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STATE OF WASHINGTON

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No. 77985-6

BY C.J. MERRITT

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SUPREME COURT OF THE STATE OF WASHINGTON

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HERBERT NELSON

On his behalf and on behalf of all others similarly situated,

*Respondent-Appellee,*

v.

APPLEWAY CHEVROLET, INC., a Washington corporation, d/b/a  
APPLEWAY SUBARU/VOLKSWAGEN/AUDI, APPLEWAY  
ADVERTISING, APPLEWAY AUDI, APPLEWAY  
AUTOMOTIVE GROUP, APPLEWAY CHEVROLET LEASING,  
APPLEWAY GROUP, APPLEWAY MAZDA, APPLEWAY  
MITSUBISHI, APPLEWAY SUBARU, APPLEWAY TOWING,  
APPLEWAY TOYOTA, APPLEWAY VOLKSWAGEN, EAST  
TRENT AUTO SALES, LEXUS OF SPOKANE, OPPORTUNITY  
CENTER, and TSP DISTRIBUTORS; and AUTONATION, INC., a  
Delaware corporation,

*Petitioners-Appellants.*

---

**AMICI CURIAE BRIEF OF  
CAMP AUTOMOTIVE, INC. AND  
LITHIA MOTORS, INC.**

---

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SUPREME COURT  
STATE OF WASHINGTON

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## **I. STATEMENT OF THE CASE**

### **A. Identity of Amici/Statement of Facts**

Camp Automotive, Inc. (“Camp”) is a corporation that sells motor vehicles to customers in the state of Washington. It is a wholly owned subsidiary of Lithia Motors, Inc. (“Lithia”). Because Camp engages in business in Washington, it pays Business and Occupation (“B&O”) taxes to the state.

In July 2004, Camp sold a Chevrolet pick-up truck to Marcia and Theron Johnson (the “Johnsons”). During the pre-sale negotiation process, Camp disclosed a B&O charge as a component of the proposed purchase price. That charge and others were subject to negotiation before the Johnsons and Camp reached agreement on both the final purchase price and the components of that price.

### **B. Interest of Amici/Statement of Proceedings**

Six days after the Washington Court of Appeals rendered its decision in this case, the Johnsons, represented by the same lawyers who represent Respondent Nelson in this action, filed suit against Camp and Lithia. Johnson v. Camp Automotive, Inc., et al., Spokane County Superior Court, Case No. 05-2-05059-9 (a copy of the complaint is attached to this brief as Appendix A). The allegations in the Johnsons’ complaint substantially mirror those asserted by Nelson. Claims for declaratory and injunctive relief and unjust enrichment damages/restitution are asserted against

Camp and Lithia, both individually and as representatives of a putative “Defendant Class” defined as “[a]ll motor vehicle dealers who itemized and collected B&O tax and/or B&O Sales Tax on the sale of motor vehicles, parts, merchandise, or service in the state of Washington. . . .” The Johnsons allege they brought the action on their own behalf and on behalf of a putative “Plaintiff Class” of persons from whom Camp and Lithia and the Defendant Class “collected B&O Tax on the sale of motor vehicles, parts, merchandise, or service in the state of Washington.”

On May 16, 2006, the Spokane County Superior Court entered a stipulated order staying proceedings pending resolution of this action. (A copy of the order is attached to this brief as Appendix B.) The stay of the Johnson action is still in effect.

## II. ARGUMENT

### A. The B&O Tax Statute Does Not Forbid Disclosure of a Legal Pass-Through During Sales Negotiations

It is clear from the court of appeals’ opinion that to fund their B&O tax liability, Washington businesses may pass through a charge to their customers as part of their operating overhead. Nelson v. Appleway Chevrolet, Inc., 129 Wn. App. 927, 942, 121 P.3d 95 (2005). Although the court confirmed the legitimacy of this practice, it nevertheless held that “Appleway’s manner of assessing and collecting from customers violated RCW 82.04.500.” Id. at 931.

In concluding that Appleyway's sales practices violated RCW 82.04.500, the court appears to have distinguished between disclosing a negotiable B&O charge to customers during the course of negotiating a purchase price, as was Camp's practice, and including a B&O charge as one of several fees and taxes disclosed in the course of documenting the sales transaction after the parties reached an "agreed" purchase price. The latter apparently was Appleyway's practice. This distinction rests on the premise that Appleyway customers were bound to a specific purchase price even before the paperwork for the sale was executed. Whether the Court accepts this premise or not, it should confirm that no statutory violation occurs when a seller discloses an overhead charge for B&O tax while the seller and purchaser are negotiating the purchase price. Nothing in RCW 82.04.500 supports a contrary conclusion. See Washington Department of Revenue Special Notice, dated September 5, 2000, reissued April 2002 (a copy of the reissued Special Notice is attached to this brief as Appendix C).

**B. Certification Under CR 23(b)(2) Is an Abuse of Discretion when Obtaining Monetary Relief is the Primary Purpose of the Putative Class Action.**

Assuming that the prerequisites of CR 23(a) are satisfied, CR 23(b)(2) authorizes maintenance of a class action when the party opposing the class has acted "on grounds generally applicable to the class, thereby making appropriate final injunctive relief or

corresponding declaratory relief with respect to the class as a whole.” Monetary relief can be sought along with injunctive or declaratory relief, but when the injunction or declaratory relief “merely forms the basis for monetary relief, a CR 23(b)(2) action is not appropriate.” Eriks v. Denver, 118 Wn.2d 451, 466, 824 P.2d 1207 (1992). Indeed, certification under CR 23(b)(2) “violates due process unless the monetary damages sought are merely ‘incidental to the primary claim for injunctive or declaratory relief.’” Sitton v. State Farm Mut. Auto. Ins. Co., 116 Wn. App. 245, 252, 63 P.3d 198 (2003) (quoting Molski v. Gleich, 307 F.3d 1155, 1165 (9<sup>th</sup> Cir. 2002), withdrawn, 318 F.3d 937 (9<sup>th</sup> Cir. 2003)).

In the action at issue, Nelson sought a declaration that Appleway was violating state law by itemizing and collecting B&O tax from its customers. Nelson also sought monetary relief in the form of unjust enrichment damages/restitution. Nelson’s class action claim for damages was not merely “incidental” to his request for declaratory and injunctive relief. This is apparent from Nelson’s description of the plaintiff class, which comprised “individuals and entities from whom [Appleway] itemized and collected B&O Tax on the sale of motor vehicles, parts, merchandise, or service in the state of Washington.” 129 Wn. App. at 934. Instead of representing a class of prospective purchasers who might benefit from declaratory or injunctive relief causing Appleway to change its sales practices, the class Nelson sought to represent comprised persons affected by

Appleway's past practices. The class members thus are persons for whom monetary relief would be the only relief of any significance.

Also telling is the fact that only six days after the court of appeals filed its decision, the Johnson plaintiffs (represented by the same legal counsel who represent Nelson) filed a copycat complaint against Camp and Lithia. Not surprisingly, the Johnson plaintiffs, too, claim to represent a class of persons "from whom Defendants and the Defendant Class itemized and collected B&O Tax on the sale of motor vehicles, parts, merchandise, or service in the state of Washington." Appendix A (paragraph 4.2). Again, the class is not one that would benefit from a prospective change in sales practices. Rather, the sole interest of the putative Plaintiff Class is recovery of monetary compensation for alleged past injury stemming from agreeing to pay, and paying, purchase prices that included B&O overhead charges.

Monetary relief was the primary relief sought by Nelson (just as it is the primary relief sought by the Johnsons in their proposed class action against every motor vehicle dealer in the state of Washington other than Appleway). Class certification under CR 23(b)(2) was therefore improper.

Bolstering this conclusion is the fact that both the trial court and the court of appeals ignored the Sitton court's full description of "incidental damages." Latching onto the acknowledgement that incidental damages "should at least be capable of computation by

means of objective standards and not dependent in any significant way on the intangible subjective differences of each class member's circumstances," Sitton, 116 Wn. App. at 252 (internal citations omitted), the court of appeals upheld certification under (b)(2) based upon its assumption that damages could be computed solely "with reference to the individual sales agreements," *i.e.*, without "inquiry into Appleway's negotiations with each individual member of the class." Nelson, 129 Wn. App. at 949. Even assuming the assumption were correct (given Appleway's practice of including the B&O charge as a component of every sale of a vehicle, as opposed to Camp's practice of negotiating a proposed B&O charge for each sale), the court of appeals ignored the Sitton court's explanation that incidental damages are those "that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." 116 Wn. App. at 252 (internal citations omitted) (emphasis added). "Such damages are really a group remedy, rather than an individual one." Id.

The claims for unjust enrichment damages asserted by Nelson and the Johnson plaintiffs are not claims for a group remedy. Rather, they are individual claims that plaintiffs seek to have aggregated. The Court should make it clear that under such circumstances, certification under CR 23(b)(2) is an abuse of discretion.

DATED this 15<sup>th</sup> day of September, 2006.

Respectfully submitted,



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## **APPENDIX A**

**ORIGINAL**

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**THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK**

**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR SPOKANE COUNTY**

**05205059-9**

**MARCIA JOHNSON and THERON  
JOHNSON, a married couple, on their behalf  
and on behalf of all others similarly situated,**

**Plaintiffs,**

**v.**

**CAMP AUTOMOTIVE, INC., a Washington  
Corporation, d/b/a CAMP CHEVROLET  
CADILLAC, and LITHIA MOTORS, INC.,  
an Oregon Corporation, individually, and as  
representatives of a class of motor vehicle  
dealers in Washington State itemizing and  
charging B&O Tax and B&O Sales Tax,**

**Defendants.**

**CLASS ACTION**

**NO.**

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF AND  
UNJUST ENRICHMENT DAMAGES**

Plaintiffs Marcia Johnson and Theron Johnson bring this action on their behalf and on behalf of all other similarly situated individuals and entities for declaratory and injunctive relief and for incidental monetary damages against Defendants and the Defendant Class who itemize and collect the Washington State Business and Occupation Tax ("B&O Tax") on the sale of motor vehicles, parts, merchandise, or services in Washington State.

## I. FACTUAL BACKGROUND

1  
2 1.1 On July 10, 2004, Plaintiffs Marcia Johnson and Theron Johnson purchased a  
3 vehicle from Camp Automotive, Inc., d/b/a Camp Chevrolet Cadillac ("Camp Automotive") in  
4 Spokane, Washington. Upon information and belief, Defendant Camp Automotive is a wholly-  
5 owned subsidiary of Defendant Lithia Motors, Inc.

6 1.2 After agreeing on the vehicle price with Defendants' sales agents, Defendants  
7 drafted a purchase agreement, which added to the sales price of the vehicle, among other  
8 things, a charge for Defendants' B&O Tax, and a charge for sales tax on the B&O Tax ("B&O  
9 Sales Tax").

10 1.3 Upon information and belief, Defendants and the Defendant Class itemize and  
11 collect B&O Tax and B&O Sales Tax on all transactions, including the sale of cars, parts,  
12 merchandise, and service. Upon information and belief, Defendants and the Defendant Class  
13 itemize and collect B&O Tax and B&O Sales Tax in a concerted and systematic manner.

14 1.4 Defendants and the Defendant Class are prohibited by statute from itemizing  
15 and collecting B&O Tax and B&O Sales Tax from Plaintiffs and the Plaintiff Class.

## II. PARTIES

### 2.1 Plaintiffs:

17  
18 2.1.1 Marcia Johnson and Theron Johnson are husband and wife residing in  
19 Spokane County, Washington. Mr. and Mrs. Johnson purchased an automobile from  
20 Defendants Camp Automotive and Lithia Motors, Inc., in Spokane County, Washington.

### 2.2 Defendants:

21  
22 2.2.1 Camp Automotive, Inc., is a Washington corporation doing business as  
23 Camp Chevrolet Cadillac.

24 2.2.2 Lithia Motors, Inc., is an Oregon corporation doing business in the state  
25 of Washington. Upon information and belief, Lithia Motors, Inc. wholly owns and controls  
26 Camp Automotive, Inc.



1 Inc., conducts business through its wholly-owned subsidiary companies or franchisees,  
 2 including Camp Automotive. Defendants maintain regular and continuous contacts with the  
 3 state of Washington.

4 3.4 Venue is proper in Spokane County because the acts alleged herein occurred in  
 5 whole or in part in Spokane County, Washington, because the Camp and Lithia Defendants do  
 6 business in this county and because the Defendant Class acted in a concerted and systematic  
 7 manner to illegally itemize and collect B&O Tax and B&O Sales Tax from Plaintiffs and the  
 8 Plaintiff Class.

9 3.5 Plaintiffs and the Plaintiff Class assert no federal question. The amount in  
 10 controversy as to Plaintiffs and to each member of the Plaintiff Class does not equal or exceed  
 11 \$75,000, exclusive of interest and costs. More than two-thirds of all Plaintiff Class members,  
 12 as well as the primary Defendants, are citizens of Washington State. In addition, the  
 13 controversy involves a question of the application of Washington state law.

14 **IV. CLASS ACTION ALLEGATIONS**

15 **A. Plaintiff Class**

16 4.1 Plaintiffs bring this class action lawsuit on their behalf and on behalf of all  
 17 others similarly situated as members of a proposed Plaintiff Class pursuant to CR 23(a) and  
 18 CR 23(b)(2). This action satisfies the numerosity, commonality, typicality, and adequacy  
 19 requirements of CR 23(a). Class requirements under CR 23(b)(2) are met because Defendants  
 20 and the Defendant Class have acted or refused to act in concert and systematically on grounds  
 21 generally applicable to the Plaintiff Class, thereby making final injunctive relief or  
 22 corresponding declaratory relief appropriate with respect to the class as a whole.

23 4.2 The Plaintiff Class is defined as:

24 All individuals and entities from whom Defendants and the  
 25 Defendant Class itemized and collected B&O Tax on the sale of  
 26 motor vehicles, parts, merchandise, or service in the state of  
 Washington. Excluded from the Class are Defendants and the  
 Defendant Class, any entity in which Defendants have a  
 controlling interest, any entity which has a controlling interest in

1 Defendants, and Defendants' legal representatives, assigns, and  
 2 successors. Also excluded from the Class are: Appleyway  
 3 Chevrolet, Inc., d/b/a Appleyway Subaru/Volkswagen/Audi,  
 4 Appleyway Advertising, Appleyway Audi, Appleyway Automotive  
 5 Group, Appleyway Chevrolet Leasing, Appleyway Group, Appleyway  
 6 Mazda, Appleyway Mitsubishi, Appleyway Subaru, Appleyway  
 7 Towing, Appleyway Toyota, Appleyway Volkswagen, East Trent  
 8 Auto Sales, Lexus of Spokane, Opportunity Center, TSP  
 9 Distributors, and AutoNation, Inc. Also excluded are the judge to  
 10 whom this case is assigned and any member of the judge's  
 11 immediate family.

12 4.3 Claims for personal injury are specifically excluded from the Plaintiff Class.

13 4.4 The Plaintiff Class is comprised of thousands of individuals and entities, making  
 14 joinder impracticable. The disposition of the claims of these Plaintiff Class Members in a  
 15 single class action will provide substantial benefits to all parties and to the Court.

16 4.5 The claims of the representative Plaintiffs are typical of the claims of the  
 17 Plaintiff Class in that the representative Plaintiffs, like all Plaintiff Class Members, purchased  
 18 goods or services from Defendants and were charged a direct B&O Tax and a B&O Sales Tax  
 19 for those goods and services. It was and is illegal for Defendants to itemize and collect a B&O  
 20 Tax and B&O Sales Tax from Plaintiffs and Plaintiff Class Members. The representative  
 21 Plaintiffs, like all Plaintiff Class Members, have been damaged by Defendants' misconduct in  
 22 that they have been illegally charged and have paid Defendants' B&O Tax and B&O Sales Tax.  
 23 The factual and legal bases of Defendants' misconduct are common to all Plaintiff Class  
 24 Members, and represent common and systematic practices resulting in injury to all members of  
 25 the Plaintiff Class.

26 4.6 There are numerous questions of law and fact common to Plaintiffs and the  
 Plaintiff Class, including the following:

4.6.1 Whether Defendants illegally itemized and collected their B&O Tax and  
 B&O Sales Tax from Plaintiffs and the Plaintiff Class;

4.6.2 Whether Defendants should be declared financially responsible for  
 notifying all Plaintiff Class Members of the illegality of their acts, and for reimbursing

1 Plaintiffs and the Plaintiff Class all amounts collected as B&O Tax and B&O Sales Tax,  
2 together with 12% interest per annum from date of collection, attorneys' fees, and costs;

3 4.6.3 Whether Defendants should be ordered to disgorge, for the benefit of the  
4 Plaintiff Class, all or part of the ill-gotten monies they received from itemizing and collecting  
5 B&O Tax and B&O Sales Tax, and to make full restitution to Plaintiffs and members of the  
6 Plaintiff Class;

7 4.6.4 Whether Defendants should be enjoined from continuing to collect B&O  
8 Tax and B&O Sales Tax from the Plaintiff Class.

9 4.7 Plaintiffs will fairly and adequately protect the interests of the Plaintiff Class.  
10 Plaintiffs have retained counsel with substantial experience in prosecuting consumer class  
11 actions. Plaintiffs and their counsel are committed to prosecuting this action vigorously on  
12 behalf of the Plaintiff Class, and have the financial resources to do so. Neither Plaintiffs nor  
13 their counsel have any interests adverse to those of the Plaintiff Class.

14 4.8 As a result of Defendants' misconduct, Plaintiffs and members of the Plaintiff  
15 Class have suffered incidental damages to the extent they have wrongfully paid B&O Tax and  
16 B&O Sales Tax. Because of the relatively small size of the typical damages, and because most  
17 Plaintiff Class Members have only relatively modest resources, it is unlikely that individual  
18 Plaintiff Class Members could afford to seek recovery against Defendants on their own. This is  
19 especially true in light of the size and resources of Defendants. A class action is therefore  
20 likely to be the only means for Plaintiff Class Members to recover from Defendants for the  
21 damage they have caused, and is superior to other available methods for the fair and efficient  
22 adjudication of the controversy. Class treatment of common questions of law and fact would  
23 also be superior to multiple individual actions or piecemeal litigation in that class treatment will  
24 conserve the resources of the courts and the litigants, and will promote consistency and  
25 efficiency of adjudication.  
26

1 **B. Defendant Class**

2 4.9 Plaintiffs bring this action against the named Defendants, individually and as  
3 representatives of a proposed Defendant Class pursuant to CR 23(a) and CR 23(b)(2). This  
4 action satisfies the numerosity, commonality, typicality, and adequacy requirements of  
5 CR 23(a). Class requirements under CR 23(b)(2) are met because Defendants and the  
6 Defendant Class have acted or refused to act systematically, on grounds generally applicable to  
7 the Plaintiff Class, thereby making appropriate final injunctive relief or corresponding  
8 declaratory relief with respect to the Plaintiff Class as a whole.

9 4.10 The Defendant Class is defined as:

10 All motor vehicle dealers who itemized and collected B&O Tax  
11 and/or B&O Sales Tax on the sale of motor vehicles, parts,  
12 merchandise, or service in the state of Washington. Excluded from  
13 the Defendant Class are: Appleway Chevrolet, Inc., d/b/a  
14 Appleway Subaru/Volkswagen/Audi, Appleway Advertising,  
15 Appleway Audi, Appleway Automotive Group, Appleway  
16 Chevrolet Leasing, Appleway Group, Appleway Mazda, Appleway  
17 Mitsubishi, Appleway Subaru, Appleway Towing, Appleway  
18 Toyota, Appleway Volkswagen, East Trent Auto Sales, Lexus of  
19 Spokane, Opportunity Center, TSP Distributors, and AutoNation,  
20 Inc.

21 4.11 Upon information and belief, the Defendant Class is comprised of hundreds of  
22 entities, making joinder impracticable. The disposition of the claims of these Defendant Class  
23 Members in a single class action will provide substantial benefits to all parties and to the Court.

24 4.12 The defenses of the representative Defendants are typical of the claims of the  
25 Defendant Class in that the representative Defendants, like all Defendant Class Members,  
26 itemized and collected B&O Tax and a B&O Sales Tax directly from consumers for goods and  
services. It was and is illegal for Defendants to itemize and collect a B&O Tax and B&O Sales  
Tax from Plaintiffs and Plaintiff Class Members. The conduct of the representative  
Defendants, like that of all Defendant Class Members, damaged Plaintiffs and all members of  
the Plaintiff Class in that they were illegally charged and have paid Defendants' B&O Tax and  
B&O Sales Tax. The factual and legal bases of Defendants' misconduct are common to all

1 Defendant Class Members, and represent common and systematic practices resulting in injury  
2 to all members of the Plaintiff Class.

3 4.13 There are numerous questions of law and fact common to Defendants and the  
4 Defendant Class, including the following:

5 4.13.1 Whether Defendants and the Defendant Class illegally itemized and  
6 collected their B&O Tax and B&O Sales Tax from Plaintiffs and the Plaintiff Class;

7 4.13.2 Whether Defendants and the Defendant Class should be declared  
8 financially responsible for notifying all Plaintiff Class Members of the illegality of Defendants'  
9 and the Defendant Class's acts, and for reimbursing Plaintiffs and the Plaintiff Class all  
10 amounts collected as B&O Tax and B&O Sales Tax, together with 12% interest per annum  
11 from date of collection, attorneys' fees, and costs;

12 4.13.3 Whether Defendants and the Defendant Class should be ordered to  
13 disgorge, for the benefit of the Plaintiff Class, all or part of the ill-gotten monies they received  
14 from itemizing and collecting B&O Tax and B&O Sales Tax, and to make full restitution to  
15 Plaintiffs and members of the Plaintiff Class;

16 4.13.4 Whether Defendants and the Defendant Class should be enjoined from  
17 continuing to itemize and collect B&O Tax and B&O Sales Tax from the Plaintiff Class.

18 4.14 The claims against Defendants are typical of the claims against the Defendant  
19 Class in that Defendants and the Defendant Class itemize and collect B&O Tax and B&O Sales  
20 Tax from the Plaintiff Class. In addition, the defenses of Defendants are typical of the defenses  
21 of the Defendant Class in that Defendants and members of the Defendant Class are all similarly  
22 situated and have the same incentive and ability to raise the same defenses. Defendants also  
23 have the incentive and ability to adequately protect the interests of the Defendant Class because  
24 they share the same incentive and ability to acquire competent counsel.

25 4.15 Plaintiffs and the Plaintiff Class allege that the systematic misconduct of  
26 Defendants and the Defendant Class has caused Plaintiffs and the Plaintiff Class incidental

1 damages to the extent they have wrongfully paid B&O Tax and B&O Sales Tax. Class  
2 treatment of common questions of law and fact would be superior to multiple individual actions  
3 or piecemeal litigation in that class treatment will conserve the resources of the courts and the  
4 litigants, and will promote consistency and efficiency of adjudication.

5 **V. FIRST CLAIM FOR RELIEF**  
6 **(Declaratory and Injunctive Relief)**

7 5.1 Plaintiffs hereby incorporate by reference the allegations contained in the  
8 preceding paragraphs of this Complaint.

9 5.2 Defendants' and the Defendant Class's systematic itemization and collection of  
10 B&O Tax and B&O Sales Tax from Plaintiffs and the Plaintiff Class are contrary to the laws of  
11 the state of Washington because they are in violation of RCW 82.04 *et seq.*

12 5.3 Specifically, Defendants' and the Defendant Class's practice violates  
13 RCW 82.04.500, which provides in pertinent part:

14 [B&O] Tax Part of Operating Overhead.

15 It is not the intention of this chapter that the taxes herein . . . be  
16 construed as taxes upon the purchasers or consumers, but that such  
17 taxes shall be levied upon and collected from the person engaging  
18 in the business activities . . . and that such taxes shall constitute a  
19 part of the operating overhead of such persons.

20 5.4 A controversy exists between Plaintiffs, the Plaintiff Class, Defendants, and the  
21 Defendant Class as to whether Defendants' and the Defendant Class's itemization and  
22 collection of B&O Tax and B&O Sales Tax from consumers are contrary to the laws of the  
23 state of Washington.

24 5.5 Plaintiffs and the Plaintiff Class are parties whose financial interests are affected  
25 and have suffered injury as a result of Defendants' and the Defendant Class's illegal  
26 itemization and collection of B&O Tax and B&O Sales Tax. Plaintiffs and the Plaintiff Class  
will continue to be affected by Defendants' and the Defendant Class's systematic practice  
unless the Court provides declaratory relief.



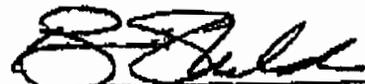


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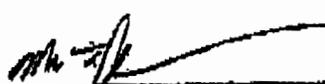
7.7 Grant Plaintiffs and the Plaintiff Class leave to amend these pleadings to conform to the evidence produced at trial; and  
7.8 Award such other and further relief as may be deemed just and equitable by the Court, pursuant to RCW 7.24.080, including attorneys' fees and costs as allowed by law.

DATED this 19 day of October, 2005.

PHILABAUM, LEDLIN, MATTHEWS & SHELDON, PLLC

By:   
Brian S. Sheldon, WSBA #32851

TOUSLEY BRAIN STEPHENS PLLC

By:   
Kim D. Stephens, WSBA #11984  
Max E. Jacobs, WSBA #32783

Attorneys for Plaintiffs

## **APPENDIX B**

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MAY 16 2006

SUPERIOR COURT  
SPOKANE COUNTY, WA

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

MARCIA JOHNSON and THERON  
JOHNSON, a married couple, on their behalf  
and on behalf of all others similarly situated,

Plaintiffs,

No. 05-2-05059-9

vs.

~~(PROPOSED)~~ STIPULATED ORDER

CAMP AUTOMOTIVE, INC., a Washington  
corporation, d/b/a CAMP CHEVROLET  
CADILLAC, and LITHIA MOTORS, INC.,  
an Oregon corporation, individually, and as  
representatives of a class of motor vehicle  
dealers in Washington State itemizing and  
charging B&O Tax and B&O Sales Tax,

Defendants.

Pursuant to the parties' Stipulated Motion to Stay Proceeding, the Court hereby orders  
this action stayed until the earlier of:

(a) thirty (30) days from the date a final settlement agreement is reached between and  
among the parties to Nelson v. Appleway Chevrolet, Inc., et al., Supreme Court Case No. 77985-  
6 ("Nelson"); or

(PROPOSED) STIPULATED ORDER  
PAGE 1

1 (b) thirty (30) days from the date that the Washington State Supreme Court rejects the  
2 Petition for Review filed in the Nelson case; or

3 (c) thirty (30) days from the date the Washington State Supreme Court issues its  
4 opinion in the Nelson case.

5 IT IS SO ORDERED.

6 DONE IN OPEN COURT this 16<sup>th</sup> day of May, 2006.

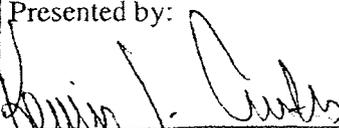
7 **ELLEN KALAMA CLARK**

8  
9 

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JUDGE, SPOKANE COUNTY SUPERIOR COURT

10 Presented by:

11   
12 

---

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## **APPENDIX C**

WASHINGTON STATE DEPARTMENT OF REVENUE

# SPECIAL NOTICE

For further information contact:  
Telephone Information Center  
1-800-647-7706 or (360) 486-2345

Alternate Formats (360) 486-2342  
Teletype 1-800-451-7985

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## What You Need to Know about Itemizing the B&O Tax

A number of businesses are contacting the Department of Revenue to ask if it is illegal to identify the business and occupation (B&O) tax as a separate item on the invoice. If it is not illegal to do so, businesses are also asking if the buyer can take an offsetting credit when completing the Combined Excise Tax Return.

The answer to both these questions is no. It is not illegal for a seller to itemize the B&O tax. Nor are there any deductions or credits available to persons making purchases from such sellers.

The statute intends the B&O tax to be a part of a seller's overhead. However, it does not prevent a seller from itemizing and showing the effect of the tax. RCW 82.04.500 states:

It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

Sellers choosing to itemize the B&O tax as a separate cost item must understand that there are certain tax implications associated with doing so.

Virtually all persons conducting business activities in Washington are subject to the B&O tax. For sales of goods and services, the tax is computed using the "gross proceeds of sale." Revised Code of Washington (RCW) 82.04.070 explains:

"Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, **taxes**, or any other expense whatsoever paid or accrued and without any deduction on account of losses. (Emphasis added.)

Thus, for purposes of computing the B&O tax, a business may not exclude the taxes imposed on it from the gross proceeds of sale. Furthermore, B&O tax credits, deductions, and exemptions are limited to

(more)



## What You Need to Know about Itemizing the B&O Tax Special Notice

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those specifically provided by chapter 82.04 RCW. The statute makes no provisions allowing for an offset of taxes.

A seller itemizing the B&O tax must be aware that the separately stated amount is a part of the gross proceeds of sale that is subject to tax. This means that the taxable amount for all B&O tax classifications increases by the amount of the itemized tax. If the sale is a retail sale, the amount subject to sales tax likewise increases by the amount of the itemized B&O tax.

Let's compare two examples. Two Seattle retailers selling the same products both make a \$20,000 sale. One retailer doesn't itemize the B&O tax while the other does. The retailer who doesn't itemize the B&O tax owes \$94.20 (\$20,000 multiplied by the 0.471 percent tax rate). The amount of sales tax the retailer must collect from the buyer is \$1,720 (\$20,000 multiplied by the 8.6 percent tax rate). However, the retailer itemizing the B&O tax owes \$94.64 (\$20,000 plus \$94.20 equals \$20,094.20 multiplied by the 0.471 percent tax rate). The amount of sales tax this same retailer must collect from its customer is \$1,728.10 (\$20,094.20 multiplied by the 8.6 percent sales tax rate).

Generally, the B&O tax is viewed as being the seller's responsibility because it is a cost of doing business in this state. Although a few businesses do choose to itemize the B&O tax, the majority does not. Such a decision generally has as much to do with customer service considerations as it does the tax implications. The tax simply becomes one of the many overhead costs a prudent businessperson considers when pricing goods and services.

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