

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 28, 2016, 9:48 am
BY RONALD R. CARPENTER
CLERK

No. 92080-0

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent,

v.

AVNET, INC.,

Petitioner.

**BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE
TAXATION**

FILED E
APR 11 2016
WASHINGTON STATE
SUPREME COURT b/h

Gregg D. Barton, WSBA No. 17022
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
Attorneys for *Amicus Curiae*
Council On State Taxation

TABLE OF CONTENTS

TABLE OF CONTENTS..... i
TABLE OF AUTHORITIES ii
INTRODUCTION 1
IDENTITY AND INTEREST OF *AMICUS*..... 2
STATEMENT OF THE CASE..... 4
ARGUMENT..... 4
 I. THE DEPARTMENT OF REVENUE IS BOUND BY ITS
 PUBLISHED RULES 4
 II. THE U.S. CONSTITUTION’S DORMANT
 COMMERCE CLAUSE PROTECTS GROSS RECEIPTS
 DISSOCIATED FROM ANY INSTATE ACTIVITY FROM
 BEING SUBJECT TO A GROSS RECEIPTS TAX..... 11
 A. *COMPLETE AUTO* DID NOT ALTER *NORTON’S*
 DISSOCIATION REQUIREMENT FOR GROSS RECEIPTS
 TAXES. 12
 B. SALES/USE TAX CASES HAVE NOT ERODED
 THE APPLICATION OF DISSOCIATION FOR GROSS
 RECEIPTS TAXES IMPOSED ON A BUSINESS’S
 ACTIVITY IN A STATE. 14
 C. *TYLER PIPE* and *STANDARD PRESS STEEL* ARE
 INAPPLICABLE; *AVNET* AGREES ITS SALES
 RELATED TO ITS WASHINGTON OFFICE ACTIVITIES
 ARE SUBJECT TO THE B&O TAX..... 17
CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases

<i>Alabama Dep't of Revenue v. CSX Transp.</i> , 135 S. Ct. 1136 (2015)	3
<i>American Fed'n of Gov't Employees, AFL-CIO, Local 3090 v. Fed. Labor Relations Auth.</i> , 777 F.2d 751 (D.C. Cir. 1985)	10
Ans. to Pet. for Rev.	14
<i>Ass'n of Wash. Bus. v. Dep't of Revenue</i> , 155 Wn.2d 430, 120 P.3d 45 (2006)	7, 8
<i>Avnet, Inc. v. Dep't of Washington</i> , No. 45108-5-11 (Apr. 28, 2015)	7
<i>B.F. Goodrich Co. v. Washington</i> , 38 Wn.2d 663, 231 P.2d 325 (1951)	4, 16
<i>Burke v. Houston NANA L.L.C.</i> , 222 P.2d 851 (Alaska 2010)	10
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977) 1, 2, 14, 17	
<i>Comptroller of the Treasury of Maryland v. Wynne.</i> , 135 S. Ct. 1787 (2015)	3
<i>Deffenbaugh v. DSHS</i> , 53 Wn. App. 868, 770 P.2d 1084 (1989) ...	9
<i>Dep't of Envtl. Res. v. Rushton Mining Co.</i> , 591 A.2d 1168 (Pa. Commw. Ct. 1991)	11
<i>Direct Marketing Association v. Brohl</i> , 135 S. Ct. 1124 (2015) ...	3
<i>Eastwood Nursing and Rehab. v. Dep't of Pub. Welfare</i> , 910 A.2d 134 (Pa. Commw. Ct. 2006)	11
<i>General Motors Corp. v. State</i> , 60 Wn.2d 862, 376 P.2d 843 (1962)	15
<i>G-P Gypsum Corp. v. State, Dep't of Revenue</i> , 169 Wn.2d 304, 237 P.3d 256 (2010)	4
<i>Hansen Baking Co. v. City of Seattle</i> , 48 Wn.2d 737, 296 P.2d 670 (1956)	9, 12
<i>Home Builders Ass'n of Chester v. Dep't of Envtl. Prot.</i> , 828 A.2d 446 (Pa. Commw. Ct. 2003)	11
<i>McCulloch v. Maryland</i> , 17 U.S. 316 (1819)	17
<i>Nat'l Conservative Political Action Comm. v. Fed. Election Comm.</i> , 626 F.2d 953 (D.C. Cir. 1980)	10
<i>Nat'l Geographic v. Cal. Bd. of Equalization</i> , 430 U.S. 551 (1977)	14
<i>Northwest Portland Cement Co. v. Minnesota</i> , 358 U.S. 450 (1959)	15

<i>Norton Co. v. Dep't of Revenue of Illinois</i> , 340 U.S. 534 (1951).....	4, 16
<i>Portland General Electric Co. v. Bonneville Power Administration</i> , 501 F.3d 1009 (9th Cir. 2007)	10
<i>Scripto Inc. v. Carson</i> , 362 U.S. 207 (1960).....	14
<i>Skamania County v. Woodall</i> , 104 Wn. App. 525, 16 P.3d 701 (2001)	9
<i>Spector Motor Serv., Inc. v. O'Connor</i> , 340 U.S. 602 (1951)	17
<i>Standard Press Steel Co. v. Dep't of Revenue</i> , 419 U.S. 560 (1975)	15
<i>Tesoro Refining and Marketing Co. v. Dep't of Revenue</i> , 173 Wn.2d 551, 269 P.3d 1013 (2012).....	4, 9
<i>Texaco Refining and Marketing, Inc. v. Dep't of Revenue</i> , 158 Wn.2d 1012, 145 P.3d 1214 (2006).....	3
<i>Tyler Pipe Indus., Inc. v. Dep't of Revenue</i> , 483 U.S. 232 (1987).....	14, 15
<i>U.S. Tobacco Sales and Marketing Co. Inc. v. Washington</i> , 157 Wn.2d 1001, 136 P.3d 759 (2006).....	3
<i>U.S. v. Nixon</i> , 418 U.S. 638 (1974).....	9, 10
Other Authorities	
P.L. 86-272.....	18
Pet. for Rev.	4, 6
Resp't Supp. Br.	14, 15
Rules	
WAC 458-20-193.....	2, 5, 6, 11

INTRODUCTION

This case concerns the Department of Revenue (“DOR”) ignoring its own rules and United States Supreme Court Dormant Commerce Clause precedent when assessing the State’s Business and Occupation gross receipts tax (“B&O tax”) on Avnet, Inc. (“Avnet”) for two types of transactions Avnet made to customers in Washington. As *amicus* will explain below, both types of transactions did not have the requisite contacts with this State for the DOR to impose the B&O tax.

Amicus does not dispute Avnet properly paid taxes for transactions associated with its office in Redmond, Washington. However, transactions that Avnet solicited, fulfilled and shipped from out-of-state offices and facilities to locations in multiple states, including Washington, should not be included as taxable sales for the B&O tax. The first type of disputed transaction is referred to as “National Sales.” Those are transactions where the customer requests Avnet at one of its non-Washington office locations to ship goods to multiple locations, some in Washington.¹ The second type of disputed transaction is referred to as “Third Party Drop-Shipped Sales.” Those are transactions where the customer requests for Avnet, again not using Avnet’s Washington office, to ship goods to a third party in this State.² These transactions are

¹ An example of a National Sale would be Company X, a Nevada company, placing an order with Avnet’s office in Arizona for products to be shipped (at least in part) to one of Company X’s offices in Seattle, Washington.

² An example of a Third Party Drop-Shipped Sale would be Company Y, a Nevada company, placing an order with Avnet’s office in Arizona, directing Avnet to ship the

protected by both a DOR rule and the Dormant Commerce Clause. WAC 458-20-193 (“Rule 193”), in effect during the years at issue, allows a company to dissociate out-of-state transactions from transactions that involved some in-state activity.³ This rule is consistent with the limitations the Commerce Clause imposes on the B&O tax in connection with transactions dissociated from any in-state activity conducted by a taxpayer doing business in Washington.

Thus, the DOR overstepped its authority when it imposed the B&O tax on Avnet’s National Sales and the Third Party Drop-Shipped Sales. This Court should overturn the Court of Appeals’ decision upholding the DOR’s assessment that impermissibly expands the scope of the B&O tax. This Court needs to hold that Rule 193 was binding on the DOR. And, alternatively, if Rule 193 was not binding, this Court should rule that the disputed transactions are not subject to B&O tax under the U.S. Supreme Court’s Commerce Clause test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The dissociated transactions fail *Complete Auto*’s “substantial nexus over the activity” prong. *Id.* at 279.

IDENTITY AND INTEREST OF *AMICUS*

COST is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of

products to Company Y’s customer in Spokane, Washington.

³ Unless otherwise provided, all references to Rule 193 are to the version of that rule in effect prior to the changes finalized on August 7, 2015.

State Chambers of Commerce. Today COST has grown to an independent membership of nearly 600 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST members employ a substantial number of citizens in Washington, own extensive property in Washington, and conduct substantial business in Washington.

As *amicus curiae*, COST has participated in numerous significant United States Supreme Court cases over the past 40 years, including most recently *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015); *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (2015); and *Alabama Dep't of Revenue v. CSX Transp.*, 135 S. Ct. 1136 (2015).

Since 2005, COST has also appeared as *amicus curiae* before this Court in several cases involving the equitable treatment of multijurisdictional taxpayers. *U.S. Tobacco Sales and Marketing Co. Inc. v. Dep't of Revenue*, 157 Wn.2d 1001, 136 P.3d 759 (2006); *Texaco Refining and Marketing, Inc. v. Dep't of Revenue*, 158 Wn.2d 1012, 145 P.3d 1214 (2006); *G-P Gypsum Corp. v. State, Dep't of Revenue*, 169 Wn.2d 304, 237 P.3d 256 (2010); and *Tesoro Refining and Marketing Co. v. Dep't of Revenue*, 173 Wn.2d 551, 269 P.3d 1013 (2012).

COST has a strong interest in ensuring multijurisdictional taxpayers are treated equitably. Its membership is very concerned with the Court of Appeals' decision allowing the DOR to ignore one of its own

rules and to subject taxpayers' dissociated transactions to gross receipts taxation in violation of the protections afforded under the Dormant Commerce Clause. Because the DOR seeks to improperly impose the B&O tax on Avnet and other multijurisdictional businesses, COST has a keen interest in providing this Court with reasons why it should reverse the lower court's controversial decision.

STATEMENT OF THE CASE

COST adopts the Statement of the Case set forth by Petitioner in its Petition for Review. Pet. for Rev. 2-6.

ARGUMENT

I. THE DEPARTMENT OF REVENUE IS BOUND BY ITS PUBLISHED RULES

The Court of Appeals erred in allowing the DOR to ignore its own rule, which allows for dissociation. Rule 193(7) provides that:

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. . . . (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.

Id. (emphasis in italics added).

While Avnet has an office in this State, that office played no role in certain *particular sales*: the National Sales and the Third Party Drop-Shipped Sales. In both of those types of sales, Avnet's customers placed orders with Avnet offices located outside of Washington, and Avnet shipped the products from distribution centers outside of Washington. Avnet's Washington office employees neither facilitated these transactions nor provided any customer service or technical advice in connection with these transactions. CP 10-11, 196-200. Avnet has met its burden of showing that both the National Sales and the Third Party Drop-Shipped Sales are dissociated from Avnet's Washington business activities. Its activities fall squarely within the purview of the DOR's longstanding position as promulgated under Rule 193.⁴

Rule 193 also provides a second reason why Third Party Drop-Shipped sales are excluded from the B&O tax. Rule 193 provides that an in-bound sale occurs in the state when the "goods are received by the purchaser in Washington." WAC 458-20-193(7). Rule 193 defines "received" to be when "the purchaser or its agent first either [took] physical possession of the goods or [had] dominion and control over

⁴ See Pet. for Rev. n. 3.

them.” WAC 458-20-193(7)(d). Rule 193 also explains that a purchaser of goods that are drop-shipped to Washington (*i.e.*, goods shipped directly from an out-of-state seller to an out-of-state purchaser’s customers in Washington) does not receive the goods in Washington as defined in the rule. WAC 458-20-193(11)(h). Thus, Avnet’s Third Party Drop-Shipped Sales were also properly excluded from B&O tax pursuant to these provisions of Rule 193.

Avnet’s business activities clearly fall squarely within the scope of Rule 193. The Court of Appeals’ decision, allowing the DOR to disavow its own rule without a prospective repeal or amendment of that rule is improper. If the DOR is allowed to simply ignore its own rules where it suits its own purposes, taxpayers will no longer be able to rely on such rules, and taxpayers’ confidence in Washington’s tax system will erode.

The Court of Appeals relied on *Ass’n of Wash. Bus. v. Dep’t of Revenue*, 155 Wn.2d 430, 446-7, 120 P.3d 45, 54-55 (2006), to support its determination that the DOR may ignore its own rule because it was merely interpretive. This Court should clarify that the Court of Appeals’ reliance on *Ass’n of Wash. Business* was misplaced. This Court held in *Ass’n of Wash. Business* that interpretive rules “are not binding on the courts and are afforded no deference [by the courts] other than the power of persuasion.” *Avnet, Inc. v. Dep’t of Washington*, No. 45108-5-11 (Apr. 28, 2015), *citing Ass’n of Wash. Business v. Dep’t of Revenue*, 155 Wn.2d

at 447 (emphasis added). Importantly, this Court also stated that:

Technically, interpretive rules are not binding on the public. They serve merely as advanced notice of the agency's position should a dispute arise and the matter result in litigation. The public cannot be penalized or sanctioned for breaking them.

Id. at 447. When the DOR issues interpretive rules, it is publishing its position on how it interprets a tax statute. *See id.* at 447. The DOR should be bound by the public notice of its position articulated in the rule. However, when the DOR position asserted in the rule is challenged by taxpayers, the courts should review the DOR's position. In that situation, it is the courts' duty to decide whether the DOR's interpretive rule or a taxpayer's position is correct.

Ass'n of Wash. Business did not address a fact pattern where a taxpayer filed in accordance with the DOR's rule and the DOR disavowed a position in that rule. Indeed, contrary to the Court of Appeals' holding, this Court in *Ass'n of Wash. Business* suggested that while taxpayers are not bound by the DOR's interpretive rules, the DOR itself is bound by such rules. This Court stated:

[The] DOR will stick by its rules (whether interpretive, procedural, or legislative) unless and until they are stricken by a court. For interpretive rules in particular, [the] DOR will maintain it interpreted the underlying statutes correctly, and any taxpayer who disagrees will have to persuade a court otherwise.

Id. at 447-48. Thus, while *Ass'n of Wash. Business* stands for the

proposition that taxpayers and courts are not bound by the DOR's interpretive rules, it neither relieves the DOR from its duty to follow its own rules nor does it authorize the courts to allow the DOR to retroactively reverse its position on a published rule upon which a taxpayer relied.⁵

In addition, other Washington courts have determined that “[a]dministrative agencies are bound by their own rules.” *See Skamania County v. Woodall*, 104 Wn. App. 525, 539, 16 P.3d 701, 708 (2001), citing *Deffenbaugh v. DSHS*, 53 Wn. App. 868, 871, 770 P.2d 1084, 1085 (1989). And that “[a] government agency may not repudiate one of its own regulatory interpretations after a third party has relied upon it to their detriment.” *Tesoro Refining and Marketing Co. v. State, Dep’t of Revenue*, 164 Wn.2d 310, 324, 190 P.3d 28 (2008). In *Hansen Baking Co. v. City of Seattle*, 48 Wn.2d 737, 743-44, 296 P.2d 670 (1956), this Court also concluded that an administrative agency could not retroactively impeach its own rules.

This determination is consistent with the findings of other state and federal courts. In *U.S. v. Nixon*, 418 U.S. 638, 694-96 (1974), the U.S. Supreme Court considered whether the Attorney General was bound by a rule defining the Special Prosecutor’s authority. Considering that issue, the Court noted “it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor’s

⁵ *Amicus* does not dispute that a Court can hold an interpretive rule was wrong, prospectively making it no longer binding on the DOR.

authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it” *Id.* at 696. Other federal and state courts have also held that agencies are bound by their rules until such rules are repealed.⁶

If the states’ taxing agencies are not bound by their own rules and are allowed to repudiate promulgated rules at their convenience, the state and local tax system of voluntary compliance will be seriously undermined. First, the public would no longer be able to rely on any agency pronouncements. Although taxpayers are not required to follow the DOR’s interpretive rules that are contrary to their understanding of tax statutes, taxpayers need to be able to rely on the DOR’s rules comporting with the taxpayers’ reading of the law. Rules, including interpretive rules, are intended to provide guidance on the accepted procedures and policies of the DOR, which taxpayers use to obtain certainty when filing their state tax returns.

In addition, taxpayers depend on such rules for purposes of

⁶ See *Portland General Electric Co. v. Bonneville Power Administration*, 501 F.3d 1009, 1038-39 (9th Cir. 2007) (Ninth Circuit determined an agency was bound by its rules until repealed and could not circumvent the amendment process through informal policy.); see also *Burke v. Houston NANA L.L.C.*, 222 P.2d 851, 868 (Alaska 2010). (“Because the board chose to establish by regulation the procedure an applicant for a reemployment eligibility evaluation must use, it is bound by those regulations unless and until it repeals or amends the regulation using the proper procedure”); *Eastwood Nursing and Rehab. v. Dep’t of Pub. Welfare*, 910 A.2d 134, 144 (Pa. Commw. Ct. 2006), citing *Dep’t of Envtl. Res. v. Rushton Mining Co.*, 591 A.2d 1168, 1173 (Pa. Commw. Ct. 1991) and *Home Builders Ass’n of Chester v. Dep’t of Envtl. Prot.*, 828 A.2d 446, 450 (Pa. Commw. Ct. 2003) (Pennsylvania follows the “binding norm test,” which provides that an agency is bound by its policy statements or rules until such statements or rules are repealed by the agency).

preparing their financial statements.⁷ See *Hansen Baking Company*, 48 Wn.2d at 743-744 (“If it were permissible for a taxing agency to challenge, years later, [its lawful] rules promulgated by its own enforcement agency, taxpayer would never be able to close their books with assurance.”) It is critical for taxpayers to be able to rely on the interpretations of the DOR, the agency charged with administering the B&O tax, so they can voluntarily comply with the law and avoid costly controversy and litigation.

Considering the significant consequences that the Court of Appeals decision could have, this Court should clarify that its holding in *Ass’n of Wash. Business* allows neither the DOR to ignore its own promulgated rules nor the Court of Appeals to relieve the DOR of its obligation to do the same. As long as the former version of Rule 193 remained in effect, the DOR should be bound by that rule for tax periods prior to the rule being amended. Additionally, to amend or repeal Rule 193, the DOR must go through a formal notice, hearing and comment process – which it did not do for the years at issue in this case.⁸ To hold otherwise leaves taxpayers adrift with no ability to rely on any DOR rules, never certain which ones the DOR may decide to disavow in the future.

⁷ Gross receipts tax contingencies are subject to financial reporting under Financial Accounting Standards Board ASC 450.

⁸ See part III (Rule Making Procedures) of Washington’s Administrative Procedures Act codified at RCW §§ 34.05.310-.395. In a Tax Analysts article, Kim Schmanke, the DOR’s Communications Director, noted the “pending amendments to the regulation at issue in the case, Rule 193, [were] intended, in part, to clarify the DOR’s position on dissociation. David Sawyer, *Washington Appeals Court Holds Out-of-State Distributor Must Pay B&O Tax*, State Tax Today, May 4, 2015. The DOR’s substantive “clarification” to Rule 193 should only be applied prospectively.

This outcome is not only detrimental to taxpayers, but also to the DOR. The DOR would be confronted with increased numbers of taxpayers—no longer trusting the DOR’s advice—interpreting tax statutes in many different ways, leading to intensified and protracted audit controversies and litigation.

II. THE U.S. CONSTITUTION’S DORMANT COMMERCE CLAUSE PROTECTS GROSS RECEIPTS DISSOCIATED FROM ANY INSTATE ACTIVITY FROM BEING SUBJECT TO A GROSS RECEIPTS TAX.

Neither Avnet nor *amicus* dispute that the State had the requisite “substantial nexus” under the U.S. Supreme Court’s first prong of its four-prong test in *Complete Auto* to impose its B&O tax on transactions where Avnet’s Washington office assisted in making its sales. However, the U.S. Supreme Court was clear in *Complete Auto* that the test is **not** whether the taxpayer itself had substantial nexus, but whether the **activity** conducted by the taxpayer had substantial nexus with the state.

We note again that no claim is made that [1] *the activity is not sufficiently connected to the State* to justify a tax, or [2] that the tax is not fairly related to benefits provide the taxpayer, or [3] that the tax discriminates against interstate commerce, or [4] that the tax is not fairly apportioned.

Complete Auto at 287 (emphasis added). As indicated above, Avnet’s activities related to its National Sales and Third Party Drop-Shipped Sales had no connection to its Washington office. As such, these activities are

not sufficiently connected to the State to justify imposing the B&O tax on these transactions.

A. COMPLETE AUTO DID NOT ALTER NORTON'S DISSOCIATION REQUIREMENT FOR GROSS RECEIPTS TAXES.

The U.S. Supreme Court's decision in *Norton Co. v. Dep't of Revenue of Illinois*, 340 U.S. 534, (1951), is still controlling. Similar to this case, the U.S. Supreme Court in *Norton* ruled that sales dissociated from a taxpayer's instate activity were not subject to gross receipts taxation. As the Court stated:

Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. *Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable.* ... Of course, a state imposing a sales or use tax can more easily meet this burden, because the impact of those taxes is [local]. Cases involving them are not controlling here, for this tax falls on the vendor.

Id. at 537 (emphasis added). Moreover, immediately after the U.S. Supreme Court's *Norton* decision, this Court followed that holding in a similar fact pattern in *B.F. Goodrich Co. v. State of Washington*, 38 Wn.2d 663 (1951). In that case, this Court reversed the DOR's unconstitutional

attempts to impose the B&O tax to transactions that “strongly resembles [Norton].” *Id.* at 670.

The DOR and Court of Appeals imply that *Norton* has been invalidated by subsequent U.S. Supreme Court cases. *See* Resp’t Supp. Br. 9. However, *Norton* is still good law, and the U.S. Supreme Court clearly knows how to overrule its prior decisions which no longer support a principle in subsequent cases. *Spector Motor Serv., Inc. v. O’Connor*, 340 U.S. 602 (1951) is a good example of this. *Spector* was decided in 1951—the same year *Norton* was decided. In both cases the U.S. Supreme Court addressed the ramifications of the Dormant Commerce Clause to state taxes imposed on interstate commerce. The Court in *Spector* held “there is ... long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—*McCulloch v. Maryland*, [17 U.S. 316 (1819)].” *Spector* at 610.

In 1977, the U.S. Supreme Court overruled the *Spector* case in its landmark *Complete Auto* decision. *Complete Auto* at 288-89. If the Court determined that *Norton* had outlived its usefulness, it would have subsequently ruled that *Norton* was no longer good authority to limit the states’ ability to impose gross receipts taxes on businesses engaged in interstate commerce. While the Court has had ample opportunity to

overturn *Norton*, it has not done so. Thus, states like Washington (and Ohio and Texas) that impose gross receipts taxes on interstate businesses must allow an out-of-state business to exclude certain interstate sales: those sales that are dissociated from a business's in-state activities in the taxing state.⁹

B. SALES/USE TAX CASES HAVE NOT ERODED THE APPLICATION OF DISSOCIATION FOR GROSS RECEIPTS TAXES IMPOSED ON A BUSINESS'S ACTIVITY IN A STATE.

What constitutes "substantial nexus" varies by the type of tax a state is imposing. The U.S. Supreme Court has granted the states greater latitude to impose its taxing powers on sales and use taxes (*e.g.*, Washington's Retail Sales and Use Tax),¹⁰ where a business is primarily serving as a tax collector for the state and the tax is not directly imposed on a business's net or gross income (*e.g.*, Washington's B&O tax). As pointed out by the Court in *Norton*, sales and use tax cases are distinguishable because the tax is principally imposed "on the local buyer or user." *Id.* at 537.

For sales and use taxes, the U.S. Supreme Court's decision in *Nat'l Geographic v. Cal. Bd. of Equalization*, 430 U.S. 551, 558 (1977) is controlling. In that case, the Court allowed California to impose its

⁹ The issue of dissociation is an issue that is also pending before the Ohio Supreme Court in three cases on whether Ohio can impose its gross receipts tax on internet-based remote sellers, *see Crutchfield Corp. v. Testa*, Case No. 15-0386; *Mason Companies, Inc. v. Testa*, Case No. 15-0794; and *Newegg, Inc. v. Testa*, Case No. 15-0483.

¹⁰ This also applies to other state excise taxes where a business has a duty to collect the tax from its customers.

sales/use tax collection and remittance responsibility on a business's dissociated sales. *Id.* at 560, The U.S. Supreme Court upheld the California Supreme Court's decision that California could impose its compensatory use tax (compensatory to the State's sales tax) based on the "sole burden imposed upon the out-of-state seller [for California's use tax] is the administrative one of collecting it." *Id.* at 558. The Court, however, did not eliminate dissociation for all other tax types, *e.g.*, net income and gross receipts taxes.¹¹

The DOR's attempt to extend *Nat'l Geographic's* holding outside the sales/use tax context is inappropriate. *See* Resp't Supp. Br. 5. The U.S. Supreme Court has not held "transactional nexus" applies to all tax types. *Id.* In addition, the DOR also inaccurately cites *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995), to support that position. According to the DOR, *Jefferson Lines* stands for the proposition that *delivery* of a good into a state creates transactional nexus for all tax types. *Jefferson Lines* is inapposite; the U.S. Supreme Court in that decision held that Oklahoma could impose its sales/use tax on transportation services that commenced in Oklahoma (it was not based on the delivery location). *Id.* at 190.

The U.S. Supreme Court has allowed much more latitude in the sales/use tax area, in part, because those states provide credits for similar

¹¹ The U.S. Supreme Court in *Nat'l Geographic* also distinguished *Norton* from the states' imposition of their sales/use taxes by noting "fatal to a direct tax a showing that particular transactions re dissociated from the local business ..., [*Norton*], such dissociation does not bar the imposition of the use-tax-collection duty. *Nat'l Geographic* at 560 (internal quotations omitted).

taxes previously paid to other states, see *Goldberg v. Sweet*, 488 U.S. 252, 265 (1989).¹² In contrast, *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948), is still good law. That case dealt with New York imposing a direct tax on an interstate transportation company's unapportioned gross receipts. That direct tax on the Central Greyhound was struck down based on "New York [seeking] to tax the total receipts from transportation of which nearly 43% of the mileage lay in [other states]." *Id.* at 660, see also *Jefferson Lines* at 190.¹³ In *Goldberg*, *Jefferson Lines*, and *Central Greyhound*, the U.S. Supreme Court has clearly distinguished gross receipts taxes which are directly imposed on a business's income (e.g., the B&O tax) from taxes where the business serves as the State's tax collector (e.g., Washington's Retail Sales & Use Tax).

Focusing on income-based taxation, the U.S. Supreme Court has affirmed that states are more restricted in their ability to tax the income (including gross income subject to the B&O tax) of a multijurisdictional corporation. "[T]here must be a rational relation between the income attributed to the taxing State and the intrastate value of the corporate

¹² The U.S. Supreme Court held Illinois' tax on telecommunications "economic effect is like that of a sales tax, the risk of multiple taxation is low, and actual multiple taxation is precluded by the credit provision." *Goldberg* at 265 (emphasis added).

¹³ Acknowledging the factual scenarios with *Jefferson Lines* and *Central Greyhound* were similar, the U.S. Supreme Court distinguished its holding in *Jefferson Lines* from *Central Greyhound* primarily based on the tax in *Jefferson Lines* (a sales tax) fell on the buyer of the services (reducing the chances of double taxation). *Jefferson Lines* at 190.

business.” *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 772, (1992). “[W]e have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax.” *Id.* at 778 (citing *Quill*, 504 U.S. at 306-308). “[I]f the value [a] State [wishes] to tax [is] derived from a discrete business enterprise, then the State could not tax even an apportioned share of that value.” (Quotations omitted.) *MeadWestvaco Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16, 26, (2008) (citing *Mobil Oil Corp. v. Commr. of Taxes of Vermont*, 445 U.S. 425, 1 (1980) and *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, (1983)).

Thus, the U.S. Supreme Court has applied different limitations on the imposition of sales/use taxes and business income taxes based on out-of-state businesses’ activities in the state. Other than the unique sales and use tax context, the U.S. Supreme Court has never veered from the *Norton* dissociation rule for any other tax type.

C. TYLER PIPE AND STANDARD PRESS STEEL ARE INAPPLICABLE; AVNET AGREES ITS SALES RELATED TO ITS WASHINGTON OFFICE ACTIVITIES ARE SUBJECT TO THE B&O TAX.

The DOR and the Court of Appeals correctly assert that a U.S. Supreme Court case, *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 483 U.S. 232 (1987), set a controlling precedent for what activities create

“substantial nexus.” See Ans. to Pet. for Rev. 1-2; Resp’t Supp. Br. 1. *Tyler Pipe* affirmed an independent contractor assisting an out-of-state business in establishing and maintaining the marketplace can create substantial nexus for a taxpayer (e.g., it created an agency relationship). *Tyler Pipe* at 250. But the independent contractor could do so only because these “sales representatives acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders.” *Id.* at 249. In other words, “substantial nexus” was created only if the out-of-state sales were “associated” with the in-state activities. There is no evidence that Avnet’s employees at its Washington office assisted in the National Sales or Drop-Shipped Sales.

This is also consistent with an earlier U.S. Supreme Court case, *Scripto Inc. v. Carson*, 362 U.S. 207 (1960), that stands for substantially the same proposition.¹⁴ *Tyler Pipe* did not suddenly eviscerate prior U.S. Supreme Court holdings requiring the State, especially for gross receipts taxes, to have substantial nexus over the activity taxed. The DOR has made unsubstantiated assertions that Avnet’s employees in its Washington office poisoned the well by assisting Avnet with all of its sales that were ultimately delivered to a location in this State.

The DOR and the Court of Appeals’ reliance on the U.S. Supreme Court’s decision in *Standard Press Steel Co. v. Dep’t of Revenue*, 419

¹⁴ “True, the ‘salesmen’ are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance. The formal shift in the contractual tagging of the salesman as ‘independent’ neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida.” *Id.* at 621-22.

U.S. 560 (1975), is also unfounded. In *Standard Press Steel*, there was no attempt by the taxpayer to dissociate its salesperson's activities from the actual sales being made to a customer in Washington. Similarly, any reliance on *General Motors Corp. v. State*, 60 Wn.2d 862, 376 P.2d 843 (1962), and the U.S. Supreme Court's review of that case, *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), is misplaced. General Motors failed to prove its out-of-state wholesaling activity was dissociated from General Motors' district managers and others assisting retail dealers in the State. As noted in *Tyler Pipe*, "*General Motors* is not a controlling precedent." *Id.* at 242.

As stated by the *Norton* Court, "[t]he only items that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business are orders sent directly to [the out-of-state location] by the customer and shipped directly to the customer from [the out-of-state location]. Income from those we think was not [constitutionally] subject to [the State's gross receipts] tax." *Id.* at 539. "[A business] can avoid taxation on some [State] sales only by showing that particular transactions are dissociated from the local business and interstate in nature." *Id.* at 537. Similar to *Norton*, Avnet was able to identify the out-of-state transactions that are dissociated from its transactions where its instate office facilitated the sale, and thus the National Sales and Third Party Drop-Shipped Sales should not be subject to the B&O tax.

CONCLUSION

For these reasons stated above, COST urges this Court to reverse the decision of the Court of Appeals.

DATED: March 28, 2016

PERKINS COIE LLP

By: 
Gregg D. Barton
WSBA No. 17022
GBarton@perkinscoie.com
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for *Amicus Curiae*
Council On State Taxation

OFFICE RECEPTIONIST, CLERK

To: Kawagoe, Betty (Perkins Coie)
Cc: RosannF@atg.wa.gov; edwardss@lanepowell.com; JoshuaW@atg.wa.gov;
ChuckZ@atg.wa.gov; bob@awb.org; Barton, Gregg (Perkins Coie);
mcbrider@lanepowell.com; Johnson, Julie (ATG)
Subject: RE: No. 92080-0: State of Washington, Department of Revenue v. Avnet, Inc.

Received 3-28-16

Supreme Court Clerk's Office

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

From: Kawagoe, Betty (Perkins Coie) [mailto:BKawagoe@perkinscoie.com]
Sent: Monday, March 28, 2016 9:47 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: RosannF@atg.wa.gov; edwardss@lanepowell.com; JoshuaW@atg.wa.gov; ChuckZ@atg.wa.gov; bob@awb.org; Barton, Gregg (Perkins Coie) <GBarton@perkinscoie.com>; mcbrider@lanepowell.com; Johnson, Julie (ATG) <JulieJ@ATG.WA.GOV>
Subject: No. 92080-0: State of Washington, Department of Revenue v. Avnet, Inc.

Case Number: 92080-0
Case Name: State of Washington, Department of Revenue v. Avnet, Inc.
Filing Attorney: Gregg D. Barton, WSBA No. 17022
Telephone: (206) 359-6358
Gbarton@PerkinsCoie.com

Dear Clerk:

Attached for filing are the following documents:

1. Motion for Permission to File Brief of *Amicus Curiae* Council on State Taxation; and
2. Brief of *Amicus Curiae* Council on State Taxation

Thank you.

Betty Kawagoe | Perkins Coie LLP
LEGAL SECRETARY
1201 Third Avenue Suite 4900
Seattle, WA 98101-3099
D. +1.206.359.3420
F. +1.206.359.9000
E. BKawagoe@perkinscoie.com

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.