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The Washington B&O Tax

Nexus Traps for the Unwary Taxpayer

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In This Issue:

The Washington B&O Tax – Nexus Traps for the Unwary Taxpayer[1]

By Robert Wood and Scott Schiefelbein[2]

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Introduction

Washington's unique gross receipts excise tax, better known as the Business and Occupation (B&O) tax, has caused many headaches for businesses residing in the Evergreen State. Over the last several years, Washington has enacted several changes to its B&O tax that will extend similar challenges to non-Washington based businesses. This article provides helpful tips regarding some of the nexus traps the B&O tax poses for the unwary company seeking to do business in Washington.

Business and Occupation Tax Overview

Washington's B&O is an excise tax measured by the value of products, gross proceeds of sales, or gross income of a business with over 30 different classifications and associated tax rates ranging from .138% to 1.5%. In general, there are no deductions from the B&O tax for labor, materials, or other costs of doing business.[3] The tax rate depends on the classification (*i.e.*, manufacturing, wholesaling, retailing, service and other, etc.). The classification also determines where the receipts from various activities will be sourced. In the case of "retailing" and "wholesaling" receipts, the revenue is sourced based on the delivery destination of the products sold, in accordance with the Streamlined Sales and Use Tax souring hierarchy.[4] "Apportionable" receipts, such as services or royalties, are sourced to where the customer receives the benefit of the taxpayer's services or intangible property.[5] When the benefit of the services or intangible property is received in more than one location, the taxpayer may "reasonably determine" the manner in which apportionable receipts should be attributed to Washington.[6]

Next-up ... Nexus

In many cases, the threshold question for every company when considering its potential taxability in a particular state is whether the company has established a taxable connection, or "nexus," with the taxing state. Nexus is typically measured by the nature and extent of the taxpayer's business activities in the taxing state. Generally speaking, a state's ability to assert nexus is constrained by the Due Process

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3 Rev. Code Wash. § 82.04.220.

4 Rev. Code Wash. § 82.32.730.

5 Rev. Code Wash. § 82.04.462(3).

6 Rev. Code Wash. § 82.04.462(3)(b)(i).

and Commerce Clauses of the U.S. (as well as federal statutes). The scope of nexus can be narrowed, but not expanded, by the taxing statutes of the particular state.[7]

In certain instances, the nature of a taxpayer's particular business activity may dictate the nexus standard that applies to that taxpayer. Washington's B&O tax provides one example of this state tax nuance, having adopted specific standards that vary based on the business activity conducted. Once the out-of-state taxpayer's classification of business activities has been determined, the taxpayer must then apply the nexus test that applies to that particular business activity classification. For example, with regard to transactions classified under the retailing category, and also subject to retail sales tax unless a specific exemption applies, Washington relies on the physical presence test as outlined in the United States Supreme Court decision in *Quill*.[8] Pursuant to that decision, a business must have more than a "*de minimis*" or "slightest [physical] presence" within a particular state in order to establish nexus. Washington applies that standard to taxpayers engaged in retailing transactions.[9]

A taxpayer is deemed to have physical presence nexus for retailing and retail sales tax purposes in Washington if the taxpayer, either directly or through an agent or other representative, engages in activities in Washington that are significantly associated with the taxpayer's ability to establish or maintain a market for its products in Washington.[10]

A few examples of physical presence nexus-creating activities include, but are not limited to:

- Soliciting sales in this state through employees or other representatives;
- Installing or assembling goods in Washington, either by employees or other representatives;
- Maintaining a stock of goods in Washington;
- Renting or leasing tangible personal property;
- Providing services;
- Constructing, installing, repairing, maintaining real property or tangible personal property in Washington; and
- Making regular deliveries of goods into Washington using the taxpayer's own vehicles.[11]

In a recent decision, an Administrative Law Judge (ALJ) for the Washington Department of Revenue found that a manufacturer of bedding products had physical presence nexus with Washington for purposes of the retailing B&O tax and retail sales tax because the in-state activities of an out-of-state employee and a resident independent contractor were significantly associated with the taxpayer's ability to establish or maintain a market for its products in Washington.[12] The taxpayer argued that the out-of-state employee only visited Washington a "limited" number of times over the course of the year. The ALJ determined that the "limited" visits, in this case two to four visits over the course of a year, with retailers located in Washington was enough to satisfy the "slightest [physical] presence" standard outlined in the *National Geographic* and *Quill* decisions of the U.S. Supreme Court.[13] Furthermore, the ALJ noted that the second representative's status as an independent contractor did not preclude the representative's activities from establishing nexus on behalf of the taxpayer. In this case, the activities of the independent contractor helped the manufacturer establish and maintain a market in Washington and thus were sufficient to create nexus on behalf of the taxpayer.[14]

This authority indicates that Washington has taken a relatively aggressive stance on what establishes physical presence nexus. Notwithstanding, the Washington Department of Revenue has provided a limited safe harbor from nexus with regard to computer software stored on servers located in Washington. The Washington Department of Revenue may not consider a person's ownership or rights in computer software, including software used in providing a digital automated service, master copies of software, digital goods or digital codes residing on servers located in Washington in determining substantial nexus for purposes of taxation.[15] Thus, physical presence nexus will not be established if the taxpayer's only connection with Washington is the storage of software on servers located in the state.

In contrast to this physical presence nexus test that is applied to transactions classified under the retailing category, effective June 1, 2010, Washington adopted an "economic nexus" standard rather than a physical presence standard with regard to certain non-retailing B&O tax classifications.[16] This standard subjects businesses earning

7 *See, e.g., Tyler Pipe Industries v. Washington Dep't of Revenue*, 483 U.S. 232 (1987) (Washington's assertion of nexus upheld based on constitutional principles rather than reference to state taxing statute). Also, Congress may act to regulate interstate commerce in a manner where states may not. *See, e.g.*, P.L. 86-272 (federal law limiting the states' ability to impose net income taxes on sellers of tangible personal property where taxpayers' activities in-state are limited to solicitation of sales of tangible personal property).

8 *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

9 Rev. Code Wash. § 82.04.067(6)(a).

10 Rev. Code Wash. § 82.04.067(6)(c)(i).

11 Rev. Code Wash. § 82.04.067(6)(c)(i); Wash. Admin. Code § 458-20-194; http://dor.wa.gov/content/doingbusiness/businesstypes/doingbus_outofstbus.aspx#Nexus.

12 Washington Tax Determination No. 15-0031, 35 WTD 311 (2016).

13 *National Geographic Society v. California Bd. of Equalization,* 430 U.S. 551, 556, 97 S.Ct. 1386 (1977); *Quill, supra*, at 315, n.8.

14 Washington Tax Determination No. 15-0031, *supra*.

15 Rev. Code Wash. § 82.32.532(1).

16 Rev. Code Wash. § 82.04.067; Wash. Admin. Code § 458-20-19402; Excise Tax Advisory No. 3195.2015, Washington Department of Revenue (February 3, 2015).

"apportionable income" (such as receipts classified under "service and other activities" or "royalty" for B&O tax purposes) to Washington's B&O tax regardless of whether the taxpayers have any physical presence in Washington. Under the economic nexus standard a person engaging in business in Washington is deemed to have substantial nexus with Washington if the person is:

1. An individual and is a resident or domiciliary of Washington;
2. A business entity and is organized or commercially domiciled in Washington; or
3. A nonresident individual or a business entity that is organized or commercially domiciled outside Washington, and in the immediately preceding tax year the person had:
    a. More than $53,000 of property in Washington;
    b. More than $53,000 of payroll in Washington;
    c. More than $267,000 of receipts from Washington; or
    d. At least twenty-five percent of the person's total property, total payroll, or total receipts in Washington.[17]

Furthermore, effective September 1, 2015, Washington extended the economic nexus standard to the wholesaling classification:

> 'Engaging within this state' and 'engaging within the state,' when used in connection with any apportionable activity as defined in RCW 82.04.460 or *wholesale sales taxable under RCW 82.04.257(1) or 82.04.270*, means that a person generates gross income of the business from sources within this state, such as customers or intangible property located in this state, regardless of whether the person is physically present in this state.[18]

Under this standard, out-of-state businesses making wholesale sales into Washington are subject to the wholesaling B&O tax on wholesale sales delivered to Washington customers if the taxpayers meet any of the above listed economic nexus thresholds. Out-of-state taxpayers that do not have a physical presence in Washington but exceed $267,000 receipts in wholesale transactions attributed to Washington within a calendar year are subject to the B&O tax on their Washington sourced wholesale sales.[19]

Under the Washington Department of Revenue's proposed expedited amendments to the applicable regulations, the economic nexus threshold of $267,000 in receipts attributed to Washington can be reached through a combination of both wholesale sales and apportionable gross receipts attributed to Washington.[20] For example, an out-of-state business that receives $200,000 in fees for consulting services provided to clients located in Washington has not exceeded the economic nexus threshold of $267,000. However, if this same business also engages in $80,000 worth of wholesale transactions delivered to Washington customers, the taxpayer reaches the economic nexus threshold and is subject to both the Service and Other B&O tax on its consulting services at the rate of 1.5%, and wholesaling B&O tax on its wholesale sales at the rate of 0.484%.

Finally, it is important to note that the physical presence standard and the economic nexus standard are applied independently for Washington B&O tax purposes. Thus, in the example above, if the taxpayer also had retail sales into the state of Washington, but no physical presence, it would not be required to remit retailing B&O tax or collect retail sales tax even though it has established economic nexus through the businesses' wholesaling and service activities. The existence of economic nexus presence does not create a de facto physical presence in Washington for retail sales activity.

Click-through Nexus

Also effective September 1, 2015, Washington adopted a "click-through" nexus presumption for both the retailing B&O and retail sales tax purposes. Under these provisions, out-of-state retailers are presumed to have physical presence nexus with Washington if the taxpayers:

1. Enter into agreements with Washington residents and pay a commission or other consideration for referrals (such as linking on a website), and
2. Gross more than $10,000 in sales into Washington state during the prior calendar year under this type of agreement.[21]

Trade Show Attendance

Under RCW 82.32.531, effective July 1, 2016, for purposes of B&O taxes and sales and use taxes, the Washington Department of Revenue may not consider the mere attendance of one or more representatives of a business at a ***single*** trade convention per year in Washington in determining if the person is physically present in this state for the purposes of establishing substantial nexus with Washington with respect to making retail sales.[22] This exclusion does not apply if the business makes retail sales at the trade convention.[23] The Washington Department of Revenue has interpreted the above language to infer that attendance at as little as two tradeshows in a calendar year

17 Rev. Code Wash. § 82.04.067(1)(c); Excise Tax Advisory No. 3195.2015, *supra*.

18 Rev. Code Wash. § 82.04.066 (emphasis added).

19 Rev. Code Wash. § 82.04.066; Rev. Code Wash. § 82.04.460; Rev. Code Wash. § 82.04.462; Rev. Code Wash. § 82.04.067

20 Wash. State Reg. 16-08-103 (April 5, 2016); Wash. Admin. Code § 458-20-19401.

21 Rev. Code Wash. §§ 82.04.067(6)(c), 82.08.052.

22 Rev. Code Wash. §§ 82.32.531(1)

23 Washington State Legislature HB 2938 - 2015-16.

could establish physical presence for retailing B&O and sales tax purposes.[24]

Trailing Nexus

Washington also provides that a person ceasing nexus-creating business activity in Washington continues to have nexus for the remainder of that calendar year, plus one additional calendar year (also known as "trailing nexus").[25] The Washington Department of Revenue applies the same trailing nexus period for retail sales tax and other taxes reported on the B&O tax return.[26] For example, if a business does not have a physical presence in Washington, or does not exceed any of the economic nexus thresholds outlined above as of February 1, 2016, it would still be required to pay B&O tax on all gross receipts attributed to Washington for the remainder of calendar year 2016 as well as all of calendar year 2017.

What about the Cloud?

The state taxability of cloud computing (including such terms as Software as a Service (SaaS), Infrastructure as a Services (IaaS), and Platform as a Service (PaaS)) is currently a subject of close consideration in many states, with varying determinations and conclusions. As a general rule, taxing jurisdictions continue to struggle in the application of dated sales and use tax laws to the technology businesses centered on the growth of the internet and cloud. Examples of the differing approaches in this area abound. For example, South Carolina taxes SaaS as a communication service[27] while Connecticut classifies SaaS as data processing and taxes these services at a lower rate.[28] Washington, on the other hand, has been more legislatively active in its approach, enacting laws in 2009 to address the classification and taxation of digital goods and services.[29]

The taxation of digital products and services in Washington (both the nexus standard and the tax rate) will depend on the classification of the various goods and services under Washington's digital products law.[30] As addressed above, the nexus standard applied under Washington law is dependent on the classification of the business activity. The treatment of a SaaS/cloud computing company will depend largely on whether the taxpayer's product or service is classified as a Digital Good, Digital Automated Service (DAS), Remote Access Software (RAS), or alternatively, a data processing service. Digital goods, DAS, and RAS are classified as "retailing" for B&O tax purposes and subject to the physical presence standard.[31] However, certain activities are still classified under the "service and other activities" B&O classification and are subject to the economic nexus standard. These services include activities such as: data processing services, web site development services, digital data storage and hosting and backup services.[32] Thus, the nexus standard and tax rate applied to many "cloud based" services depends upon within which classification or exemption a taxpayer's activities falls.

The classification of the taxpayer's services, an equally important determination, will also dictate whether the sellers will be required to collect and remit retail sales tax. For example, a service that uses one or more software applications to "crawl the internet" in order to identify, gather, and categorize digital information according to specified criteria qualifies as a digital automated service, the sale of which is generally subject to retail sales tax and retailing B&O tax.[33] By contrast, a company that charges a fee for storage space under its "basic storage service" offering is not subject to retail sales tax. The "basic storage" services are mere storage services and excluded from the definition of digital automated services. These services would generally be classified under the service and other activities B&O tax classification.[34]

Voluntary Disclosure Program

Companies that are not currently registered and are discovered through the Washington Department of Revenue's normal investigation, examination, or audit procedures may be subject to an assessment equal to the current year plus the prior seven years of tax, as well as the assessment of applicable penalties and interest. Businesses, however, can seek to come forward through Washington's Voluntary Disclosure Program by submitting an online application. Under this Voluntary Disclosure Program, the "look back" period is generally limited to the current year plus the prior four years. Penalties, but not interest, will either be partially or fully waived.

In order to qualify for the Washington Voluntary Disclosure program a business must meet the following criterion:

- Never registered with or reported taxes to the Department of Revenue;
- Never been contacted, nor its affiliates contacted, by the Department of Revenue for enforcement

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24 Washington State Department of Revenue Special Notice, *Trade Convention Exceptions from Nexus for Retail Sales*, May 27,2015.

25 Wash. Admin. Code § 458-20-193(104).

26 *Id.*

27 117 S.C. Code Ann. Regs. 329.4(k).

28 Conn. Gen. Stat. §12-408(1); Policy Statement 2006(8); Policy Statement 2004(2)

29 Rev. Code Wash. §§ 82.04.192; Rev. Code Wash. §§ 82.04.257; Wash. Admin. Code § 458-20-15503

30 Wash. Admin. Code § 458-20-15503; Excise Tax Advisory No. 3176.2013, Washington Department of Revenue (Sept. 3, 2013); Excise Tax Advisory No. 3177.2013, Washington Department of Revenue (Sept. 3, 2013).

31 Wash. Admin. Code § 458-20-15503(202); Wash. Admin. Code § 458-20-15503(203)(a)(ii);Wash. Admin. Code § 458-20-15503(303)(o).

32 Wash. Admin. Code § 458-20-15503(303)(o); Wash. Admin. Code § 458-20-15503(303)(a); Wash. Admin. Code § 458-20-15503(303)(n).

33 Wash. Admin. Code § 458-20-15503(203)(a) Example 2.

34 Wash. Admin. Code § 458-20-15503(303)(n) Example 19.

purposes (e.g., audit or compliance contacts regarding registration or reporting requirements); and

- Not engaged in evasion or misrepresentation in reporting tax liabilities.

Conclusion

Gross receipts taxes such as the Washington B&O tax are often touted for their simplicity – unlike corporate income taxes, gross receipts taxes do not require a computation of net taxable income. However, this article has highlighted that complex questions of nexus, the threshold question in any state tax discussion, do exist relative to the Washington B&O tax. Accordingly, businesses (and their representatives) need to have a comprehensive grasp of both Washington's intricate body of laws and rules as well as a thorough understanding of the company's business activity in Washington – even if the company does not have a physical presence in the state. Given that the Washington legislature has demonstrated a willingness to enact new laws to address the changing economy (e.g., digital products law enacted in 2009 and the click-through nexus law enacted in 2015), careful practitioners should continue to closely monitor developments in Washington.

2017 Award of Merit Recipient

The Tax Section Chair Jennifer Woodhouse is delighted to announce that Magistrate Jill Tanner has been selected as the Award of Merit recipient for 2017. Prior to her retirement, Magistrate Tanner served on the Oregon Tax Court for nearly two decades, most recently as Presiding Magistrate. The award recognizes her for exemplary leadership and service to the Oregon State Tax Court, the Bar, and the community in general; her professionalism; her commitment to the advancement of women in the legal profession; and for her tireless efforts at mentoring new lawyers. The award will be conferred on Thursday, June 1, at the Oregon Tax Institute, which the Tax Section Chair encourages everyone to attend. In addition to honoring Magistrate Tanner, this year's event features an outstanding lineup of topics and speakers (available here) and will be held June 1-2 at the Multnomah Athletic Club in Portland.

Paying Taxes on Taxes: Washington Supreme Court Holds Estate Must Pay Estate Taxes on Gift Taxes Paid Within Three Years of Death

By Caitlin M. Wong[1]

On February 16, 2017, the Washington Supreme Court issued an en banc opinion in *Estate of Barry A. Ackerley v. Washington Department of Revenue*, 389 P.3d 583 (Wash. 2016). The issue that lead the Estate of the former owner of the Seattle Sonics to Court? Whether gift taxes paid within three years of death are includable in the Washington taxable estate of the decedent.

For federal estate tax purposes, the taxable estate includes the amount of any federal gift tax paid by the decedent within three years of his or her death. IRC § 2035(b). This is commonly referred to as the "gross-up rule." Washington does not have a gift tax or an express gross-up rule.

The lack of a Washington gift tax or express gross-up provision previously lead some practitioners to conclude that there is no gross-up requirement under Washington law. After all, imposing Washington estate tax on gift tax paid seems nonsensical given Washington's lack of a gift tax. The Estate of Barry Ackerley, the former owner of the Seattle Sonics, took this position on its estate tax return and, when the Department of Revenue disagreed and assessed estate tax on the gift tax paid, challenged the assessment in *Estate of Barry A. Ackerley*.

If you also consider inclusion of gift taxes paid in a Washington taxable estate to be nonsensical, then congrats! Four justices agree with you, and if they were NBA officials then I could stop writing and go watch the Blazers game.[2] Unfortunately for the Estate, five justices ruled that the decedent's Washington taxable estate includes the gift tax paid within three years of death. In short: Washington estates must pay taxes on taxes.

According to the Court, the definition of "Washington taxable estate" under RCW 83.100.020(15) includes any gift taxes paid within three years of death because the legislature did not specifically exempt the gross-up rule from inclusion in the taxable estate. In defining "Washington

1 Caitlin M. Wong is the owner of CW Law. She assists individuals, families, and businesses with their estate and trust, tax, and business law needs in Washington and Oregon. She has an LL.M. in taxation.

2 The author acknowledges that the Blazers did not play between when the Opinion was filed and the original publication of this writing. The author admits that many years ago she sometimes watched Sonics games even when they were not playing the Blazers. She regrets nothing, including those times she cheered for the Sonics over the Suns.