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WASHINGTON STATE
SUPREME COURT

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No. 92080-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent

v.

AVNET, INC.,

Petitioner

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION II
(Court of Appeals Case No. 45108-5-II)

AVNET, INC.'S ANSWER TO AMICI CURIAE

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I. INTRODUCTION

Avnet, Inc. respectfully submits this answer in response to the separate amicus curiae briefs filed by the Council on State Taxation (“COST”) and the Multistate Tax Commission (“MTC”).

COST agrees that the Court of Appeals erred in affirming the B&O tax assessment on Avnet’s Drop-Shipped and National Sales. COST correctly argues that the assessment is contrary to (a) former WAC 458-20-193, which required the goods to be “received” by the purchaser in Washington as a requisite to the imposition of tax and (b) the Commerce Clause of the federal Constitution, as interpreted by the United States Supreme Court in *Norton Company v. Dep’t of Revenue of Illinois*, 340 U.S. 534 (1951). As COST persuasively argues, Avnet and other taxpayers are entitled to rely on the binding effect of the Supreme Court’s decisions until and unless they are overruled, as well as DOR’s interpretive rules until and unless they are amended. *Norton* has never been overruled and DOR did not amend former Rule 193 until after the assessment at issue.

MTC’s analysis, on the other hand, is flawed. MTC ignores the effect of former Rule 193, but does not take issue with Avnet’s position that—regardless of the constitutional issue—DOR cannot abandon the plain meaning of its own interpretive rule; after all, one of MTC’s tenets is to “establish fair tax systems.” MTC Br. at 1. On the constitutional issue, contrary to MTC’s assertion, the U.S. Supreme Court has never expressly or implicitly rejected *Norton* or the limitation that states may not tax sales wholly dissociated from the taxpayer’s in-state activities. The Court of

Appeals is, literally, the only court to so hold—and, as both the Supreme Court and this Court have recognized, it had no authority to do so.

II. ARGUMENT

A. **COST Is Right, DOR Must Follow Its Own Rules; Neither Requirement Of Former Rule 193 Is Met In This Case.**

As DOR has acknowledged, by statute, B&O tax is only imposed on business activities performed in Washington. CP 117 (“The B&O tax is imposed on ‘every person for the privilege of engaging in business activities’ within the state,” *quoting* RCW 82.04.220). This Court has recognized the same. *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 149, 3 P.3d 741 (2003) (B&O tax applies to “business activities carried on within the state.”). The statute’s geographic limitation is consistent with the constitutional limit of a state’s taxing power. *ASARCO, Inc. v. Idaho Tax Comm’n*, 458 U.S. 159, 185 (1983) (“a State may not tax value earned outside its borders.”). For nearly a quarter of a century, from 1991 to 2015, this statutory limitation was reflected in WAC 458-20-193 (“former Rule 193”)—the DOR’s duly promulgated rule addressing the application of B&O tax to interstate sales of goods.

Former Rule 193 identified two requirements that must be met for wholesaling B&O tax to apply to “a particular sale,” and stated that the “B&O tax *will not apply* if one of these elements is missing.” Former Rule 193(7) (emphasis added).¹ Specifically, former Rule 193 required

¹ Contrary to the Court of Appeals’ erroneous characterization of the rule as an “exemption,” the rule’s requirements are conditions to the (continued)

that there “must be both 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.” *Id.* Neither requirement was satisfied here.

1. The Wholesale Purchasers of Avnet’s Drop-Shipped Sales Did Not Receive the Goods In Washington As Required By Former Rule 193 for B&O Tax To Apply To Those Wholesale Sales.

With respect to the first requirement—that tax “will not apply” unless the goods are “received by the purchaser” in Washington—as COST notes, former Rule 193 expressly defined “‘receipt’ or ‘received’” to mean ‘the purchaser or its agent first either taking physical possession of the goods or having dominion and control over them.’” COST Br. at 5-6, *quoting* WAC 458-20-193(2)(d) (1991). Moreover, former Rule 193 applied this definition of receipt to drop-shipped sales, explaining that when an out-of-state wholesale purchaser instructs an out-of-state wholesale seller to ship goods to the wholesale purchaser’s customer in Washington, the wholesale purchaser “has not taken possession or dominion and control over the [goods] in Washington” and, thus, has not “received” the goods in Washington. WAC 458-20-193(11)(h) (1991).

imposition of tax, reflecting the nature of the tax as one imposed on gross income derived from engaging in business activities in Washington. As this Court has long instructed, “[i]f any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer.” *Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 396-97, 103 P.2d 1226 (2005).

The Superior Court applied former Rule 193 according to its plain meaning and correctly held that B&O tax did not apply to Avnet's Drop-Shipped Sales because the goods were never "received" by Avnet's customer in Washington:

Receipt is defined in Rule 193 as taking possession in Washington or exercising dominion and control in Washington, and that relates to the purchaser. The purchaser does not have dominion and control in Washington and did not take physical possession ... as it relates to the third party drop-shipment, the tax was improperly assessed upon Avnet.

6/7/13 Tr. at 30-31. As it did in the Court of Appeals, DOR asks this Court to adopt an "interpretation" of former Rule 193 that is directly contrary to the rule's unambiguous language. Specifically, DOR argues that the former rule should be interpreted to source sales for B&O tax purposes to the place where the goods are "delivered" instead of where the goods are "received by the purchaser." DOR Supp. Br. at 17. MTC takes the same faulty approach, mischaracterizing former Rule 193 as imposing tax "if the property is delivered in Washington." MTC Br. at 13.²

² MTC suggests that a "delivery" rule would be consistent with the approach used in the model Uniform Division of Income for Tax Purposes Act to apportion income for net income tax purposes. MTC Br. at 13. But Washington does not have an income tax and has not adopted that model act. In fact, this Court has distinguished the B&O tax from an income tax. *Puyallup v. Pacific NW Bell*, 98 Wn.2d 443, 451-51, 656 P.2d 1035 (1982). MTC correctly notes that states are free to establish their own tax rules, MTC Br. at 4, 5—which is what Washington has done. By its plain language, former Rule 193 established the purchaser's "receipt," not "delivery," as the standard for imposing B&O tax on sales of goods.

While DOR argues that “there is no meaningful difference” between “delivery’ and “received.” 6/17/13 Tr. p. 19 line 19, the rule not only expressly identifies “receipt ... by the purchaser” as the controlling standard and defines what receipt means, the rule also separately defines “delivery.” WAC 458-20-193(2)(c). Rules are construed using principles of statutory construction. *Dep’t of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). It is axiomatic that when certain language is used in one place and different language is used in another, a different meaning is intended. *AgriLink*, 153 Wn.2d at 397. If former Rule 193 imposed tax based on “delivery” into Washington it would have said so. It does not; it says “receipt by the purchaser.” As the Superior Court properly held, former Rule 193 is “plain on its face, and the argument otherwise is contrary to the law, and the Court will not adopt that interpretation.” 6/7/13 Tr. at 30. This Court should do the same.

Perhaps recognizing that former Rule 193’s plain language cannot support B&O tax on the Drop-Shipped Sales, DOR argues, without citation to supporting authority, that the third parties to whom Avnet drop-ships the goods should be treated as the wholesale purchaser’s receiving “agents”—so that receipt by the third party would be deemed to be receipt by Avnet’s customer. DOR Supp. Br. at 18. There is a reason DOR fails to cite any authority for this position—there is none. In fact, it is directly contrary to both the plain language of the rule and to published DOR determinations addressing receiving agents under the rule.

Former Rule 193 specifically states that a person receiving goods as the purchaser's "agent" must have "express written authority to accept or reject the goods for the purchaser with the right of inspection." WAC 458-20-193(7)(a). DOR issued an Excise Tax Advisory explaining that under former Rule 193, to receive goods as the purchaser's agent, one must: (i) have "written authority to accept or reject goods for the buyer" (ii) "physically examine" the goods and (iii) "provide documentation ... to the seller" of the agent's acceptance or rejection of the goods. Excise Tax Advisory 561.041.193 (1993) (reissued as ETA 3091.2009 (2009)). Consistent with this guidance, DOR routinely rejected claims that goods were received by an agent under former Rule 193 in the absence of written authority and documentation verifying the agent's actual inspection and acceptance of the goods. Det. No. 06-0028, 26 WTD 97 (2007); Det. No. 99-289, 20 WTD 197 (2000); Det. No. 99-219E, 18 WTD 264 (1999). No such evidence exists here. CP 660. The third parties were not authorized to and did not receive the goods on behalf of Avnet's purchasers.

As COST correctly argues, DOR cannot disavow the unambiguous language and prior interpretation of former Rule 193—its own duly promulgated rule. COST Br. at 4-11. Not only is it the law that "[a]dministrative agencies are bound by their own rules," COST Br. at 8 (quoting *Skamania County v. Woodall*, 104 Wn. App. 525, 539, 16 P.3d 701 (2001)), it is also good policy. DOR acknowledges that Washington's "tax system is based largely on voluntary compliance," Det. No. 14-0397, 34 WTD 332 (2015), which, in turn, is driven by "fairness and uniform

application” of the law. DOR Tax Facts Sept. 2002, p. 2, available at http://dor.wa.gov/docs/pubs/excisetax/wataxfacts/taxfacts_mq_02_m09.pdf (last visited April 20, 2016). Adopting a new interpretation contrary to the plain terms of a duly promulgated rule is unfair, results in non-uniform application of the tax code and undermines taxpayers’ confidence in the system. As COST explains “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.” COST Br. at 10. If taxpayers can’t rely on DOR’s consistent interpretation and application of an unchanged rule, why should they try to comply with them at all?

Unless quashed, the implications of DOR’s transient approach to its own rules will extend beyond this case. A recent article by a prominent state tax commentator noted that the Court of Appeals’ “holding that the government’s own rules can be ignored—by the government—should trouble everyone.” D. Brunori, *Should Departments of Revenue Follow Their Own Rules?*” State Tax Notes, April 11, 2016. The commentator observed, “taxpayers might start taking those rules a little less seriously. Complying with the tax laws is expensive. Companies hire lawyers and accountants to make sure they’re dotting their i’s and crossing their t’s. In a civilized society that’s a good thing. Why would we send the message that taxpayers shouldn’t take the rules seriously? Taking the rules seriously is critical to a system that relies on voluntary compliance.” *Id.* In short, taxpayers will take the rules seriously only if DOR does as well.

2. Avnet Did Not Engage In Any Activities In Washington Associated With The “Particular” Sales At Issue—As Required By The B&O Statute, Former Rule 193, And The U.S. Constitution.

The second requirement identified in former Rule 193 for B&O tax to “apply to a particular sale” is “nexus.” The parties and both amici agree that nexus is a constitutional requirement. Nexus has two components: nexus with the taxpayer and nexus with the transaction. As the Department concedes, the Commerce Clause requires “that a state must have a connection - or “nexus” - with the taxpayer *and* with the transaction or activity it seeks to tax.” CP 356 (emphasis added).

Dissociation is a term used to describe sales for which there is taxpayer nexus (*i.e.*, the seller has an office in the taxing jurisdiction), but the sale does not have transactional nexus—the seller did not engage in any activities in the taxing jurisdiction significantly associated with the particular sale. The term is derived from the U.S. Supreme Court’s decision in *Norton Co. v. Dep’t of Revenue of Ill.*, 340 U.S. 534 (1951), which held that a state is constitutionally precluded from imposing a gross receipts tax on “particular sales [that] are dissociated from” the seller’s in-state activities. *Id.* at 537.

In *Norton*, the seller had an office in Chicago. The Supreme Court affirmed the state’s assessment of gross receipts tax on all sales shipped into the state for which the Chicago office “perform[ed] useful functions” related to the sale—whether receiving the order, investigating or approving credit, or acting “as an intermediary to reduce freight charges.” *Id.* at 536. However, the Court flatly rejected the argument made by DOR

in this case—that the presence of an in-state office was “sufficient to render [taxable] all income” from sales of goods shipped into the state. *Id.* at 537. The Court explained that unless the seller engaged in an activity within the state associated with the sale “sufficient to bring the transaction within [the state’s] taxing power,” the sale is “not taxable.” Dissociating sales for which activity was performed within the state from a class of sales with respect to which Norton performed no in-state activities, the Court struck down the assessment of gross receipts taxes on the latter. *Id.* at 540. This Court recognized *Norton’s* dissociation principle in *B.F. Goodrich Co. v. State*, 38 Wn.2d 663, 671-72, 231 P.2d 325 (1951), holding that “tax may not be levied upon proceeds from sales with which the local outlet had nothing to do.”

The record in this case is undisputed and, as both DOR and the Court of Appeals acknowledge, “indistinguishable” from *Norton* and *Goodrich*. Avnet’s Redmond, Washington office had nothing whatsoever to do with the National Sales and Drop-Shipped Sales. “The Redmond office did not receive, review, acknowledge, or accept the orders for any of the” National Sales or Drop Shipped Sales. “The Redmond, Washington office did not provide engineering or technical advice to any of the” National Sales or Drop-Shipped Sales customers. “The Redmond, Washington office did not investigate the credit of any” National Sales or Drop Shipped Sales customers. “The Redmond, Washington office did not participate in the distribution of goods for any of the” National Sales or Drop-Shipped Sales at issue in this case. The Redmond, Washington

office did not maintain a stock of goods in Washington from which any of the” National Sales or Drop Ship sales “were filled.” “The Redmond, Washington Office did not perform any other role in connection with” the National or Drop-Shipped Sales. CP 10-11, 198-200.

DOR concedes that *Norton’s* dissociation “principle”—that states cannot impose taxes on those sales for which the seller engaged in no in-state activities associated with the sale—“is still cited in post-*Complete Auto* cases.” DOR Supp. Br. at 10. This concession is not surprising. As COST observes “the U.S. Supreme Court was clear in *Complete Auto* that the test is **not** whether the taxpayer itself had subjection nexus, but whether the **activity** conducted by the taxpayer had substantial nexus with the state. COST Br. at 11 (emphasis original). *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (there must be a “substantial nexus to the activity the state seeks to tax.”). Indeed, the transactional nexus requirement was reaffirmed by the U.S. Supreme Court years after the cases DOR and MTC argue implicitly overruled *Norton*. “[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.” *Allied-Signal, Inc. v. Director, Div. of Tax’n*, 504 U.S. 768, 778 (1992). As Avnet explained in its Supplemental Brief, former Rule 193 expressly codified this principle and DOR consistently applied it with a view toward the “particular sale” at issue—until now.

MTC argues that *Norton* was implicitly overruled over a half century ago, on the theory that *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), “adopted the [*Norton*] dissent’s view of *Norton* ‘dissociation.’” MTC Br. at 7. However, as the MTC notes earlier in its brief, the dissent “agreed” with the dissociation principle, but was “of the opinion that the taxpayer had failed to meet its burden of proving the sales were not connected.” MTC Br. at 5, *citing Norton*, 340 U.S. at 54. In any event the facts that concerned the *Norton* dissent, repairing defective products and providing engineering and technical advice, are not present in this case. Avnet’s Redmond office does not repair defective goods and did not provide engineering or technical advice to any of the National Sales or Drop-Shipped sales customers. CP 10-11, 198, 200.³

The MTC also contends that the “facts in *General Motors* are, in all material respects identical to the facts in this case.” MTC Br. at 7. Wrong. Critically, in *General Motors* employees who lived in Washington visited the Washington dealers to whom GM made the sales at issue “on an average of at least once a month and often saw the larger dealers weekly. 377 U.S. at 443. There is no question that those Washington activities were associated with the sales to those dealers. Here, Avnet has paid B&O tax on sales to all Washington customers for which there was any Washington activity, including but not limited to

³ While *Norton* was a manufacturer that sold and repaired goods of its own manufacture, Avnet is merely a wholesale distributor (reseller) of goods manufactured by others.

customers that Avnet called on in Washington. The record is undisputed, however, that no one from Avnet did anything whatsoever, either pre- or post-sale, in connection with the Drop-Shipped and National Sales.

Norton's dissociation principle has not been overruled and remains controlling law. Whether or not this Court agrees with DOR that *Norton's* holding should be reconsidered, this Court cannot do so. It must follow *Norton* on this issue of federal constitutional law until and unless the U.S. Supreme Court overrules *Norton*; it should be DOR's burden to seek relief in the Supreme Court via writ of *certiorari*—not Avnet's. Indeed, even if there was some doubt about *Norton's* continued viability, former Rule 193 unambiguously interpreted the B&O tax statute to permit dissociation, as did dozens of DOR's own published tax decisions. In the absence of any change in the statute or rule, DOR was bound by—and Avnet was entitled to rely on—former Rule 193 to prove dissociation here, which it did.

III. CONCLUSION

The Court of Appeals must be reversed, and the trial court ordered to reject DOR's assessment on Avnet's Drop-Shipped and National Sales.

RESPECTFULLY SUBMITTED this 27th day of April, 2016.

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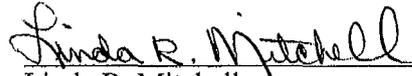
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I hereby certify under penalty of perjury of the laws of the State of Washington, that on April 27, 2016, I caused to be served a copy of the foregoing on the following persons in the manner indicated below.

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Dear Clerk: Attached for filing is Avnet, Inc.'s Answer to Amici Curiae.

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