No. 83579-9

ALEXANDER, J. (dissenting)—In *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992), the United States Supreme Court determined that a state violates the dormant commerce clause when it imposes a sales or use tax on an out-of-state business that has no physical presence in that state. Although courts in other jurisdictions have split on the question of whether the holding in *Quill* is limited to sales and use taxes, unlike the majority here, I am more persuaded by the line of decisions from state courts that have extended the bright line rule of *Quill* to other types of state taxes. In that regard, *see J.C. Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999) (franchise and excise tax), *cert. denied*, 531 U.S. 927 (2000), and *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296 (Tex. Ct. App. 2000) (all taxes). The fact that the United States Supreme Court denied certiorari in the Tennessee case cited above as well as in cases reaching a contrary result suggests to me that it favors the right of states to exercise some discretion on the question of whether or not to apply the *Quill* physical presence test to state taxes other than sales

and use taxes.

If, as I believe, a physical presence in Washington is required to justify the business and occupation (B&O) tax that was imposed here on Lamtec Corporation, it is apparent that there was not such a presence. Indeed, the State concedes that Lamtec had no physical presence in the "brick and mortar" sense. It is also undisputed that Lamtec had no employees permanently located in Washington. Occasional visits to this state by employees of Lamtec do not, in my judgment, meet the physical presence test.

The majority posits that Washington's imposition of the B&O tax is justified on the basis that the activity of the putative taxpayer had a substantial nexus with our state. Majority at 5 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977)). The majority relies heavily on our decision in *Tyler Pipe Industries, Inc. v. Department of Revenue*, 105 Wn.2d 318, 715 P.2d 123 (1986), *vacated in part*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), as support for its conclusion that Lamtec's activities in Washington satisfy the substantial nexus requirement. In my view, that case does not support the majority's conclusion because the activities of the taxpayer in that case, Tyler Pipe, were decidedly more substantial than those of Lamtec. Significantly, as the majority notes, Tyler Pipe used independent contractors as in-state sales representatives and these representatives were involved in all of Tyler Pipe's Washington transactions to the same extent as the company's own sales personnel were involved in transactions in other parts of the

country. Here, Lamtec did not engage independent contractors as a sales force. Although, as I have noted above, Lamtec employees made occasional visits to this state, they did not, as the majority acknowledges, solicit sales during those visits or perform the same sorts of functions as did Tyler Pipe's sales representatives. Rather, these representatives came here simply to answer questions and provide information to customers about Lamtec products.

Washington imposes a B&O tax on the privilege of engaging in business in this state. Lamtec's contacts with Washington were quite insignificant and do not support a holding that its activities had a sufficient nexus or connection to Washington so as to justify imposition of our B&O tax. I am, therefore, of the view that we should reverse the Court of Appeals. Because the majority does otherwise, I dissent.

AUTHOR:
Justice Gerry L. Alexander

WE CONCUR:

Justice James M. Johnson

Richard B. Sanders, Justice Pro Tem.