



Volume 13 Number 2

January 2006

State Tax Return

Washington State Finds Horses Hawking Products Can Create Nexus

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"Texas Thunder," a team of Percheron draft horses, and the team's handlers were recently found to create nexus for a Texas manufacturer in Washington State. The Washington Board of Tax Appeals (the "Board") upheld an assessment for wholesale business and occupation taxes ("B&O taxes") against Priefert Manufacturing Company, Inc. ("Priefert"), a Texas manufacturer of ranch, cattle and horse equipment, after finding the horse team's demonstrations created nexus in Washington. *Priefert Mfg. Co., Inc. v. State of Washington Dep't of Revenue*, No. 61969 (Wash. Bd. Tax App. Nov. 16, 2005). Priefert promoted its products through the demonstrations at rodeos, fairs and retailer-sponsored events.

A Washington State Department of Revenue ("Department") compliance agent observed a demonstration in the parking lot of one of the Washington retailers that carries Priefert products. The horses traveled in specially designed trailers owned by Priefert and bearing the Priefert logo. The team's handlers were Priefert employees, who wore shirts displaying the Priefert logo. Priefert fencing and a Priefert-manufactured draft horse hitch were used in the demonstration.

The compliance agent testified as to witnessing several of Priefert's demonstrations in Washington over prior years and Priefert's Web site stated that Priefert's star horse, Goliath, had toured rodeos and fairs in multiple states, including Washington State.

The Board held the Priefert demonstration marketed Priefert's name and products and the presence of Priefert's employees in a marketing capacity created nexus in the state. The Department also asserted that a Priefert sales representative regularly visits Priefert's retailers in Washington State; however, the Board did not expressly rely on this assertion in its holding to determine Priefert had nexus.

According to the Washington Administrative Code, the state will impose B&O taxes on inbound sales of goods only if two conditions are met: (1) the seller has nexus with the state and (2) the purchaser receives the goods in Washington State. Wash. Admin. Code § 458-20-193(7) (hereafter "Rule 193"). Delivery via a freight consolidator, freight forwarder or for-hire carrier from a location outside the state to a purchaser in the state does not prevent a purchaser from receiving the goods in Washington State. See Rule 193. Only if the third-party carrier has "express written authority to accept or reject the

goods for the purchaser with the right of inspection" will receipt by the carrier outside Washington State prevent receipt by the purchaser in the state. *See id.*

Priefert made two arguments. First, Priefert argued the B&O tax created double taxation of the manufacturer because Priefert paid Texas franchise taxes that were based on the sales during the audit period. The Board stated that Priefert failed to provide any authority to support a claim of illegal double taxation and the Board rejected the argument.

Second, Priefert argued that its goods were received outside Washington and were not subject to Washington's B&O tax. Priefert stated that its goods were sold to a Kansas distributor in Texas who then delivered into Washington by a common carrier. Priefert also argued the Washington regulation determining where delivery occurs for purposes of the B&O tax does not override the Texas UCC statute defining "delivery." The taxpayer argued that delivery of products sold to Washington purchasers was made in Texas under the Texas UCC statute.

The Board found that the purchasers received the goods in Washington. The Department had asserted that the Kansas intermediary was not a distributor at all but was a co-op or discount service. Without addressing the status of the Kansas company, the Board implicitly ruled that the products were shipped directly to Washington, thereby triggering taxation under Rule 193.

The Board declined to apply the Texas UCC statute to Washington tax law and held the Washington regulation applied. "Each area or chapter of the law has its own set of definitions. For example, 'delivery' for federal tax purposes is different than delivery for federal commerce code or criminal code. After all, 'delivery' of commercial goods is different from 'delivery' of controlled substances. The use of differing definitions of the same term is typical, not the exception." *Priefert Mfg. Co., Inc.*, No. 61969 (Wash. Bd. Tax App. Nov. 16, 2005).

Editor's Note: Drop shipments and differing f.o.b. terms often producing varying sales, excise and income tax results. Presumably, if presented with the corresponding facts in Miller Brewing (Ind. Tax. Ct. 2005) discussed above, the Washington Board would have imposed tax based on the ultimate delivery location. ■



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