NO. 93724-9

SUPREME COURT OF THE STATE OF WASHINGTON

IRWIN NATURALS,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Review of the decision below is unnecessary because this Court already granted review and heard oral argument in another case with the same legal issue. *See Avnet v. Dep't of Rev.*, 187 Wn. App. 427, 348 P.3d 1273 (2015), *review granted*, 184 Wn.2d 1026, 364 P.3d 120 (2016).

Both this case and *Avnet* involve the same commerce clause issue: whether a state has a sufficient "nexus" to tax interstate sales to Washington customers. In both cases, the taxpayers conceded that as a general matter, Washington had a sufficient nexus to the taxpayer based on in-state physical activities. But each taxpayer argued that certain sales were "dissociated" from this conceded nexus. Both taxpayers rely on a pair of 1951 cases, one from the United States Supreme Court and one from this Court. These cases were decided in an era where the Supreme Court prohibited direct taxation of interstate commerce by states. The Supreme Court has since overruled the prohibition on the state taxation of interstate commerce. Later decisions from the United States Supreme Court and this Court now look to whether the "bundle of corporate activity" justifies a state's taxation, rather than looking at individual sales transactions. Here, the Court of Appeals correctly identified and applied the modern case law from the United States Supreme Court and this Court.

One difference between *Avnet* and this case is that while both cases involve business and occupation (B&O) taxes imposed on Washington business activities, Irwin's case also involves its failure to collect sales taxes on Washington sales. This distinction does not warrant review, however. The United States Supreme Court already addressed this identical issue, and held that a taxpayer could not "dissociat[e]" two lines of business to avoid its tax collection duty for sales to California consumers. *Nat'l Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 554, 560, 97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977).

This Court's review of the dissociation issue in *Avnet* is likely to control the outcome of this case. If this Court affirms *Avnet* on the constitutional nexus standard applied in that case, review of this case will not be warranted. Even if the Court were to modify the constitutional nexus standard applied in *Avnet*, review would likely still be unnecessary because of the strong connection between Irwin's retail and wholesale sales, as described below.

II. COUNTERSTATEMENT OF THE ISSUE

Irwin Naturals concedes that it has "nexus" with Washington for its wholesale nutritional product sales in the state because its employees visit the state and because of independent marketing representatives in the state. Irwin also sold nutritional products at retail directly to consumers

through telephone and online orders, taking advantage of an integrated approach that sought to maximize revenue through both sales channels and transfer products between channels when advantageous to do so. Do the facts establish sufficient "nexus" under the dormant commerce clause for Washington to impose B&O tax and a sales tax collection requirement on Irwin's retail sales directly to Washington customers?

III. COUNTERSTATEMENT OF THE FACTS

A. Irwin's Washington Activities

1. Irwin's Washington sales

Irwin is a major nutritional product seller in the Washington market, with substantial Washington revenues. CP 45-46, 85-86, 88-89. Irwin is based in Los Angeles, California, and sends products to Washington by common carrier. CP 45-46. Between 2002 and 2009, the tax period at issue, Irwin earned over $15 million in total gross revenue selling its products to Washington customers. CP 45, 88-89.

Irwin's products and brand have a significant Washington presence. In addition to being sold in health food stores, Irwin products are available at numerous grocery stores in Washington, such as Albertsons, Haggen, Kmart, QFC, Target, Trader Joe's, Vitamin World, Walgreens, and 7-Eleven. CP 85-86. Amazon.com and drugstore.com, which also

have Washington locations, carry Irwin products. CP 85-86. Irwin has strong brand recognition, and people know the Irwin name. CP 118.

During the tax period, Irwin developed, marketed, and sold nutritional products wholesale to Washington retailers and distributors, and also made retail sales directly to Washington consumers. CP 45. Irwin sold at wholesale to distributors, health food stores, and grocery stores. Irwin made these sales throughout the tax period at issue in this case. From 2002 through 2009, Irwin earned approximately $10 million in gross revenue from these wholesale sales. CP 45. Irwin concedes that it owes tax on these wholesale sales. *See* CP 11.

Irwin also sold products at retail directly to Washington consumers. CP 45. These sales were initiated through online or phone orders. CP 45. Irwin started making direct consumer retail sales in 2004, after it already had a store presence in Washington. CP 45. Irwin earned approximately $5 million in gross revenue on its retail sales to Washington customers during the tax period. *See* CP 88-89 (showing the sales figures by year). The taxes on these retail sales are the subject of the dispute in this case.

2. Irwin's Washington marketing

Irwin employed an extensive marketing strategy in Washington to maintain its market here. During the tax period, senior Irwin employees

visited Washington in person numerous times. CP 83-84, 187-89. For example, Mike Berg, Vice President of Sales & Marketing, spent approximately 28 to 35 days in Washington between 2002 and 2009. CP 188. Jeff Sugawara, Vice President of Sales, spent approximately 30 to 32 days here over the same period. CP 188. They each engaged in new item presentation, category review, and promotional planning. CP 188. Lisa Clarke, an Inside Sales Representative, spent approximately 20 to 30 days in Washington over the same time period engaging in new item presentation, education of sales staff, and trade show exhibitions. CP 188.

Klee Irwin, the company's namesake, founder, and owner, spent two to six days in Washington between 2002 and 2004 engaging in new item presentation. CP 189. At least 11 other employees made visits to Washington to market Irwin products. CP 188-89. One Irwin sales representative lived in Washington during 2003 and 2004. CP 84, 188.

Irwin also contracted with four Washington marketing firms to assist it in marketing its products to Washington stores. CP 94-111. These companies provided a number of in-state services on behalf of Irwin in Washington. CP 83. These marketing firms agreed to adhere strictly to Irwin's price schedules, terms, and conditions of sale and acted as agents for Irwin. CP 107.

Mittenthal Associates, one of the companies Irwin hired to promote its products, received $152,300 from Irwin during the tax period. CP 81. Mittenthal made presentations to Costco regarding Irwin products. CP 116. Mittenthal sometimes presented together with Mike Berg, Irwin Vice President & Sales Representative. CP 119. Irwin admits that the various trips by its employees and independent representatives created sufficient nexus for Washington to tax its wholesale sales, but it contends they did not create sufficient nexus for its retail sales. CP 11.

Most Irwin wholesale customers used imagery and promotional materials provided by Irwin. CP 91. These customers often sold Irwin products on their websites. CP 92. Irwin also advertised directly to consumers using a variety of radio and television commercials. CP 89.

3. Links between Irwin's wholesale and retail sales

Irwin's wholesale and retail sales involved the same type of products—nutritional products. Almost every Irwin product sold at a Washington grocery or health store listed a phone number or email address allowing consumers to contact Irwin. CP 86. In addition, product packaging for in-store products contained a website, such as irwinnaturals.com. CP 86. These websites provided consumers with information about Irwin products and a way to obtain single-dose samples. CP 86. Irwin sold products to wholesale customers under the brand "Irwin

Naturals," as well as other names, from 2002 through 2006. CP 193. Some consumers who purchased Irwin products from Irwin's wholesale customers made phone inquiries to Irwin about buying additional Irwin products. *See* CP 47.

Irwin executed a marketing strategy that integrated its wholesale and retail sales. In 2004, two years after Irwin began selling products at wholesale to Washington stores, Irwin began promoting products directly to Washington consumers through infomercials. CP 87. One of Irwin's objectives was to shift products that it sold directly to consumers at retail to its wholesale customers, which would run "As Seen On TV" campaigns. CP 87. As explained by Vice President Mark Green, "The business plan in 2004 with respect to the Retail Channel was to offer products through infomercials for retail sale and then, as sales began to peak, offer those products for wholesale sale through retailers and distributors in the Wholesale Channel." CP 47.

A prime example of this integrated market strategy involved the product "Dual Action Cleanse," which was Irwin's "primary product" in its retail business. CP 87. After first selling the product directly to consumers, Irwin in 2006 began selling the product to Washington stores at wholesale, which displayed "As Seen On TV" advertising. CP 87. Irwin

continued to sell substantial amounts of the product in both the wholesale and retail channels throughout the tax period. CP 48.

B. Procedural History

The Department of Revenue audited Irwin's books and records and issued assessments for unpaid B&O, retail sales, and litter taxes for 2002 through 2009. CP 10, 11, 58. After paying the assessments, Irwin filed an action seeking a refund under RCW 82.32.180. CP 10-12.

Both parties moved for summary judgment. The trial court determined that the material facts were undisputed, and it ruled that Washington had substantial nexus under the commerce clause to tax all of Irwin's Washington sales. The trial granted summary judgment to the Department, and denied Irwin's motion. CP 247-48. Irwin appealed.

In a thorough and well-reasoned 25-page opinion, Division I of the Court of Appeals affirmed. *Irwin Naturals v. Dep't of Rev.*, No. 73966-2-1, slip op. (Wn. App. July 25, 2016) (publication granted Sept. 12, 2016). The Court explained in detail why Irwin was incorrect with respect to each of the taxes at issue.

For its sales tax collection duty, Irwin relied on *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992). *Quill* affirmed, on *stare decisis* grounds, one of the holdings from a prior Supreme Court decision, *National Bellas Hess, Inc. v. Illinois Dep't of*

Revenue, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967). *Quill* held that a company with no physical presence in a state had no duty to collect sales taxes on its interstate sales into that state. But *Quill* did not implicitly overrule, as Irwin argued, a different case[1] that concerned the issue of a company that had a physical presence in a state, but sought to "dissociate" certain sales that it claimed were unrelated to that physical presence. *See* Opinion at 15. Rather, the *Quill* Court, under the commerce clause, embraced "the sharp distinction" between mail-order sellers with a physical presence in the taxing state and those without it. *Id.* The Court of Appeals concluded that because Irwin's substantial physical presence in Washington was undisputed, the commerce clause did not prohibit Washington from imposing a sales tax collection duty. Opinion at 16.

The Court of Appeals also provided a detailed explanation of nexus related to Irwin's B&O tax obligations. Opinion at 17-24. After accurately summarizing the parties' arguments, the Court agreed with Division II's opinion in *Avnet* "that *Tyler Pipe*[2] controls the analysis of whether a substantial nexus exists." Opinion at 22. Rejecting the earlier cases relied on by Irwin, the Court of Appeals explained that *Tyler Pipe*, a 1987 U.S. Supreme Court case, "makes two things clear":

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[1] *Nat'l Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977).

[2] *Tyler Pipe Indus., Inc. v. Wash. Dep't of Rev.*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987).

> First, for businesses with a presence in the taxing state, the fact that orders are received and filled out-of-state for delivery within the taxing state does not, by itself, immunize the sales from a B&O tax. And second, the activities that form the nexus with the taxing state need not be tied to specific sales, but instead need only generally support the out-of-state vendor's ability to establish and maintain a market for its goods in the taxing state.

Opinion at 22.

Applying this standard, the Court had no difficulty in finding the requisite nexus. Irwin's wholesale and retail sales both involved nutritional products. *Id.* Irwin became very familiar with the Washington nutritional products market through the activities its employees and four marketing firms it contracted with engaged in here. Opinion at 23. The packaging for Irwin products sold at grocery and drug stores contained Irwin's phone numbers and email addresses. *Id.* And "Irwin's own marketing strategy establishes the symbiotic relationship between its wholesale activities and retail sales, with each supporting the other." Opinion at 24. Accordingly, Irwin could not show its retail sales were unrelated to its wholesale activities, and the Court affirmed the trial court's denial of Irwin's refund claim. *Id.* at 24-25. The Court also granted the Department's motion to publish.

IV. REASONS WHY THIS COURT SHOULD DENY REVIEW

This Court should deny review for three reasons. First, Irwin's central constitutional argument is identical to the argument being made in *Avnet*, even relying on the same two 1951 cases. Second, the former version of the administrative rule Irwin relies on has been substantially amended, and will also be addressed by this Court in *Avnet*. Third, there is no reason for this Court to accept review simply to apply the case law to the facts.

A. This Court Will Address "Dissociation" in *Avnet*.

The decision below is consistent with modern case law from the United States Supreme Court and this Court, and therefore RAP 13.4(b)(1) is not satisfied. The case also does not involve a significant constitutional issue or an issue of substantial public interest. RAP 13.4(b)(3), (4). The decision below is based on settled case law, and the Court will address the same legal issue in *Avnet*, alleviating the need to address "dissociation" in the state tax context for the second time here.

Under modern dormant commerce clause case law, courts apply a four-part test to determine whether a state may tax interstate commerce. A state tax is consistent with the commerce clause "when the tax [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). *Complete Auto Transit* expressly overruled earlier cases that held that a state could not directly tax interstate commerce.

Only the "substantial nexus" prong is in dispute in this case. "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." *Space Age Fuels v. State*, 178 Wn. App. 756, 762, 315 P.3d 604 (2013).

Both Avnet and Irwin Naturals primarily rely on *Norton Co. v. Illinois Dep't of Revenue*, 340 U.S. 534, 71 S. Ct. 377, 95 L. Ed. 517 (1951). *See* Irwin's Pet. for Review at 2, 6-7, 12, 16; *Avnet*, 187 Wn. App. at 444-46. In *Norton*, a Massachusetts company with a Chicago office challenged an Illinois gross receipts tax on its Illinois-bound sales. *Norton*, 340 U.S. at 535-37. The *Norton* Court held that, notwithstanding the presence of the Chicago office, Illinois could not tax transactions where Illinois customers placed orders with Norton's Massachusetts office, which filled them and delivered the goods directly to the buyer via common carrier. *Id.* at 539. These sales were "so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business . . . ." *Id.*

Both petitioners also rely on *B.F. Goodrich*, a Washington decision that reluctantly followed *Norton*. *B.F. Goodrich Co. v. State*, 38 Wn.2d 663, 675, 231 P.2d 325 (1951) (applying *Norton* shortly after that case was decided but remarking, "[w]ere we free to decide this case differently, we might well do so").

In both *Avnet* and this case, the Court of Appeals agreed with the Department that modern cases have modified the constitutional standards. *Avnet*, 187 Wn. App. at 445-47 (citing modern cases and explaining that "*Norton*'s foundations have been eroded by subsequent precedent"); Opinion at 20-23. A leading treatise agrees that *Norton* no longer provides the correct nexus standard because it was based on the direct vs. indirect taxation standard in effect at the time. WALTER HELLERSTEIN & JOHN A. SWAIN, STATE TAXATION ¶ 19.02[3][b][i] (3d ed. 2015) (explaining that "*Norton*, however, was rendered obsolete by *Complete Auto Transit . . .*", which rejected the formal distinction between direct and indirect taxes on interstate commerce).

Rather, the United States Supreme Court now focuses not on whether in-state activities are connected to specific transactions, but on whether the bundle of corporate activity in a state is geared towards establishing and maintaining a market. *See* Opinion at 22 (citing *Tyler Pipe*). This Court has adopted the same approach. *Chicago Bridge & Iron*

Co. v. Dep't of Rev., 98 Wn.2d 814, 821, 659 P.2d 463 (1983) (rejecting taxpayer's dissociation claim that because contracts for certain sales were negotiated and formalized out of state, nexus with Washington was absent for those sales). Therefore, in both *Avnet* and this case, the parties rely on the same case authority and arguments.[3]

Avnet and this case both involve the B&O tax, a tax imposed on a seller of goods for the gross proceeds from sales. *See* RCW 82.04.220. Irwin's case also involves the retail sales tax, which is not at issue in *Avnet*, but that distinction does not make the case worthy of review. The retail sales tax is collected by the seller from the purchaser, who then holds the tax in trust and remits it to the state. RCW 82.08.050. The seller becomes liable for the sales tax, however, if it does not collect the tax. RCW 82.08.050(3). That is what occurred with Irwin.

The sales tax element to this case does not warrant review because the United States Supreme Court has already addressed and rejected the same "dissociation" argument in a comparable sales and use tax collection case. The issue in *National Geographic* was whether California could require out-of-state seller National Geographic to collect use tax on direct

[3] There is an additional issue in *Avnet* that is not present in this case: whether a wholesale sale that involves a wholesale purchaser outside Washington but delivery to a separate Washington purchaser (a three-party transaction known as a drop shipment) is taxable under Washington law. Here, it is conceded that all the retail sales at issue occur in Washington.

mail-order sales of globes, maps, and atlases sent to California addresses. *National Geographic*, 430 U.S. at 554. National Geographic maintained two offices in California from which it solicited advertising for its magazine. However, neither office performed any activity relating to National Geographic's mail-order business. Thus, National Geographic argued that its in-state activity—which was all related to advertising sales, not mail-order sales—should be disregarded in determining whether it must collect California use tax on mail-order sales. More specifically, "[t]he Society argues . . . that there must exist a nexus or relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller's activity within the State." *Nat'l Geographic*, 430 U.S. at 560.

The Supreme Court squarely rejected National Geographic's dissociation argument, holding that because National Geographic had a sufficient physical presence in California, it did not matter that those California contacts were related to a specific line of business. *Id.* at 561. The case is directly on point. And *National Geographic* was decided four weeks *after* the Supreme Court's landmark decision in *Complete Auto Transit*, which set forth the modern commerce clause standards.

Irwin argues that *National Geographic* was implicitly overruled by *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d

91 (1992). But *Quill* does not address dissociation, or a business that has multiple operations or product lines. *Quill* addressed a North Dakota sales and use tax collection requirement imposed on an out-of-state mail order company that did not send employees or independent representatives into the State or have other in-state contacts. *Quill*, 504 U.S. at 301. *Quill* preserved "a safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail.' " *Id.* at 315 (quoting *Nat'l Bellas Hess, Inc. v. Illinois Dep't of Rev.*, 386 U.S. 753, 758, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967)). *Quill* is clearly distinguishable because Irwin sent employees into Washington and contracted with independent representatives here to conduct business activity on its behalf. In other words, Irwin concedes the "physical presence" that was lacking in *Quill*.

Irwin cites no case authority from any jurisdiction supporting its novel interpretation of *Quill*. The fact that *Quill* clarified the contours of the due process clause and commerce clause does nothing to suggest the Court was reconsidering its holding in *National Geographic*, as the Court of Appeals correctly analyzed. This unsupported argument does not warrant review. Because the United States Supreme Court has directly addressed the issue, review by this Court is not warranted.

B. This Court Does Not Need Another Decision Interpreting Former Rule 193.

The Department of Revenue has an administrative rule, WAC 458-20-193, that addresses many issues surrounding the taxation of interstate sales. The version of the rule in effect during the tax period provided the following with respect to B&O taxes: "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." *Former* WAC 458-20-193(7)(c) (1991). The Department amended the rule several times over the years to incorporate changes in commerce clause case law concerning nexus and B&O taxes. Nevertheless, taxpayers such as Irwin continued to assert dissociation claims based on case law that no longer sets forth the modern standards for nexus. Accordingly, the Department significantly revised this rule again in 2016, deleting this portion of the rule altogether. *See* WAC 458-20-193 (2016) (Part I). Because the rule has now been amended, any decision based on the former version of the rule will not affect taxpayers in tax periods after 2016.

In addition, review based on this portion of the former version of the rule is not necessary. This section of the former rule is already at issue

in *Avnet*, and a second ruling on the meaning of a former Department administrative rule would not be helpful to the general public.

The Court of Appeals was also correct on the merits. The Court correctly determined that the rule was the Department's attempt to distill the commerce clause case law. *See* Opinion at 25 n.4. The rule did not provide a different standard by which to raise a constitutional challenge. The Court correctly reasoned that Irwin did not prove a commerce clause violation either under the constitutional standards, or under the Department's interpretation of those constitutional standards in its administrative rule. *Id.*

C. This Court Should Not Accept Review to Apply the Law to the Facts.

Irwin also appears to assert that this Court should accept review because the Court of Appeals incorrectly applied the law to the facts. *See* Pet. for Review at 9-12. This is not one of the grounds for review of a decision by the Court of Appeals. *See* RAP 13.4.

This case was decided on cross-motions for summary judgment. Both parties agreed there were no genuine issues of material fact. The facts in the record primarily involved declarations by officers or employees of Irwin, and one deposition of a third party representative contracted by Irwin to promote its products to Costco. Ample facts

demonstrate a connection between Irwin's retail and wholesale sales, even assuming a connection is constitutionally required. *See* Opinion at 22-24.

The question at issue is a legal one. The Court of Appeals properly identified the modern nexus cases. Each of these cases looks not to whether in-state activities are related to specific sales, but at the effect those activities have in creating a broader market for a company's sales. Irwin's theory could have legs only if all of these cases are inapplicable and only the earlier *Norton* decision applies. The question of what law applies is the same legal question at issue in *Avnet*.

D. The Court Should Defer Ruling on Irwin's Petition Until the Court Issues Its Decision in *Avnet*.

Avnet and this case address the same legal issue. This Court should therefore defer Irwin's petition until it decides *Avnet*. Though *Avnet* does not involve sales tax and would not impact this case as to that tax, the Court's review of the dissociation issue with respect to B&O taxes in *Avnet* is likely to control the outcome of this case. If this Court affirms *Avnet* on the constitutional nexus standard applied in that case, review of this case will not be warranted. Even if the Court were to modify the constitutional nexus standard applied in *Avnet*, the Court would have to

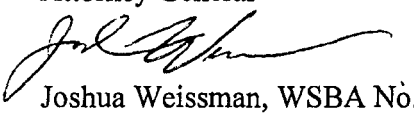
determine whether review or remand of the Court of Appeals decision in this case was necessary to apply a different constitutional standard.[4]

V. CONCLUSION

This case presents the same constitutional issue as another case already before this Court. The decision by the Court of Appeals is well-reasoned, thorough, and consistent with another published case by that court. The Court of Appeals and trial court correctly rejected Irwin's claim. This Court should deny the petition for review.

RESPECTFULLY SUBMITTED this 10th day of November, 2016.

ROBERT W. FERGUSON
Attorney General



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[4] It is likely that neither review nor remand would be warranted because of the significant link between Irwin's retail and wholesale sales. Review would also not be warranted based on any decision in *Avnet* on the issue of where sales occurred in that case, because it is undisputed the sales at issue in this case occurred in Washington.

PROOF OF SERVICE

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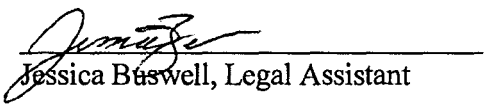
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of November, 2016, at Tumwater, WA.



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