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BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 20-0059
. . .	)	Registration No. . . .

RCW 82.04.067; WAC 458-20-193: NEXUS – PHYSICAL PRESENCE. A Washington business whose owner was present in the state and had property interests in an in-state bank account and physical mailboxes is sufficient to establish substantial nexus under RCW 82.04.067 and WAC 458-20-193.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Farquhar, T.R.O. – A Washington company whose owner resides . . . [outside of the United States] protests the Department's assessment of retail sales tax and retailing business and occupation ("B&O") tax on retail sales made to Washington consumers. The company argues that despite the fact that it was formed in Washington, it did not establish nexus with Washington during the relevant periods because it had no physical presence in the state. We conclude that the company did indeed have a physical presence in Washington because its owner/sole employee was present in the state as the company's registered agent and the company owned a bank account in Washington, maintained a physical mailbox in Washington, and used a Washington-based answering service to interact with its Washington customers. For those reasons, we find that the company did have nexus with Washington throughout the subject periods and is subject to Washington retail sales tax and B&O tax as assessed. Petition denied.[1]

ISSUE

Whether a Washington company whose owner resides . . . [outside of the United States] established nexus with Washington under RCW 82.04.067 and WAC 458-20-193 by using the owner as a its registered agent in the state, owning a bank account in the state, and utilizing a Washington mailbox and answering service.

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

FINDINGS OF FACT

. . . , LLC ("Taxpayer") is a Washington company that sells [tangible personal property] to independent automobile dealers. Taxpayer is owned entirely by . . . ("the Owner"), who resides . . . [outside of the United States]. Taxpayer asserts that the business itself is located exclusively . . . [outside of the United States] and all of its product development and sales activity occurs there. The Owner's children live in Washington, and he occasionally travels to the state, though it is unclear how often or how long his visits last.

The Owner formed Taxpayer in Washington as a limited liability company ("LLC") on . . . 2013. As part of the formation process, the Owner submitted a Certificate of Formation ("the Certificate") with Washington's Secretary of State. The Certificate listed Taxpayer's business address as . . . [address in Washington State]. The Certificate also identified the Owner as Taxpayer's registered agent. Along with the Certificate, Taxpayer filed its initial annual report. The report references the same . . . address and refers to the Owner as the sole "member/manager" and Taxpayer's registered agent. The report also states that Taxpayer's place of business is in the United States.

Since 2013, Taxpayer has submitted six additional annual reports. All of the reports were submitted by the Owner, who submitted them under penalty of perjury.[2] The [six] reports . . . [list addresses in Washington State for Governing People and Registered Agents.]

. . .

[In] 2018, the Owner submitted a business license application for Taxpayer with the Department. The Owner listed Taxpayer's mailing address as . . . [address in Washington State] and did not provide an alternative business address. The Owner listed himself as the sole owner of the business. He identified a . . . , Washington branch of . . . Bank as Taxpayer's bank. As with the annual reports discussed above, the Owner submitted the information contained in the business license application under the penalty of perjury.

Taxpayer's website lists the . . . [Washington State] address featured on Taxpayer's 2018 and 2019 annual reports and its business license application as its "Registered USA Address." . . .

In the fall of 2018, the Department's Audit Division ("Audit") began a review of Taxpayer's books and records for the period of January 1, 2012, to September 30, 2018 ("the Audit Period"). After reviewing records and discussing Taxpayer's business with the Owner, Audit determined that Taxpayer's business activities . . . are subject to retail sales tax and retailing B&O tax. Audit issued its audit report to Taxpayer on December 14, 2018. The report includes a discussion of economic nexus standards and informed Taxpayer that its "sales into Washington exceeded the thresholds needed to trigger economic nexus." . . .

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[2] The following language appears at the end of the 2014-2017 reports: "I am the person listed above and I certify under penalty of perjury that the renewal information submitted is true and correct to the best of my knowledge. I understand that deliberately submitting false information may be punishable as a gross misdemeanor. RCW 43.07.210." The 2018 and 2019 reports include the following: "This document is hereby executed under penalty of law and is to the best of my knowledge, true and correct."

On December 14, 2018, Audit issued a Notice of Balance Due ("the Assessment") in the amount of $. . . . The Assessment is composed of $ . . . in taxes, $ . . . in penalties, and $ . . . in interest, less $ . . . in prior payments. The tax portion of the Assessment includes $ . . . in state and local retail sales tax and $ . . . in retailing business and occupation ("B&O") tax. Taxpayer has not paid the Assessment.

On February 13, 2019, Taxpayer submitted a timely petition for review ("the Petition"). Taxpayer concedes that, for the purposes of our review, its sales . . . are subject to retail sales tax. . . . Taxpayer's arguments against the Assessment are organized by time period. The first period covers the start of the Audit Period through July 1, 2017. During that time, Taxpayer argues that retail sales were not considered an apportionable activity and, therefore, economic nexus standards do not apply. Because Audit appeared to base the Assessment on an economic nexus analysis, Taxpayer argues that the Assessment for that period should be "vacated" because Audit "does not allege sufficient facts to support the assessment for that time period." *Id.* at pg. 4.

The second time period covers July 1, 2017, through June 21, 2018. This period covers the time between when Washington extended economic nexus standards to the retailing B&O classification on July 1, 2017, and the Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, 585 U.S. __, 138 S. Ct. 2080 (2018) the following June. In this section of the Petition, Taxpayer acknowledges several physical contacts it had with Washington during the Audit Period. In particular, Taxpayer admits to using a "Washington-state based answering service that [Owner] uses when he's sleeping or flying." . . . . Taxpayer used the answering service to field calls from its customers regarding "network, viruses, onsite training and other non-software related questions." . . . . Taxpayer also acknowledges that it maintains a "post office mailbox" in . . . , Washington. . . . . Taxpayer claims that the mailbox is used "primarily for mail from the IRS and other government senders; it serves no other purpose." . . . . Taxpayer admits that, in the past, its customers would send forms for custom software designs to Taxpayer at the mailbox address. The forms were then forwarded to Taxpayer . . . [outside of the United States]. Taxpayer did not provide dates for when the mailbox was used for that purpose. Finally, Taxpayer admits that the Owner does travel to the state, but "only for personal reasons." . . . . Taxpayer claims that the Owner "performs no work for [Taxpayer] in Washington." . . . .

Despite these contacts with the state, Taxpayer argues that it did not have physical presence here because such contacts "would need to be 'the slightest presence' and 'significantly associated with' [Taxpayer's] 'ability to establish or maintain a market for its products in Washington.'" . . . . Taxpayer argues that if its contacts do not meet both of those elements, the contacts are not enough to establish nexus. In other words, even if we were to determine that Taxpayer's contacts did rise to the level of the "slightest presence," it would not be enough to establish nexus unless the contacts were also related to establishing or maintaining a market.

Taxpayer's last argument relates to the period between June 21, 2018, and the end of the Audit Period. This covers the portion of the Audit Period that occurred after the U.S. Supreme Court's *Wayfair* decision. Taxpayer acknowledges that the *Wayfair* decision confirmed Washington's ability to employ economic nexus rules for establishing nexus for retail sales tax liability. However, Taxpayer argues that during this last portion of the Audit Period, Washington had not yet passed new legislation implementing *Wayfair* and, therefore, "no one, including the

Department itself, could know what constituted taxable nexus" during that time. Petition Supplement, pg. 6. As such, the Department should vacate the portion of the Assessment related to that period.

ANALYSIS

RCW 82.08.020 imposes a retail sales tax on each retail sale in this state. RCW 82.08.020(1). Retail sales tax is to be paid by the buyer to the seller, who is required to hold the tax in trust until remitting the funds to the Department. RCW 82.08.050(1). If a seller fails to collect the tax or, having collected the tax, fails to remit the funds to the Department, the seller is liable for the amount of the tax regardless of "whether such failure is the result of the seller's own acts or the result of acts or conditions beyond the seller's control[.]" RCW 82.08.050(3). Sellers will not be relieved of personal liability for the tax unless they maintain "proper records of exempt or nontaxable transactions and provide them to the department when requested." RCW 82.08.050(4).

Washington imposes B&O tax on every person "that has a substantial nexus" with Washington for the act or privilege of engaging in business activities in Washington. RCW 82.04.220. The tax is measured by applying particular rates against the value of products, gross proceeds of sales, or gross income of the business, as the case may be. RCW 82.04.220. The tax rate or rates applicable to a particular taxpayer depend on the type of activity or activities in which the taxpayer engages. Persons making retail sales are subject to retailing B&O tax on their gross proceeds of sales. RCW 82.04.250(1).

There is no dispute that Taxpayer made sales to Washington consumers during the Audit Period that meet the definition of "retail sale" under Washington law. Indeed, Taxpayer conceded to this fact in the Petition. . . . . However, Taxpayer argues that it does not have nexus with Washington and, therefore, is not liable for collecting and remitting retail sales tax on those sales or paying retailing B&O tax on the associated income. Our analysis will now turn to whether the facts and circumstances present here support Taxpayer's argument.

RCW 82.04.067 establishes the statutory "substantial nexus" thresholds that apply to persons engaging in business in Washington. For persons engaged in the business of making retail sales, substantial nexus exists if the person has a physical presence in this state, which need only be demonstrably more than a slightest presence. RCW 82.04.067(6)(a)(ii).[3] A person is considered "physically present" in Washington "if the person has property or employees in this state." RCW 82.04.067(6)(b). A person may also be considered "physically present" in this state if "the person, either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in this state." RCW 82.04.067(6)(c).

WAC 458-20-193 ("Rule 193") sets forth administrative guidance regarding the application of the B&O tax and retail sales tax to interstate sales and includes specific guidance on the application

[3] Prior to July 1, 2017, physical presence in Washington was the only way to establish nexus for people engaged in retailing activities. After that date, Washington law changed so that sellers could be found to have "economic nexus" with Washington for the purposes of imposing retailing B&O tax. Beginning October 1, 2018, Washington law changed again to allow for using "economic nexus" standards for establishing nexus for retail sales tax purposes.

of nexus standards for retailing activities. Rule 193(101) explains that in order for Washington to impose retail sales tax or retailing B&O taxes, a seller must have nexus with Washington and the sale must occur in Washington. Rule 193 discusses nexus based on physical presence, in pertinent part, as follows:

> (102) **Physical presence nexus standard.** A person who sells tangible personal property is deemed to have nexus with Washington if the person has a physical presence in this state, which need only be demonstrably more than the slightest presence. RCW 82.04.067(6). This standard applies to retail sales both in the retail sales tax and retailing B&O tax context.
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> (a) **Physical presence.** A person is physically present in this state if:
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> (i) The person has property in this state;
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> (ii) The person has one or more employees in this state;
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> (iii) The person, either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in Washington
>
> . . .
>
> (b) **Property.** A person has property in this state if the person owns, leases, or otherwise has a legal or beneficial interest in real or personal property in Washington.
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> (c) **Employees.** A person has employees in this state if the person is required to report its employees for Washington unemployment insurance tax purposes, or the facts and circumstances otherwise indicate that the person has employees in the state.
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> (d) **In-state activities.** Even if a person does not have property or employees in Washington, the person is physically present in Washington when the person, either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in Washington. It is immaterial that the activities that establish nexus are not significantly associated with a particular sale into this state.
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> For purposes of this rule, the term "agent or other representative" includes an employee, independent contractor, commissioned sales representative, or other person acting either at the direction of or on behalf of another.

> A person performing the following nonexclusive list of activities, directly or through an agent or other representative, generally is performing activities that are significantly associated with establishing or maintaining a market for a person's products in this state:
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> . . .
>
> (vii) Performing activities designed to establish or maintain customer relationships including, but not limited to:
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> . . .
>
> (B) Being available to provide services associated with the product sold (such as warranty repairs, installation assistance or guidance, and training on the use of the product), if the availability of such services is referenced by the seller in its marketing materials, communications, or other information accessible to customers.

Nexus requirements flow from limits on a state's jurisdiction to tax found in the Due Process and Commerce Clause provisions of the United States Constitution. The limitations imposed by those clauses are discussed in depth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and other opinions, as well numerous Department determinations. *See*, *e.g.,* Det. No. 01-074, 20 WTD 531 (2001); Det. No. 96-144, 16 WTD 201 (1996). The simple and overarching inquiry under the dormant Commerce Clause is whether the taxpayer has "avail[ed] itself of the substantial privilege of carrying on business" in the taxing jurisdiction. *Wayfair*, 138 S. Ct. at 2099 (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)).

The determination of whether in-state activities create nexus looks to the entire collection of a taxpayer's different activities, the totality of which creates substantial nexus. *GMC v. City of Seattle*, 107 Wn. App. 42, 25 P.3d 1022 (2001); *see also General Motors Corp. v. Washington*, 377 U.S. 436 (1964), *overruled on other grounds*, *Tyler Pipe v. Wash. Dep't of Revenue*, 483 U.S. at 250 (1987) (holding that it is the bundle of corporate activity that determines whether a taxpayer has nexus with a state); WAC 458-20-193. Thus, establishing taxing nexus requires consideration of the entire bundle of a taxpayer's in-state activities.

Here, Taxpayer argues that it was not "physically present" in Washington during the Audit Period for the purposes of imposing retail sales tax and retailing B&O tax. However, Taxpayer does concede that it had certain contacts with the state, and we discovered additional evidence during our review of the matter. The evidence we have reviewed supports the conclusion that Taxpayer did, in fact, have physical presence in Washington throughout the Audit Period and, thus, Taxpayer is liable for the retail sales tax and retailing B&O tax included in the Assessment.

Our conclusion is supported by four critical facts: First, Taxpayer's Owner made statements under penalty of perjury to Washington's Secretary of State that he was present in Washington as Taxpayer's registered agent throughout the Audit Period; second; Taxpayer owns property in this

state in the form of a bank account; third, Taxpayer's Secretary of State filings indicate that it had offices or leased mailboxes in the state throughout the Audit Period; and, fourth, Taxpayer used a Washington-based answering service to "establish or maintain a market" by interacting with his Washington customers.

The first fact we considered when analyzing Taxpayer's physical presence in Washington was the location of Taxpayer's sole employee, the Owner. While Taxpayer argues that the Owner was only present in the state for personal reasons and never conducted business in the state, the evidence we reviewed from Taxpayer's Secretary of State filings suggests otherwise. In every year of the Audit Period, Taxpayer asserted, through the Owner and under penalty of perjury, that the Owner was present in the state as Taxpayer's registered agent. Washington LLCs are required to "maintain in this state" a registered agent in accordance with chapter 23.95 RCW. RCW 25.15.021. Registered agents have a number of responsibilities, one of which being the duty to accept service of process on behalf of the entity they represent. *See generally* chapter 23.95 RCW. To accept such service, the registered agent must be present "in the state." As such, we find that Taxpayer's Secretary of State filings offer a strong presumption that the Owner was, indeed, physically present in the state for business purposes throughout the Audit period. The presence in this state of Taxpayer's owner and sole employee, especially over the course of the entire Audit Period, rises above the level of a "slightest presence" and is enough to establish nexus with Washington.

Furthermore, we note that the Secretary of State filings suggest that Taxpayer itself was actually located in Washington in 2013. The Certificate and Taxpayer's initial annual report stated that Taxpayer's business was located in the United States and provided a physical business address in . . . , Washington. While the Owner may have moved his operation . . . [outside of the United States] sometime later, it appears that Taxpayer itself was actually located in Washington for part of the Audit Period.

The second basis we found for Taxpayer's physical presence in the state was its ownership of a . . . [Washington] bank account. Taxpayer admitted to owning the bank account in the business license application it filed with the Department [in] 2018. RCW 82.04.067(6)(b) states that a person is considered physically present in Washington if the person has property or employees in this state. Taxpayer's bank account, and the funds kept within it, represent property owned by Taxpayer in Washington. While we do not know how long Taxpayer owned the account, it, at a minimum, provides a second basis for physical presence in Washington for 2018 and beyond.

The third basis for establishing physical presence in Washington stems from Taxpayer's use of physical mailboxes in this state.[4] Taxpayer conceded in the Petition that it uses a private mailbox in Washington. We also discovered that it listed the mailbox address as its "Registered USA Address" on its website. Taxpayer's rental of private mailboxes represents yet another property interest in the state. It can also be considered a method by which Taxpayer physically interfaces with its customers in the state. As Taxpayer noted in the Petition, the mailbox was, at one time, used as a convenience for customers who wanted to send physical order forms to Taxpayer.

[4] The addresses listed in its Secretary of State filings suggest that Taxpayer has rented several private mailboxes during the course of the Audit Period, all of which are located in Washington.

As discussed above, a person who sells tangible personal property need only have demonstrably more than the slightest physical presence in the state to establish nexus. RCW 82.04.067(6). The demonstrated physical presence and making retail sales to Washington customers is sufficient to satisfy this requirement. *See* 15-0302, 36 WTD 222 (2017) ("When a person has either property or employees in this state, we do not need to further inquire whether the person's 'activities in Washington are significantly associated with the person's ability to establish or maintain a market for its products in this state.'")

The fact that Taxpayer's Owner was present in the state and that Taxpayer had a property interest in the bank account and mailboxes is sufficient to establish substantial nexus under RCW 82.04.067 and Rule 193. However, we also see a fourth basis for physical presence in Taxpayer's use of a "Washington-based" answering service. . . . . Taxpayer admitted that it uses the service to address customer questions when the Owner is unavailable. We presume that Taxpayer uses the answering service as a way to provide 24-hour customer service to his customers. Given that Taxpayer's [tangible personal property] is used for managing auto dealership businesses, offering around-the-clock customer service and support is likely essential to maintaining customer relationships. As such, the call service represents the type of activity envisioned by RCW 82.04.067(6)(c), which states that a person will be considered physically present in this state if it, "either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in this state." *See Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987); *Scripto, Inc. v. Carson*, 362 U. S. 207 (1960). Therefore, the use of an in-state answering service is yet another basis for establishing physical presence with Washington.

The Washington Supreme Court has affirmed this substantial nexus standard in *Lamtec Corp. v. Dep't of Revenue*, 170 Wn.2d 838, 842, 246 P.3d 788, *cert. denied*, 565 U.S. 816 (2011). In *Lamtec*, the taxpayer, based out of state, made sales into Washington. *Id.* at 841. Lamtec did not have any employees, property, or office space located in Washington. *Id.* Lamtec sent employee sales representatives into Washington about two or three times each year to visit major customers. *Id*. During those visits, the employees did not solicit sales directly, but they answered questions and provided information about Lamtec products. *Id*.

The Washington Supreme Court held the following:

> The contacts made by Lamtec's sales representative were designed to maintain relationships with its customers and to maintain its market within Washington State. Nor were the activities slight or incidental to some other purpose or activity. We hold that Lamtec's practice of sending sales representatives to meet with its customers within Washington was significantly associated with its ability to establish and maintain its market.

Id. at 851.

Similar to *Lamtec*, Taxpayer here used an in-state answering service to engage with its customers and maintain its existing business relationships. Courts recognize that an out-of-state company need not engage in direct selling activities in the taxing jurisdiction for substantial nexus to exist.

See, e.g., Standard Pressed Steel Co. v. Dep't of Revenue, 419 U.S. 560 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Space Age Fuels, Inc. v. Dep't of Revenue*, 178 Wn. App. 756, 315 P.3d 604 (2013); *General Motors Corp. v. City of Seattle*, 107 Wn. App. 42, 52, 25 P.3d 1022 (2001), *review denied*, 145 Wn.2d 1014, *cert. denied*, 535 U.S. 1056 (2002). Therefore, even absent the other physical contacts discussed above, Taxpayer's use of the answering service serves as another basis for establishing physical presence.

In closing, we note that Taxpayer is correct that, prior to July 1, 2017, [RCW 82.04.067(6) mandated that] physical presence was the only method [required before an out-of-state business would be deemed to have] nexus in Washington for retailing B&O and retail sales tax liability. After that date, economic nexus standards applied to retailing activities for B&O tax purposes. Laws of 2017, 3d Spec. Sess., ch. 28, §§ 301-303. Then, after October 1, 2018, retail sales tax liability could be established through economic nexus as well. Laws of 2019, ch. 8, §§ 101-107. While it does appear that Audit incorrectly considered economic nexus standards throughout the entirety of the Audit Period, we see this as a harmless error because, as discussed above, enough evidence exists to establish nexus through physical presence throughout the Audit Period.

Similarly, because we have established that Taxpayer was physically present in the state throughout the Audit Period, we need not discuss Taxpayer's various arguments regarding the shifting economic nexus standards. While Taxpayer is correct that economic nexus standards evolved over the course of the Audit Period, the standards for establishing nexus through physical presence did not. Therefore, whether Taxpayer would have established economic nexus with the state for its retailing activities is immaterial.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 14th day of February 2020.