

### Constitutional Limitations

## **COST Amicus Brief Questions Reading Of Washington Dissociation Rule**

**T**he Council On State Taxation is calling on the Washington Supreme Court to reject a revenue department reading of its rules that sharply curtails applicability of transactional nexus to the state's business and occupation tax (*Wash. Dep't of Revenue v. Avnet, Inc.*, Wash., No. 902080-0, *amicus brief filed 3/28/16*).

The COST amicus brief was filed March 28 in the case of global electronics distributor Avnet Inc., which wants the justices to overturn a \$556,330 assessment in back business and occupation tax on drop-shipped and national sales.

Avnet contends that when the Washington Court of Appeals upheld the assessment, it rendered the state Department of Revenue interpretative rules "virtually meaningless to taxpayers" and in essence overruled controlling U.S. Supreme Court precedent on the dormant commerce clause (2015 Weekly State Tax Report 38, 10/16/15).

COST, which has almost 600 corporate members engaged in interstate and international business, said the department flouted its own Rule 193, which lays out the circumstances under which dissociation may be claimed on sales into Washington. Avnet's argument that it lacked nexus because the company's only physical presence in Washington is a market-and-product-development office dissociated from the sales failed before the three-judge appellate panel.

**'Bound by Its Rules.'** "The Court of Appeal's decision, allowing the DOR to disavow its own rule without a prospective repeal or amendment of that rule is improper," the COST brief said. "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," it said.

"There is no case law that suggests that the department itself can ignore its own rules. And that issue has broader implications because obviously if you are in the situation of being a multistate taxpayer, you may have to abide by rules and regulations and statutes in 20 or 30 or 40 states," COST Vice President and General

Counsel Karl Frieden told Bloomberg BNA March 30. "And to the extent that you can't rely on what they say either for determining the correct amount of tax or for financial reporting purposes, then that causes significant problems," Frieden said.

"A state tax agency is bound by its rules. Taxpayers, if they cannot rely on the rules, have less trust in the system. When taxpayers have less trust in the system, their compliance rate tends to go down," COST local counsel Gregg Barton, of Perkins Coie LLP's Seattle office, told Bloomberg BNA March 30.

**Misreading Rule 193?** In a supplemental brief filed Feb. 19 by the Washington Attorney General's office, the department argued that Avnet misread Rule 193. The state contended the rule doesn't exempt any of the company's inbound sales based on Avnet's theory that the rule codifies dissociation as conceptualized in *Norton v. Dept. of Revenue of Illinois*, 340 U.S. 534, 537 (1951).

The version of Rule 193 "in effect during the tax periods at issue correctly reflected contemporary commerce clause law and did not 'codify' *Norton*," the brief said.

Although *Norton* hasn't been expressly overturned, the department successfully argued before the Court of Appeals that the law has evolved since *Norton* was decided in such a way that subsequent precedents have expanded the activities relevant to a substantial nexus analysis.

Avnet engaged in varied in-state activities to create and maintain its market in Washington, the department said in its supplemental brief. The department ended its brief, declaring that it "has not 'disavowed' former Rule 193; it simply disagrees with Avnet's interpretation."

The case will be heard by the state Supreme Court May 12.

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□ COST's amicus brief is at <http://src.bna.com/dJ2>.

The supplemental brief is at <http://src.bna.com/dLc>.

For additional discussion of Washington's B&O tax, see *Excise Taxes Navigator*, at Washington 3.1.

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