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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LAMTEC CORPORATION,

Appellant,

v.

DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Lamtec Corporation takes advantage of Washington's market by making wholesale sales to Washington customers of over $1.1 million per year. In order to maintain its customers in Washington, Lamtec employees make regular, in-person visits to Washington – visits so significant to Lamtec's business model that Lamtec would not even consider abandoning them. Nevertheless, Lamtec seeks to avoid Washington's Business and Occupation (B&O) tax that applies to all wholesale sales activity in Washington because it ships its products to Washington "FOB" New Jersey and it claims that its contacts with Washington are not sufficient to allow Washington to tax its activity pursuant to the Commerce Clause of the United States Constitution.

Lamtec's argument fails for at least two reasons. First, Washington courts have consistently and repeatedly rejected the notion that parties may avoid Washington's B&O tax by shipping their goods "FOB" from outside the state. Second, under well-established constitutional jurisprudence regarding state taxation of interstate business, Lamtec has sufficient nexus with Washington because the visits by Lamtec employees to Washington are significantly associated with maintaining its market in the state. Moreover, Lamtec may not rely on the "safe harbor" rule that does not allow taxation when a taxpayer has no

physical presence in a state because of its in-person visits to Washington customers. Accordingly, this Court should affirm the grant of summary judgment to the Department by the trial court.

II. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Can Lamtec avoid Washington's B&O tax on wholesale sales to Washington customers by shipping its products "FOB" New Jersey when Washington courts and the United States Supreme Court have repeatedly upheld the imposition of B&O tax upon products shipped to Washington "FOB" from outside the state and the Department's administrative rules specifically allow taxation under such circumstances.

B. Does Lamtec have sufficient "nexus" with Washington to be subject to tax where it makes annual sales of over $1.1 million to Washington customers and its employees make regular, in-person visits to Washington customers in order to maintain its market in the state.

III. COUNTERSTATEMENT OF THE CASE

Lamtec manufactures and sells vapor barriers and insulation facings. CP 5. For many years, Lamtec has taken advantage of the Washington market, resulting in over $1.1 million in annual sales to

Washington from 1997-2003.[1] CP 285-86; 429. Lamtec sells its products on a continuous basis to a small number of large-volume customers. CP 286-89; 339-40. As Lamtec's vice-president of sales and marketing stated in his deposition testimony:

> Q: Would you say that the typical Lamtec customer makes more than one purchase from Lamtec?
> A: Yes.
> . . .
> A: We aren't looking for customers who buy one time.
> Q: Why not?
> A: Because it isn't the business model we have.
> Q: What is the business model you have?
> A: We have long established customers and long established relationships. It's not a fickle industry.

CP 339-40. This general business model is consistent with Lamtec's activity in Washington. Over the seven years of the tax period, Lamtec had at most 12 customers. CP 312-13.[2] Yet Lamtec made sales each year of 1.1 to 1.4 million dollars. CP 429. Given this business model, rather than expending effort and resources at locating new customers in Washington, Lamtec's marketing focus is on maintaining the customer base it already has. CP 285-86, 339-41, 372-73.

As part of its effort to maintain existing customers, Lamtec sends sales representatives on personal visits to Washington customers. Three

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[1] The period for which Lamtec seeks a tax refund is 1997-2003. CP 308.

[2] Some of the customers listed may have gone out of business during the tax period or been acquired by one of the other listed companies. CP 359. Accordingly, it is likely that the number of customers at any one time was fewer than 12.

Lamtec employees visited Washington on a regular basis for this purpose during the tax period. Expense report records and deposition testimony establish that two of these employees visited Washington 2-3 times per year and the third visited once a year. CP 76-78; 312; 335; 360; 372; 383-84; 389-98. Lamtec estimates the total amount of days spent in Washington by these Lamtec employees each year was 7 – 11 days. *Id.* Documentation for the only year provided by Lamtec shows a total of 11 days of Lamtec visits to Washington customers. CP 389-98. During their visits to Washington, Lamtec sales representatives stayed in Washington hotels, rented cars in Washington, entertained the customers in Washington (usually a lunch) and flew into the Sea-Tac International Airport. CP 335-36; 376-80.

Lamtec admits that the purpose of these visits to Washington customers was to maintain the customer relationship in order to encourage continued purchases from Lamtec. CP 294-95; 337-40, 374. As described by Lamtec customers, "[t]he purpose of the visits is to answer questions concerning Lamtec's product, answer [customer] concerns and otherwise address issues regarding the [customer's] use of the Lamtec product." CP 400, 403, 405. Lamtec sales representatives generally described the visits as providing information to customers, listening to customer concerns about the Lamtec product, providing "good customer

service," participating in telephone calls with customers to Lamtec's technical or customer service departments, fielding questions about potential price increases or new products, and general client relations. *See generally* CP 338-44; 371, 373, 85-86. As part of its marketing efforts, Lamtec sales representatives also sometimes left brochures and product samples when visiting with Washington customers. CP 343-45; 375; 408-13.

Although Lamtec sales representatives may not have solicited or accepted individual orders during their visits, Lamtec admitted that it was engaging in efforts to maintain Lamtec's market in Washington. *E.g.,* CP 294, 298, 339-40. Lamtec considered the physical, in-person visits by its sales representatives significant to its business model and marketing program and would not even consider abandoning the visits. CP 295-96, 345-46.

Consistent with the fact that Lamtec employees were engaged in activities designed to continue sales to Washington customers is the terminology used by Lamtec itself to describe their activities. The company's chief financial officer agreed that it would be accurate to characterize the Lamtec employees who visited Washington as "sales representatives." CP 297. One of the employees who visited Washington stated that his title was "sales manager" and another was the "vice-

president of sales and marketing." CP 370; 334. During his deposition, Lamtec's vice-president of sales and marketing referred to the other Lamtec employees visiting Washington as the "salesmen." CP 336. Sales invoices identified the Lamtec employees who visited Washington by their initials and described them as "salesperson." CP 351; 415.

Lamtec typically shipped its products via common carrier to Washington customers from its manufacturing plant in Flanders, New Jersey, "FOB." CP 5, 290. There is no evidence that the common carrier had written authority to "accept or reject the goods for the purchaser with the right of inspection" as required by WAC 458-20-193(7)(a) for the products to be deemed "received" in New Jersey. *See* WAC 458-20-193(7)(a).

Procedural History

The Department contacted Lamtec in 2004 regarding its wholesale sales to Washington customers. CP 48. The Department subsequently concluded that the sales to Washington were subject to Washington's B&O tax and that Lamtec had sufficient nexus with Washington to be subject to its taxing authority. *Id.* Accordingly, the Department assessed a B&O tax on Lamtec's wholesale sales activity for 1997 through June 30, 2004. CP 61-64. The Department's Appeals division affirmed the

assessment after Lamtec protested the assessment by petitioning the Department's Appeals division. CP 50.

Lamtec paid the assessment and brought a refund lawsuit in Thurston County Superior Court.[3] On cross-motions for summary judgment, the superior court granted summary judgment to the Department, agreeing that Lamtec had nexus with Washington and that the goods were received, for B&O tax purposes, in Washington. CP 472-74. Lamtec then brought this appeal.

IV. SUMMARY OF ARGUMENTS

Washington's B&O tax applies to all business activity in Washington, including wholesale sales. The B&O tax thus applies to Lamtec's wholesale sales to Washington. The Commerce Clause does not allow Lamtec to avoid the B&O tax because, for B&O tax purposes, Lamtec's products are received by its customers in Washington and Lamtec has sufficient nexus with Washington to be taxed on these sales.

[3] Lamtec incorrectly asserts that interest continues to run on the assessment. App. Br. at 5. Lamtec has paid the assessment, as required by RCW 82.32.180 to bring its refund lawsuit in superior court, so interest is not accruing.

V. ARGUMENT

A. Lamtec Has The Burden To Show That Washington's B&O Tax Does Not Apply To Wholesale Sales To Washington Customers

The Department agrees that there are no material facts in dispute in this case and that the Court's review of the grant of a summary judgment motion is de novo. The Washington Supreme Court has unequivocally held that when determining whether an out-of-state business is subject to B&O tax, the tax is "presumed to be just and legal, and the burden rests upon one assailing the tax to show its invalidity." *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 41, 156 P.3d 185 (2007), *cert. denied*, 1285 S. Ct. 1224 (2008). Accordingly, the Court presumes that taxation in this case was valid and Lamtec must show that the tax on its wholesale sales activity was improper. Lamtec argues that ambiguous taxing statutes and rules must be interpreted in favor of Lamtec. App. Br. at 7. Yet Lamtec does not identify any ambiguity in taxing statutes or rules. Accordingly, this rule of construction does not apply.

B. Washington's B&O Tax Imposes Tax On All Business Activity Within Washington

Washington's B&O tax is imposed on every person "for the act or privilege of engaging in business activities" and applies to the "gross

income of the business." RCW 82.04.220. The "legislature intended to impose the business and occupation tax upon virtually all business activities carried on within the state." *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 149, 3 P.3d 741 (2000) (quoting *Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971)). Washington imposes a specific B&O tax "[u]pon every person engaging within this state in the business of making sales at wholesale." RCW 82.04.270. Lamtec does not dispute that it engaged in wholesale sales to Washington customers. Thus, the B&O tax applied to the wholesale sales unless Washington was constitutionally prohibited from taxing these sales or another exemption or deduction applied.

The Department of Revenue has promulgated rules that specifically address whether sales made to Washington customers by out-of-state businesses are subject to the B&O tax on wholesale sales. Pursuant to Rule 193, the tax is imposed if "the goods are received by the purchaser in this state and the seller has nexus." WAC 458-20-193(7). Nexus is defined as "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). In this case, Lamtec customers received Lamtec's products in

Washington and Lamtec has nexus in the state. Accordingly, the wholesale sales are taxable.

C. Case Law And The Department's Rules Regarding "Receipt" Of Goods In Washington Allow Taxation Of The Revenue

Controlling case law and administrative rule definitively establish that, for purposes of Washington's B&O tax, Lamtec's products sold to Washington customers were "received" by the customers in Washington. Lamtec's reliance on a portion of the Department's administrative rule without applying the rule's definitions also must fail.

1. Washington courts have consistently held that the sale of goods shipped to Washington "FOB" from outside Washington are subject to Washington B&O tax.

Lamtec's argument that terms in its shipping contracts control the applicability of Washington's B&O tax has been repeatedly rejected by Washington courts. A recent Washington Supreme Court case summarized two prior opinions reaffirming this principle:

> In both [cases], as here, goods were sold by out-of-state companies to Washington buyers and shipped free on board point of shipment. We upheld the imposition of the state B&O tax in both cases, reasoning that 'the substance of each transaction occurs in Washington where the customer is located.' In doing so, we rejected the argument that a contract specifying that title will transfer at a point out of state enabled the out-of-state seller to avoid the tax.

Ford Motor Co., 160 Wn.2d at 43-44 (discussing *General Motors Corp. v. State*, 60 Wn.2d 862, 376 P.2d 843 (1962), *aff'd on other grounds*, 377

U.S. 436 (1964) and *Field Enterprises, Inc. v. State*, 47 Wn.2d 852, 289 P.2d 1010 (1955), *aff'd*, 352 U.S. 806 (1956)). *See also United States Steel Corp. v. State*, 51 Wn.2d 224, 316 P.2d 1099 (1957) (upholding assessment of B&O tax on sales where products shipped FOB from out of state), *appeal dismissed for want of substantial federal question*, 358 U.S. 46, 79 S. Ct. 40, 3 L. Ed. 2d 44 (1958).[4] Similarly, the United States Supreme Court has upheld imposition of the very tax at issue in this case – Washington's B&O tax on wholesale sales activity – despite delivery of the products "FOB" from outside the state.[5] *General Motors Corp. v. Washington*, 377 U.S. 436, 443, 447-48, 84 S. Ct. 1654, 12 L. Ed. 2d 430 (1964).

Lamtec attempts to distinguish the *Ford Motor Co.* case by stating that the case addressed only Seattle's B&O tax and did not have to determine where the sale was made or where goods were received. App. Br. at 12. However, the *Ford* case explicitly rejected Lamtec's argument that terms in a shipping contract control whether a B&O tax applies and

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[4] A dismissal for want of a substantial federal question operates as an affirmance and is binding authority on lower courts, unlike a denial of a petition for certiorari. *Hicks v. Miranda*, 422 U.S. 332, 344-45, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975); *State v. Wanrow*, 91 Wn.2d 301, 309-10, 588 P.2d 1320 (1978).

[5] Lamtec's own actions suggest that it understands that a wholesale sale occurs in the state where a customer receives delivery from the common carrier. Lamtec admits that it pays B&O tax in Ohio, presumably on its wholesale sales to Ohio. App. Br. at 3. If Lamtec believed that the products are delivered and accepted in New Jersey, there would be no reason to pay tax in Ohio on these sales, even if Lamtec had an employee in the state.

cited approvingly two prior opinions that did address the state B&O tax. *Ford Motor Co.*, 160 Wn.2d at 43-44. In addition, the two cases cited by *Ford* both upheld imposition of Washington's B&O tax on wholesale sales activity where the products were shipped "FOB" from outside Washington. *General Motors*, 60 Wn.2d at 869, 876; *Field Enterprises*, 47 Wn.2d at 855, 857. In each of these cases, the United States Supreme Court affirmed the judgment. *General Motors Corp.*, 377 U.S. at 439; *Field Enterprises*, 352 U.S. at 806. Since these cases address Washington's B&O tax on wholesale sales activity, they are directly on point.

In contrast, the authorities upon which Lamtec relies do not address Washington's B&O tax and are not applicable here. *See* App. Br. at 10-12 (citing *Weyerhaeuser Co. v. Dep't of Revenue*, 106 Wn.2d 557, 723 P.2d 1141 (1986) (addressing exemption to fuel tax); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565 (1940) (addressing New York sales tax); *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304 (1944) (addressing Arkansas sales tax and gross receipts tax)). The Washington Supreme Court has specifically addressed two of the cited cases, stating that they were "neither persuasive nor helpful" when analyzing Washington's B&O tax on wholesale sales activity. *Ford Motor Co.*, 160 Wn.2d at 44

(discussing *McLeod v. J. E. Dilworth Co* and *Weyerhaeuser Co. v. Dep't of Revenue*). The *McLeod* case is further called into question by the United States Supreme Court's later approval of the imposition of Washington's B&O tax on wholesale sales activity despite the goods being shipped into Washington "FOB" from outside the state. *General Motors Corp.*, 377 U.S. at 439; *Field Enterprises*, 352 U.S. at 806; *United States Steel*, 358 U.S. at 46 (dismissing appeal for want of a substantial federal question). Moreover, the *Weyerhaeuser* case did not address the question of "delivery" nor the place of sale, as suggested by Lamtec. Rather, the court focused on the question of who held legal title to the goods when the goods were being transported. *Weyerhaeuser*, 106 Wn.2d at 562-63. Further distinguishing *Weyerhaeuser*, that case did not involve a Commerce Clause analysis. *Id.*

The one case cited by Lamtec not specifically discounted by the Washington Supreme Court actually contradicts Lamtec's contention. In *Berwind-White*, the United States Supreme Court implicitly held that the Commerce Clause did not prevent the imposition of a sales tax by the destination state of goods shipped FOB from out of state. *Berwind-White*, 309 U.S. at 58. The Court remanded that issue to determine whether state law allowed imposition of the tax. *Id.* at 59. *See also id.* at 49 (disregarding the "time and place of passing title" of goods being shipped

interstate in determining whether Commerce Clause prevented taxation). In a companion case decided at the same time as *Berwind-White*, the United States Supreme Court upheld a sales tax by the destination state despite the fact that the goods were shipped "FOB" from outside the state.[6] *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U.S. 70, 76, 60 S. Ct. 404, 84 L. Ed. 584 (1940) (upholding New York sales tax on goods shipped FOB from Massachusetts).

Therefore, whether goods are shipped "FOB" or upon some other terms does not affect whether the customer "received" the product in Washington for B&O tax purposes. *See also* WAC 458-20-103 ("For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this state when the goods sold are delivered to the buyer in this state, *irrespective of whether title to the goods passes to the buyer at a point within or without this state.*") From the undisputed testimony and documents regarding shipping of Lamtec products, it is apparent that Washington customers received the products, for purposes of the application of the B&O tax, in Washington. Whether the designation

[6] The United States Supreme Court opinion in *Felt & Tarrant* addressed two cases and noted in the *Dugrenier* case that the goods were shipped to New York from Massachusetts and that the purchaser paid the freight; the lower court opinion it was reviewing establishes that the goods were shipped FOB. *A.H. Dugrenier, Inc. v. McGoldrick*, 281 N.Y. 608, 609, 22 N.E.2d 172 (N.Y. 1939).

"FOB Flanders, NJ" has other business or contractual implications is not relevant to this question.

2. Rule 193, consistent with case law interpreting the Commerce Clause, allows taxation on goods shipped "FOB" from outside Washington.

Case law interpreting Washington's statutes imposing B&O tax on wholesale sales activity and the Commerce Clause of the United States Constitution establish that a party cannot avoid taxation by designating that goods are shipped "FOB" from outside the taxing state. The Department has issued rules that reflect the principles set forth in the case law and statute imposing B&O tax, including Rule 193. WAC 458-20-193. Application of Rule 193 does not allow Lamtec to avoid Washington taxation merely because it ships its goods to Washington "FOB" New Jersey.[7]

Rule 193 provides that goods must be "received" in Washington for the B&O tax to apply to sales activity associated with the sale. WAC 458-20-193(7). The Rule then addresses the exact factual situation of this case, where products are shipped by common carrier to customers in Washington:

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[7] The Department notes that the definition of "received" applies equally to goods that are shipped from Washington "FOB." WAC 458-20-193(3)(b). Consequently, wholesale sales of goods that are shipped from Washington FOB are not subject to Washington's B&O tax.

> 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). Lamtec does not even argue to this Court that it meets the requirements of this rule.[8] Instead, Lamtec argues that the Court should invalidate only the portion of the Rule that explains the term "received" and that the terms of its shipping contracts should control whether the sales to Washington customers can be taxed. Applying all of the terms of Rule 193, Lamtec's products were "received" in Washington for purposes of Washington's B&O tax.

Lamtec claims that Rule 193 is in conflict with UCC provisions regarding where title and ownership of goods passes when using a common carrier. App. Br. at 9, 13. As set forth above, UCC provisions regarding ownership or the passage of title of goods do not determine whether Washington's B&O tax applies, and Rule 193 does not purport to interpret or apply Washington's UCC statutes. Rather, the rule correctly interprets and applies Washington taxing statutes.

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[8] The record in this case is clear that Lamtec cannot satisfy the requirement that the for-hire carriers had written authority to accept or reject the goods with the right of inspection. *See* CP 92-93. Pursuant to Rule 193, the goods were therefore "received" in Washington for purposes of imposing Washington's B&O tax. WAC 458-20-193(7).

D. Lamtec Has Constitutional "Nexus" With Washington

In a series of cases, the United States Supreme Court developed a four-part test to determine whether a state tax on interstate commerce is permitted by the Commerce Clause of the United States Constitution. A state tax is valid if it: 1) is applied to an activity with a substantial nexus with the taxing State, 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the State.[9] *Quill Corp. v. North Dakota*, 504 U.S. 298, 309-12, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) (including history of Supreme Court jurisprudence regarding state taxation of interstate commerce); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). The concept of nexus, in the context of taxation and the Commerce Clause, is best understood as "a means for limiting state burdens on interstate commerce." *Quill*, 504 U.S. at 313. While the Commerce Clause prevents states from unduly burdening interstate commerce, "[i]t is not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."

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[9] Lamtec has raised only the nexus portion of this four-part test. Accordingly, the Department does not address the other prongs of Commerce Clause analysis. In any event, Washington courts have definitively addressed the second and third prongs of the test with respect to the tax at issue. *See, e.g., W.R. Grace & Co.-Conn. v. Dep't of Revenue*, 137 Wn.2d 580, 596-97, 973 P.2d 1011, *cert. denied*, 528 U.S. 950 (1999).

General Motors Corp. v. City of Seattle, 107 Wn. App. 42, 50, 25 P.3d 1022 (internal quotes and citations omitted), *review denied*, 145 Wn.2d 1014 (2001), *cert. denied*, 535 U.S. 1056 (2002).

Under Commerce Clause analysis, the "crucial factor governing nexus is whether the activities performed in [the] state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in [the] state for the sales." *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 250, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987). *See also* WAC 458-20-193(2)(f) (adopting *Tyler Pipe* standard for nexus). This principle has been repeatedly used by Washington courts in determining whether to uphold assessments of B&O tax on out-of-state businesses measured by wholesale sales to Washington customers. *E.g., General Motors*, 107 Wn. App. at 49.

Lamtec argues that nexus turns on a taxpayer's ability to both establish *and* maintain a market in the state. App. Br at 21. The trial court properly rejected this argument that leads to nonsensical results. RP 4. No court has ever disallowed a tax because a taxpayer's activities in the state were associated with only "maintaining" a market and not "establishing" one. In contrast, courts have upheld B&O taxes where there was no evidence of establishing a market but only maintaining a market in the state. *E.g., Standard Pressed Steel Co. v. Washington Dep't*

of Revenue, 419 U.S. 560, 562-64, 95 S. Ct. 706, 42 L. Ed. 2d 719 (1975) (upholding Washington B&O tax on sales to Washington where taxpayer's employee did not solicit sales; opinion contained no analysis or evidence of establishing the market in Washington).

A requirement that a business cannot be taxed unless its activities both establish and maintain a market also leads to absurd results. A taxpayer who first establishes a market in the state could move its entire sales force to that state and yet still have no nexus under Lamtec's approach. Similarly, a taxpayer that only comes to the attention of the Department after it has already established a market, as in the present case, would be able to avoid the tax because the Department could not show that it established a market here. Conversely, a business that established a market by significant activity in the state could not be taxed unless it engaged in additional efforts to "maintain" the market. Businesses that engaged in single, high-end sales could thus avoid Washington's B&O tax despite massive in-state activity. Accordingly, this Court should reject Lamtec's unprecedented interpretation of the nexus requirements of the Commerce Clause.

In light of the focus on whether a taxpayer's in-state activity is significantly associated with establishing or maintaining a market in the state, courts have held that solicitation or acceptance of individual orders

for merchandise is not required before a court will find nexus with the taxing state. *Standard Pressed Steel*, 419 U.S. at 562-64. Consistent with *Tyler Pipe*, the court instead looks to whether the activities in the state are purposeful and designed to maintain a market. *E.g., General Motors*, 107 Wn. App. at 52. In *Standard Pressed Steel*, the United States Supreme Court held that Washington could constitutionally tax the sales to a Washington customer of an out-of-state manufacturer where the out-of-state manufacturer employed one person who resided and worked in Washington. 419 U.S. at 561, 564. The single employee did not solicit sales nor receive orders. *Id.* at 561. Rather, he performed much the same tasks as the Lamtec employees do here, albeit as a full-time job rather than for 11 days out of the year: his "primary duty was to consult with [the purchaser] regarding its anticipated needs and requirements for aerospace fasteners and to follow up any difficulties in the use of [out-of-state manufacturer's] product after delivery." *Id.* Additional employees of the manufacturer visited Washington to assist the single employee in these tasks. *Id.* Nevertheless, the Court held that the tax imposed was constitutional despite the fact that the employees did not solicit sales nor receive orders in Washington. *Id. See also General Motors*, 107 Wn. App. at 52 ("Although the automakers place great emphasis on the fact that they engage in no direct selling activities in Seattle, substantial nexus

has never turned on this distinction."); *National Geographic Soc. v. California Bd. Of Equalization*, 430 U.S. 551, 97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977) (finding nexus sufficient to uphold use tax despite fact that no solicitations occurred in state).

The United States Supreme Court has developed a "safe harbor" rule allowing taxpayers to avoid certain taxation by a state if they have no physical presence in the state. *Quill*, 504 U.S. at 315, 317-18. The *Quill* Court was reviewing the "safe harbor" rule first established in an earlier decision, *National Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967). Both *Quill* and *Bellas Hess* involved a state's attempt to require an out-of-state mail-order business to collect and remit use tax when the mail-order business's "only connection with customers in the State [was] by common carrier or the United States mail."[10] *Quill*, 504 U.S. at 301 (quoting *Bellas Hess*, 386 U.S. at 758). The *Bellas Hess* rule had been called into question because of the

[10] Both *Quill* and *Bellas Hess* involved the application of sales and use tax, rather than a B&O tax as in the present case. Some courts have limited the *Quill* physical presence requirement to sales and use tax, allowing the imposition of an income and business franchise tax without physical presence. *E.g., Tax Commissioner v. MBNA America Bank, N.A.*, 220 W. Va. 163, 640 S.E.2d 226 (2006), *cert. denied*, 127 S. Ct. 2997 (2007); *Geoffrey Inc. v. South Carolina Tax Comm'n*, 313 S.C. 15, 437 S.E. 2d 13 (1993), *cert. denied*, 510 U.S. 992 (1993). *See also General Motors Corp.*, 107 Wn. App. at 54-55 (discussing the physical presence requirement with regard to taxes other than sales and use taxes). The Department has administered the B&O tax as if it is subject to the physical presence rule and for purposes of this case, it assumes that the physical presence rule applies. Just as in *General Motors*, the court need not decide the issue here since Lamtec did have a physical presence in the state.

evolution of Supreme Court jurisprudence regarding due process "minimum contacts" and the advances of technology that would address some of the concerns expressed in *Bellas Hess*. *Quill*, 504 U.S. at 314. The *Quill* Court acknowledged that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today" but upheld the rule based on principles of stare decisis and because the mail-order industry had relied upon the rule. *Id.* at 311. In upholding the *Bellas Hess* rule, the *Quill* Court described it as a "safe harbor" and a "bright-line" test. *Quill*, 504 U.S. at 315.[11]

Applying these constitutional principles as set forth by the United States Supreme Court, the Washington Board of Tax Appeals and courts in other jurisdictions have upheld state taxation in cases similar to the present case. *Orvis Co., Inc. v. Tax Appeals Tribunal of New York*, 86 N.Y.2d 165, 654 N.E.2d 954, *cert. denied*, 516 U.S. 989 (1995); *Carr Lane Mfg. Co. v. Dep't of Revenue*, Bd. Tax Appeals No. 54917 (2001).[12] *See also Arizona Dep't of Revenue v. Care Computer Systems, Inc.*, 197 Ariz. 414, 4 P.3d 469 (2000) (finding substantial nexus where sales

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[11] Lamtec argues that *Quill* requires something akin to a small sales force, plant, or office within the taxing state to satisfy the physical presence requirement. *See* App. Br. at 15. The *Quill* Court looked to prior cases for examples of what would clearly satisfy a physical presence requirement but did not hold that something akin to a small sales force, plant or office was required. *Quill*, 504 U.S. at 315.

[12] Board of Tax Appeals decisions of course are not binding on this court, but can be persuasive authority, just as court decisions from other states can be persuasive. *See Seattle FilmWorks, Inc. v. Dep't of Revenue,* 106 Wn. App. 448, 459, 24 P.3d 460, *review denied*, 145 Wn.2d 1009 (2001).

representative visited state approximately one time per year and training personnel were sent into state on regular basis).

In *Carr Lane*, the Board of Tax Appeals addressed a nearly identical fact situation to the present case, except that the taxpayer's physical presence in Washington was less than Lamtec's. The Board held that visits two or three times a year to Washington in order to deliver catalogs and explain new parts and features were sufficient to establish nexus and satisfy Commerce Clause concerns. *Carr Lane*, at 2-3. Just as in the present case, the taxpayer had sent its products into Washington by shipping them FOB from outside the state and had no physical presence in Washington other than the visits by an employee to its customers. *Id.* at 2. As the *Carr Lane* opinion reasoned: "'[T]he 2 or 3 days a year spent at the Distribution Company is informational as to new products of taxpayer and to provide inserts for the catalog.' The purpose of the sales calls was clearly to maintain the Taxpayer's presence in Washington's market." *Id.* at 3. *See also Dynamic Information Systems Corp. v. Dep't of Revenue*, Bd. Tax Appeals No. 98-84 (2000) (finding substantial nexus where taxpayer visited Washington from 2-9 times per year for 1-4 days each visit in order to demonstrate products and support existing customers).

In *Orvis*, the court addressed the cases of two taxpayers. In the first case, the court held that an average of four visits a year to as many as

19 wholesale customers was sufficient to establish nexus.[13] *Orvis*, 654 N.E.2d at 961. In the second case, the *Orvis* court upheld taxation based on the taxpayer's 41 non-solicitation visits in the state over three years. *Id.* at 962. The visits were pursuant to the taxpayer's agreement to assist the buyers of software if problems developed within 60 days of purchase. *Id.* Despite the fact that the visits were not for solicitation purposes, the court found that the trouble-shooting visits and the assurances of such visits "enhanced sales and significantly contributed to VIP's ability to establish and maintain a market . . . in New York." *Id.*

In the present case, Lamtec has substantial nexus with Washington because its activities within Washington are significantly associated with maintaining a market in this state. *Tyler Pipe*, 483 U.S. at 250. Lamtec witnesses were unanimous in stating that a purpose of the visits to Washington was to maintain Lamtec's customer base so the Washington customers would continue to make purchases from Lamtec. The visits were regular and initiated by Lamtec. Lamtec's own witnesses attested to the importance of these customer visits given Lamtec's business model. CP 295-96; 345-46. There is no escaping the plain truth that Lamtec visits to Washington were directly associated with maintaining a market for

[13] The actual number of visits was disputed in *Orvis*, but the court seemed to base its analysis on the above-cited number. The court's conclusion regarding the purpose of the visits is unclear, but suggests that it rejected the taxpayer's assertion that the visits were not for the purposes of sales promotion. *Id.* at 961.

Lamtec in Washington. Just as in the case of *Orvis*, *General Motors* and *Carr Lane*, Lamtec purposefully directed its activities to Washington for the express purpose of maintaining its market. Moreover, Lamtec may not take advantage of the "safe harbor" rule of *Quill* because, by sending its sales representatives into the state, Lamtec has stepped beyond merely sending products into the state by mail or common carrier.

Lamtec's contacts with Washington are even more significant when one considers Lamtec's business model and marketing approach. Lamtec is not in the business of making occasional, one-time sales to a great number of customers, as was the case in *Quill*. Instead, Lamtec sells continuously – throughout the year and across the years – to a relatively small number of customers. The nature of Lamtec's business means that a crucial part of its business strategy is to maintain its existing customers.

Making in-person visits to its customers is thus a significant component of Lamtec's ability to maintain its market in Washington. Lamtec's vice-president of sales and marketing (one of the representatives who visited Washington customers each year) testified that it would be a "poor business practice" not to visit the Washington customers and that, given Lamtec's business model, it was very important to maintain good relationships with its existing customers. CP 339-40. Similarly, Lamtec's chief financial officer testified that the purpose of the Washington visits

was to maintain the existing customers and that the Lamtec employees marketed its products while visiting Washington. CP 294, 298. Accordingly, Lamtec's activities in Washington are significantly associated with maintaining its market in Washington and are thus sufficient to establish Commerce Clause nexus over the person of Lamtec.

In its briefing to the Court, Lamtec characterizes its visits to Washington as merely "social" in nature. App. Br. at 4. This characterization is contrary to the undisputed facts in the record. Some examples of evidence in the record, all of which were provided by Lamtec, its employees, or its customers, establish the nature of the visits:

> "The purpose of the visits is to answer questions concerning Lamtec's product, answer Company concerns and otherwise address issues regarding the Company's use of the Lamtec product." CP 400, 403, 405.
>
> "Lamtec's sales people do offer technical assistance during there [sic] visits when requested by the customer." CP 317.
>
> "Lamtec's sales people will suggest the use of certain products for specific applications when requested by the customer during a visit." CP 318.
>
> "The reason I go out [to Washington] is to see if there are issues and if there are issues, make sure the company addresses them and if they address them I would hope that the business continues going forward." CP 339.
>
> "My role has been since I joined Lamtec is to meet with our existing customer base, basically maintain our relationship with that customer and typically a factual type meeting where I bring them up to date in on what is happening with

> our company and I inquire as to what their opinion is of our operations and our service capability as to their needs." CP 371.

The statements of Lamtec customers and employees establish that the visits were for business purposes. The notion that Lamtec would pay its employees to travel to Washington, stay in hotels, rent cars, and meet with customers for purely social reasons is absurd. Lamtec paid for these visits because it knew that the visits were critical to maintaining the customers so that the customers would continue to make purchases from Lamtec.[14]

Even if Lamtec's characterization of the visits as primarily "social" in nature were accurate, it would not immunize Lamtec from taxation if the "social" contacts were significantly associated with maintaining a market in this state. As the trial court recognized, "not all business is done 8:00 to 5:00 in a sales room, but it is more likely that the dinner parties, the cocktail parties, the golf tournaments, the social setting is very important to business." RP 4.

E. The Authority Lamtec Cites Is Inapplicable

To support its argument that its wholesale sales to Washington cannot be taxed, Lamtec relies primarily on a case that did not involve interstate commerce or the Commerce Clause. App. Br. at 17-18 (citing

[14] A classic United Airlines television commercial from 1989 aptly dramatizes the commonly acknowledged importance of face-to-face meetings in maintaining customers. *See* http://www.youtube.com/watch?v=zZ6Z8kcoi-E.

City of Tacoma v. Fiberchem, Inc., 44 Wn. App. 538, 722 P.2d 1357, *review denied*, 107 Wn.2d 1008 (1986)). Since *Fiberchem* was not construing Commerce Clause law, it did not apply the four-part test set forth above and did not cite to any federal authority. *Fiberchem*, 44 Wn. App. at 544. Nor did *Fiberchem* apply the Washington court's then-recently announced standard for Commerce Clause nexus of whether the in-state activities were significantly associated with the taxpayer's ability to establish and maintain a market in Washington. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 105 Wn.2d 318, 715 P.2d 123 (1986), *aff'd*, 483 U.S. 232 (1987). Subsequent case law has recognized that *Fiberchem* was not a Commerce Clause case. *General Motors*, 107 Wn. App. at 53 ("The Commerce Clause of the federal constitution was not implicated.") Accordingly, *Fiberchem* is inapplicable here.

Moreover, *Fiberchem* has been implicitly overruled by subsequent United States Supreme Court cases and this Court should explicitly overrule *Fiberchem*. The *Fiberchem* case was split, with two judges voting to invalidate the tax and one voting to uphold it. 44 Wn. App. at 546. The majority opinion rested its analysis not on the Commerce Clause but on Fourteenth Amendment due process limits on taxation. *Fiberchem*, 44 Wn. App. at 542, 544. The United States Supreme Court in *Quill* later established that, for Fourteenth Amendment due process purposes, a

taxpayer need not have any physical presence whatsoever in the taxing state. *Quill*, 504 U.S. at 308. Instead, for due process nexus the *Quill* Court used a "minimum contacts" test akin to the standard set forth in *International Shoe* and its progeny. *Id.* at 307-08 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). The *Quill* Court thus upheld the tax against a due process challenge, even though the taxpayer's only contact with the taxing state was through mail or common carrier. *Id.* Accordingly, the basis of the *Fiberchem* court's analysis and its focus on the business's physical presence in Tacoma while discounting other contacts with the city should be overruled. *See Fiberchem*, 44 Wn. App. at 545.

Lamtec's reliance on *KMS Financial Services, Inc. v. City of Seattle*, 135 Wn. App. 489, 493, 146 P.3d 1195 (2006), *review denied*, 161 Wn.2d 1011 (2007), is similarly misplaced. *See* App. Br. at 18. That case did not involve any discussion of the nexus prong of Commerce Clause analysis but was concerned solely with the fair apportionment prong of the four-part test set forth above. *KMS Financial Services*, 135 Wn. App. at 504. The Washington and United States Supreme Courts have held that Washington's B&O tax on wholesale sales activity is inherently apportioned because it taxes only the revenue associated with the sales to

Washington customers. *Tyler Pipe*, 483 U.S. at 251; *W.R. Grace*, 137 Wn.2d at 596 (describing as "meritless" taxpayer's claim that B&O tax applied to out-of-state sellers was not fairly apportioned). Indeed, the fact that wholesale sales made to Washington customers are inherently apportioned to Washington suggests that Washington is the *only* state that can impose a B&O tax based on these wholesale sales to Washington. *Cf. Evco v. Jones*, 409 U.S. 91, 93, 93 S. Ct. 349, 34 L. Ed. 2d 325 (1972) ("a tax levied on the gross receipts from the sales of tangible personal property in another State is an impermissible burden on commerce"); *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 58 S. Ct. 913, 82 L. Ed. 1365 (1938) (declaring unconstitutional unapportioned tax on gross receipts that included sales to other than taxing state). Thus, there is no danger of double taxation here and if Lamtec succeeds in convincing the Court that its activity in Washington is not taxable by Washington, it will have immunity from all taxation of its wholesale sales to Washington.

F. The Concept Of "Disassociaton" Is Not Applicable Here

Lamtec also asserts that even if Lamtec had nexus with Washington, the wholesale sales to Washington customers can be "disassociated" from its Washington activities, ignoring that those activities are directly associated with ensuring continued purchases by Washington customers. App. Br. at 19. In order to show disassociation,

Lamtec argues it must show that its activities in Washington are "not significantly associated *in any way* with the sales into this state." App. Br. at 19 (quoting WAC 458-20-193(7)(c)) (emphasis added). The "disassociation" theory is not supported by the facts here and is based on repudiated Commerce Clause analysis so is likely invalid. Accordingly, the Department urges the Court not to acknowledge that disassociation remains valid but to simply recognize that even if the theory remained valid, the facts presented here do not call for its application.

A "disassociation" analysis was generally implicated only when a taxpayer had activities in the state wholly unconnected with sales that were the subject of taxation. *E.g., National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551, 51 L. Ed. 2d 631, 97 S. Ct. 1386(1977); *Norton Co. v. Dep't of Revenue of Ill.*, 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377 (1951). In the present case, a "disassociation" analysis is not helpful: Lamtec's in-state activities are significantly associated with maintaining its market and are therefore associated with all its sales to Washington customers. Consequently, the same analysis that establishes nexus based on Lamtec's activities in Washington establishes that the activities are related to the sales.

Lamtec appears to argue that because its sales representatives were not signing up new customers and were not soliciting individual orders, its

activities were not significantly associated, in any way, with the sales. *See* App. Br. at 20-21. This assertion defies common sense and case law. The purpose of Lamtec's visits to Washington customers is to keep them as customers so the customers will continue to make purchases from Lamtec. Whether or not the sales representatives solicited individual orders, their visits were significantly associated "in any way" with the continued sales to the customers. Otherwise, Lamtec would not have bothered to expend its resources by sending the sales representatives to Washington.

Courts have also consistently upheld taxation on an out-of-state business despite the fact that the in-state activities did not involve signing up new customers or soliciting individual orders. *E.g., Standard Pressed Steel*, 419 U.S. at 561-62; *General Motors Corp.*, 377 U.S. at 439; *General Motors Corp.*, 107 Wn. App. at 52.

Furthermore, the *Norton* case is easily distinguished from the present case. In that case, the state of Illinois had exempted "business in interstate commerce," reflecting contemporaneous Commerce Clause analysis that exempted such business from taxation. *Norton Co. v. Dep't of Revenue*, 340 U.S. at 535. The *Norton* Court, without analysis, simply declared that orders sent and processed out-of-state, without the involvement of the local office, were "clearly interstate in character." *Id.* at 539. Subsequent cases have noted that *Norton* was premised on "the

absence of any connection between the local office and the interstate sales." *Chicago Bridge & Iron Co. v. Dep't of Revenue*, 98 Wn.2d 814, 821, 659 P.2d 463 (1983). In the present case, there is a connection between Lamtec's activities in Washington and the sales to Washington. Accordingly, Lamtec cannot meet its burden that the activities are disassociated from the sales.

Moreover, "disassociation" analysis is of questionable validity under modern-day Commerce Clause analysis. "Disassociation" is most often associated with the United States Supreme Court's opinion in *Norton*, cited by Lamtec. *See* App. Br. at 19. Modern-day Commerce Clause analysis has repudiated the doctrines used by the *Norton* Court in reaching its conclusions. For example, the *Norton* Court applied a doctrine that "interstate" business could not be taxed, which was subsequently repudiated by the United States Supreme Court and is no longer a part of modern Commerce Clause analysis. *Complete Auto Transit*, 430 U.S. at 288-89. Similarly, the *Norton* court's reasoning that the taxpayer could have avoided taxation by employing "solicitors" instead of having local offices has been repudiated. *Scripto, Inc. v. Carson*, 362 U.S. 207, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1960). For this reason, commentators have stated that *Norton* is likely no longer valid. *E.g.,* 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) (stating that "the Court seems to have liberated the states completely from the restraints of *Norton*.")

Subsequent cases have also repudiated the formalistic distinctions between "direct" and "indirect" burdens on interstate commerce. *See Quill*, 504 U.S. at 309-10 (recognizing that Court has rejected formalistic distinctions of direct and indirect burdens on interstate commerce in discussing history of Commerce Clause jurisprudence). Although the *National Geographic* Court, in dicta, suggested that a disassociation analysis may still be proper for a "direct" tax, this dicta is inconsistent with the Court's modern Commerce Clause jurisprudence that focuses on the practical impact of taxes rather than the terminology of the taxing statute.[15] *Id.* Since the Court's decision in *Complete Auto Transit*, the Court has never applied the distinction between "direct" and "indirect" taxes to invalidate a tax and has not applied a disassociation analysis at all. Nor has Lamtec cited any court since *Complete Auto* was issued that

[15] Lamtec claims that the *National Geographic* Court held that a "direct" tax such as Washington's B&O tax requires a greater nexus threshold than an "indirect" tax, such as a use tax. App. Br. at 20. The *National Geographic* Court was addressing a use tax, not a B&O tax. 430 U.S. at 554. Because the application of disassociation to "direct" taxes was not at issue in *National Geographic*, the Court's suggestion that the concept remained valid for other taxes is dicta.

rejected a B&O tax on the grounds that it required some "higher" nexus than other taxes.[16]

Given that the facts in this case do not justify a "disassociation" analysis even if it remained valid, the Department urges the Court to restrict its decision to whether or not Lamtec has sufficient nexus with Washington to impose a B&O tax on wholesale sales made to Washington customers and delivered to Washington. This Court should leave the question of the validity of "disassociation" to a case that properly presents the issue.

VI. CONCLUSION

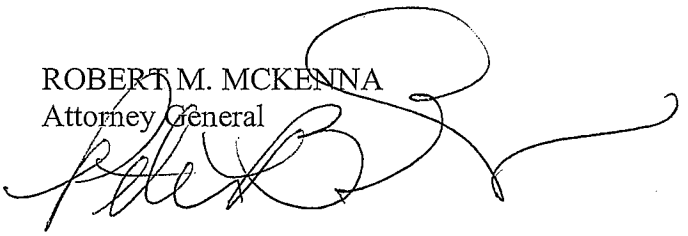
Washington's B&O tax is properly imposed on wholesale sales to Washington customers by out-of-state sellers where, as here, the goods are delivered to the buyers in Washington and the out-of-state seller has some physical presence in the state. Lamtec cannot avoid taxation by declaring the goods are shipped "FOB" from its New Jersey plant and cannot rely on the *Quill* safe harbor because Lamtec regularly sends sales representatives to Washington. Lamtec purposefully and regularly visits Washington in order to continue to make sales in Washington. Lamtec should thus have to pay its fair share of tax. The Department respectfully submits that the

[16] If anything, a B&O tax may be subject to a lower standard than a sales or use tax. *See, e.g., General Motors Corp.*, 107 Wn. App. at 55 (questioning whether *Quill* "physical presence" rule applies to income and B&O taxes).

superior court decision granting summary judgment to the Department should be affirmed.

RESPECTFULLY SUBMITTED this 15th day of September, 2008.

ROBERT M. MCKENNA
Attorney General



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APPENDIX A-1

458-20-192 << 458-20-193 >> 458-20-19301

WAC 458-20-193 Washington State Register filings since 2003

Inbound and outbound interstate sales of tangible personal property.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The seller's name and address,

The purchaser's name and address,

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) The retail sales tax does not apply when the seller delivers the goods to the purchaser who receives them at a

point outside the state, or delivers the same to a for-hire carrier consigned to the purchaser outside the state. This exemption applies even in cases where the shipment is arranged through a for-hire carrier or freight consolidator or freight forwarder acting on behalf of either the seller or the purchaser. It also applies regardless of whether the shipment is arranged on a "freight prepaid" or a "freight collect" basis and regardless of who bears the risk of loss. The seller must retain proof of exemption as outlined in subsection (4), above.

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

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

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

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

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

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

Exemption Certificate

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

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

. . . . . .
. . . . . .

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

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

DATED . . . . . .

. . . . . .

(Purchaser)
By . . . . . .

(Officer or Purchaser's

Representative)
Address . . . . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) The use tax is imposed upon the use, including storage preparatory to use in this state, of all tangible personal property acquired for any use or consumption in this state unless specifically exempt by statute. The out-of-state seller may have nexus to require the collection of use tax without personal contact with the customer if the seller has an extensive, continuous, and intentional solicitation and exploitation of Washington's consumer market. (See WAC 458-20-221).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) Company X is located in Ohio and has no office, employees, or other agents located in Washington or any other contact which would create nexus. Company X receives by mail an order from Company Y for parts which are to be shipped to a Washington location. Company X purchases the parts from Company Z who is located in Washington and requests that the parts be drop shipped to Company Y. Since Company X has no nexus in Washington, Company X is not subject to B&O tax or required to collect retail sales tax. Company X has not taken possession or dominion or control over the parts in Washington. Company Z may accept a resale certificate from Company X which will bear the registration number issued by the state of Ohio. Company Y is required to pay use tax on the value of the parts.

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

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

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

[Statutory Authority: RCW 82.32.300. 91-24-020, § 458-20-193, filed 11/22/91, effective 1/1/92. Formerly WAC 458-20-193A and 458-20-193B.]

APPENDIX A-2

BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

CARR LANE MANUFACTURING CO., Appellant,	)	Docket No. 54917
v.	)	RE: Excise Tax Appeal
STATE OF WASHINGTON DEPARTMENT OF REVENUE, Respondent.	)	PROPOSED DECISION

This matter came before the Board of Tax Appeals (Board) for an informal hearing on February 15, 2000. Eric Winschel, CPA, and Brian Humes, CPA, appeared for Appellant, Carr Lane Mfg. Co., Inc. (Taxpayer). Rex Munger, Tax Policy Specialist III, appeared for Respondent, Department of Revenue (Department).

This Board heard the testimony, reviewed the evidence, and considered the arguments made on behalf of both parties. This Board now makes its decision as follows:

ISSUES

The issues in this informal excise tax appeal are: (1) whether the Taxpayer has insufficient nexus with Washington to sustain the imposition of the B&O tax, and (2) whether Taxpayer's sales should be excluded from the measure of the B&O tax because they are delivered to Washington customers outside the State. We answer both questions in the negative, and sustain the Department's determination.

FACTS

The Taxpayer is a Missouri corporation engaged in manufacturing of tooling component parts. These parts are mostly small sized, consisting of valves and bushings shipped in bulk. These manufactured parts are sold throughout the country primarily by and through The Taxpayer's parts catalog. Taxpayer has sales representatives, inventories and district management in some states. Taxpayer does not have any employees, property or inventory in Washington. Parts are shipped by the Taxpayer from its out-of-state manufacturing plants. The terms are FOB

shipping point, with title passing to the buyer at the time of shipment. The buyer bears the risk of loss and is responsible for the cost of shipment.

The Taxpayer provides its catalog of tooling component products to an unrelated distribution company in Washington. This distribution company is a parts wholesaler/distributor which re-sells a wide variety of products to its customers from a network of over 150 suppliers for application in industry.

The Taxpayer has an employee in California who goes to Washington two or three times a year to deliver product catalog inserts to the parts wholesaler/distributor and explain new parts features and applications.

The Department audited the Taxpayer's books and records for the period January 1, 1992, through December 31, 1996. The Department determined that the Taxpayer had sufficient nexus to support the imposition of the B&O tax with respect to its sales to the Washington distributor. The Department further determined that the delivery of goods to the Washington distributor took place in Washington because the purchaser's shipping agent, United Parcel Service, did not have the authority and duty to inspect the goods for acceptance on behalf of the purchaser.

ANALYSIS AND CONCLUSIONS

Issue No. 1. Does the presence of Taxpayer's sales representative in Washington two or three time per year for the purpose of delivering updates to the Taxpayer's sales catalog and explaining new parts features and applications constitute sufficient nexus to support the imposition of the B&O tax?

In order to pass muster under the Commerce Clause of the U.S. Constitution, Washington's B&O tax must meet the following tests: (1) there must be a sufficient nexus or connection between Washington and the activities taxed; (2) the tax must be fairly apportioned; (3) the tax cannot discriminate against interstate commerce in favor of local commerce; and (4) the tax must be fairly related to the services provided by Washington. Wash. St. Dept. of Revenue v. Assn. Of Washington Stevedoring Co's, 435 U.S. 734 (1978), citing Complete Auto Transit v. Brady, 430 U.S. 274 (1977). The term "sufficient nexus" means substantial nexus. Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

The Taxpayer's challenge to the Department's assessment implicates the first of these tests: substantial nexus. The Department's operative definition of "substantial nexus" for purposes of satisfying the Commerce Clause has three elements:

(1) some sort of in-state activity; (2) an in-state physical presence related to that activity; and (3) the activity's purpose is to establish or maintain a position in Washington's marketplace. See Det. 96-147, 16 WTD 117 (1996). This Board recently concluded that regular, purposeful in-state sales solicitation activity by a company's employees or agents constitutes "substantial nexus" for B&O tax purposes as a matter of law when that activity is specifically directed at in-state customers. See Dynamic Information Systems Corp. v. Dept. of Revenue, BTA Docket No. 98-84 (2000).

The Department argues that the Taxpayer's in-state sales solicitation activities constitute "substantial nexus." We agree. The Taxpayer's employee made regular sales calls on its only Washington customer. As the Taxpayer itself explains: "…the 2 or 3 days a year spent at the Distribution Company is informational as to new products of taxpayer and to provide inserts for the catalog." Taxpayer Letter of April 27, 1999, p. 3. The purpose of the sales calls was clearly to maintain the Taxpayer's presence in Washington's market. The Department did not err when it concluded that the Taxpayer's Washington activities established sufficient nexus to overcome a challenge based on the Commerce Clause.

Issue No. 2. Should the Taxpayer's sales be excluded from the B&O tax because they are delivered to Washington customers outside the State.

The B&O tax on wholesaling activities reaches only wholesale sales which occur in Washington. WAC 458-20-193(7) states in relevant part:

> Washington does not assert B&O tax on sales of goods which originate outside this state unless the goods are received by the purchaser in this state and the seller has nexus. There must be both the receipt of the goods in Washington by the purchaser and the seller must have nexus for the B&O tax to apply to a particular sale. The B&O tax will not apply if one of these elements is missing.
> (a) Delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier located outside this state merely utilized to arrange for and/or transport the goods into this state is not receipt of the goods by the purchaser or its agent unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.

The Taxpayer argues that it meets the terms of this WAC rule because its shipper, UPS, is the purchaser's agent and receives the goods on behalf of the Taxpayer's Washington customer at the Taxpayer's out-of-state manufacturing sites. The Taxpayer points to UPS's published tariff, wherein UPS retains the right to open and inspect any package tendered to it for transportation. In addition, the Taxpayer submitted a letter dated September 29, 1998, from its Washington customer to UPS, purporting to set forth its customer's understanding of the terms of UPS's carriage contract. The letter states, in its entirety:

> This letter is to reaffirm our prior understanding and terms pursuant to the receipt and delivery of products from Carr-Lane Mfg. Co., St. Louis, Missouri, to our company facilities in the State of Washington.
>
> Receipt of products ordered is at the manufacturer's location, FOB, St. Louis, freight prepaid. Transfer of title to E. F. Bailey Co. occurs in St. Louis and we accept the risk of loss upon acceptance of the goods at St. Louis. United Parcel Service, as a for-hire freight carrier, has our express authority to accept or reject the goods on our behalf, including the right to inspect, count, or otherwise verify the goods being accepted for transport.
>
> The points mentioned above, along with the purchase order, bill of lading and any other sales documents combined to reflect the terms and conditions of the delivery and receipt of the purchased goods.

The Department reviewed the above documentation and concluded that it was insufficient to meet the out-of-state receipt requirements of WAC 458-20-193(7)(a), above. The Department's position, set out in Excise Tax Advisory 561.04.193, is as follows:

> For receipt to occur at the out-of-state location, the for-hire carrier must take those actions that would generally be taken by a prudent buyer to assure that the goods conform to the purchase order or contract. This generally requires at a minimum that the goods be physically examined by the receiving agent. The agent must also have access to the purchase order or contract in order to determine if the goods conform. The mere giving to the for-hire carrier of a written authority to accept the goods at an out-of-state location, without some further act of acceptance, will not be considered as receipt by the purchaser or the purchaser's agent at that location. In short, the

> carrier must not only have written authority to accept or reject goods for the buyer, it must actually do so and provide documentation of that fact to the seller.
>
> If the goods are given by the seller to a for-hire carrier in sealed containers and the containers are not opened by the purchaser until arrival in Washington, it will be presumed that receipt did not occur until the goods arrived in Washington, irrespective of any express written authority granted to the carrier. An agent acting for a buyer for receipt of goods must in some manner substantiate that the goods conform to the buyer's specifications.
>
> The department will not accept a mere stamped or other "form-over-substance" shipping document as satisfying the requirement that the goods have been accepted by the buyer's agent outside the state. This ETB expresses the intent of Rule 193 from its inception.

We find this ETA to be fair and reasonable, and in furtherance of the Department's authority to administer the B&O tax in a manner consistent with the Commerce Clause. The Taxpayer has not shown otherwise.

The Department argues that the September, 1998 letter to UPS, quoted above, was dated after the Department's audit was completed and after the Department issued its first written determination to the Taxpayer, and therefore could not have constituted "express written authority to accept or reject the goods for the purchaser with the right of inspection," as that phrase is used in WAC 458-20-193(7)(a), above. We agree. In addition, we note that there is no evidence that UPS has agreed to the purchaser's understanding of its carriage contract, nor is there even a complete UPS shipping contract in evidence. We would be very surprised if the standard UPS contract did not contain a clause that limited the terms of its agreement to the express undertakings set forth in the standard written agreement.

In short, there is simply no evidence that UPS acted in any way as the purchaser's agent for "acceptance of the goods", i.e., determining whether the goods conformed to the buy/sell contract, at the FOB point. There is no evidence that UPS even knew of the terms of the buy/sell contract, or ever opened the shipping containers to attempt to determine if the goods conformed to it.

The Taxpayer attempts to avoid this evidentiary shortcoming by arguing:

> …the nature of the goods Taxpayer sells to Distribution Company is small parts, valves and bushings by the hundreds (if not thousands). We suggest that in the practical business environment of accurate and timely delivery that a prudent buyer of parts, the volume of which we are dealing with in this case, would not insist upon inspecting each unit. Instead, they would rely on shipping and purchase order documentation reviewed at the dock by its agent.

The Taxpayer's suggestion as to what a prudent buyer might or might not do is not persuasive. The Taxpayer is a seller, not a buyer, and therefore its opinion as to a buyer's prudence is not entitled to weight. In addition, its opinion as to the buyer's prudence is counter-intuitive: reviewing shipping and purchase order documentation at the seller's dock confirms nothing in regard to whether the goods conform to the buy/sell contract, other than that the seller claims to have shipped what the buyer ordered. In any event, there is no evidence UPS had knowledge of the purchase order documentation, and thus could not have been the purchaser's agent for acceptance.

In sum, the Taxpayer has not established that the goods were "delivered" to the Taxpayer's customer outside Washington. Indeed, what evidence there is points to delivery in Washington, and we so conclude.

DECISION

The determination of the Department of Revenue is affirmed.

DATED this 22nd day of January, 2001.

BOARD OF TAX APPEALS

MATTHEW J. COYLE, Chair

* * * * *

Pursuant to WAC 456-10-730, you may file an exception to this Proposed Decision. You must file the letter of exception with the Board of Tax Appeals within twenty calendar days of the date of mailing of the Proposed Decision. You must also serve a copy on all other parties. The letter of exception should be brief and must clearly specify why the Proposed Decision did not properly consider the evidence or that there was an omission of certain pertinent facts. The other parties may submit a reply to the exception within ten business days. The Board will then consider the matter and issue a Final Decision. There is no reconsideration from the Board's Final Decision. If exceptions are not filed, the Proposed Decision becomes the Board's Final Decision.

APPENDIX A-3

BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

DYNAMIC INFORMATION SYSTEMS CORPORATION, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Respondent.	Docket No. 98-84 RE: Excise Tax Appeal FINAL DECISION

This matter came before the Board of Tax Appeals (Board) for a formal hearing on November 30, 1999. Michael Martin, Attorney at Law, and Kevin O'Brien, Corporate Counsel appearing pro hac vice, appeared for Appellant, Dynamic Information Systems Corporation (Taxpayer). Cindy Evans, Assistant Attorney General, appeared for Respondent, Department of Revenue (Department).

This Board heard the testimony, reviewed the evidence, and considered the arguments made on behalf of both parties. This Board now makes its decision as follows:

OPINION

COYLE, Member—The question in this formal excise tax appeal is whether the Commerce and Due Process Clauses of the United States Constitution prohibit Washington from requiring the Taxpayer to collect the state's use tax (RCW 82.12) with respect to sales made in

Washington where its employees were present in Washington for 95 days during the six-year audit period. We find the Taxpayer's presence in Washington was sufficient to permit the state to impose a use tax collection responsibility, and sustain the Department's assessment.

FACTS

Dynamic Information Systems Corporation (Taxpayer), a Colorado corporation, develops and sells computer software. The Taxpayer's principal product is various versions of OMNIDEX, which improves speed and flexibility of text retrieval (such as key word searches) from a particular type of database. The Taxpayer sells OMNIDEX in two main ways: by providing a uniform product for incorporation into other companies' information system products (value-added resellers, or "VAR's") and by direct sales of individual licenses to use the software, with each license being issued for a particular identified central processing unit. The Taxpayer employs sales representatives, on a salary-plus-commission basis, to make the direct sales of individual licenses.

The Taxpayer's primary offices and operations are located in Boulder, Colorado. The Taxpayer sells its OMNIDEX products, and related products and training, to users in Washington State. The Taxpayer has had no employees located in Washington, nor any office or storage facility in the state. Between 1990 and 1996, the Taxpayer did not have a sales representative based in Washington State.

Rather, the Taxpayer accomplished most of its sales to Washington customers through nonresident representatives or other employees based in Boulder, Colorado, or in Southern California. Those representatives traveled to Washington when the travel was warranted.

Historically, the Taxpayer closed approximately 50 to 60 percent of its initial license sales through on-site demonstrations. Sales trips could also include servicing existing accounts or setting up training classes. These trips were authorized as needed, at the request of potential customers; the Taxpayer did not arrange them on any scheduled or regular basis. The Taxpayer approved such travel only where a representative could show in advance that he had sufficient appointments in one area with persons authorized to make purchasing decisions, consolidating several on-site visits into one trip where possible.

The Taxpayer reconstructed its sales representatives' visits to the state from its assessment period travel expense records. During the assessment years in question, the Taxpayer's representatives made the following trips into Washington:

1990	2
1991	9
1992	6
1993	8
1994	4
1995	6

The trips lasted from one to four days each by the Taxpayer's count, for a total of 95 days during the assessment period. These trips were primarily to demonstrate the Taxpayer's products in order to facilitate sales of initial licenses, but also included support for existing customers such as arranging training and promoting new products or applications. These trips effected contacts with existing or potential Taxpayer customers in Washington but frequently, as part of the same trip into Seattle, also included on-site visits with existing or potential customers in Oregon, British Columbia, or, occasionally, Idaho. Any sales agreements made in Washington were subject to approval and acceptance in Colorado.

The Department suggests that the Taxpayer understated the length of visits to Washington by its sales representatives, but since these visits on many occasions included contacts in Oregon and British Columbia, we have taken the Taxpayer's estimate of 95 set out above as an acceptable approximation of the number of days its sales representatives spent contacting customers in Washington during the assessment period.

As existing sales representatives left and new representatives came on with the Taxpayer during the assessment period, its sales managers sometimes accompanied new representatives on sales trips, for training purposes. Dave Smith, who served as the Taxpayer's regional

or national sales manager during the assessment period, recalled taking two of these trips into Washington during that period, and he believed that another national sales manager for the Taxpayer made additional training trips to Washington. The record contains no documentary or other corroborating evidence to establish details such as dates and duration of trips by the Taxpayer's sales managers into Washington for sales representative training.

When no Taxpayer sales representative was available to respond to Washington customers, the Taxpayer would send another sales representative from another territory, or a sales manager, or another trained employee, such as a technician who could give sales presentations. The record also contains no details about trips by these other employees into Washington during the assessment period.

One of the Taxpayer's major customers in Washington was the Boeing Company (Boeing). Boeing held an unusually high number of OMNIDEX licenses, perhaps 30, during the period in question. Boeing's structure and use of OMNIDEX licenses was unique among the Taxpayer's customers. That relationship called for ongoing assistance (characterized by the Taxpayer's witness as "organizational") from the Taxpayer to keep Boeing's licenses in line with its internal changes and to familiarize new or transferred Boeing personnel with the OMNIDEX product, new related products or applications, and training opportunities (which were offered in Boulder and in California). The evidence does not reveal whether the Taxpayer's employees other than

sales representatives entered Washington to provide such support to Boeing, but does establish that Boeing's needs justified a visit by a sales representative every year to acquaint persons at Boeing with OMNIDEX, new products, and training, and that Boeing's activities justified a re-working of its license agreements with the Taxpayer about every three years.

The Taxpayer made sales to Washington customers in the approximate gross amount of $1.4 million during the audit period. Of that amount, approximately $280,000 ($41,480 per year) was attributable to sales of initial licenses. Since each license sale was worth approximately $15,000, this annual average represents sales of between three and four initial licenses per year. The sales constituting the remainder of the gross sales amount generally would not depend on representative visits to the state, for example, sales of software upgrades, renewal and maintenance charges, training, and sales to VAR's.

The Department audited the Taxpayer's records of sales for the period January 1990 through September 30, 1996, and assessed against the Taxpayer liability for unpaid sales and use taxes, business and occupation (B&O) taxes, and interest and penalties. In deriving the amount of the Taxpayer's income subject to Washington State sales and/or use taxes, the Department excluded from its computation sales to VAR's and receipts from training seminars provided to customers in out-of-state locations.

The Taxpayer paid the assessment under protest, and sought a refund from the Department of overpaid taxes. The Department denied the refund request by Determination 98-014, dated February 24, 1998.

ANALYSIS AND CONCLUSIONS

I

Washington's sales tax is imposed on each retail sale in this state. RCW 82.08.020. Every retailer who engages in business activity within this state is required to collect sales tax. RCW 82.08.050. As a corollary to its sales tax, Washington imposes a use tax on property purchased for use in Washington under circumstances where the sales tax has not been paid. RCW 82.12.020. Retailers who engage in business activities in this state are required to collect the use tax at the time of sale. RCW 82.12.040 provides:

> (1) Every person who maintains in this state a place of business or a stock of goods, or engages in business activities within this state, shall obtain from the department a certificate of registration, and shall, at the time of making sales, or making transfers of either possession or title or both, of tangible personal property for use in this state, collect from the purchasers or transferees the tax imposed under this chapter. For the purposes of this chapter, the phrase "maintains in this state a place of business" shall include the solicitation of sales and/or taking of orders by sales agents or traveling representatives. <u>For the purposes of this chapter, "engages in business activity within this state" includes every activity which is sufficient under the Constitution of the United States for this state to require collection of tax under this chapter</u>. The department shall in rules specify activities which constitute engaging in business activity within this state, and shall keep the rules current with future

> court interpretations of the Constitution of the United States.

(Emphasis supplied.)

The Department's rule governing use tax collection responsibility for out-of-state sellers, WAC 458-20-221, provides in pertinent part:

> (1) Statutory requirements. RCW 82.12.040(1) provides that every person who maintains a place of business in this state, maintains a stock of goods in this state, or engages in business activities within this state must obtain a certificate of registration and must collect use tax from purchasers at the time it makes sales of tangible personal property for use in this state. The legislature has directed the department of revenue to specify, by rule, activities which constitute engaging in business activities within this state. These are activities which are sufficient under the Constitution of the United States to require the collection of use tax.
>
> (2) Definitions.
>
> (a) "Maintains a place of business in this state" includes:
>
> . . .
>
> (ii) Soliciting sales or taking orders by sales agents or traveling representatives.
>
> (b) "Engages in business activities within this state" includes:
>
> (i) Purposefully or systematically exploiting the market provided by this state by any media-assisted, media-facilitated, or media-solicited means, including, but not

> limited to, direct mail advertising, unsolicited distribution of catalogues, computer-assisted shopping, telephone, television, radio or other electronic media, or magazine or newspaper advertisements or other media . . . .
>
> . . .
>
> (c) "Purposefully or systematically exploiting the market provided by this state" is presumed to take place if the gross proceeds of sales of tangible personal property delivered from outside this state to destinations in this state exceed five hundred thousand dollars during a period of twelve consecutive months.
>
> . . .
>
> (4) Obligation of sellers to collect use tax. Persons who obtain a certificate of registration, maintain a place of business in this state, maintain a stock of goods in this state, or engage in business activities within this state are required to collect use tax from persons in this state to whom they sell tangible personal property at retail and from whom they have not collected sales tax. Use tax collected by sellers shall be deemed to be held in trust until paid to the department. Any seller failing to collect the tax or, if collected, failing to remit the tax is personally liable to the state for the amount of tax. (For exceptions as to sale to certain persons engaged in interstate or foreign commerce see WAC 458-20-175.)

The upshot of these statutory and regulatory provisions insofar as relevant to this appeal is: (1) a seller who sends its employees and agents into Washington to solicit sales thereby "maintains a place of business in Washington"; and (2) a seller who "systematically or purposefully" exploits the market provided by Washington is engaged in business activities in Washington. In either case, the seller is required to collect the use tax on sales for use in Washington. It is the express policy of Washington to enforce this use tax collection responsibility up to—but not beyond—the outer margin of the United States Constitution.

II

The Taxpayer argues its presence in Washington is insufficient to give rise to a sales/use tax collection responsibility consistent with the United States Constitution. It further contends that most of its sales to Washington customers should be disregarded as "dissociated", that is, not related to any activity of its sales representatives in this state, and thus not subject to the state's taxing authority. Finally, the Taxpayer requests that all interest and penalties be waived in light of the unsettled law in this area of interstate taxation.

At the hearing, the Department withdrew its claim against the Taxpayer for all B&O taxes, but maintained its position that it has the authority to require the Taxpayer to collect and remit Washington use taxes on the Taxpayer's sales of licensed products to Washington purchasers.

A. Due Process Claim.

The Due Process Clause is primarily concerned with historical and cultural notions of "fair play and substantial justice" between the government and its citizens. Milliken v. Meyer, 311 U.S. 457, 463 (1940). Consistent with the Due Process Clause, a state may require an out-of-state seller to collect sales/use tax where the seller has purposefully availed itself of the benefits of an economic market in the taxing state. Quill Corp. v. North Dakota, 504 U.S. 298 (1992). Purposeful exploitation of the market state gives the seller "fair

warning" that it may be subject to the laws of that state. Id. Physical presence of the seller is not required. Id.

The Taxpayer's sales representatives or other employees entered Washington on an average of 5.6 times per year during the assessment period. Sales into Washington were not steady, but neither were they only sporadic; they continued at a substantial level each year throughout the assessment period. We see as especially significant that the Taxpayer sent salespeople or other employees only where it felt there was justification for the trip expenses. The presence in Washington of the Taxpayer's employees was clearly deliberate and purposeful. We infer that the justification was economic, that the company would not have incurred the expense unless it expected to see an adequate return in terms of sales. These decisions to send personnel to visit Washington we characterize as demonstrating an economic activity intended to establish or maintain the Taxpayer's market in Washington. We see continuing, purposeful activity by the Taxpayer in Washington establishing a definite link with this state and putting the Taxpayer on notice that it might be subject to all of Washington's laws (including use tax collection responsibility) in regard to the activities of its employees in Washington. The Taxpayer's activity in Washington during the assessment period was more than sufficient to establish nexus for Due Process purposes.

B. Commerce Clause Claim.

Nexus for Commerce Clause purposes requires a distinct examination. The nexus question under the Commerce Clause is whether subjecting an out-of-state seller to a use tax collection requirement places an "undue burden" on interstate commerce. Quill, supra. In the absence of a "safe harbor" rule categorically exempting certain commercial activity from state taxation (e.g., mail order sales), the analysis depends upon a "case by case evaluation of the actual burdens imposed by particular regulations or taxes." Quill, supra. These burdens must be evaluated in light of the fundamental purpose of the Commerce Clause: the creation and maintenance of a vibrant national economy free from hindrance and suppression at the hands of local interests.

The onus is on the Taxpayer to establish the actual burdens imposed by Washington's use tax collection requirement, and to show how these burdens (if any) impermissibly restrict the Taxpayer's participation in the Washington market for its products. A person seeking exemption from taxation has the burden of showing all the facts which would entitle such person to the exemption. Norton Co. v. Department of Revenue, 340 U.S. 534 (1951); Standard Pressed Steel Co. v. Department of Revenue, 10 Wn. App. 45, 516 P.2d 1043 (1973). The Taxpayer has made no such showing here.

We have considered the Quill Court's admonition that the sheer multiplicity of jurisdictions imposing use taxes might unduly burden interstate commerce. See Quill, supra, f.n. 6. But we do not take

the Court's language as an indication that it would find use tax collection to be an undue burden where the out-of-state seller regularly and systematically sends its employees or agents into the taxing state to solicit sales. Indeed, since the demise of the "Drummer cases", the Court has always determined that regular in-state sales solicitation activity by a company's employees or agents specifically directed at in-state customers is sufficient to pass muster under the Commerce Clause nexus tests. See, e.g., Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959); Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232 (1987).

It may be that there is some de minimus standard for physical presence; but the modern cases emanating from the United States Supreme Court demonstrate that regular, purposeful in-state sales solicitation activities by employees or sales agents specifically directed at in-state customers is sufficient as a matter of law to meet the "substantial nexus" prong of the test in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). In this connection, a case cited by the Taxpayer, Florida Dep't of Revenue v. Share Int'l, Inc., 667 So. 2d 226 (Fla. App. 1995), aff'd 676 So. 2d 1362 (Fla. 1996) is instructive. In that case, the Florida courts held that the presence of company personnel and display of products at an annual three-day trade fair was insufficient to establish nexus for use tax collection on mail order sales. The company did, however, collect sales tax on goods sold during the trade fair, and there was no claim that the company was exempt from this collection responsibility due to

lack of nexus. In the case of the mail order sales, the in-state sales solicitation activities were not directed specifically at the company's in-state customers, but were directed at customers without regard to where they might reside. On the other hand, the sales solicitation activities resulting in Florida sales at the trade fair were by definition specifically directed at the company's in-state customers because all the sales took place to customers in Florida without regard to where the customer might reside. Thus, the Share International case also stands as much for the rule that where a seller's in-state sales solicitation activity is specifically directed at in-state customers, the seller may be required to collect a sales/use tax without offending the nexus prong of the Complete Auto Transit test. There is nothing in Share International which is contrary to the Department's position.

The Taxpayer characterizes its visits as "intermittent, irregular, occasional, and nonsystematic." Brief for Appellant at 5. These are characterizations more useful in pre-Quill Due Process Clause analysis than in post-Quill Commerce Clause analysis. It is not the amount of in-state activity which controls; it is the purpose and effect of the in-state activities which provides the touchstone for "substantial nexus".

The purpose of the Taxpayer's physical presence in Washington was to make sales. Its personnel made more than five trips per year to Washington on average, trips that can only be characterized as sales

trips, intended primarily to produce sales. They did produce sales directly, but they also served to initiate and preserve contacts and relationships with potential to produce sales later. The visits were not casual. They were planned for maximum exposure of the Taxpayer's products and services for the least travel time and expense. They were not regular in the sense of occurring at fixed intervals, but they were regular in the sense that they recurred over a significant period of time, whenever the need presented. They comprised 95 days of sales agent activity, not including training trips by sales managers.

The effect of the Taxpayer's sales activities in Washington were substantial. Its sales to Washington customers amounted to more than $1 million over the 6.76-year period at issue. To be sure, one cannot say for certain that the Taxpayer's in-state activities were solely responsible for its sales success. But we can be certain that the Taxpayer thought its in-state sales activities were essential to its sales effort; otherwise, the Taxpayer would not have spent the time and money to maintain a physical presence here. Throughout the assessment period, the Taxpayer never abandoned attempts to make sales to Washington businesses even though its major markets were elsewhere, but persisted in its sales efforts here, manifestly because its efforts were meeting with success.

We conclude that where a seller deliberately sends its sales force into a state for the purpose of soliciting sales from customers

located in that state, it thereby establishes a substantial nexus with that state, at least insofar as use tax collection responsibility is concerned. The purpose and effect of such in-state sales activities is to cloak the seller with the essential trappings of a local merchant: face-to-face, hand-to-hand contact. There is nothing in the purpose of the Commerce Clause which any longer requires a state to maintain a "hands off" posture with respect to such sellers.

III

An out-of-state seller which becomes liable for B&O taxes because of nexus-creating activities is permitted to "dissociate" other sales it makes in Washington which have no relation to the nexus-creating activities. Such a seller bears the "distinct burden" of proof on any claimed dissociated sales. WAC 458-20-193(7)(c). The Department has abandoned its claim to B&O tax liability in this matter, and thus we have not addressed the question of nexus for purposes of the B&O tax. However, this process of "dissociation" is not available where the tax obligation is for collection of sales or use tax. WAC 458-20-193(8) states in pertinent part: "If the seller is not required to collect retail sales tax on a particular sale because the transaction is disassociated from the instate activity, it must collect the use tax from the buyer."

In National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977), the Court permitted imposition of use tax

collection liability on an out-of-state seller where its in-state activities of soliciting advertising copy for its magazine were concededly unrelated to its mail order sales of tangible items to California residents. The court said that the relevant constitutional test for the imposition of use tax collection is the same as that for nexus with the taxing state under the Due Process Clause. The Court reasoned that a use tax collection obligation is less of a burden on interstate commerce because the state tax is imposed on state resident purchasers, and the out-of-state seller is merely the collection agent for the tax.

We have already concluded that the facts here meet the requirements of minimum connection for the Due Process Clause. We can see no basis for dissociation of any of the Taxpayer's sales included in the Department's assessment of retail sales tax/use tax.

IV

The Taxpayer requests a refund of interest and penalties assessed by the Department. The interest and penalties were assessed because the Taxpayer did not timely register, collect, and pay over the use tax at the time of making the sales in Washington. See RCW 82.32.050 (interest); and RCW 82.32.090(1) (penalties). The Department did not assess the 10 percent penalty for failure to follow written instructions. RCW 82.32.090(4).

The Taxpayer succinctly argues:

> Under WAC 458-20-228, both the interest and ten percent penalty for not voluntarily registering prior to being contacted by the Department can be waived by the Washington Department of Revenue "if the failure to pay any tax by the due date was due to circumstances beyond the control of the taxpayer." Since the case law is so unsettled, both as to the legal tests to be used as well as the varying results based on the facts, as to whether DISC's sales visits constituted nexus for Washington sales tax purposes, DISC's failure to voluntarily register was justified. Based on legal counsel throughout the audit period, DISC had a good faith belief that the sales visits were not "regular, systematic or purposeful"; but rather, occasional, ad hoc, "sporadic sojourns" that did not amount to Washington nexus.

Brief for Appellant at 6-7.

We have no doubt that at the margins, the question of nexus for use tax collection liability is open to debate. But the mere fact that one's tax liability is open to debate does not provide the grounds for waiving penalties and interest. The purpose of penalties assessed in this case against the Taxpayer is to secure timely payment of the tax. This purpose would be defeated if a taxpayer could avoid any sanction for late payment merely by arguing that it had a "good faith belief" that the tax was not due. The late payment of taxes in this case is not due to "circumstances beyond the control of the taxpayer". The Taxpayer could at any time have inquired of the Department as to its use tax collection responsibility. Further, if the Taxpayer had read the administrative regulations governing the question of nexus (WAC 458-20-193 and -221), it would have discovered the Department's clear position with respect to nexus.

We conclude the Taxpayer has not shown the Department erred in refusing to waive the applicable penalties and interest.

FINDINGS OF FACT

1. Dynamic Information Systems Corporation (Taxpayer), a Colorado corporation, develops and sells computer software. The Taxpayer's principal product is various versions of OMNIDEX, which improves speed and flexibility of text retrieval (such as key word searches) from a particular type of database. The Taxpayer sells OMNIDEX in two main ways: by providing a uniform product for incorporation into other companies' information system products (value-added resellers, or "VAR's") and by direct sales of individual licenses to use the software, with each license issued for a particular identified central processing unit (CPU). The Taxpayer employs sales representatives, on a salary-plus-commission basis, to make the direct sales of individual licenses.

2. The Taxpayer sells its OMNIDEX products, and related products and training, to users in Washington State. Any sales agreements made in Washington were subject to approval and acceptance in Colorado.

3. The Taxpayer's primary offices and operations are located in Boulder, Colorado. The Taxpayer has had no employees located in Washington, nor any office or storage facility in the state. Between

1990 and 1996, the Taxpayer did not have a sales representative based in Washington State. Rather, the Taxpayer accomplished most of its sales to Washington customers through nonresident representatives or other employees based in Boulder, Colorado, or in Southern California. Those representatives traveled to Washington when the travel was warranted.

4. Historically, the Taxpayer closes approximately 50 to 60 percent of its sales through on-site demonstrations. Sales trips could also include servicing existing accounts or setting up training classes. These trips are authorized as needed, at the request of potential customers; the Taxpayer does not arrange them on any scheduled or regular basis. The Taxpayer approved such travel only where a representative could show in advance that he had sufficient appointments in one area with persons authorized to make purchasing decisions, consolidating several on-site visits into one trip where possible.

5. The Taxpayer reconstructed its sales representatives' visits to the state from its assessment period travel expense records. During the assessment years in question, the Taxpayer's representatives made the following trips into Washington:

1990	2
1991	9
1992	6
1993	8

1994	4
1995	6
1996	3

6. The trips lasted from one to four days each by the Taxpayer's count, for a total of 95 days during the assessment period. These trips were primarily to demonstrate the Taxpayer's products in order to facilitate sales of initial licenses, but also included support for existing customers such as arranging training and promoting new products or applications. These trips effected contacts with existing or potential Taxpayer customers in Washington but frequently, as part of the same trip into Seattle, also included on-site visits with existing or potential customers in Oregon, British Columbia, or, occasionally, Idaho.

7. As existing sales representatives left and new representatives came on with the Taxpayer during the assessment period, its sales managers sometimes accompanied new representatives on sales trips, for training purposes. Dave Smith, who served as the Taxpayer's regional or national sales manager during the assessment period, recalled taking two of these trips into Washington during that period, and he believed that another national sales manager for the Taxpayer made additional training trips to Washington.

8. When no Taxpayer sales representative was available to respond to Washington customers, the Taxpayer would send another sales

representative from another territory, or a sales manager, or another trained employee, such as a technician who could give sales presentations.

9. One of the Taxpayer's major customers in Washington was the Boeing Company (Boeing). Boeing held an unusually high number of OMNIDEX licenses, perhaps 30, during the period in question. Boeing's structure and use of OMNIDEX licenses was unique among the Taxpayer's customers. That relationship called for ongoing assistance (characterized by the Taxpayer's witness as "organizational") from the Taxpayer to keep Boeing's licenses in line with internal changes and to familiarize new or transferred Boeing personnel with the OMNIDEX product, new related products or applications, and training opportunities (which were offered in Boulder and in California).

10. Boeing's needs justified a visit by a sales representative every year to acquaint persons at Boeing with OMNIDEX, new products, and training, and that Boeing's activities justified a re-working of its license agreements with the Taxpayer about every three years.

11. The Taxpayer made sales to Washington customers in the approximate gross amount of $1.4 million during the audit period. Of that amount, approximately $280,000 ($41,480 per year) was attributable to sales of initial licenses. Since each license sale was worth approximately $15,000, this annual average represents sales of between three and four initial licenses per year. The sales consti-

tuting the remainder of the gross sales amount generally would not depend on representative visits to the state, for example, sales of software upgrades, renewal and maintenance charges, training, and sales to VAR's.

12. The presence in Washington of the Taxpayer's employees was clearly deliberate and purposeful. We find that the justification was economic, that the company would not have incurred the expense unless it expected to see an adequate return in terms of sales. These decisions to send personnel to visit Washington were activities intended to establish and maintain the Taxpayer's market in Washington. As shown by the Taxpayer's sales, the effect of the Taxpayer's activities was also to establish and maintain its market in Washington.

13. The Department of Revenue (Department) audited the Taxpayer's records of sales for the period January 1990 through September 30, 1996, and assessed against the Taxpayer liability for unpaid sales and use taxes, business and occupation (B&O) taxes, and interest and penalties. In deriving the amount of the Taxpayer's income subject to Washington State sales and/or use taxes, the Department excluded from its computation sales to VAR's and receipts from training seminars provided to customers in out-of-state locations.

14. The Taxpayer paid the assessment under protest, and sought a refund from the Department of overpaid taxes. The Department denied

the refund request by Determination No. 98-014, dated February 24, 1998.

15. The Taxpayer filed its Notice of Appeal within 30 days of the Department's final determination.

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these findings, this Board comes to these

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter and parties to this appeal.

2. A person seeking exemption from taxation has the burden of showing all the facts which would entitle such person to the exemption.

3. Washington imposes a use tax on the sale of tangible personal property and certain services with respect to purchases made for consumption in this state. The tax is imposed on the purchaser and is to be collected by the seller at the time of sale.

4. A seller located outside of Washington who sends its employees or agents into Washington to solicit sales maintains a place of business in Washington.

5. A seller who systematically or purposefully exploits the market provided by Washington is engaged in business activities in Washington.

6. The Taxpayer is required to collect the use tax on sales of its products to Washington customers because it maintains a place of business in Washington and is engaged in business activities in this state.

7. Washington may, consistent with the Due Process Clause of the United States Constitution, require the Taxpayer to collect the use tax from its Washington customers because the Taxpayer's sales solicitation activities in Washington during the audit period demonstrated that the Taxpayer purposefully availed itself of the economic benefits of the Washington market. Such activities provided sufficient "nexus" with this state.

8. Once a seller's in-state activities establish sufficient "nexus" with a taxing state, e.g., where the seller purposefully avails itself of the economic benefits of the taxing state, the taxing state may require the seller to collect use tax on all sales made in

the taxing state, including those which are not "associated" with the seller's in-state activities.

9. The Taxpayer may not "disassociate" its sales in Washington for use tax collection purposes.

10. Washington may, consistent with the Commerce Clause of the United States Constitution, impose a non-discriminatory use tax collection requirement on a seller whose in-state activities consist of regular, purposeful in-state sales solicitation activities by its employees and agents specifically directed at Washington customers.

11. The Taxpayer's in-state sales solicitation activities were regular, purposeful, and were specifically directed at in-state customers. The Commerce Clause does not prevent Washington from requiring the Taxpayer to collect the use tax on its Washington sales.

12. The Taxpayer has failed to show that Washington's use tax collection requirement, as applied to the Taxpayer's in-state activities, places an impermissible burden on interstate commerce.

13. The Taxpayer has failed to show that the Department erred in refusing to waive otherwise applicable interest and penalties. A "good faith belief" that taxes are not due and owing is not grounds for waiving penalties and interest.

14. The Department's determination should be affirmed with respect to the use tax issues, and the matter should be remanded to the Department for correction of the assessment to reflect the fact that the Department has abandoned its claim for unpaid B&O tax.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these conclusions, this Board enters this

DECISION

The determination of the Department is affirmed with respect to the use tax issues. The matter is remanded to the Department for correction of the assessment to reflect the deletion of the Department's claim for unpaid B&O taxes.

DATED this 28th day of December, 2000.

BOARD OF TAX APPEALS

MATTHEW J. COYLE, Chair

ANN ANDERSON, Vice Chair

* * * * *

Pursuant to WAC 456-09-955, you may file a petition for reconsideration of this Final Decision. You must file the petition for reconsideration with the Board of Tax Appeals within ten business days of the date of mailing of the Final Decision. You must also serve a copy on all other parties. The Board may deny the petition, modify its decision, or reopen the hearing.

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STATE OF WASHINGTON
BY
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NO. 37516-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LAMTEC CORPORATION, Appellant, v. DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON, Respondent.	CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent and this Certificate of Service, via U.S. Mail, postage prepaid, through Consolidated Mail Services, upon the following:

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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 15th day of September, 2008, at Tumwater, Washington.

Carrie A. Parker

CARRIE PARKER, Legal Assistant
(360) 586-9675