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NO. 37516-8-11

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

LAMTEC CORPORATION,

Appellants,

v.

DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

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A. INTRODUCTION

The Department of Revenue (the "Department") has improperly assessed Business and Occupation ("B&O") taxes upon Lamtec Corporation ("Lamtec") for the years 1997 through 2004. The Department's B&O tax assessment is invalid because Lamtec has virtually no contact with the State of Washington. Lamtec ships all of its products to customers located in Washington "FOB Flanders, New Jersey," which means that all of Lamtec's customers receive Lamtec's goods in New Jersey, not Washington. Lamtec's occasional visits to existing customers located in Washington are not directly related to Lamtec's sales. Instead, Lamtec's sales are solicited by employees outside of Washington. Lamtec has no contact with Washington directly related to its sales to customers located in Washington, and therefore Lamtec's minimum contacts with Washington State are disassociated with the sale of its products to customers located in Washington.

The Department, however, asks this Court to hold that a company which neither owns nor leases any real property in Washington, employs no one in Washington, hires no independent contractors in Washington, and which has employees that merely visit existing customers located in Washington on an occasional basis "does business in Washington" and is therefore subject Washington B&O tax. Lamtec requests that this Court reverse the superior court and award it a refund of the taxes it has paid.

B. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred when it ruled that the Department is entitled to summary judgment as a matter of law, granted the Department summary judgment, dismissed Lamtec's appeal for a refund of B&O tax with prejudice, and awarded the Department statutory attorney fees.

Issues Pertaining to Assignments of Error

1. Whether the Department may impose Washington B&O tax on Lamtec under WAC 458-20-193 when Lamtec does not deliver its products to Washington and does not have a sufficient nexus with Washington (Assignment of Error 1).

2. Whether Lamtec's activities in Washington are disassociated from any sales to Washington customers (Assignment of Error 1).

3. Whether the Department's imposition of B&O tax on Lamtec under the facts of this case violated the Commerce Clause of the United States Constitution (Assignment of Error 1).

C. STATEMENT OF THE CASE

1. Background on Lamtec and Its Minimal Contacts with Washington State

Lamtec manufactures vapor barriers and insulation facings, which are incorporated into the products made by its customers. These products include insulation rolls, duct wrap, duct board, and pipe insulation.

Lamtec's headquarters are in Flanders, New Jersey, as is its only manufacturing facility, where it employs approximately 120 persons. CP 24. It also employs one person in Ohio. CP 26. Lamtec sells its products for use in all 50 states, but pays B&O taxes only in New Jersey and Ohio. CP 25-26.

Lamtec's contacts with Washington are minimal. Lamtec has never owned real property in Washington. CP 24. Lamtec has never leased any real property in the State of Washington. CP 25. Lamtec has never employed any individual who resided in Washington. CP 25. Lamtec has never even paid for the services of an independent contractor who has resided in Washington. CP 25.

Lamtec has never done any advertising specifically targeted at Washington. CP 25. All orders placed by Lamtec's Washington customers are placed by telephone and handled by Lamtec's employees in Flanders, New Jersey. CP 25. No orders have been solicited by Lamtec employees within Washington, and no orders have ever been accepted by Lamtec employees within Washington. CP 25. All of the goods purchased by Lamtec's customers located in Washington have been shipped FOB Flanders, New Jersey. CP 25; 39-41. Several of Lamtec's customers located in Washington verify that they assume all "dominion and control over the goods beginning at Lamtec's Flanders, New Jersey location and continuing at all times thereafter." CP 41. These customers even personally inspect Lamtec's manufacturing facility located in

Flanders, New Jersey to ensure that the products they receive there meet their specifications. CP 41.

The only direct contacts Lamtec made with Washington for the period relevant to this appeal (1997 through 2004) were made by three Lamtec employees: Tom Thomas, Bill Buckman, and Paul Leonardelli. CP 25. These visits to Washington were made only to existing and established customers of Lamtec. CP 25; 37-45. None of Lamtec's customers located in Washington became customers of Lamtec because of these visits. CP 25; 37-45. These visits were predominantly, if not wholly, social in nature, during which Lamtec's products were not even discussed. CP 446-50.

2. Procedural Background

On or about May 24, 2004, the Department requested that Lamtec complete a Washington State Business Activities Questionnaire by June 3, 2004. CP 46-47; 69. This questionnaire was unsolicited by Lamtec and was understandably met with some confusion, given Lamtec's minimal contacts with Washington. In fact, Lamtec's outside accountant, Ray Mark, did not even know what a Washington State Business Activities Questionnaire was, or why the Department had sent one to Lamtac. Mr. Mark is not a Washington CPA and is not familiar with Washington's tax structure.

Mr. Mark contacted Revenue Agent Vivian Chung to ask about the request. Ms. Chung evidently misunderstood the nature of Lamtec's business and its contacts with Washington and reached conclusions during this telephone conversation that were not supported by the facts. After talking with Mr. Mark, Ms. Chung determined that Lamtec was required to register with the Department of Revenue and demanded that Lamtec complete a Washington Master Business License Application. CP 48-49. She based this decision solely upon her telephone conversation with Mr. Mark and without the benefit of a completed Washington State Business Activities Questionnaire. CP 48-49.

In an effort to comply with Ms. Chung's demand, Lamtec promptly completed and returned a Washington Master Business License Application. Lamtec's eagerness to be cooperative and comply with Ms. Chung's demand unfortunately, compounded the Department's misunderstandings about the nature of Lamtec's business and contacts with Washington State. As explained above, Lamtec does not engage in business in Washington or ship goods directly into Washington. CP 25-26; 37-45.

Nevertheless, the Department assessed $45,599.76 in back taxes upon Lamtec, plus $11,399.96 in delinquent penalties and $14,456.40 in assessment interest and penalties, for a total of **$71,566.12,** which continues to accrue interest. CP 422. Lamtec contested the Department's tax assessment and appealed to the Thurston County Superior Court under

RCW 82.32.180. CP 50. Thurston County Superior Court affirmed the Department's ruling on summary judgment. CP 472-74. Lamtec timely filed the present appeal. CP 477-83.

D. ARGUMENT

1. Standard of Review.

This Court reviews determinations on summary judgment de novo. *Enterprise Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 551, 988 P.2d 961 (1999). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). Courts consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Clements*, 121 Wn.2d at 249. When the parties agree on the facts, whether a statute applies to a particular factual situation is a conclusion of law. *Blake v. Federal Way Cycle Ctr.*, 40 Wn. App. 302, 309, 698 P.2d 578 (1985). "[I]f there are no material issues of fact, the court may resolve this case on summary judgment motions." *Texaco Refining and Marketing, Inc. v. Department of Revenue*, 131 Wn. App. 385, 401, 127 P.3d 771 (2006). Here, no material issues of fact exist. The only issue or question here is whether the Department correctly applied WAC 458-20-193 ("Rule 193"), which involves inbound and outbound interstate sales of tangible personal property, and which resulted in the imposition of B&O tax on Lamtec.

Tax statutes are interpreted narrowly in favor of the taxpayer. *Tesoro Refining and Marketing Co. v. State, Dept. of Revenue*, 135 Wn. App. 411, 418, 144 P.3d 368 (2006); *First Am. Title. Ins. Co. v. Dep't of Revenue*, 144 Wn.2d 300, 303, 27 P.3d 604 (2001) (any doubt as to the meaning of a tax statute is construed against the taxing power). Here, the issue is whether the statutes and rules for imposing Washington B&O tax apply to Lamtec. These rules, including Rule 193, must be read narrowly and any ambiguity must be interpreted in favor of Lamtec.

2. Lamtec is Not Subject to Washington B&O Tax Under the Department's Own Rules.

Washington's B&O tax is imposed on the "act or privilege of engaging in business activities" in Washington and is "measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be." RCW 82.04.220. The Department of Revenue cannot assert B&O tax on sales of goods that originate outside Washington unless: (1) the goods are received by the purchaser in Washington; *and* (2) the seller has a nexus to Washington. WAC 458-20-193(7)). A "nexus" is defined as "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." WAC 458-20-193(2)(f). Both of these elements must be satisfied before B&O tax may be imposed on an out-of-state seller. If either one is

missing, the Department may not assess B&O tax on Lamtec. WAC 458-20-193(7).

Here, both elements are missing because Lamtec's Washington customers receive Lamtec's products in New Jersey, not Washington, and Lamtec has not carried on any activity within Washington that is significantly associated with Lamtec's ability to establish a market for its products here. At most, Lamtec's occasional visits to Washington assisted in maintaining existing customer relationships, but were insufficient to establish a nexus, such that Lamtec could be seen as doing business in Washington.

a. Lamtec's Goods are "Received" by Washington Customers in the State of New Jersey.

Lamtec's Washington customers receive Lamtec's goods in New Jersey, not Washington. Accordingly, Washington may not assess B&O tax on Lamtec. WAC 458-20-193(7). Lamtec ships all orders FOB Flanders, New Jersey. CP 25. This term is reflected in Lamtec's bill(s) of lading, which provide that its products are received by Lamtec's customers when the carrier picks the products up in Flanders, New Jersey. CP 29. The shipment of the goods FOB Flanders, New Jersey and the bill of lading constitute part of the sales agreement between Lamtec and its customers located in Washington for the delivery of Lamtec goods.

The term FOB has both practical and legal significance. The FOB designation indicates where the purchaser takes possession of the goods.[1] In this case, Lamtec transfers title and ownership of its goods to its customers located in Washington upon delivery of its goods to the transportation carrier located in Flanders, New Jersey. The passing of title is not a mere technicality. When title passes, the purchaser assumes all risk of loss. If Lamtec's products are lost or damaged en route after title has passed to the customer in Flanders, New Jersey, the customer, not Lamtec, must bear the cost. The F.O.B. meaning therefore has real, practical commercial significance for both Lamtec and its customers.

The Uniform Commercial Code ("UCC"), the Washington Supreme Court and the U.S. Supreme Court all recognize the real impact of an FOB designation for the purposes of imposing taxes. Under the UCC the place of delivery in such contracts (and those that include equivalent language) is the place where the facilities of a seller's carrier are located. 1 J. White & R. Summers, Uniform Commercial Code (4th Ed. 1995), § 3-5 at 128. RCW 62A.2-401(2)(a) ("title passes to the buyer at the time and place of shipment"); RCW 62A.2-401 (ownership passes at delivery even if title is reserved).

The Washington Supreme Court has expressly held that the UCC determines where a sale is made when determining the tax consequences

[1] "Free on board some location (for example, FOB shipping point; FOB destination). A delivery term which requires a seller to ship goods and bear the expense and risk of loss to the F.O.B. point designated.... Title to goods usually passes from seller to buyer at the FOB location." Black's Law Dictionary 642 (6th Ed.1990).

of a sales transaction. *Weyerhaeuser Co. v. Dep't of Revenue*, 106 Wn.2d 557, 562-63, 723 P.2d 1141 (1986). The issue in *Weyerhaeuser* was whether Weyerhaeuser's purchases of bunker fuel were subject to sales tax. That issue ultimately depended on where Weyerhaeuser delivered the timber it sold to its Asian customers. If delivery occurred *before* the ship's voyage, Weyerhaeuser functioned as a carrier when it transported the logs and, as a carrier, its purchases of bunker fuel were exempt from sales tax. On the other hand, if Weyerhaeuser delivered the logs *after* the ship's voyage, then Weyerhaeuser transported the logs for itself as a seller, and its purchases of bunker fuel were taxable. The Washington Supreme Court applied the UCC and determined that the logs were delivered and the sale made before the voyage began:

> Thus, a fair reading of the contracts in question, together with the relevant sections of RCW 62A.2-320 compels the conclusion that ***at all times during the ocean voyage to the port of destination the logs being shipped by Weyerhaeuser are the property of the purchaser***. Because the purchaser owns this timber and has contracted with the Weyerhaeuser for carriage, the purchaser has effectively hired the corporation as a carrier.

Weyerhaeuser, 106 Wn.2d at 562-63 (emphasis added). As *Weyerhaeuser* demonstrates, the UCC applies to the terms of the parties' transportation agreement to determine where a sale is made and, from that determination, what tax classification follows.

Similarly, the United States Supreme Court has held that the parties' sales agreement determines where a sale is made for tax purposes. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304 (1944) (agreement provided sales made by delivery at point of shipment taxable only at origin); *McGoldrick v. Berwind-White Coal Company*, 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565 (1940) (agreement provided sales made by delivery at point of destination taxable only at destination).

McLeod is factually similar to the present case. In *McLeod*, Arkansas sought to impose tax on the gross receipts from a Tennessee corporation's sales made under a contract that provided for delivery F.O.B. Memphis, with the goods transported to the buyers in Arkansas by common carrier. The Supreme Court reaffirmed that delivery of the goods at the designated F.O.B. point determined where the sale was made:

> In this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale -- the transfer of ownership -- was made in Tennessee. **For Arkansas to impose a tax on such transactions would be to project its powers beyond its boundaries . . . .**

McLeod, 64 S. Ct. at 1025 (emphasis added). Similarly, here the Department (and thus Washington) is attempting to impermissibly project its powers beyond its boundaries to impose B&O tax on Lamtec based on sales transactions that occur in New Jersey thousands of miles away rather than here in Washington.

The *McLeod* Court expressly distinguished *Berwind-White*:

> We agree with the Arkansas Supreme Court that the *Berwind-White* case presented a situation different from this case and that this case is on the other side of the line which marks off the limits of state power. . .
> .

McLeod, 64 S. Ct. at 1025.

> In *Berwind-White*, the Pennsylvania seller completed his sales in New York; in this case the Tennessee seller was through selling in Tennessee.

Id.

The Washington Supreme Court and the U.S. Supreme Court determined the above cases based on the parties' shipping terms, as defined by the UCC. Thus, the parties' contract is determinative as to when a sale becomes taxable.

Recent case law that discusses *McLeod* and *Weyerhaeuser* in regard to municipal B&O tax is not applicable here. *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 156 P.3d 185 (2007). *Ford* addressed the propriety of two municipal B&O tax schemes, which did not require determining where a sale was made or where goods were received for assessment. At issue in the present case, however, is Washington's assessment of B&O tax, which *does* require determining that the goods are received by the purchaser in Washington. WAC 458-20-193(7). Like the present case, *McLeod* and *Weyerhaeuser* required locating the transfer of title of the goods to determine whether the tax was proper. *See Ford*, 160

Wn.2d at 44. Therefore, the courts' application of UCC standards to this issue in *McLeod* and *Weyerhaeuser* are persuasive here.

Lamtec's contract with its customers provides that the purchaser takes possession of goods it purchased in New Jersey, and Lamtec's customers assume all risk of loss when the product is shipped away from Flanders, New Jersey to the customers' home states. Applying WAC 458-20-193(7) in the manner it was applied below would violate this principle and would allow the Department to overreach by allowing it to impose an additional requirement beyond the parties' FOB designation for purposes of assessing Washington B&O tax. WAC 458-20-193(7)(a) provides that:

> 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.**

WAC 458-20-193(7)(a). This regulation overreaches when it requires more than what the UCC requires, which has been an FOB designation that does not typically require the carrier to expressly have the right to inspect the goods.

The Department ignores this long established legal standard. The term "FOB Flanders" means that Lamtec's customers located in Washington received the Lamtec goods in Flanders, New Jersey. Because no Lamtec goods are received in Washington, the first requirement for

imposing B&O tax under WAC 458-20-193(7) is not met, and the Washington's imposition B&O tax upon Lamtec is invalid.

b. Lamtec Does not Have a Substantial Nexus with Washington.

B&O tax cannot be imposed without establishing nexus. WAC 458-20-193(7). In order to be valid, the definition of nexus[2] must be read in light of the Commerce Clause and the Due Process Clause of the United States Constitution. A state's jurisdiction to tax a non-resident corporation is bound by the nexus requirements of the Due Process Clause of the 14th Amendment. The Commerce Clause requires that "[t]he interstate business must have a substantial nexus with the State before any tax may be levied on it." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626, 101 S. Ct. 2946 (1981).

In *Complete Auto Transit, Inc., v. Brady*, the U.S. Supreme Court adopted a four-part test for Commerce Clause challenges. *Complete Auto Transit, Inc., v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). This test requires that: (1) there be a *substantial* nexus with the taxing state; (2) the tax be fairly apportioned; (3) the tax not discriminate against interstate commerce; and (4) the tax be fairly related to the services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 279.

[2] "'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." WAC 458-20-193(2)(f).

An out-of-state corporation only has a substantial nexus with a state for purposes of imposing taxes where the corporation has a physical presence in the taxing State. *Quill Corp. v. North Dakota*, 504 U.S. 298, 311-12, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) (applying the substantial nexus test in the context of sales and use taxes and reaffirming the physical presence rule from *National Bellas Hess, Inc. v. Department of Revenue of State of Ill.*, 386 U.S. 753, 87 S. Ct. 1389 (1967)).

A physical presence in a state requires something akin to "a small sales force, plant or office" within the state. *Quill*, 504 U.S. at 315. This is a bright-line constitutional rule for the imposition of taxes that are based on sales within the state, such as Washington's B&O tax. *Quill*, 504 U.S. at 315; *see* WAC 458-20-193. Both *Quill* and *National Bellas Hess* involved companies marketing their products by mailing catalogues to customers in other states. The U.S. Supreme Court held that this activity did <u>not</u> establish the nexus requirement because it did not involve a physical presence in those states.

Lamtec does not satisfy the physical presence requirement necessary to establish substantial nexus. Lamtec's contacts with Washington state were short, infrequent, nonsolicitation visits made by Lamtec's employees. Lamtec has no sales force, no office, and no plant within Washington, and no equivalent of these things. In fact, Lamtec's contacts with Washington were even more indirect than sending mail order catalogues into Washington because Lamtec's visits to Washington

did not involve any solicitation of business. Lamtec's employees made an average of only three visits to Washington per year. These visits were short in duration, lasting no more than 1 to 3 days. Indeed, these visits only lasted more than one day because of the logistics of flying to Washington from New Jersey, not because of the length or significance of the meetings. As Lamtec employee Bill Buckman describes:

> I candidly stay in Washington overnight simply because of the travel, as often it is because of the travel distance. So it doesn't make sense. It practically can't be done so I have to stay overnight. If they were in Indiana or if they were in Chicago or if they were in Kentucky I would probably would be there one day and be home that night.

CP 37.

No sales solicitations occurred during any of these visits to Washington by Lamtec employees. CP 25; 37-45. The purpose of these trips was to meet with existing customers and answer questions about the product. CP 25; 37-45. The employees do not solicit or receive orders. CP 25; 37-45. Instead all orders are placed by customers to Lamtec's customer service department in Flanders, New Jersey. CP 25; 37-45. Other than these short, infrequent visits, Lamtec has no contact with Washington state. CP 25; 37-45. It does not maintain employees (or independent contractors), facilities, a place of business or inventory within the State of Washington. CP 25; 37-45. Therefore, Lamtec does not have substantial nexus with the State of Washington as required by *Quill* and its progeny.

The Washington Court of Appeals, Division II, has already ruled against a taxing authority in a case that is remarkably similar to this case. *City of Tacoma v. Fiberchem*, 44 Wn. App. 538, 722 P.2d 1357, *rev. den'd* 107 Wn.2d 1008 (1986). In *Fiberchem*, the City of Tacoma attempted to impose its B&O tax on a nonresident corporation, Fiberchem, Inc. The authority of a municipality to tax is analogous to the authority of the State to tax. *Fiberchem*, 44 Wn. App. at 543. The facts of the case revealed that Fiberchem did not have an office in Tacoma, but it employed one sales representative who spent approximately one and a half days per month (about 12 hours a month) contacting customers in Tacoma. *Fiberchem*, 44 Wn. App. at 543. Some of Fiberchem's largest customers were contacted in person by sales personnel, but sales orders were handled by Fiberchem's Tukwila office. *Fiberchem*, 44 Wn. App. at 540 Fiberchem delivered its goods to customers in Tacoma by common carrier and even its own delivery trucks. The Court of Appeals held that Fiberchem's activities in Tacoma were so minimal that it could not be said to be engaging in business there. The Court held that such activities did not form a nexus with Tacoma sufficient for Tacoma to tax Fiberchem. *Fiberchem*, 44 Wn. App. at 543.

The contacts that *Fiberchem* had with the City of Tacoma were much more significant and substantial than Lamtec's contacts with Washington. Unlike Fiberchem, Lamtec has not made monthly calls on its Washington customersand Lamtec does not make deliveries in

Washington. And yet, in *Fiberchem*, the trial court ruled, and the Court of Appeals affirmed, that *Fiberchem's* contacts with the taxing jurisdiction were too minimal to constitute nexus. *Fiberchem*, 44 Wn. App. at 539. Lamtec's contacts with Washington are well below the threshold set out in *Fiberchem*, and are therefore far less than "substantial" for imposing Washington B&O tax on Lamtec.

In addition, in a fairly recent case decided by the Washington Court of Appeals Division I, the Court explicitly recognized that imposing a B&O tax based on extraterritorial activities was unconstitutional. *See e.g.*, *KMS Financial Services, Inc. v. City of Seattle*, 135 Wn. App. 489, 493, 146 P.3d 1195 (2006), *rev. denied* 161 Wn2d 1011 (2007). ("We agree with KMS that by seeking to tax income generated by extraterritorial activities, the City's B & O tax as applied to KMS exceeds federal and state constitutional limits."), *rev. denied*, 161 Wn2d 1011 (2007).

In sum, the facts of the present case do not support a conclusion that Lamtec has substantial nexus with Washington. Lamtec's presence within the State of Washington is narrowly confined to an average of three trips per year to visit its customers located in Washington. These contacts are simply not substantial enough to justify imposing B&O taxes upon Lamtec. Without this nexus of substantial contacts, the second element required by WAC 458-20-193(7) is not met, and Washington's imposition of B&O tax on Lamtec is improper.

3. Lamtec's Minimal Visits to Washington are Disassociated from Washington Sales and Therefore Are Not Subject to B&O Tax.

Even assuming, for the sake of argument, that Lamtec's goods were received in Washington and Lamtec had a sufficient nexus with Washington through substantial contacts (both of which are not accurate and, for that reason, disputed), the Department would still not be authorized to impose B&O taxes upon Lamtec because Lamtec's Washington activities are "not significantly associated in any way with the sales into this state." WAC 458-20-193(7)(c).

Rule 193 does not define "significantly associated" activities. However, the U.S. Supreme Court has addressed this concept. In *Norton Co. v. Illinois Dept. of Rev.*, the taxpayer maintained a branch office in Illinois. *Norton Co. v. Illinois Dept. of Rev.*,340 U.S. 534, 537, 71 S. Ct. 377 (1951). Sales by the taxpayer out of its Illinois branch office to Illinois residents were conceded by the taxpayer to be subject to Illinois occupation tax. However, Illinois also argued that maintenance by the taxpayer of the branch office meant that all sales to Illinois residents by the taxpayer, including those sales which the taxpayer received directly in its Massachusetts plant, accepted in its Massachusetts plant, filled in Massachusetts and shipped F.O.B. Massachusetts, were subject to Illinois' occupation tax. The U.S. Supreme Court held that Illinois could not impose tax on sales that were sent by the Illinois customer directly to

Massachusetts. Even though the taxpayer had a physical presence in Illinois, sales that were not made through its branch office were disassociated from the taxpayer's Illinois activity. *Id.*

Another U.S. Supreme Court case held that the nexus test is different and requires a lower threshold for indirect taxes such as use taxes, but for a direct tax, such as a B&O tax requires a higher nexus threshold. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S. Ct. 1386 (1977). Disassociation of the activity to the sale is fatal to the application of a direct tax such as a B&O tax. *National Geographic Society*, 430 U.S. at 560 (citing *Norton*, 340 U.S. 534).

The three Lamtec employees who came to Washington during the relevant time period only visited Lamtec's existing and established clients. These clients did not become Lamtec customers through these visits. CP 25. In fact, none of Lamtec's employees solicited orders and were not even authorized to receive orders on behalf of Lamtec. CP 25. Instead, as previously emphasized, all customer orders are received by Lamtec's customer service department in New Jersey where the goods are delivered and received by the customer, and shipped F.O.B. Flanders, New Jersey, to the customer. CP 25. As such, even if the Court were to conclude that constitutional nexus was established, Lamtec's particular facts reveal that the occasional short visits by its representatives are disassociated from its sales to Washington businesses.

In *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, the U.S. Supreme Court affirmed that for a constitutional nexus to exist, "'the activities performed in this state on behalf of taxpayer [must be] significantly associated with the taxpayer's ability to establish ***and*** maintain a market in this state for the sales.'" *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987) (quoting and affirming, in part, *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 105 Wn.2d 318, 323, 715 P.2d 123 (1986)).

This requirement is conjunctive. The taxpayer's activities must be significantly associated with *both* establishing *and* maintaining a market. The Department's regulation overreaches in its attempt to collect B&O tax on out-of-state corporations when it requires that significant activity in the state can mean "significant services in relation to establishment **or maintenance** of sales into the state" WAC 458-20-193(7)(c)(v). This is much broader than the constitutional requirement set forth in *Tyler Pipe*, as the present case illustrates. Here, Lamtec's employee's visits to Washington were, at most, for the purpose of maintaining sales in the state, but were not done to establish new customers. Lamtec's customers located in Washington were already established.

Lamtec's activities in occasionally visiting existing customers located in Washington were disassociated with establishing new customers and Lamtec is entitled to a refund of the B&O tax it has paid.

E. CONCLUSION

The Department's B&O tax assessment against Lamtec's is invalid because Lamtec has virtually no contact with the State of Washington. Lamtec ships all goods to Washington as FOB Flanders, New Jersey, which means that all of Lamtec's customers receive the Lamtec goods it purchases in New Jersey not Washington. The Department's imposition of B&O taxes upon Lamtec is also improper because Lamtec's minimal contacts with Washington are disassociated with the sale its goods to customers located in Washington. The trial court erred when it denied Lamtec's motion for summary judgment because Washington law and United States Supreme Court precedent do not support the Department's position that Lamtec is subject to Washington B&O taxes. Lamtec is entitled to be reimbursed by the Department for prior taxes paid plus costs.

If the Department's assessment of B&O taxes were adopted and followed throughout the United States, Lamtec and other corporations like it, would have to fill out tax returns for every state. Imposing B&O taxes upon Lamtec violates existing case law from the State of Washington and the United States Supreme Court.

RESPECTFULLY SUBMITTED 1st day of August, 2008.

Respectfully submitted,

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No. 37516-8-II

COURT OF APPEALS,
DIVISION II,
OF THE STATE OF WASHINGTON

LAMTEC CORPORATION

Appellant,

v.

DEPT. OF REVENUE, STATE OF WA,

Respondent.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I served a copy of Brief of Appellant on August 1, 2008, via Seattle Legal and/or U.S. Mail and/or facsimile as follows:

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