through Avnet's local office.

Avnet's petition for review is based on the false premise that *Norton Co. v. Dep't of Revenue of Illinois*, 340 U.S. 534, 71 S. Ct. 377, 95 L. Ed. 517 (1951), is the controlling United States Supreme Court precedent. The controlling precedents are *Tyler Pipe Industries, Inc. v. Dep't of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), and the numerous cases that have followed the *Tyler Pipe* nexus standard, including this Court's recent decision in *Lamtec Corp. v. Dep't of Revenue*, 170 Wn.2d 838, 246 P.3d 788 (2011). In *Tyler Pipe*, the Supreme Court explained that the states may impose a fairly apportioned tax on amounts derived from the inbound sales of goods by an out-of-state seller so long as the seller's instate activities are significantly associated

with establishing or maintaining a *market* within the taxing state. Applying the *Tyler-Pipe* standard, the Court of Appeals correctly rejected Avnet's claim to tax immunity on its "national sales" and "drop-shipped" sales.

The Court of Appeals also properly rejected Avnet's argument that it may avoid the B&O tax under a Department of Revenue interpretive rule on interstate sales, WAC 458-20-193 (Rule 193). Avnet contends this Court should take review to address whether the Department can repudiate a long-standing interpretation of its own rule in defiance of reasonable taxpayer expectations. Avnet seeks review of a false issue. The Department has not "repudiated" its rule. Rather, the Department opposes Avnet's erroneous reading of the rule's requirements. The Court of Appeals agreed with the Department's interpretation of the rule, which was supported by the language of the rule when read as a whole, a related rule, applicable tax statutes, and relevant case law.

Avnet's petition for review should be denied.

II. IDENTITY OF RESPONDENT

Respondent is the State of Washington, Department of Revenue.

III. COUNTERSTATEMENT OF THE ISSUES

If the Court were to grant review, the issues on review would be:

1. Did the Court of Appeals correctly apply *Tyler Pipe* (and reject

Avnet's reliance on *Norton*) as the controlling Supreme Court precedent in holding that a "substantial nexus" exists between Avnet's instate activities and all its inbound sales to Washington?

2. Did the Court of Appeals properly hold that Rule 193 cannot reasonably be read as "codifying" a long-outdated view of the restrictions on the State's constitutional authority to impose a gross receipts tax on interstate sales of goods shipped to or delivered in the State?

3. Did the Court of Appeals properly reject Avnet's proposed reading of the "receipt" provisions of Rule 193 in holding that a drop-shipment sale occurs in Washington for B&O tax purposes when the goods are physically delivered to the buyer's customer in Washington?

IV. COUNTERSTATEMENT OF THE CASE

The undisputed dispositive facts are that Avnet has nexus with Washington by virtue of its instate business activities and that each of the contested transactions involves the sale of goods that Avnet shipped into the state for delivery to Washington destinations designated by the buyer.

Avnet is in the business of selling electronic components and computer parts supplied by hundreds of manufacturers. CP 500. During the tax period at issue, Avnet had more than forty employees working out of its sales office in Redmond, Washington. CP 59-64. Avnet's Redmond office is part of a world-wide, functionally integrated operating group. CP

448. Avnet offers essentially the same line of products for sale everywhere through an online ordering system, and it ships the goods to wherever the purchaser requests. CP 427, 447, 454.

An important component of Avnet's business model is to anticipate and promote the development of the next generation of computer components and embedded technology it sells. CP 24, 454, 510. To that end, it employs engineers in Washington who gather information from suppliers, manufacturers, and others in the high tech industry about product performance and potential design improvements. CP 446-47, 474, 510. Avnet relays the information gained from Washington staff to its suppliers and helps to design and embed new technologies into existing products to sustain consumer demand for the products it sells. CP 24.

Another important component of Avnet's business model is promoting a "Direct-Blind Ship model" whereby Avnet ships goods "directly to the customers' end customer." CP 437. Avnet promotes "direct shipment" as a means for its customers to reduce the time-to-market, avoid overhead expenses, and increase flexibility. *Id.* Such direct shipments, also known as "drop shipments," comprise a significant and growing proportion of Avnet's Washington sales. CP 111.

The Court of Appeals held that under the applicable tax statutes and administrative rules, Washington's wholesaling B&O tax applies to all

Avnet's sales of goods shipped into Washington, including those Avnet labels "national sales" and "drop-shipped" sales. *Avnet, Inc. v. Dep't of Revenue*, 187 Wn. App. 427, 435-36, 348 P.3d 1273 (2015). The Court rejected as inapposite Avnet's reliance on an example in Rule 193 that addresses how the retail sales tax applies to a drop shipment, holding it was "not determinative" of *where* a drop shipment sale occurs for tax purposes. *Id.* at 438. The Court also rejected Avnet's contention the contested sales occurred in the state where the customer placed the order, holding that under the B&O tax statutes and Rule 193, the physical delivery of the goods in Washington "locates the sale in this state." *Id.*

After rejecting Avnet's interpretation of Rule 193's place of sale provisions, the Court of Appeals stated "a more profound infirmity" in Avnet's argument was its false assumption that a taxpayer could avoid B&O tax based on words in an interpretive rule that purportedly allow a broader tax exemption than statutorily authorized or constitutionally required. *Avnet*, 187 Wn. App. at 439 (citing *Association of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 120 P.3d 46 (2005), and *Coast Pac. Trading, Inc. v. Dep't of Revenue*, 105 Wn.2d 912, 719 P.2d 541 (1986)).

In addressing Avnet's constitutional claim, the Court of Appeals applied *General Motors* and *Tyler Pipe* as the controlling authorities on whether the contested sales have nexus with Washington. *Avnet*, 187 Wn.

App. at 446-47 (discussing *Tyler Pipe*, 483 U.S. 232, and *General Motors Corp. v. State*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964)). The Court held that the "wide variety of market research and product development activities aimed at building and maintaining the company's worldwide market" provided nexus for all the contested sales. *Id.* at 448.

V. REASONS WHY REVIEW SHOULD BE DENIED

The Court of Appeals correctly applied well-established law in holding that Washington may tax all Avnet's inbound sales to this state, not just those directly connected to its Redmond office. The Court also correctly held that Rule 193 cannot reasonably be read as exempting from B&O tax any of Avnet's Washington sales. Avnet has not presented sufficient reason for this Court to grant review.

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

Avnet asserts this Court should "summarily reverse" the decision below because "only the United States Supreme Court has authority to decide whether [*Norton's*] doctrinal underpinnings have been impliedly eroded by subsequent cases." Pet. Review at 12. The Court of Appeals did not overrule or disregard *Norton*. Rather, it correctly held that subsequent precedents, which Avnet ignores, have broadened "the types of activities that may establish substantial nexus for purposes of state taxation of

interstate commerce." *Avnet*, 187 Wn. App. at 447. Consistently with numerous decisions of this Court and of the United States Supreme Court, the Court of Appeals correctly held that "a state need not demonstrate a direct connection between a taxpayer's nexus-creating activities and particular sales into the state in order to tax those sales." *Id.*

1. The Court of Appeals correctly applied *Tyler Pipe* as the controlling Commerce Clause precedent.

The Court of Appeals relied on three seminal United States Supreme Court decisions that specifically addressed the constitutionality of Washington's wholesaling B&O tax as applied to interstate sales. *See Avnet*, 187 Wn. App. 446-47 (citing *Tyler Pipe*, 483 U.S. 232; *Standard Pressed Steel Co. v. Dep't of Revenue*, 419 U.S. 560, 95 S. Ct. 706, 42 L. Ed. 2d 719 (1975); *General Motors*, 377 U.S. 436). Following these decisions, it is well-settled that Washington can impose its B&O tax on all the inbound sales of goods made by a seller that has nexus with the state.

According to Avnet, no state or federal court has "held or suggested that *Norton's* dissociation principle was rejected in subsequent cases." Pet. Review at 9. Avnet argues as if the Supreme Court's decisions in *Tyler Pipe*, *Standard Pressed Steel*, and *General Motors* had nothing to do with *Norton.* But in each case, the taxpayer relied on *Norton* as the controlling authority for its argument that Washington could not impose

its wholesaling B&O tax on its inbound sales of goods because they were not associated with the taxpayer's instate activities.[1] In each case, the United States Supreme Court affirmed the Washington court's rejection of the taxpayer's dissociation argument.

In each case, the Supreme Court made its nexus determination by examining whether the taxpayer's instate activities were significantly associated with its ability to establish and maintain *a market* for its sales in the state. *General Motors*, 377 U.S. at 448; *Standard Pressed Steel*, 419 U.S. at 562-63; *Tyler Pipe*, 483 U.S. at 250-51. Having concluded that such a nexus existed, the Court in each case rejected the premise that the taxpayer could avoid state taxation based on the absence of any activities directly associated with specific transactions.

The taxpayer in *Standard Pressed Steel* correctly asserted its activities in Washington were far less substantial than Norton's activities had been in Illinois. 419 U.S. at 562. Still, the Supreme Court summarily dismissed the taxpayer's reliance on *Norton*, stating it "verges on the

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[1] *See* Brief of App. at 13, *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), 1986 WL 728565 (1986) ("[U]nder the rules established in *Norton,* the State of Washington is constitutionally prohibited from taxing Tyler Pipe on its Washington gross receipts."). Brief of App. at 14, *Standard Pressed Steel Co. v. Dep't of Revenue*, 419 U.S. 560, 95 S. Ct. 706, 42 L. Ed. 2d 719 (1975), 1974 WL 186395 (1974) ("That appellant's in-state activity is not sufficient to establish a constitutional nexus with the taxing power of the state was established in *Norton*, which is a case remarkably similar to the case at bar, and is controlling authority in support of appellant."); Brief of App. at 45, *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964), 1963 WL 105970 (1963) ("[*Norton*] is controlling here.").

frivolous" in view of the Court's subsequent decision in *General Motors*. *Id.*[2] And in *Tyler Pipe*, the Supreme Court did not even cite to *Norton* even though the taxpayer relied on it as controlling authority in arguing its sales into the state were not taxable by Washington. 483 U.S. 232.

After *General Motors* and *Standard Pressed Steel,* it is clear states are not constitutionally required to establish nexus on a transaction-by-transaction basis. Instead, nexus exists if the taxpayer is engaging in activities significantly associated with maintaining a *market* for its sales of goods in the state. The dormant commerce clause analysis then shifts to whether the tax as applied by the state is fairly apportioned and nondiscriminatory, which is determined by asking whether inbound and outbound sales are treated equally. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995). It is well-settled the B&O tax satisfies these conditions. *W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 597-98, 973 P.2d 1011 (1999).

With respect to Avnet, the Court of Appeals correctly held that the "wide variety of market research and product development activities" Avnet performs in Washington creates nexus with all its inbound sales, including the national sales and drop-shipped sales it excluded from its

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[2] *See generally,* Walter Hellerstein, *State Taxation of Interstate Business and the Supreme Court, 1974 Term: Standard Pressed Steel and Colonial Pipeline*, 62 Va. L. Rev. 149, 155 (1976) (commenting that, in *Standard Pressed Steel*, "the Court seems to have liberated the states completely from the restraints of *Norton*.").

state excise tax returns. *Avnet*, 187 Wn. App. at 448.

2. *Norton* no longer has any relevance in addressing nexus.

If Avnet were correct that *Norton* provided "controlling authority" in determining the existence of substantial nexus, then *General Motors*, *Standard Pressed Steel*, *Tyler Pipe* and many other decisions of the United States Supreme Court and of this Court would have been decided differently. Far from providing "controlling authority," *Norton* no longer is relevant in determining whether a state may tax an interstate sale.[3]

The Court of Appeals correctly stated the Supreme Court's post-*Norton* cases "show a progressive broadening of the types of activities that may establish substantial nexus for purposes of state taxation of interstate commerce." *Avnet*, 187 Wn. App. at 447. Thus, *Norton* has not been overruled, but its conclusions do not control whether a taxpayer has sufficient nexus to permit a state to tax its inbound sales of goods. Under the *Tyler Pipe* nexus standard, "dissociation" requires a taxpayer to prove

[3] Even the authors of the law review articles Avnet relies on in support of its "dissociation" argument recognize that *Tyler Pipe* states the relevant test for determining the existence of what they call "transactional nexus." M. Bowen, *Transactional Nexus and the Continued Relevance of National Geographic*, 20 J. Multistate Tax'n & Incentives 16 (July 2010) ("the constitutional test" for transactional nexus for sales tax purposes is "likely found in *Tyler Pipe*"); J. Friedman, *Consumption Tax Nexus: The Connection with the Transaction to be Taxed*, 38 Ga. L. Rev. 119, 140 (2003) (substantial nexus test of *Tyler Pipe* "should also be used to determine whether transactional nexus is satisfied"); McHugh & Reed, *The Due Process Clause And The Commerce Clause: Two New And Easy Tests For Nexus In Tax Cases*, 90 W. Va. L. Rev. 31, 49 (1987) (presence of instate activities that substantially contributed to taxable activity is the "primary" constitutional limitation on B&O taxation of interstate sales).

its instate activities are not significantly associated with creating or maintaining a *market*; it is not enough to prove the absence of a direct connection to any particular *sale*. Because the Court of Appeals correctly applied the *Tyler Pipe* nexus standard consistently with post-*Norton* precedents, this case presents no significant question of constitutional law.

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

Avnet claims the Court of Appeals' decision conflicts with Washington decisions that have "uniformly followed" *Norton.* Pet. Review at 8. But a close examination of those cases reveals no conflict. Each case "followed" *Norton* for the proposition that once a corporation comes into the state to conduct business it has the distinct burden of proving its instate activities are not associated in any way with the transactions or activities subject to tax. *E.g., Chicago Bridge & Iron Co. v. Dep't of Revenue*, 98 Wn.2d 814, 822, 659 P.2d 463 (1983).[4] And in each case, the court found that burden unmet following post-*Norton* cases that broadened the activities deemed relevant in determining whether particular

[4] *See also Department of Revenue v. J.C. Penney Co., Inc.*, 96 Wn.2d 38, 47-48, 633 P.2d 870 (1981) (instate activities relating to servicing credit accounts were not sufficiently dissociated from retail sales to avoid taxation of finance charge income); *General Motors Corp. v. State*, 60 Wn.2d 862, 875-76, 376 P.2d 843 (1962) (distinguishing *Norton* because the bundle of activities performed in the state supported the market for wholesale sales made by independent out-of-state operating divisions), *aff'd,* 377 U.S. 436 (1964); *Lamtec Corp. v. Dep't of Revenue*, 151 Wn. App. 451, 215 P.3d 968 (2009) (taxpayer could not prove dissociation where sales agents made occasional visits to maintain relationships with select customers), *aff'd*, 170 Wn.2d at 843.

transactions were "dissociated" from a seller's instate activities. *Id.* (following *Standard Pressed Steel* and *General Motors* in rejecting taxpayer's *Norton*-based dissociation claim where taxpayer had instate personnel "available to assist" if needed). No genuine conflict exists.

Avnet asserts "courts and commentators have continued to recognize *Norton's* dissociation principle." Pet. Review at 10. But as with the Washington cases, each authority Avnet cites rejected the taxpayer's dissociation claim based on post-*Norton* case law.[5] Since deciding *Norton*, the Supreme Court has never held that a taxpayer with a physical presence in a state can "dissociate" some of its sales of goods shipped into the state.

None of the cases cited by Avnet stand for the principle that the *Norton* concept of "dissociation" and commerce clause nexus is frozen in time and must be applied without regard to the numerous post-*Norton* cases that apply a different nexus standard. There is no genuine conflict, and Avnet's claims to the contrary are unsupported and should be rejected.

C. The Court of Appeals Properly Interpreted And Applied The Department's Interpretive Rule On Interstate Sales.

In seeking review, Avnet makes several arguments related to the

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[5] *See Mobil Oil Corp. v. Comm'r of Taxes of Vermont*, 445 U.S. 425, 442, 100 S. Ct. 1223, 63 L. Ed. 2d 510 (1980) (citing *Norton* in concluding taxpayer failed "to sustain its burden of proving any unrelated business activity"); *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 560-61, 97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977) (refusing to apply a dissociation analysis in the context of a use-tax collection duty); *Department of Revenue v. Sears, Roebuck & Co.*, 660 P.2d 1188, 1190-91, & n.4 (Alaska 1983) (following *Standard Pressed Steel* and *General Motors* in holding that a taxpayer could not dissociate sales handled solely by out-of-state mail order division).

Department's Rule 193, claiming the Court of Appeals improperly allowed the Department to retroactively change its interpretation of the rule, that the Department's interpretation is contrary to its published administrative decisions, and that the Court of Appeals misinterpreted and misapplied the rule here. None of these arguments is correct and none provides a basis for this Court to accept review under RAP 13.4(b).

1. Rule 193 did not "codify" *Norton.*

Avnet asserts the Court of Appeals "ignored decades of DOR's published decisions, which never questioned the vitality of *Norton.*" Pet. Review at 11. The Court of Appeals had no need to address Avnet's reliance on purportedly inconsistent prior agency interpretations once it determined Avnet's inbound sales were subject to B&O tax under the applicable tax statutes and constitutional nexus requirements. *Cf. Tesoro Ref. & Mktg., Co. v. Dep't of Revenue*, 173 Wn.2d 551, 557-58, 269 P.3d 1013 (2012) (rejecting taxpayer's reliance on inconsistent prior determinations because courts "glean legislative intent from the text of the statute, regardless of incidental and contrary agency interpretations"). Moreover, the purported "inconsistency" was in Avnet's eyes only.

More than twenty years have passed since the Department last issued a published determination that found some portion of a taxpayer's instate sales "dissociated" from its local business activities in Washington.

Det. No. 93-155, 13 WTD 297 (1994).[6] Notably, that determination applied the 1974 version of Rule 193, which stated sales of goods shipped from out-of-state to a buyer in this state "are exempt only if there is and there has been no participation whatsoever in this state by the seller's branch office" or local agent. *See* former WAC 458-20-193B (1990); CP 637. That language was deleted in a 1991 rule revision.[7] CP 633.

As revised in 1991, Rule 193 states the B&O tax applies to "a particular sale" of goods shipped into the state when "the goods are received by the purchaser in this state and the seller has nexus." Former Rule 193 (1991). CP 633. The rule defines "nexus" in terms of the *Tyler Pipe* nexus standard, *see* Rule 193(2)(f), and it explains that a taxpayer

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[6] A "published determination" is an administrative decision of tax liability published by the Department after redaction of the taxpayer's identity. RCW 82.32.410. The Department's published determinations are not binding on the courts but they are entitled to "some deference" if not inconsistent with the governing tax statutes. *Cashmere Valley Bank v. Dep't of Revenue*, 181 Wn.2d 622, 635-36, 334 P.3d 1100 (2014). Each of the published determinations cited by Avnet that applied the post-1991 version of Rule 193 rejected the taxpayer's argument that it could dissociate some of its Washington destination sales. *See* Det. No. 93-283, 14 WTD 041 (1994) (dissociation precluded by presence of instate representative available to assist customers); Det. No. 94-209, 15 WTD 96 (1996) (rejecting dissociation claim); Det. No. 96-144, 16 WTD 201 (1996) (declining taxpayer's request for a "no nexus" letter ruling); Det. No. 97-235, 17 WTD 107 (1998) (dissociation precluded by presence of sales manager available to assist customers); Det. No. 97-061, 18 WTD 211 (1999) (dissociation precluded by occasional visits to monitor needs of instate customers).

[7] Avnet glosses over the many revisions made to Rule 193, asserting the rule was promulgated "long after *Norton* was supposedly overruled by implication." PRV at 11. The Department first promulgated its rule on interstate sales in 1935, with multiple subsequent revisions that track developments in the dormant commerce clause case law. The record includes comprehensive briefing on the history of Rule 193 and the published determinations that have interpreted and applied the rule. CP 623-27, 630-658; DOR Br. of App. at 46-48; DOR Reply Br. and Resp. Br. at 28-36.

that carries out significant activities in the state can avoid B&O tax only by proving its "instate activities are not significantly associated in any way with the sales into this state." Rule 193(7)(c)(v). On the "receipt" issue, the rule explains that when a seller's sales documents indicate "the goods are to be shipped to a buyer in Washington" a seller has the burden to prove the goods actually were delivered outside the State in order to avoid the tax. Rule 193(7)(b). To meet that burden, the seller must present documentation showing the goods actually were received by the buyer at some point outside the state before they entered Washington. *Id.*

Following the 1991 revisions, Rule 193 recognizes only two factual circumstances that justify the "dissociation" of a particular sale of goods shipped into Washington: (1) where the seller presents adequate documentary proof that the goods actually were received by the buyer outside the state before entering Washington, Rule 193(7)(b), or (2) where the seller carried out no significant activities in the state "in relation to establishment or maintenance of sales into the state." Rule 193(7)(c)(v).

2. Under Rule 193, an interstate sale takes place in the state where the goods are physically delivered.

Avnet also asserts this Court should accept review because the decision of the Court of Appeals creates a conflict between this Court's decision in *Association of Washington Business (AWB),* which held the

Department's interpretive rules do not have the force or effect of law, and "the well-established principle that an agency cannot repudiate its own interpretive rule on a retrospective basis." Pet. Review at 13 (citing *AWB*, 155 Wn.2d 430). The Department did not "repudiate" Rule 193 and the Court of Appeals did not disregard it. Rather, the Department and the Court properly rejected Avnet's erroneous interpretation of the rule.

Rule 193 reflects the "destination principle."[8] That is, it locates an interstate sale in the state where the goods are physically delivered. This is consistent with long-established commerce clause doctrine permitting the state of destination to tax an interstate sale. *Jefferson Lines*, 514 U.S. at 184; *International Harvester Co. v. Indiana Dep't of Treasury*, 322 U.S. 340, 64 S. Ct. 1019, 88 L. Ed. 1313 (1944). The physical delivery of the goods within the state creates sufficient nexus with the transaction to be treated as a taxable sale by the state. *Jefferson Lines*, 514 U.S. at 184.

Many of Rule 193's provisions specifically address how the place

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[8] *See* C. Trost & P. Hartman, *Federal Limitations on State and Local Taxation* 2d § 9.4, p. 234 (2003) ("[I]t seems settled that the state of destination has free reign in taxing the unapportioned gross receipts from interstate sales of goods that are delivered and consumed in the state"); J. Hellerstein & W. Hellerstein, *State Taxation*, ¶ 18.02[1] ("The Destination Principle"), ¶ 19A.06[1] ("Sourcing Rules") (3ed. 2013). The Department's interpretive rule on the location of an interstate sale is consistent with the sourcing rules of other taxing jurisdictions. Under the Uniform Division of Income for Tax Purposes Act (UDIPTA), which has been adopted by 46 states, sales are within a state if "the property is delivered or shipped to a purchaser...within [the] state regardless of the f.o.b. point or other conditions of sale." The comments explain that "shipped to or delivered" in the state includes shipments made directly to a person in the state at the direction of the purchaser (i.e. drop shipments). UDIPTA § 16 ("Situs of Sales of Tangible Personal Property"), 7A U.L.A. 183-84 (2002 & Supp. 2010).

of sale is determined in the context of interstate sales of goods shipped by common carrier. When the "receipt" provisions Avnet relies on are read in the context of related provisions addressing the place of sale, it is clear the transfer of possession from a for-hire carrier to the buyer's customer (the "consignee") constitutes "receipt" by the purchaser within the meaning of Rule 193(7). *See* DOR Reply Br. and Resp. Br. at 38-46.

The Court of Appeals properly rejected Avnet's reliance on an inapposite example in Rule 193 that addresses a different tax (retail sales tax), different taxable transaction (retail sale made by out-of-state seller using a Washington supplier to deliver goods), and different taxpayer (out-of-state retailer without nexus). *See* Rule 193(11)(h). The examples in Rule 193 do not apply outside the specific legal and factual context they address. *Space Age Fuels v. Dep't of Revenue,* 178 Wn. App. 756, 608, 315 P.3d 604 (2013). The Court correctly held that in a drop shipment, Rule 193 "locates the sale in this state" when the goods sold are delivered to the buyer's customer in Washington. *Avnet,* 187 Wn. App. at 438.

Avnet claims the Department's interpretation of Rule 193 here is inconsistent with its prior interpretation, which purportedly is reflected by excerpts from internal agency emails discussing proposed rule revisions.[9]

[9] Avnet presented snippets from emails between DOR employees as evidence of the purported agency interpretation, while ignoring others that explain the proposed revisions would clarify, not change, the Departments' interpretation of Rule 193. *Eg.,* CP

Pet. Review at 12. The Court of Appeals correctly dismissed the notion that these informal agency communications have any relevance to the proper interpretation and application of the tax statutes or interpretative rules. *Avnet*, 187 Wn. App. at 437 n.6. *In accord, Tesoro,* 173 Wn.2d at 557-58 (courts disregard "incidental and contrary agency interpretations").

3. Avnet is not entitled to rely on its mistaken interpretation of Rule 193.

Avnet claims the Court of Appeals' decision "flouts" the principle that taxpayers are entitled to rely on the plain meaning of the Department's rules. Pet. Review at 16. Avnet did not reasonably rely on Rule 193 when it decided to file its state tax returns as if the 1951 *Norton* decision controlled the reach of Washington's taxing jurisdiction.

Moreover, it is well-established that a taxpayer can have no reasonable expectation of avoiding tax liability by relying on language in an interpretive rule that purportedly allows a broader tax exemption than authorized by statute or required by the constitution. *Coast Pacific*, 105 Wn.2d 912; *Budget Rent-A-Car v. Dep't of Revenue*, 81 Wn.2d 171, 500 P.2d 764 (1972). The Court of Appeals properly followed *Coast Pacific* in stating "the language of the rule can provide Avnet no more haven that the B&O statute does." *Avnet*, 187 Wn. App. at 440. Tax statutes, and

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578-80 ("The drop shipment language is a clarification of existing policy, and so no particular public objection is expected to its inclusion [in the proposed rule revision].").

exemptions from the tax law, are enacted by the Legislature. The Department has no authority to alter the tax law, and taxpayers have no equitable or legal right to rely on rule language that conflicts with the law.

A taxpayer has a statutory right to receive tax reporting instructions from the Department upon which it may rely. RCW 82.32A.020; *see also Group Health Co-op. of Puget Sound, Inc. v. Wash. State Tax. Comm'n*, 72 Wn.2d 422, 427-27, 433 P.2d 201 (1967) (taxpayer was entitled to rely on prior specific ruling); *Hansen Baking Co. v. City of Seattle*, 48 Wn.2d 737, 296 P.2d 670 (1956) (same). But a taxpayer that unilaterally decides not to pay B&O tax based on its own view of the "plain language" of a rule does so at its peril. *Port of Seattle v. Dep't of Revenue*, 101 Wn. App. 106, 118, 1 P.3d 607 (2000) (taxpayer that never asked for a ruling could not rely on its own mistaken interpretation). Avnet never sought a ruling from the Department on whether it could omit its "national sales" or "drop shipment sales" from its state excise tax returns, and the Department never authorized Avnet to do so.

Avnet does not identify any case law that shields it from the tax consequences of its own mistaken reading of Rule 193's "plain language."

D. The Recent Rule Revision Provides Any Needed Clarification.

Effective August 7, 2015, Rule 193 was amended to further clarify the Department's existing interpretation of the statutes and constitutional

law applicable to inbounds sales of goods. Wash. St. Reg. 15-15-025, § 458-20-193 (filed 7/7/15). The rule revisions eliminate any reference to dissociation and clarify that the wholesaling B&O tax applies to drop shipment transactions like Avnet's. *See* WAC 458-20-193(301) (2015). As a result, this controversy regarding the proper interpretation of Rule 193 rule does not present a recurring issue that warrants review by this Court.

VI. CONCLUSION

None of Avnet's arguments in support of its petition for review withstand scrutiny. The Court of Appeals did not "overrule" *Norton*. Rather, it properly applied subsequent precedents that rejected the same *Norton*-based arguments Avnet makes here. Nor did the Court of Appeals "disregard" the Department's rule on interstate sales: it correctly interpreted and applied that rule consistently with the applicable statutory and constitutional law. Thus, this Court should deny review.

RESPECTFULLY SUBMITTED on September 18, 2015.

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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 17th day of September, 2015, at Tumwater, WA.

Julie Johnson, Legal Assistant

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Subject: State v. Avnet - S. Ct. No. 92080-0 - DOR's Answer to Petition for Review
Importance: High

Please find attached DOR's answer for filing in the above-referenced case; let me know if you have any questions.

Thanks,

Julie Johnson, LS III
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