THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

JON BARGAINS INC., Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	Docket No. 19-078 RE: Excise Tax Appeal FINAL DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter came before the Board of Tax Appeals (the Board), on December 9, 2021, Claire Hesselholt, Chair, presiding, with Vice Chair Lisa Marsh, and Member Andrea Vingo on the panel. Christopher Smith, of Cohen, LaBarbera and Landrigan LLP, represented the Appellant, Jon Bargains Inc. (Taxpayer). Charles Zalesky and David Moon, Assistant Attorneys General, represented the Respondent, State of Washington, Department of Revenue (Department).

Pursuant to WAC 456-09-545 and the Board's Pre-Hearing Order issued on April 15, 2021, the parties timely filed cross motions for summary judgment. The Board heard the oral arguments of counsel and considered the written materials filed in this matter.

Based on the parties' written submissions and oral arguments, the Board concludes "that there is no genuine issue as to any material fact and that [a] party is entitled to judgment as a matter of law."[1] The Board grants the Department's motion for summary judgment and denies the Taxpayer's motion for summary judgment.

ISSUES

1. Is the Taxpayer subject to Washington's B&O tax? Answer: Yes.
2. Is the Taxpayer responsible for uncollected retail sales tax? Answer: Yes.

[1] WAC 456-09-545.

FINDINGS OF FACT

1. The Taxpayer is a New York corporation which sells various consumer products over the Internet, and specifically through the Amazon.com marketplace.[2]
2. The Taxpayer participated in Amazon's "Fulfillment by Amazon" (FBA) program.[3] As a result, some of the Taxpayer's goods were stored in at least one of Amazon's Washington warehouses.[4]
3. The Taxpayer had no agents or employees in Washington and no brick-and-mortar presence in the state.[5]
4. In June 2017 the Department asked the Taxpayer to fill out and return the Washington Business Activities Questionnaire.[6] The Taxpayer did so, indicating that it had sold products to consumers in Washington from 2010 to 2016, that its gross retailing revenue in Washington was $182,402 in 2016; that it had no activities other than making sales over the Internet; and that it had no employees, locations, or property in Washington.[7]
5. In July 2017 the Department informed the Taxpayer that it had "engaged in activities in Washington which constitutes [sic] physical presence and a requirement to register."[8] The Taxpayer provided an Amazon inventory report form showing goods housed in Amazon warehouses on July 29, 2017, including warehouses in Washington.[9] The Taxpayer filed a Washington Business License Application in August 2017.[10]
6. In January 2018, the Department issued an assessment for the period May 16, 2013, through June 30, 2017, in the amount of $66,481, which represented $2,303 in retailing business and occupation (B&O) tax, $44,959 in retail sales tax, and the balance in interest and penalties.[11] The assessment was based on sales data provided

[2] Taxpayer's Cross-Motion for Summary Judgment (MSJ), at 1.
[3] Department's Motion for Summary Judgment, at 5.
[4] *See* Exhibit R3, Taxpayer's MSJ at 1.
[5] *Id.*
[6] Exhibit R1.
[7] Exhibit R2.
[8] Exhibit R3.
[9] Exhibit R3-3 through 72.
[10] Exhibit R6-4.
[11] Exhibit R7-1.

by the Taxpayer, which showed $488,994 in sales to Washington customers during the entire audit period.[12]

7. The Taxpayer did not provide a copy of its agreement with Amazon.[13] The Department provided a copy of the Amazon Services Business Solutions Agreement (BSA, or agreement), which was publicly available, dated December 22, 2016.[14] The BSA includes the following relevant provisions:

> THIS [AGREEMENT] CONTAINS THE TERMS AND CONDITIONS THAT GOVERN YOUR ACCESS TO AND USE OF THE SERVICES AND IS AN AGREEMENT BETWEEN YOU OR THE BUSINESS YOU REPRESENT AND AMAZON. BY REGISTERING FOR OR USING THE SERVICES, YOU . . . AGREE TO BE BOUND BY THE TERMS OF THIS AGREEMENT, INCLUDING THE SERVICE TERMS AND PROGRAM POLICIES THAT APPLY FOR EACH COUNTRY FOR WHICH YOU REGISTER. . . .[15]
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> **10. TAX MATTERS.** As between the parties, you [seller] will be responsible for the collection, reporting, and payment of any and all of Your Taxes, except to the extent that Amazon expressly agrees to receive taxes or other transaction-based charges on your behalf in connection with tax calculation services made available by Amazon and used by you. . . . [16]
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> **"Your Taxes"** means any and all sales, goods and services, use, excise, premium, import, export, value added, consumption, and other taxes, regulatory fees, levies (specifically including environmental levies), or charges and duties assessed, incurred, or required to be collected or paid for any reason (a) in connection with any advertisement, offer or sale of products or services by you on or through or in connection with the Services; (b) in connection with any products provided for which Your Products are, directly or indirectly, involved as a form of payment or exchange; or (c) otherwise in connection with any action, inaction, or omission of you or your Affiliates. . . Also, if the Elected country is the United States, Mexico, or Canada as it is used in the Fulfillment by Amazon Service Terms, this defined term also means any of the types of taxes, duties, levies, or fees mentioned above that are imposed on or collectable by Amazon or any of its Affiliates in connection with or as a result of fulfillment services including the storage of inventory of

[12] Exhibit R7-6, 20.
[13] Department's MSJ, at 3, Footnote 1.
[14] Exhibit R11.
[15] Exhibit R11-1.
[16] Exhibit R11-3.

> packaging of Your Products and other materials owned by you and stored by Amazon. . . .[17]
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> The Selling on Amazon Service (**"Selling on Amazon"**) is a Service that allows you to offer certain products and services directly on the Amazon Sites. . . .[18]

8. The FBA program allows a seller to send products to an Amazon warehouse so that Amazon actually ships the goods to the purchaser. At Amazon's direction, the seller ships goods to an Amazon warehouse at its own cost.[19]
9. The agreement provides that Amazon will store the seller's goods and keep electronic records to track the inventory and may comingle the goods with other goods.[20] Each of the contracts contains the following language in the storage section: "We may move Units among facilities."[21]

   Another section provides:

   > **F-14 Tax Matters.** You understand and acknowledge that storing Units at fulfillment centers may create tax nexus for you in any country, state, province, or other localities in which your units are stored, and you will be solely responsible for any taxes owed as a result of such storage. If any Foreign Shipment Taxes or Your Taxes are assessed against us as a result of performing services for you in connection with the FBA program or otherwise pursuant to these FBA Service Terms, you will be responsible for such Foreign Shipment Taxes and Your Taxes and you will indemnify and hold Amazon harmless from such Foreign Shipment Taxes and Your Taxes as provided in Section F-10 of these FBA service terms.[22]

10. The Taxpayer appealed the assessment to the Department's Administrative Review and Hearings Division, which denied its appeal. The Taxpayer timely appealed to this Board.[23]

[17] Exhibit R11-8,9.
[18] Exhibit R11-9.
[19] Exhibit R11-13.
[20] Exhibit R11-14.
[21] *Id.*
[22] Exhibit R11-17.
[23] Taxpayer's Notice of Appeal dated May 14, 2019.

ARGUMENTS OF THE PARTIES

Taxpayer Arguments

The Taxpayer argues that "[c]ompletely unbeknownst to [Taxpayer] at the time, Amazon stored certain of [Taxpayer's] Merchandise products in at least one warehouse within the state of Washington."[24] The Taxpayer acknowledges that "certain of those products may've been sold to one or more Washington end-customers."[25]

The Taxpayer notes the long line of U.S. Supreme Court cases regarding a state's ability to impose taxes on an out-of-state business. The Taxpayer argues that prior to the Court's decision in *South Dakota v. Wayfair*,[26] states were generally only allowed to impose taxes on an out-of-state business when the business had "substantial nexus" and physical presence within the taxing state.[27] The Taxpayer notes the Court's earlier decisions in *National Bellas Hess*,[28] *Complete Auto Transit v. Brady,*[29] and *Quill Corp. v. North Dakota.*[30] The Taxpayer also cites to *International Shoe Co. v. Washington,*[31] and *Hanson v. Denckla,*[32]regarding the ability of a state to exert its jurisdiction over out-of-state defendants.

The Taxpayer argues that under those precedents, the imposition of Washington's sales tax against the Taxpayer clearly offends "traditional notions of fair play and substantial justice."[33] The Taxpayer contends that it did not "purposefully avail" itself of the privilege of engaging in activities in Washington; and that it had no facilities, stores, employees, or agents within the state during the audit periods.[34] The Taxpayer explains that it was not aware that Amazon was storing its merchandise in Washington.[35]

The Taxpayer asserts that the Department is applying the *Wayfair* decision retroactively; and that it "is a basic truism that [Taxpayer] is entitled to rely on existing legal precedent in managing its operations and affairs, which clearly mandated that 'remote' sellers have some

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[24] Taxpayer's MSJ, at 1.
[25] *Id.*
[26] *South Dakota v. Wayfair, Inc.,* __ U.S. __, 201 L.Ed.2d 403, 138 S. Ct. 2080 (2018).
[27] Taxpayer's MSJ, at 2.
[28] *National Bellas Hess v. Illinois Dept. of Revenue,* 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967).
[29] *Complete Auto Transit v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1997).
[30] *Quill Corp. v. North Dakota,* 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992).
[31] *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed 95 (1945).
[32] *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).
[33] Taxpayer's MSJ at, 4, *citing International Shoe Co.,* 326 U.S. at 316.
[34] *Id.*
[35] *Id.*

level of physical presence, or 'substantial nexus'" within the taxing state before the State can impose a tax on it.[36] The Taxpayer argues that its only "nexus" with Washington during the audit period was "*indirect* and *without [Taxpayer's] knowledge.*"[37]

Finally, the Taxpayer contends that the Department's imposition of the sales tax on it is "grossly unjust and unfair."[38] The Taxpayer argues that the tax should have been paid by the end user, rather than the Taxpayer, and that the additional assessment of penalties is "absolutely untenable and unjustified."[39] The Taxpayer notes that the Department declined to settle the assessment despite an offer by the Taxpayer.

Department's Arguments

The Department contends that the Taxpayer has substantial nexus in Washington during the audit period because of the presence of its inventory in Amazon's warehouses.[40] Under the Due Process and Commerce clauses, this physical presence is enough to establish a tax nexus with the state.[41] The Department asserts that the Taxpayer was assessed taxes based on pre-*Wayfair* statutes and rules, but also contends that *Wayfair* controls for the audit period.

The Department argues that the Taxpayer made "substantial revenues" from its Washington sales during the audit period, and it is well within the threshold level of economic online sales activity that the Court upheld in *Wayfair.*[42]

Nonetheless, the Department contends that the Taxpayer meets the requirements of former RCW 82.04.067(6) and is therefore subject to tax.[43] The Department explains that the Taxpayer "had property in this state in the form of physical inventory units stored in FBA warehouses – 11,593 units on the date of its Inventory Report."[44]

The Department further argues that the Taxpayer's physical presence in Washington was "bolstered by [the Taxpayer's] hiring of Amazon Services LLC to provide inventory

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[36] *Id.* at 5.
[37] *Id.* Emphasis in original.
[38] *Id*.
[39] *Id.*
[40] Department's MSJ, at 9.
[41] *Id.*
[42] *Id.* at 11. The Department cites to $490,177.97 for total sales during the audit period from Exhibit 13-4. The Board relies on the figures used by the Department to calculate the tax due shown at Exhibit 7-20. The difference is not material.
[43] *Id.* at 12.
[44] *Id.*

management, logistics, and fulfillment services on its behalf, and hiring Amazon Payments, Inc. to process customer payments as its agent."[45] The Department cites to *Tyler Pipe Indus., Inc. v. Dep't of Revenue*[46] to assert that a taxpayer is physically present in a state when it hires "independent contractor or agents to perform business activities on its behalf."[47] And the Department argues that it is constitutionally irrelevant that the Taxpayer was not in control of Amazon's warehouse, because it relied on Amazon Services LLC as its independent contractor.[48]

The Department explains that three penalties were imposed; a 29 percent delinquent payment penalty, a five percent substantial underpayment penalty, and a 5 percent unregistered business penalty.[49] The Department describes the penalties as mandatory under the statutes, rather than discretionary, and notes that its ability to waive or cancel penalties as limited.[50]

APPLICABLE LAW

The B&O tax is imposed on every person for "the act or privilege of engaging in business activities" in the state.[51] A *retail sale* is defined, in relevant part, as "every sale of tangible personal property. . . to all persons" unless excluded or exempted. [52] Every person making sales at retail in Washington is subject to the retailing B&O tax on their gross proceeds of sales.[53] Retail sales tax is imposed on every retail sale to a consumer.[54]

In 2010, the Legislature enacted a provision that explained that a person was deemed to have "substantial nexus" with Washington for entities not engaged in B&O apportionable activities if "the person has a physical presence in this state, which need only be demonstrably more than a slightest presence. . . . [A] person is physically present in this state if the person has property or employees in this state."[55]

In 2015, the Washington Legislature acknowledged that the then-current Commerce Clause interpretation required that "substantial nexus" to impose a sales or use tax collection

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[45] *Id. See also* Exhibit R11-6.
[46] *Tyler Pipe Indus., Inc. v. Dep't of Revenue,* 105 Wn.2d 318, 324, 715 P.2d 123 (1986), other citations omitted.
[47] Department's MSJ at 13.
[48] *Id*.
[49] *Id.* at 14.
[50] *Id.* at 15, and RCW 82.32.090.
[51] RCW 82.04.220.
[52] RCW 82.04.050.
[53] RCW 82.04.250.
[54] RCW 82.08.020, RCW 82.04.190.
[55] 2ESSB 6143, Laws of 2010, 1st Spec. Sess., ch 23, §104, codified at RCW 82.04.067(6).

required physical presence, it enacted a provision designed to "provide clear statutory guidelines for determining" when the out-of-state sellers were required to collect retail sales tax.[56] To that end, the Legislature adopted the following provision:

> (c)(i) A person is also physically present in this state for the purposes of this subsection 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.
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> (ii) A remote seller as defined in section 202 of this act is presumed to be engaged in activities in this state that are significantly associated with the remote seller's ability to establish or maintain a market for its products in this state if the remote seller is presumed to have a substantial nexus with this state under section 202 of this act.[57]

A *remote seller* was defined as:

> "Remote seller" means a seller that makes retail sales in this state through one or more agreements described in subsection (1) of this section, and the seller's other physical presence in this state, if any, is not sufficient to establish a retail sales or use tax collection obligation under the commerce clause of the United States Constitution.[58]

Remote sellers were required to collect sales tax in the following circumstances:

> [I]f the remote seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet web site or otherwise, to the remote seller, if the cumulative gross receipts from sales by the remote seller to customers in this state who are referred to the remote seller by all residents with this type of an agreement with the remote seller exceed ten thousand dollars during the preceding calendar year. This presumption may be rebutted by proof that the resident with whom the remote seller has an agreement did not engage in any solicitation in this state on behalf of the remote seller that would satisfy the nexus requirement of the United States Constitution during the calendar year in question.[59]

In 2017 the Washington Legislature revised the law to require certain remote sellers and marketplace facilitators to either collect and remit sales taxes on internet sales, or to provide

[56] ESSB 6138, Laws of 2015, 3rd Spec. Sess. ch. 5, §201.
[57] *Id.* §204(6)(c), then codified at RCW 82.04.067(6)(c).
[58] *Id.* §202(2), codified at RCW 82.08.052.
[59] *Id*.

reports on their sales into Washington.[60] That legislation was explicitly aimed at "the significant harm and unfairness brought about by the physical presence nexus rule."[61]

A 29 percent penalty is imposed when the tax is not paid before "the last day of the second month following" the tax due date.[62] If the tax was "substantially underpaid," a five percent penalty is assessed.[63] If a person is unregistered and owes tax, an additional five percent penalty is imposed.[64] The Department has the ability to waive or cancel penalties if it finds that the underpayment was "the result of circumstances beyond the control of the taxpayer."[65]

By rule, the Department has provided an explanation of what it considers to be circumstances beyond the taxpayer's control, which generally requires that the late payment to be a result of the circumstances such as serious illness or death of the taxpayer or taxpayer's accountant, or the result of fraud, embezzlement, theft, or fire.[66] The Department's rules also list circumstances not considered to be beyond the control of the taxpayer, including financial hardship and lack of knowledge of a tax liability.[67]

ANALYSIS

Washington's B&O tax is intended to apply to "virtually all business activities carried on within the state, and to leave practically no business and commerce free of . . . tax."[68] Retailing B&O, and the duty to collect retail sales tax, is imposed on every person engaged in the business of making retail sales, unless an exemption applies.

For retail sales tax, the definition of *seller* is "every person. . . making sales at retail or retail sales to a buyer, purchaser, or consumer. . . ."[69] A seller is required to collect the sales tax from the buyer, and if the seller fails to do so, is "personally liable to the state for the amount of the tax."[70]

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[60] *See* EHB 2163, Laws of 2017, 3rd Spec. Sess., ch. 28, §202.
[61] *Id,* §201(3).
[62] RCW 82.32.090(1).
[63] RCW 82.32.090(2).
[64] RCW 82.32.090(4).
[65] RCW 82.32.105(1).
[66] WAC 458-20-228(9) (Rule 228).
[67] Rule 228(9)(a)(iii).
[68] *Simpson Inv. v. Dep't of Revenue,* 141 Wn.2d 139, 149, 3 P.3d 741 (2001).
[69] RCW 82.08.010(2)(a), in effect during the audit periods at issue.
[70] RCW 82.08.050.

In the 1967 *Bellas Hess* case, the US Supreme Court found that a mail-order company, whose only connection with the taxing state was through mailed catalogs and flyers, with all deliveries made by common carrier, could not be subject to the state's use tax collection requirement.[71] The Court decided the case on Due Process and Commerce Clause grounds, which the court found were "closely related."[72]

In 1977, the Court established a four-part test for determining if a state tax violated the commerce clause: (1) does the tax apply to an activity with a substantial nexus with the taxing state; (2) is it fairly apportioned; (3) does it discriminate against interstate commerce; and (4) is it fairly related to the services provided by the state.[73]

Twenty-five years after *Bellas Hess*, the Court reaffirmed its Commerce Clause holding in *Quill*, but held that there was no due process violation to require a business to pay or collect taxes, when that business was "purposefully directing" its activities at a state; physical presence was not required to meet due process requirements.[74] But the *Quill* court declined to overrule the *Bellas Hess* "bright-line, physical-presence requirement" for the collection of sales or use taxes under its Commerce Clause analysis essentially because of *stare decisis,* recognizing that the "bright-line" test was "artificial at its edges."[75] The Court noted that its due process decision removed any impediment from allowing Congress to decide to overrule its decision on the bright-line test.[76]

Between *Quill* in 1992 and *Wayfair* in 2018, states tried several approaches to collecting sales or use taxes on purchases made from remote sellers, including imposing a reporting requirement on sellers with more than a certain dollar amount of sales in the state.[77] As explained in the "Applicable Law" section, above, Washington adopted multiple provisions in an attempt to encourage or require remote sellers to collect and remit sales taxes.[78]

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[71] *National Bellas Hess*, 386 U.S. at 760.
[72] *Id.* at 756.
[73] *Complete Auto Transit*, 430 U.S. at 279.
[74] *Quill,* 504 U.S. at 308.
[75] *Id.* at 315, 317.
[76] *Id.* at 318.
[77] *See e.g., Direct Marketing Ass'n v. Brohl,* 571 U.S. 1, 135 S.Ct. 1124, 191 L.Ed.2d 97 (2015); Colorado imposed a transaction reporting requirement on sellers with more than $100,000 dollars in the state.
[78] *See e.g.,* EHB 2163, Laws of 2017, 3rd Spec. Sess. ch 28, §201; ESSB 6138, Laws of 2015, 3rd Spec. Sess. ch. 5, §201.

In 2018, the U.S. Supreme Court overturned the physical presence requirement in *Wayfair.*[79]

The Taxpayer contends that it had no knowledge that Amazon stored its goods in Washington warehouses, and that it cannot be subject to tax liability for this "inadvertent" nexus. The Taxpayer argues that the imposition of Washington's sales tax offends "traditional notions of fair play and substantial justice," citing to the standard used in *International Shoe.*[80]

International Shoe involved the imposition of Washington's unemployment insurance tax on an out-of-state corporation that had salesmen in Washington, but no other presence. The Court found that the regular and systematic solicitation of sales by the Washington-based salesmen was sufficient to support Washington's imposition of tax and did not violate the Due Process Clause.

In this matter, the Taxpayer has sold thousands of dollars of products to Washington residents. The Taxpayer made a deliberate decision to put its goods on Amazon's site so that it could reach a national audience. Amazon's contracts explicitly state that sellers (taxpayers) are responsible for their own taxes. Amazon's contracts explicitly explain that putting inventory into the FBA system could lead to tax liabilities in other states. It is possible to have Amazon collect state taxes for sellers, but the Taxpayer elected not to do that. The Taxpayer's goods were stored in Washington and, presumably, shipped to at least some Washington buyers from those warehouses. The Taxpayer's actions here are the more modern equivalent of the catalogues sent into the states in *Quill*, and the Supreme Court found that the Due Process Clause did not prohibit the state's taxation of Quill. This supports that there is no due process violation in requiring a seller with inventory in the state to collect sales tax on sales made to Washington residents.

The Department has assessed the B&O tax on the Taxpayer's activities of making retail sales to Washington residents, and the sales tax on those sales, because the Taxpayer did not collect the tax from its customers. Making sales to Washington consumers has a substantial nexus with Washington: substantial nexus is established when the Taxpayer avails itself of the privilege of carrying on business in the taxing jurisdiction.[81] The tax is "fairly apportioned"

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[79] *Wayfair,* 138 S.Ct. at 2099.
[80] *International Shoe*, 326 U.S. at 320.
[81] *Polar Tankers, Inc., v. City of Valdez,* 557 U.S. 1, 11, 129 S.Ct. 2277, 174 L.Ed.2d 1 (2009).

because it is limited only to Washington sales. Contrary to the Taxpayer's arguments, there is no discrimination of interstate commerce, because a Washington seller making a sale to an in-state buyer would similarly be required to pay retailing B&O tax and collect retail sales tax and would be held responsible if it failed to collect the tax.[82] Finally, the tax is related to the services provided by the state. Washington's services protect the Taxpayer's inventory when in Washington's warehouses and Washington's law controls the contracts with Amazon.[83]

During the audit period in question, RCW 82.04.067(6) provided that a person making retail sales had substantial nexus with Washington if it had a physical presence in the state, which included having property in the state. The Taxpayer has conceded that its goods were located in the state during the audit period. During that period, the statute provided that physical presence in the state constitutes substantial nexus. If the Taxpayer has substantial nexus with Washington, requiring tax collection satisfies Commerce Clause requirements. The Board, as an administrative agency, does not have the authority to determine the constitutionality of the law that it reviews; only courts have that authority.[84] It is outside the Board's authority to invalidate RCW 82.04.067(6)'s provision that physical presence provides substantial nexus. Given the statute and our analysis here, the Board need not determine the retroactivity of the *Wayfair* decision.

The Taxpayer has also contended that the penalties imposed on it are unjustified. The penalties are statutory, and the Department's authority to waive or reduce them has been defined by its duly adopted rules. The Taxpayer provided no legal or factual circumstances that meet the Department's criteria, nor any authority for the Board to waive or reduce the statutory penalties.

The Taxpayer complained that the Department refused to settle this case. The Department has the authority to settle tax disputes.[85] In WAC 458-20-100(7), the Department sets out its criteria for settling cases. The Department concluded that this case did not meet its criteria and therefore declined to settle. The Board has no authority over the Department's settlement decisions. The Board's jurisdiction is statutory.[86] In excise cases, the Board's

[82] RCW 82.04.220, RCW 82.08.020.
[83] Exhibit R11-7, "Governing Laws" means "the laws of the State of Washington, United States. . . ."
[84] *Bare v. Gorton*, 84 Wn.2d 380, 383, 529 P.2d 379 (1974).
[85] RCW 82.32.350.
[86] RCW 82.03.130.

jurisdiction is limited to review of a denial of a petition or a notice of determination.[87] Declining to settle a case does not fall within those criteria.

Any Conclusion of Law that should be deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this appeal.[88]
2. The purpose of summary judgment "is to avoid a useless trial."[89]
3. Summary judgment is appropriate where "the written record shows [1] that there is no genuine issue as to any material fact and [2] that [a] party is entitled to judgment as a matter of law."[90]
4. The Board's role in this appeal is to determine, in light of the facts and the applicable law, whether either party is entitled to judgment as a matter of law. Factual issues may be decided on summary judgment when reasonable minds could reach but one conclusion from the evidence presented.[91] A *material fact* is one upon which the outcome of the litigation depends.[92] A genuine issue of material fact exists only if reasonable minds could differ on the facts that control the result of the litigation.[93]
5. In filing cross-motions for summary judgment, the parties necessarily agree that there is no genuine issue of material fact that would make an evidentiary hearing necessary.[94]
6. Washington's B&O tax is intended to apply to "virtually all business activities carried on within the state, and to leave practically no business and commerce free of . . . tax."[95] Retailing B&O, and the resulting duty to collect retail sales tax, is imposed on

[87] RCW 82.03.190. The Board acknowledges the Taxpayer's frustration with the process.
[88] RCW 82.03.130.
[89] *Balise v. Underwood*, 62 Wn.2d at 199.
[90] WAC 456-09-545; *see also* CR 56(c).
[91] *Lane v. Harborview Med. Ctr.,* 154 Wn. App. 279, 288, 227 P.3d 297 (2010).
[92] *Haines-Marchel*, 183 Wn. App. at 662.
[93] *Ranger Ins.*, 164 Wn.2d at 552.
[94] *See Pleasant v. Regence*, 181 Wn. App. at 261, citing *Tiger Oil*, 88 Wn. App. at 930.
[95] *Simpson,* 141 Wn.2d at 139.

every person engaged in the business of making retail sales, unless an exemption applies.[96]

7. Exemptions to a tax law are narrowly construed; taxation is the rule and exemption is the exception.[97] Anyone claiming a benefit or deduction from a taxable category has the burden of showing that he qualifies for it.[98] The Taxpayer had goods stored in Washington that were sold to buyers in Washington. The Taxpayer has provided no persuasive arguments that would exempt it from the B&O tax.
8. Persons making retail sales of goods to buyers in Washington, as the Taxpayer does, are liable for retailing B&O tax.[99]
9. A *seller* is "every person. . . making sales at retail or retail sales to a buyer, purchaser, or consumer, whether as an agent, broker, or principal. . . ."[100] A seller is required to collect the sales tax from the buyer, and if the seller fails to do so, is "personally liable to the state for the amount of the tax."[101]
10. The Taxpayers are sellers of goods to buyers in Washington and were required to collect and remit the sales tax.
11. The Taxpayers have argued that the imposition of tax on them is a violation of the Due Process Clause as well as the Commerce Clause. The U.S. Supreme Court decided *Quill* in 1992, holding that there was no due process violation in requiring a business to pay or collect taxes, when that business was "purposefully directing" its activities at a state.[102] The Taxpayers here have used Amazon's site to direct their products to a national audience, including Washington. The Taxpayers have sold thousands of dollars of products to Washington residents. The Taxpayers deliberately put their goods on the Amazon site to reach a national audience. The Taxpayer's actions here are the more modern equivalent of the catalogues sent into the states in *Quill*, and the Supreme Court there found that the Due Process Clause did not prohibit the state's taxation of Quill. Here, the Taxpayer has even more connections

[96] RCW 82.04.220, RCW 82.04.250, RCW 82.08.020, RCW 82.08.050.
[97] *Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep't of Revenue*, 81 Wn.2d 171,174, 500 P.2d 764 (1972).
[98] *Id*. at 175, citing *Group Health Coop. of Puget Sound v. Tax Comm'n*, 72 Wn.2d 422, 433 P.2d 201 (1967).
[99] RCW 82.04.250, *See also Bucoda Trailer Park, Inc. v. State*, 17 Wn. App. 79, 81, 561 P.2d 1100 (1977).
[100] RCW 82.08.010(2)(a), in effect during the audit periods at issue.
[101] RCW 82.08.050.
[102] *Quill,* 504 U.S. at 308.

with the state than Quill had; there is no due process violation in requiring a Taxpayer with inventory in the state to collect sales tax on sales made to Washington residents.

12. Imposing a tax and a tax-collecting responsibility on a taxpayer that has substantial nexus with a state does not violate the Commerce Clause.[103]
13. During the audit period, RCW 82.04.067(6) specifically provided that the presence of property in Washington constituted substantial nexus. The Board is without authority to find a statute unconstitutional.[104]
14. The Taxpayer has provided no basis to abate the penalties assessed by the Department.

Any Finding of Fact that should be deemed a Conclusion of Law is hereby adopted as such.

DECISION

For the forgoing reasons, and pursuant to WAC 456-09-545, the Board hereby grants the Department's Motion for Summary Judgment sustaining Determination 19-0110, as corrected by the Errata dated April 17, 2019. The Taxpayer's Motion for Summary Judgment is denied.

ISSUED March 30, 2022.

BOARD OF TAX APPEALS

CLAIRE HESSELHOLT, Chair

LISA MARSH, Vice Chair

ANDREA VINGO, Member

[103] *Id*.
[104] *Bare v. Gorton*, 84 Wn.2d at 383.

Right of Reconsideration of a Final Decision

Pursuant to WAC 456-09-955, you may file a petition for reconsideration of this Final Decision. You must file the petition for reconsideration with the Board within 10 business days of the date of mailing of the Final Decision. The petition must state the specific grounds upon which relief is requested. You must also serve a copy on all other parties and their representatives of record in compliance with WAC 456-09-345.

The Board may require, or a party may at its own option, within 10 business days of the date of the letter acknowledging receipt by the Board of the petition for reconsideration, submit to the Board a response together with proof of service pursuant to WAC 456-09-345.

The petition shall be deemed denied if, within 20 calendar days from the date the petition is received by the Board, the Board does not either dispose of the petition or provide the parties with a written notice specifying the date by which it will act on the petition. The Board may deny the petition, modify its decision, or reopen the hearing.

Please be advised that a party petitioning for judicial review of a Final Decision is responsible for the reasonable costs incurred by this agency in preparing the necessary copies of the record for transmittal to the superior court. Charges for the transcript may be payable separately to the court reporter.