

No. 235041

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

HERBERT NELSON,  
on his behalf and on behalf of all others similarly situated,

**Respondent**

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**

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BRIEF OF PETITIONERS

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**TABLE OF CONTENTS**

Table of Authorities ..... iv

A. Assignments of Error ..... 1

B. Statement of the Case.....2

    1. Factual Background .....2

    2. Proceedings in the Superior Court .....6

    3. Proceedings in Court of Appeals .....8

C. Summary of Argument .....9

    1. Summary Judgment .....9

    2. Class Certification.....12

D. Argument .....13

    1. This Court Reviews the Superior Court’s Ruling Respecting Summary Judgment De Novo and the Superior Court’s Ruling Respecting Class Certification for Abuse of Discretion.....13

    2. Mr. Nelson May Not Invoke Washington’s Uniform Declaratory Judgments Act To Avoid Establishing a Private Cause of Action or Standing.....14

        a. Mr. Nelson Must Establish a Private Cause of Action, and He Cannot Do So.....15

        b. Mr. Nelson Must Establish Standing, and He Cannot Do So. ....21

    3. The Superior Court Ruling Should Be Reversed Because Washington Excise Tax Law Expressly Permits a B&O Tax Pass-Through and Nowhere Prohibits Itemization of the Tax Pass-Through.....23

a.	Mr. Nelson Improperly Invokes Washington Tax Law As a Backdoor Way To Bring a Fatally-Flawed Consumer Protection Act Claim.....	23
b.	The Statute Unambiguously Permits the Dealerships To Pass On the B&O Tax to Consumers as Overhead Cost.....	25
c.	The Statute Nowhere Prohibits the Dealerships from Disclosing an Itemized B&O Tax to Consumers.....	27
d.	The Statutory Language Making the B&O Tax Part of Overhead Protects the State’s Gross-Sales Tax Base; It Does Not Dictate the Manner of the Seller’s Disclosure of the B&O Tax. ....	30
e.	It Would Be Unreasonable and Defy Common Sense To Construe the Statute as Penalizing Disclosure of Pricing Information to Consumers. ....	37
4.	The Superior Court Should Have Deferred to the Department of Revenue’s Special Notice Concluding that Itemization of the B&O Tax Is Lawful.....	40
5.	Mr. Nelson Has No Claim Because He Suffered No Cognizable Injury, and the Dealerships Were Not Unjustly Enriched.....	43
6.	Mr. Nelson Is Not Entitled to Declaratory or Injunctive Relief Because He Has an Adequate Remedy at Law.....	44
7.	Mr. Nelson Lacks Standing To Represent a Class.....	45

8.	Mr. Nelson Is Ineligible for Class Certification under CR 23(b)(2), Because His Damages Claim Predominates Over His Claim for Equitable Relief. ....	45
E.	Conclusion .....	49
	Certificate of Service .....	51
F.	APPENDIX.....	52

**TABLE OF AUTHORITIES**

**Washington Cases**

*American Legion Post No. 32 v. City of Walla Walla*, 116 Wash. 2d 1, 802 P.2d 784 (1991).....38

*Bird-Johnson Corp. v. Dana Corp.*, 119 Wash. 2d 423, 833 P.2d 375 (Wash. 1992).....29

*Branson v. Port of Seattle*, 152 Wash. 2d 862, 101 P.2d 67 (2004).....13, 22, 32, 33, 39

*Camer v. Seattle Sch. District No. 1*, 52 Wash. App. 531, 762 P.2d 356 (1988).....17

*Canteen Serv., Inc. v. State*, 83 Wash. 2d 761, 522 P.2d 847 (1974)..... 26, 33-34

*Corrigan v. Tompkins*, 67 Wash. App. 475, 836 P.2d 260 (1992).....44

*Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash. App. 106, 780 P.2d 853 (1989).....45

*Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wash. App. 719, 741 P.2d 58 (1987).....43

*Graham v. Findahl*, 122 Wash. App. 461, 93 P.3d 977 (2004).....13

*Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wash. 2d 791, 83 P.3d 419 (2004).....21

*Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.*, 105 Wash. 2d 778, 719 P.2d 531 (1986).....23

*Marquis v. City of Spokane*, 130 Wash. 2d 97, 922 P.2d 43 (1996).....42

<i>Martin v. Department of Social Sec.</i> , 12 Wash. 2d 329, 121 P.2d 394 (1942).....	37
<i>McCandlish Electric, Inc. v. Will Construction Co.</i> , 107 Wash. App. 85, 25 P.3d 1057 (2001).....	19
<i>Miller v. Farmer Brothers Co.</i> , 115 Wash. App. 815, 64 P.3d 49 (2003).....	13
<i>Pudmaroff v. Allen</i> , 138 Wash. 2d 55, 977 P.2d 574 (1999) .....	38
<i>Seatoma Convalescent Ctr. v. Department of Social &amp; Health Services</i> , 82 Wash. App. 495, 919 P.2d 602 (1996).....	42
<i>Sheldon v. America States Preferred Insurance Co.</i> , 123 Wash. App. 2d 12, 95 P.3d 391 (2004).....	40
<i>Sitton v. State Farm Mutual Automobile Insurance Co.</i> , 116 Wash. App. 245, 63 P.3d 198 (2003).....	46
<i>State Department of Ecology v. Campbell &amp; Gwinn, L.L.C.</i> , 146 Wash. 2d 1, 43 P.3d 4 (Wash. 2002) .....	29
<i>State v. Ammons</i> , 136 Wash. 2d 453, 963 P.2d 812 (1998).....	38
<i>State v. Contreras</i> , 124 Wash. 2d 741, 880 P.2d 1000 (1994).....	37
<i>State v. Salavea</i> , 151 Wash. 2d 133, 86 P.3d 125 (Wash. 2004) .....	29
<i>State v. Superior Court of Pierce County</i> , 107 Wash. 620, 182 P. 607 (1919).....	27-28
<i>State v. Vela</i> , 100 Wash. 2d 636, 673 P.2d 185 (1983) .....	38
<i>Thurston County v. City of Olympia</i> , 151 Wash. 2d 171, 86 P.3d 151 (2004).....	37
<i>Wash. Federation of State Emp. v. State Personal Board</i> , 23 Wash. App. 142, 594 P.2d 1375 (1979).....	17

### Cases from Other Jurisdictions

<i>Ability Center of Greater Toledo v. City of Sandusky</i> , 385 F.3d 901 (6th Cir. 2004) .....	13
<i>Alliance for Metropolitan Stability v. Metropolitan Council</i> , 671 N.W.2d 905 (Minn. Ct. App. 2003).....	18
<i>Allison v. Citgo Petroleum Corp.</i> , 151 F.3d 402 (5th Cir. 1998) .....	47
<i>Arizona Department of Revenue v. Canyoneers, Inc.</i> , 23 P.3d 684 (Ariz. Ct. App. 2001).....	35
<i>Blockbuster, Inc. v. White</i> , 819 So. 2d 43 (Ala. 2001).....	17
<i>Bloom v. O'Brien</i> , 841 F. Supp. 277 (D. Minn. 1993) .....	28, 38, 39
<i>Builders Association v. City of Reno</i> , 776 P.2d 1234 (Nev. 1989) .....	18
<i>City of Tucson v. Tucson Hotel Equity Ltd. Partnership</i> , 2 P.3d 110 (Ariz. Ct. App. 2000).....	35
<i>Davenport v. Gerber Products Co.</i> , 125 F.R.D. 116 (E.D. Pa. 1989) .....	47
<i>Ferrara v. Director, Division of Taxation</i> , 317 A.2d 80 (N.J. Super. Ct. 1974) .....	27, 36
<i>Fry v. Hayt, Hayt &amp; Landau</i> , 198 F.R.D. 461 (E.D. Pa. 2000) .....	46
<i>GTE Southwest Inc. v. Taxation &amp; Rev. Department</i> , 830 P.2d 162 (N.M. Ct. App. 1992).....	34
<i>Gurley v. Rhoden</i> , 421 U.S. 200 (1975).....	27
<i>Kaczmarek v. International Business Machines Corp.</i> , 186 F.R.D. 307 (S.D.N.Y. 1999) .....	46

<i>Nelsen v. King County</i> , 895 F.2d 1248 (9th Cir. 1990) .....	46
<i>Omnipoint Communications Enterp., L.P. v. Zoning Hearing Board of Easttown TP.</i> , 331 F.3d 386 (3d Cir. 2003) .....	28
<i>Pure Oil Co. v. State</i> , 12 So. 2d 861 (Ala. 1943).....	34, 35
<i>Robinson v. Texas Automobile Dealers Associate</i> , 387 F.3d 416 (5th Cir. 2004).....	48, 49
<i>Texaco Refining &amp; Marketing Co. v. Commissioner of Revenue Services</i> , 522 A.2d 771 (Conn. 1987) .....	30, 31, 32, 33
<i>United Nuclear Corp. v. Revenue Division</i> , 648 P.2d 335 (N.M. Ct. App. 1982).....	33
<i>United States v. McCrae</i> , 714 F.2d 83 (9th Cir. 1983) .....	28
<i>Van Eck v. Gavin</i> , 690 A.2d 460 (Conn. Superior Ct. 1996) .....	15, 16, 20
<i>Watkins Cigarette Serv., Inc. v. Arizona State Tax Commission</i> , 526 P.2d 708 (Ariz. 1974).....	27, 35
<i>Williams v. National Sch. of Health Tech., Inc.</i> , 836 F. Supp. 273 (E.D. Pa. 1993), <i>aff'd mem.</i> , 37 F.3d 1491 (3d Cir. 1994) .....	18

**Statutes**

RCW § 7.24.020 .....	1; <i>passim</i>
RCW § 18.51.540 .....	40
RCW § 19.146.030 .....	40
RCW § 19.86.090 .....	19, 20; <i>passim</i>
RCW § 19.182.070 .....	40

RCW § 48.84.050 .....	40
RCW § 82.04.220 .....	10, 25, 28, 52
RCW § 82.04.500 .....	1, 10, 15, 18, 19, 25, 26, 28, 30, 31, 32, 52; <i>passim</i>
RCW § 82.32 <i>et seq</i> .....	20
RCW § 82.32.060 .....	20
RCW § 82.32.150 .....	20
RCW § 82.32.160 .....	20
RCW § 82.32.170 .....	20
Con. Gen. Stat. § 12-599(a) .....	15-16, 31

**Rules**

RCW 23(b)(2) .....	2, 7, 12, 45
RCW 56 .....	6
RCW 59(a)(7) .....	8

**Other Authority**

Washington Department of Revenue Special Notice.....	11, 41
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**A. Assignments of Error**

**Assignments of Error**

1. The Superior Court erred in entering the Order of October 13, 2004, denying defendants'-appellants' Motion for Reconsideration of Summary Judgment Order of August 30, 2004, and in denying defendants'-appellants' Motion for Summary Judgment and in granting plaintiff's-appellee's Cross Motion for Partial Summary Judgment in its August 30, 2004 Order.

2. The Superior Court erred in entering the Order of October 13, 2004, denying defendants'-appellants' Motion for Reconsideration of Class Certification Order of August 30, 2004, and in granting plaintiff's-appellee's Motion for Class Certification in its August 30, 2004 Order.

**Issues Pertaining to Assignments of Error**

Does the Washington Uniform Declaratory Judgments Act, RCW § 7.24.020, provide an independent cause of action to persons who have no underlying private cause of action under the statute allegedly violated? (Assignment of Error 1)

Does a consumer have standing under the Washington Uniform Declaratory Judgments Act, RCW § 7.24.020, to seek relief for an alleged violation of Washington's excise tax law, RCW § 82.04.500, a statute that imposes a tax on businesses and expressly contemplates that the tax will be passed on to consumers? (Assignment of Error 1)

Does Washington's excise tax law, RCW § 82.04.500, which expressly permits businesses to pass through the Business and Occupation tax to consumers, prohibit businesses from itemizing the Business-and-Occupation-tax pass-through on consumer invoices? (Assignment of Error 1)

Did the Superior Court err by failing to defer to the Washington Department of Revenue, which specifically addressed the question of whether Washington's excise tax

law permits businesses to itemize the Business and Occupation tax on consumer invoices and concluded in a published Special Notice that the practice is lawful? (Assignment of Error 1)

Did the Superior Court err in holding that plaintiff-appellee was not required to establish a compensable injury and in denying defendants'-appellants' motion for summary judgment on plaintiff's-appellee's unjust enrichment claim based on a tax pass-through that defendants-appellants were indisputably permitted to make? (Assignment of Error 1)

Did the Superior Court err in holding that plaintiff-appellee was entitled to declaratory and injunctive relief where, even assuming plaintiff-appellee had suffered an injury, any such injury would be fully compensable through a monetary award? (Assignment of Error 1)

Was plaintiff-appellee entitled to class certification under CR 23(b)(2) when he failed to establish that he had a legal claim against any defendant-appellant in his own right? (Assignment of Error 2)

Was plaintiff-appellee entitled to class certification under CR 23(b)(2), which provides for class certification for claims seeking predominantly injunctive relief, when plaintiff-appellee is seeking potentially millions of dollars in damages that must be determined on an individualized basis for each class member and where he is entitled neither to declaratory nor injunctive relief? (Assignment of Error 2)

## **B. Statement of the Case**

### **1. Factual Background**

Defendants-Appellants are AutoNation, Inc. ("AutoNation") and certain Washington automobile dealerships and other businesses that

are indirectly owned by AutoNation.<sup>1</sup> Plaintiff-Appellee Herbert Nelson and his wife purchased a used vehicle from one of the dealerships, Appleway Volkswagen. A \$79.23 *Business and Occupation tax* (“B&O tax”) was clearly disclosed as “overhead” and itemized as part of the sales price of Mr. Nelson’s car. Because the B&O tax was part of the sales price, Appleway Volkswagen disclosed and charged sales tax on the B&O tax.

This is not a case where the adequacy of disclosure of a charge is in issue. Indeed, before Mr. Nelson and his wife agreed to purchase the vehicle, they were plainly informed of the B&O tax in at least four places on contracts containing the terms of the transaction.<sup>2</sup> The Purchase Agreement expressly disclosed that Mr. Nelson would be charged a \$79.23 “Business & Occupation Tax [reflecting] OVERHEAD” on the

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<sup>1</sup> AutoNation is not a dealership, and it is not a proper party to this suit; AutoNation is a separate legal entity from the dealerships, and it did not engage in any of the conduct alleged to be unlawful. Further, Appleway Advertising, Appleway Chevrolet Leasing, Appleway Towing, East Trent Auto Sales, Opportunity Center, and TSP Distributors are not dealerships. All of them are inactive, with the exception of Appleway Towing, which does not itemize the Business & Occupation tax at issue in this litigation. *See* CP 16. Therefore, none of these entities is a proper party in this case. In the context of discussing the challenged conduct, reference may be made to the “dealerships,” as opposed to defendants-appellants, because some defendants-appellants (AutoNation and the businesses previously identified) did not and do not engage in the challenged conduct.

<sup>2</sup> Appleway Volkswagen also disclosed the B&O Tax in its advertising and in its signage. CP 19-22 (including Exs. A & B).

front page and explained on the reverse page the nature of the charge (including that sales tax would be charged on the B&O tax) as follows:

Business and Occupation taxes (B&O tax) have been assessed on the negotiated sales amount. B&O taxes are a tax on businesses for the right to operate in the State of Washington, are an overhead expense of the dealership, and are assessed as a percentage of total sales. As such, the amount of B&O tax assessed on your transaction depends on the negotiated price of the vehicle, service, parts or other items being purchased by you. Sales tax is assessed on both the negotiated selling price and the B&O tax amount. All advertised vehicles, services, parts, etc. are advertised at a specific price plus B&O tax, sales tax, luxury tax, license fees, or other governmentally mandated charges.

CP 50-51 (Ex. 3, ¶ 12). Likewise, the “Full Disclosure and Acknowledgement of Terms and Conditions of Vehicle Transaction” form disclosed the B&O tax and required purchasers to initial an acknowledgement regarding the B&O tax stating: “I understand that the dealership is passing through the B&O tax overhead and that I am paying sales tax on the sales price and B&O tax amounts.” CP 53 (Ex. 4, ¶ 12). Mr. Nelson’s wife initialed the line entry corresponding to that paragraph, and Mr. Nelson was present during this time and understood that his wife was initialing a provision relating to the B&O tax. CP 28-29 (11:22-25-12:1-11). Finally, the Retail Installment Contract and Security Agreement

that Mr. Nelson signed also disclosed the B&O tax charge. CP 56 (Ex. 5). Mr. Nelson concedes that he had actual notice of the B&O tax before he agreed to purchase the vehicle. CP 29 (15:16-24). Moreover, a dealership employee explained to Mr. Nelson that the B&O tax was an overhead expense that had been broken out of the price of the vehicle and was being added in as a line item. CP 29 (14:1-5). The Superior Court recognized that “there’s evidence . . . in the record that Appleway [Volkswagen] had a substantial amount of notice throughout the premises about [the B&O tax].” RP 12:5-9 (8/13/04 Hearing).

On April 16, 2004, Mr. Nelson filed a putative class action under CR 23(b)(2) against defendants-appellants based solely on the itemization of the fully-disclosed \$79.23 B&O tax. Mr. Nelson does not contend that Appleway Volkswagen or the other dealerships fail adequately to disclose the B&O tax. Mr. Nelson does not contend that Appleway Volkswagen or the other dealerships fail adequately to explain the nature of the B&O tax. Mr. Nelson does not contend that Appleway Volkswagen or the other dealerships are barred from passing through the B&O tax to him or to other consumers indirectly as an overhead cost (to the contrary, Mr. Nelson admits that an indirect pass-through is legal). Rather, Mr. Nelson contends that Appleway Volkswagen and the other dealerships violated the

law and were “unjustly enriched” solely by itemizing the B&O tax as a separate component of the vehicle price.

## **2. Proceedings in the Superior Court**

Defendants-Appellants moved for summary judgment pursuant to CR 56, arguing that Mr. Nelson had no legally cognizable claim. Mr. Nelson filed a cross motion for partial summary judgment under CR 56, seeking a declaratory judgment that the dealerships’ conduct violated Washington excise tax law and an injunction prohibiting defendants-appellants from continuing to pass through an itemized B&O tax. Mr. Nelson did not seek summary judgment on his unjust enrichment claim. Mr. Nelson also moved for class certification pursuant to CR 23(b)(2). Defendants-Appellants opposed class certification.

The Superior Court expressly acknowledged – and Mr. Nelson conceded – that passing through the B&O tax to consumers was lawful. The Superior Court stated: “It is not that you cannot figure in a B&O tax or use it as part of the overhead; that is clear in the statute.” RP 11:12-14 (8/20/04 Hearing). Mr. Nelson admitted that “the vast majority of Washington businesses . . . factor the B&O [t]ax into their overall overhead pricing” and that this is “perfectly legal.” CP 191. The Superior Court expressly declined to address the question whether itemizing the concededly lawful B&O tax pass-through injured Mr. Nelson in any way,

agreeing that Mr. Nelson may have suffered no injury at all, and, therefore, effectively held that Mr. Nelson need not establish that he suffered damages to show a statutory violation. RP 57:3-6 (8/13/04 Hearing) (“At this juncture, whether or not Mr. Nelson . . . ha[s] suffered damages . . . doesn’t define whether or not the practice is illegal.”).

The Superior Court denied defendants’-appellants’ motion for summary judgment and granted Mr. Nelson’s cross motion for partial summary judgment. Although the Superior Court agreed that “paying the B&O tax indeed can be part of the operating overhead of the business,” RP 55:6-9 (8/13/04 Hearing), the Superior Court concluded that because the statute did not expressly permit itemization it must be interpreted to forbid the practice. RP 55:9-11 (“[W]hat [the statute] does not say is that you can directly, by ‘itemization’, [sic] pass [the B&O tax] on to the consumer.”). Thus, the Superior Court entered an Order finding that

itemizing and collecting B&O Tax and B&O Sales Tax from buyers violates the laws of the State of Washington and enjoin[ed] the dealerships and stores from ‘collecting,’ ‘passing through’ or ‘itemizing’ B&O Tax and B&O Sales Tax.

CP 388. Additionally, the Superior Court granted Mr. Nelson’s motion for class certification and certified a class under CR 23(b)(2), which allows certification for actions seeking predominantly declaratory or injunctive

relief. The class the Superior Court certified is comprised of the dealerships' consumers whose sales contracts contained an itemized B&O tax. CP 380-81.

Appellants moved for reconsideration of both Orders under CR 59(a)(7), but the Superior Court denied the motions. CP 578-82. The Superior Court stayed its grant of declaratory and injunctive relief for thirty days after the Order denying reconsideration to allow appellants to seek relief from this Court. CP 383-85; CP 583-84.

### **3. Proceedings in Court of Appeals**

Defendants-Appellants moved this Court to stay the declaratory and injunctive relief pending exhaustion of their appellate rights and moved this Court for discretionary review. In briefing before this Court, Mr. Nelson conceded that it would be *lawful* for the dealerships to “*itemize the B&O tax during its negotiation of the price of its product with its consumers.*” Plaintiff’s Response Memorandum in Opposition to Motion for Stay 9-10 (emphasis added). This admission flatly contradicts Mr. Nelson’s previous assertion that the practice of itemizing the B&O tax was per se illegal, irrespective of the nature of the disclosure. CP 142.

On November 10, 2004, Commissioner Slak granted defendants’-appellants’ motion for a stay and accepted discretionary review of the case. The Commissioner determined that defendants-appellants

ha[d] sufficiently demonstrated the likelihood of success on the merits of the petition as to warrant a stay of the challenged Superior Court orders . . . [and that] there is, in this record insufficient proof of damages to the [appellee] during the pendency of this review as to require the posting of a bond. . . .

Commissioner's Ruling 1-2 (11/10/04).

### **C. Summary of Argument**

#### **1. Summary Judgment**

This entire case rests on the preposterous notion that it is lawful for a business to indirectly pass on an excise tax to a consumer, but unlawful to itemize and fully disclose the very same tax. Mr. Nelson claims that the dealerships violated Washington excise tax law, but Mr. Nelson has no private cause of action or standing to prosecute an alleged violation of the statute at issue. The statute neither expressly nor impliedly contemplates a private cause of action by consumers. The statute was not passed for the benefit of consumers such as Mr. Nelson, and Mr. Nelson suffered no compensable injury as a result of the alleged violation (the itemization). Mr. Nelson makes the remarkable argument that Washington's Uniform Declaratory Judgments Act excuses him from proving the elements required to establish a private cause of action or standing. As defendants-appellants demonstrate below, nothing in Washington law allows a litigant to circumvent the required showing

respecting a private cause of action and standing by slapping the label “declaratory judgment” on the request for relief.

In any case, Mr. Nelson cannot establish a legal violation of any sort. No Washington law prohibits the conduct at issue, specifically, itemization of the B&O tax on consumer invoices. The Superior Court’s approach to statutory interpretation – that if a statute does not expressly permit certain conduct it must, by implication, forbid it – is unsupportable. If the legislature had in fact intended to prohibit itemization, it easily could have done so by simply stating that the practice was impermissible. But the statute does nothing of the sort.

Section 82.04.500 imposes the B&O tax on sellers, measured by “gross proceeds of sales,” “for the act or privilege of engaging in business activities.” RCW § 82.04.220. As Mr. Nelson and the Superior Court both recognized, RCW § 82.04.500 specifically permits sellers to shift this tax burden onto consumers, stating that “*such taxes shall constitute a part of the operating overhead of such persons.*” *Id.* (emphasis added). The statute nowhere suggests that even though sellers *may* pass the B&O tax on to consumers they *may not* disclose the fact of the pass-through to consumers. The statutory language relating to overhead does not dictate the manner in which the B&O tax is disclosed, but rather ensures that the B&O tax is applied to *all* of a seller’s gross sales, including

that portion of the gross sales that the seller passed on to consumers. A contrary interpretation of the statute, moreover, is absurd, insofar as it would allow sellers to shift the economic burden of the B&O tax to consumers, but only if they bury the cost in the total purchase price.

Such a statutory construction not only conflicts with the statute's plain language and common sense, but also the administering agency's interpretation of the statute. The Washington Department of Revenue ("DOR") issued a Special Notice affirming "*[i]t is not illegal for a seller to itemize the B&O tax.*" CP 23-24 (Ex. C) (emphasis added). The conclusion in the Special Notice that itemizing the B&O tax is legal is the only reasonable reading of the law.

Finally, Mr. Nelson is not entitled to any of the relief that he seeks and therefore has no cognizable claim. Mr. Nelson may not recover monetary damages for "unjust enrichment" because the dealerships were not unjustly enriched. Mr. Nelson does not dispute that the dealerships were entitled to pass through the B&O tax to consumers. It is likewise undisputed that the dealerships remitted the itemized B&O tax to the State of Washington. Thus, itemizing the concededly permissible B&O-tax pass-through did not enrich the dealerships, unjustly or otherwise. Further, Mr. Nelson is entitled to neither declaratory nor injunctive relief because even

assuming for the sake of argument that he could establish some kind of injury, he would have an adequate remedy at law – money damages.

## **2. Class Certification**

The class certification order should be overruled because, as outlined above, the named representative, Mr. Nelson, lacks standing and has no cognizable claim. In addition, class certification should have been denied because class certification under CR 23(b)(2) is only appropriate where the declaratory or injunctive relief is the exclusive form of relief sought or, at the very least, is the predominant remedy requested by the named representative. Here, the opposite is plainly true. Mr. Nelson is entitled to no declaratory or injunctive relief and, indeed, would not even benefit from the award of such relief, because the alleged violation is complete, and he pleads no prospect of future harm. Mr. Nelson would only benefit from the award of monetary damages. The same is true for the class members. Moreover, calculating damages would require thousands of individual mini-trials because, contrary to plaintiff's assertion, one cannot know how much B&O tax (and sales tax on the B&O tax) any particular class member paid without reviewing his or her individual transaction. Thus, no class should have been certified under CR 23(b)(2).

**D. Argument**

**1. This Court Reviews the Superior Court's Ruling Respecting Summary Judgment De Novo and the Superior Court's Ruling Respecting Class Certification for Abuse of Discretion.**

Although this appeal is from a denial of reconsideration, the underlying orders at issue are (1) an order (a) denying defendants' appellants' motion for summary judgment and (b) granting Mr. Nelson's cross motion for partial summary judgment, and (2) an order certifying a class. While denials of reconsideration and grants of class certification are reviewed for abuse of discretion, rulings on summary judgment are reviewed de novo by this Court. *See, e.g., Graham v. Findahl*, 122 Wash. App. 461, 465 n.3, 93 P.3d 977, 979 n.3 (2004) (reconsideration; summary judgment); *Miller v. Farmer Bros. Co.*, 115 Wash. App. 815, 820, 64 P.3d 49, 53 (2003) (class certification). Thus, to determine whether the Superior Court abused its discretion in denying reconsideration, this Court must review the Superior Court's summary judgment rulings on a de novo basis. *See, e.g., Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 903 (6th Cir. 2004) (denial of a motion seeking reconsideration of a grant of summary judgment is reviewed de novo). Additionally, "[t]his [C]ourt reviews issues of statutory interpretation de novo." *Branson v. Port of Seattle*, 152 Wash.2d 862, 869, 101 P.2d 67, 70 (2004).

Even if, however, the abuse-of-discretion standard were applicable to all of the Superior Court's rulings, reversal would be warranted because the Superior Court clearly erred as a matter of law respecting both the summary judgment and the class certification rulings.

**2. Mr. Nelson May Not Invoke Washington's Uniform Declaratory Judgments Act To Avoid Establishing a Private Cause of Action or Standing.**

Mr. Nelson argued before the Superior Court that he did not need to establish a private cause of action, whether express or implied, under the statute he claimed that the dealerships violated. Likewise, Mr. Nelson made no serious attempt to establish standing under the statute. Instead, Mr. Nelson advanced the extraordinary argument that by invoking Washington's Uniform Declaratory Judgments Act to seek "equitable" relief, he could bypass the traditional elements required to show a private cause of action or standing. *See* CP 468-73.

The Superior Court apparently agreed and made no findings that Mr. Nelson satisfied the elements required to establish a private cause of action or standing. Moreover, the Superior Court demonstrated a fundamental misunderstanding of these requirements. The Superior Court addressed both issues in two paragraphs. The Superior Court asserted that Mr. Nelson does not seek tort relief (even though he seeks potentially

millions in monetary damages) and stated that Mr. Nelson “*alleges* there is (1) an actual, present and existing dispute, (2) parties have genuine and opposing interest, (3) these interests are direct and substantial and (4) a judicial determination will be final and conclusive.” CP 581 (emphasis added). Based on this, the Superior Court concluded that Mr. Nelson “is properly before the court.” *Id.* Further, the Superior Court concluded that the alleged illegality of the B&O tax itemization “is sufficient for standing,” *id.*, and that Mr. Nelson’s damages (or lack thereof) “is not the point,” *id.* As demonstrated below, these statements are directly contrary to well-established black-letter law.

**a. Mr. Nelson Must Establish a Private Cause of Action, and He Cannot Do So.**

A Connecticut court, confronted with a challenge under a statute similar to RCW § 82.04.500, held that the consumer was not a “taxpayer” within the statute and could bring no action against the government challenging the validity of a tax imposed under the statute. *See Van Eck v. Gavin*, 690 A.2d 460 (Conn. Superior Ct. 1996). For the same reasons, Mr. Nelson lacks standing here. As in this case, the Connecticut tax was imposed on gross earnings of petroleum sales, and, like the provision at issue in this case, the Connecticut statute provided that

[i]t is not the intention of the general assembly that the [petroleum sales] tax . . . be

construed as a tax upon purchasers of petroleum products, but that such tax be levied upon and be collectible from petroleum companies . . . and that such tax shall constitute a part of the operating overhead of such companies.

690 A.2d at 461 (quoting statute; alterations in original). Like the dealerships here, the petroleum seller itemized this tax as a separate charge. *Id.* at 460. The plaintiff, a purchaser of petroleum, challenged the legality of the tax that was passed on to him, arguing that he bore the economic burden of the tax. *Id.* at 461. The court rejected the plaintiff's argument that, on this basis, the statute effectively taxed him, stating:

In practice, the ultimate burden of the tax is passed on to the purchaser. This, however, does not alter the fact that for *statutory* purposes the "taxpayer" and the purchaser are two different persons. . . . [The purchaser] buys an article of merchandise for a price fixed by the seller. That price may include an apportionment of a dozen taxes or it may include none. There is no obligation on the buyer's part to pay the tax and in the event that the tax is not paid the tax collecting authority has no power to collect it from him.

*Id.* at 461 (internal quotations and citation omitted). Thus, the court determined that the plaintiff could not bring an action based on an alleged violation of the tax statute.

Likewise, the Supreme Court of Alabama recently addressed and rejected an argument similar to the one that Mr. Nelson makes here. In *Blockbuster, Inc. v. White*, 819 So. 2d 43 (Ala. 2001), the plaintiff brought suit against Blockbuster, Inc. (“Blockbuster”) because Blockbuster “add[ed] a rental tax [imposed upon Blockbuster] to the amount he had agreed to pay for rental[s],” and “unjustly enriched [itself] by passing the rental tax on to [the plaintiff].” *Id.* at 44. The plaintiff claimed, as Mr. Nelson here claims, “that he is not attempting to assert a private right of action under the Rental Tax Statute, but argue[d] that he is merely seeking to recoup [monies] under common law causes of action.” *Id.* The Alabama Supreme Court, however, noted that “[e]ach of [the plaintiff’s] common-law causes of action is predicated upon Blockbuster’s alleged violation of [the Rental Tax Statute].” *Id.* at 45. The Alabama Supreme Court then addressed whether the Rental Tax Statute permitted a private cause of action for the plaintiff’s claims and concluded that it does not. *Id.*

Washington law is no different. It has long been the law in Washington that “in order to invoke the declaratory judgment remedy, the plaintiff must assert a legal right capable of judicial protection which exists in a statute, constitution or common law.” *Wash. Fed’n of State Emp. v. State Pers. Bd.*, 23 Wash. App. 142, 148, 594 P.2d 1375, 1379 (1979); *see Camer v. Seattle Sch. Dist. No. 1*, 52 Wash. App. 531, 762 P.2d 356 (1988)

(dismissing claim for damages and declaratory relief where the underlying statute provided no private cause of action). Washington law requiring a private cause of action independent of the Uniform Declaratory Judgments Act is consistent with the law in other jurisdictions, construing Uniform Declaratory Judgments Acts similar to that adopted by Washington. *See, e.g., Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 916 (Minn. Ct. App. 2003) (“There is no private right to enforce the [statute at issue], and the Uniform Declaratory Judgments Act cannot create a cause of action that does not otherwise exist.”); *Williams v. Nat’l Sch. of Health Tech., Inc.*, 836 F. Supp. 273, 281 (E.D. Pa. 1993) (refusing to permit plaintiffs to invoke Uniform Declaratory Judgments Act to “circumvent” statutory framework where “[a]llowing plaintiffs to proceed in a declaratory judgment action with the [statute] as the source of the underlying substantive law is tantamount to allowing a private cause of action” that the statute does not provide), *aff’d mem.*, 37 F.3d 1491 (3d Cir. 1994); *Builders Ass’n v. City of Reno*, 776 P.2d 1234, 1234 (Nev. 1989) (“The Uniform Declaratory Judgments Act does not establish a new cause of action or grant jurisdiction to the court when it would not otherwise exist.”).

Section 82.04.500 contains no express private cause of action for consumers. Nor can a private cause of action be implied for an

alleged violation of that statute, and Mr. Nelson does not argue to the contrary. To establish an implied cause of action, a claimant must show: (1) the claimant is within the class for whose benefit the statute was enacted; (2) the legislative intent, explicitly or implicitly, supports creating or denying a remedy; and (3) implying a remedy is consistent with the underlying purpose of the legislation. *McCandlish Elec., Inc. v. Will Constr. Co.*, 107 Wash. App. 85, 97, 25 P.3d 1057, 1063 (2001).

Mr. Nelson fails each prong of this test. First, Washington excise tax law or, more specifically, section 82.04.500, was not enacted for the benefit of consumers – to the contrary, that statutory provision expressly permits sellers to recoup the B&O tax from consumers, and the statute nowhere seeks to “protect” the consumer from receiving full disclosure of sellers’ pricing decisions. Insofar as the statute affirms that the B&O tax should not be construed as a tax on consumers, that statement simply guards the State of Washington from claims of the kind made by taxpayers – attempting to reduce their tax burden – that the tax is in practical terms one on consumers. *See infra* Section D.3.d. Second, there is no reason to believe that the legislature intended to create a remedy for consumers pursuant to Washington excise tax law. In addition to common-law tort and contract law, Washington consumers already have a statutory remedy against sellers for unfair and/or deceptive conduct. *See Consumer*

Protection Act (“CPA”), RCW § 19.86.090 (allowing a civil action for, among other things, unfair or deceptive acts or practices). Thus, even assuming the dealerships’ practice of itemizing the B&O tax was illegal, there would be no need for the legislature to create an independent remedy for consumers under Washington excise tax law. Consumers who allege harm from the itemization could attempt to assert a claim under Washington common law or statutory law (CPA, RCW § 19.86.090). Finally, implying a private right of action for consumers would be wholly inconsistent with the statutory scheme, which is intended to fund the State of Washington by taxing sellers and, when necessary, permitting sellers to dispute the tax imposed on them. There is an extensive statutory scheme relating to tax administration and recovery. *See* RCW § 82.32 *et seq.* *Taxpayers* have private remedies under Washington law against the DOR insofar as they claim to have overpaid tax. *See, e.g.*, RCW §§ 82.32.060, 82.32.150, 82.32.160, 82.32.170; *see also Van Eck v. Gavin*, 690 A.2d 460, 461-62 (Conn. Superior Ct. 1996) (discussing statutory remedies available to taxpayers obligated to pay tax on gross sales on petroleum products and finding that purchaser of petroleum products has no remedy under this statutory scheme). Washington’s excise tax statute, however, does not purport to be a consumer protection statute, and it does not purport to

govern internal business decisions with respect to pricing structure and disclosure.

**b. Mr. Nelson Must Establish Standing, and He Cannot Do So.**

Mr. Nelson clearly cannot establish standing, which the Washington Supreme Court recently reaffirmed is a prerequisite to an action under Washington's Uniform Declaratory Judgments Act. As the Court in *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wash. 2d 791, 802, 83 P.3d 419, 423 (2004), explained:

To find that a party has personal standing to seek a declaratory judgment, the [Act] states[] [that] "a person . . . whose rights, status, or other legal relations are affected by a statute . . . may . . . [seek a declaratory judgment]." . . . This court has established a two-part test to determine standing under the [Act]. The first part of the test asks whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute. . . . The second part of the test considers whether the challenged action has caused injury in fact, economic or otherwise, to the party seeking standing.

*Id.* (quoting the Uniform Declaratory Judgments Act; other internal quotations and citations omitted). If the interest sought to be protected is not within the zone of interests to be protected or regulated by the statute, the plaintiff cannot proceed. *Id.* If there is no injury in fact, the plaintiff likewise cannot proceed. *Id.*

Mr. Nelson lacks standing under this test because (1) the interest he seeks to protect is not within the zone of interests protected or regulated by Washington's excise tax law, for the reasons discussed above, *see supra* Section D.2.a; and (2) he has suffered no injury in fact, for the reasons discussed below *see infra* Section D.5. Briefly to summarize, (1) the manner in which the dealerships and other businesses disclose their prices, including the B&O tax component of their prices, does not fall within the zone of interests protected by Washington's excise tax law, which expressly permits businesses to pass on the B&O tax to consumers as "overhead"; and (2) Mr. Nelson did not suffer any injury as a matter of law as a result of the B&O tax disclosure, since he does not allege that Appleway Volkswagen could not have charged him precisely the same price even if it had not disclosed the B&O; to the contrary, it is undisputed that even if the dealerships were forbidden from disclosing the fact of the B&O tax pass-through *they could still pass on this exact same tax to consumers. See Branson v. Port of Seattle*, 152 Wash.2d 862, 876, 101 P.2d 67, 74 (2004) (where governmental fee was imposed on seller, who passed it on to consumer in a separately-itemized bill, consumer lacked standing to challenge fee because he was not within zone of protection of statute requiring that only "reasonable and uniform" fees be charged).

The Superior Court's statements that the alleged fact of "an illegal act" "is sufficient for standing" and that Mr. Nelson's damages (or lack thereof) "is not the point" are directly contrary to Washington law on standing. *See supra* Section D.2. An illegal act, even if established, is not sufficient to confer standing. A lack of damages is very much "the point," because absent a cognizable injury, there is no standing.

**3. The Superior Court Ruling Should Be Reversed Because Washington Excise Tax Law Expressly Permits a B&O Tax Pass-Through and Nowhere Prohibits Itemization of the Tax Pass-Through.**

Mr. Nelson has not cited a single case finding a violation of Washington tax law based on the itemization of the B&O tax. For the reasons discussed below, the applicable statute and relevant legal authority make clear that itemizing the B&O tax does not violate Washington tax law.

**a. Mr. Nelson Improperly Invokes Washington Tax Law As a Backdoor Way To Bring a Fatally-Flawed Consumer Protection Act Claim.**

Mr. Nelson's claim is a fatally-flawed Consumer Protection Act claim masquerading as a Washington tax law claim. The CPA requires an unfair or deceptive act as a prerequisite to a CPA cause of action, *see, e.g., Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 784, 785, 719 P.2d 531, 535 (1986), but there is no evidence

of any unfair or deceptive conduct here. To the contrary, it is uncontested that the incidence and nature of the B&O tax were fully disclosed to Mr. Nelson before the parties consummated the sales contract. *See supra* Section B.1. Nor has Mr. Nelson even alleged any unfair or deceptive conduct, as he has previously conceded. CP 142 (“Plaintiff’s Complaint nowhere alleges a CPA violation, . . . [and] arguments regarding whether [the dealerships’] conduct was deceptive are simply not relevant to this case.”).

Strikingly, in flat contradiction to his admission during the Superior Court proceedings that he has no CPA claim, Mr. Nelson asserted in appellate proceedings that his claim in fact turns on the dealerships’ supposedly deceptive conduct. Mr. Nelson stated that “[a]ll that is required of [the dealerships] to comport with the injunction [entered by the Superior Court] is that they discontinue the practice of itemizing the B&O tax after negotiating the [product] sales price.” Plaintiff’s Response Memorandum in Opposition to Motion for Stay 9-10 (emphasis added).<sup>3</sup>

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<sup>3</sup> Thereafter, Mr. Nelson attempted to strike this passage from his brief, claiming it was a “Scrivener’s error[],” but Commissioner Slak rejected Mr. Nelson’s effort to re-write the record. *See Praecipe; Opposition to Appellee’s Praecipe; November 23, 2004 Letter from Clerk of Court to Counsel.*

Thus, in one lawsuit, Mr. Nelson has claimed both that it is unlawful *per se* to itemize the B&O tax, and that it is lawful to itemize the tax if the timing is right. These positions cannot be reconciled, and are simply an example of a litigant who will say anything that suits his purpose at a particular time. Such gamesmanship should not be countenanced.

**b. The Statute Unambiguously Permits the Dealerships To Pass On the B&O Tax to Consumers as Overhead Cost.**

Even if Mr. Nelson had not conceded the legality of itemizing the B&O tax (if done early enough), his claim would still fail. The plain language of the governing statutory sections indisputably establishes that passing the B&O tax on to consumers is proper – indeed, the statute expressly contemplates that it will be done.

RCW § 82.04.220 provides in pertinent part:

There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against . . . gross proceeds of sales . . . .

RCW § 82.04.500, which bears the caption “**Tax part of operating overhead,**” provides that the tax burden imposed by RCW § 82.04.220 may be passed onto consumers as overhead:

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.*

RCW § 82.04.500 (emphasis added).

That RCW § 82.04.500 expressly permits businesses to pass on as overhead cost the B&O tax to consumers is undisputed. Mr. Nelson conceded that “the vast majority of Washington businesses simply factor the B&O Tax into their overall overhead pricing,” and this practice is “perfectly legal.” CP 191. The Superior Court agreed that “paying the B&O tax indeed can be part of the operating overhead of the business.” RP 55:6-9 (8/13/04 Hearing). Additionally, the Superior Court cautioned that “we have to be careful. It is not that you cannot figure in a B&O tax or use it as part of the overhead; that is clear in the statute.” RP 11:12-14 (8/20/04 Hearing).

Nor is there anything remarkable about the fact that consumers bear the economic burden of a tax for which sellers are legally liable. As the Washington Supreme Court held in *Canteen Serv., Inc. v. State*, 83 Wash.2d 761, 762, 522 P.2d 847, 847-48 (1974), “[t]he legal incidence of a tax does not always fall upon the same person or entity as the economic burden.” Numerous other courts, including the United States

Supreme Court, have recognized that “[t]he economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise.” *Gurley v. Rhoden*, 421 U.S. 200, 204 (1975); accord *Ferrara v. Director, Div. of Taxation*, 317 A.2d 80, 83 (N.J. Super. Ct. 1974) (“[T]he mere fact that it may be universally recognized that the ultimate economic burden of a tax is passed on to the consumer does not determine the [l]egal incidence of the tax. Traditionally, the economic burden of all taxes, like costs in general, is passed down to the consumer level.”); *Watkins Cigarette Serv., Inc. v. Arizona State Tax Comm’n*, 526 P.2d 708, 711 (Ariz. 1974) (“The fact that the economic burden of [a] tax is shifted to the consumer does not alter the responsibility of the vendor to pay the tax.”).

**c. The Statute Nowhere Prohibits the Dealerships from Disclosing an Itemized B&O Tax to Consumers.**

The Superior Court decided that if the statute did not expressly permit itemization, it must then be construed to forbid it. RP 55:9-11 (“[W]hat [the statute] does not say is that you can directly, by ‘itemization’, [sic] pass [the B&O tax] on to the consumer.”). This is not the law. As a general matter, it cannot be concluded that simply because a statute is silent as to a certain practice, the statute thereby prohibits the practice. See *State v. Superior Court of Pierce County*, 107 Wash. 620,

627, 182 P. 607, 609 (1919) (“It is true, as the relator says, the statute does not expressly permit a substitution of liens. But it can be said with equal truth that the statute does not prohibit it, and the most that can be claimed in this regard is that the statute is silent in the matter.”); *see also Omnipoint Communications Enterp., L.P. v. Zoning Hearing Bd. of Easttown TP.*, 331 F.3d 386, 393 (3d Cir. 2003) (“[S]imply because an ordinance does not expressly permit a use does not necessarily mean that it negates that use.”); *United States v. McCrae*, 714 F.2d 83, 85 (9th Cir. 1983) (“The provision does not expressly permit extension of probation on formal revocation, but neither is such extension prohibited.”). Likewise, the statutory provisions at issue – §§ 82.04.220, 82.04.500 – do not mention itemization, let alone prohibit it. The Superior Court incorrectly concluded that statutory silence regarding itemization constitutes a prohibition on that practice. Had the legislature intended to prohibit itemization of the B&O tax it could have done so with clear language simply and directly stating that the practice of itemization was unlawful. *See, e.g., Bloom v. O’Brien*, 841 F. Supp. 277, 278-79 (D. Minn. 1993) (quoting statute stating that “health care provider[s] must not separately state the tax obligation . . . on bills provided to individual patients”).<sup>4</sup> The Washington legislature, however, did not do

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<sup>4</sup> As discussed below, *see infra* Section D.5.e, the court in *Bloom v. O’Brien*, 841 F. Supp. 277, 278 (D. Minn. 1993), found that such a

so, and it was not the province of the Superior Court to re-write the statute to add a prohibition on itemization. *See, e.g., State v. Salavea*, 151 Wash.2d 133, 144, 86 P.3d 125, 130 (Wash. 2004) (“[I]f the legislature wanted the age element in RCW 13.04.030(1)(e)(v) to refer to age at the time of commission, it could have used language indicating this. As we have previously held, the court cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.”) (internal quotation and citation omitted); *State Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 14 n.4, 43 P.3d 4, 11 n.4 (Wash. 2002) (“If the Legislature had intended the exemption to apply to all residential domestic uses, it would have written the exemption that way.”); *Bird-Johnson Corp. v. Dana Corp.*, 119 Wash.2d 423, 427-28, 833 P.2d 375, 378 (Wash. 1992) (“The MTCA’s drafters could easily have included language providing for contribution, especially since SARA provided a ready model, but they did not. The omission of these words is a clear indication that the MTCA’s drafters did not intend to adopt CERCLA’s more expansive contribution provision.”).

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prohibition would likely violate the First Amendment.

**d. The Statutory Language Making the B&O Tax Part of Overhead Protects the State's Gross-Sales Tax Base; It Does Not Dictate the Manner of the Seller's Disclosure of the B&O Tax.**

The Superior Court, in accepting Mr. Nelson's argument, misunderstood the statutory language in RCW § 82.04.500. That language does not address – and it is unconcerned with – the manner of a seller's disclosures to consumers. There are many reasons why sellers may choose to itemize the B&O tax, including in the interest of consumer disclosure, and the statute does not seek to prevent such disclosure. Instead, the thrust of the statutory language in question is to ensure that a seller is taxed on *all* gross earnings, including the B&O tax that it passes on to consumers. A long line of cases demonstrates that when a seller itemizes a tax it cannot, in so doing, reduce its tax liability by arguing that the tax is effectively one on consumers. These cases are equally applicable when a consumer makes the same argument – that by itemizing the tax the seller thereby converts the tax into a consumer tax.

A Connecticut Supreme Court opinion, *Texaco Refining & Marketing Co. v. Commissioner of Revenue Servs.*, 522 A.2d 771 (Conn. 1987), interpreting very similar language to RCW 82.04.500, confirms that the intention of such language is to preclude the type of argument that Mr. Nelson makes here. As discussed above, *see supra* D.2.a, the State of

Connecticut imposes a gross earnings tax on the gross sales of petroleum products. Just as RCW § 82.04.500, the Connecticut statute provides:

[i]t is not the intention of the general assembly that the [petroleum sales] tax . . . be construed as a tax upon purchasers of petroleum products, but that such tax be levied upon and be collectible from petroleum companies . . . and that such tax shall constitute a part of the operating overhead of such companies.

Conn. Gen. Stat. § 12-599(a). In *Texaco Refining & Marketing Co.*, a seller of petroleum products passed the petroleum tax on to his consumers by way of an invoice separately stating the sales price and the tax, as in this case. 522 A.2d at 773. The seller argued that he could exclude the separately-stated petroleum tax from its gross earnings (and thus reduce its tax liability). The Connecticut Supreme Court rejected this argument, holding that the separately-stated petroleum tax was part of the seller's gross earnings. In support of this conclusion, the Connecticut Supreme Court cited the language of section 12-599(a), stating that this language reflected the legislature's intent that the petroleum tax "be treated as an item of operating overhead measured by gross earnings derived from the sale of petroleum products in Connecticut. *Id.* at 779. The Connecticut Supreme Court's holding was "*not altered by the fact that, for its own accounting purposes, the plaintiff [seller] billed its customers separately*

*for the sales price of its petroleum products and for the taxes it collected from them.” Id. at 779 (emphasis added).*

Likewise, the similar language in RCW § 82.04.500 guards against arguments that sellers could carve out the amounts they pass on to consumers from the B&O tax scheme. Section 82.04.500 forecloses any such argument by making clear that the B&O tax constitutes the seller’s overhead. A seller cannot bring about a different result by adopting any particular bookkeeping practice. Irrespective of how the B&O tax is billed and disclosed, the State of Washington still levies and collects the tax from the business, not the consumer, and the legal responsibility on the tax remains on the business, although the consumer may bear the economic burden.

The Washington Supreme Court recently confirmed that a governmental fee imposed upon a seller will not be transformed into a governmental charge levied upon a consumer even if the seller itemizes the governmental fee on its invoices and passes it through to consumers. In *Branson v. Port of Seattle*, 152 Wash.2d 862, 866-72, 101 P.2d 67, 69-72 (2004), a car rental consumer challenged the constitutionality of a concession fee imposed on car rental companies, which car rental companies passed on to consumers by way of an itemized invoice. In rejecting his claim, the Supreme Court emphasized that the fee was not

imposed on car rental consumers but on car rental companies who “choose to pass this expense through to their customers.” 152 Wash.2d at 873; 101 P.3d at 72; *see id.* at 874-75; 101 P.3d at 73.

Numerous other courts from various jurisdictions have recognized that a seller cannot change the fundamental nature of the tax by itemizing the tax. Just as in *Texaco Refining & Marketing Co. v. Commissioner of Revenue Servs.*, 522 A.2d 771 (Conn. 1987), taxpayers in other states have argued that itemization of a tax *did* alter – or, more specifically, *reduced* – their tax liability. But court after court has rejected arguments that a taxpayer’s itemization of a tax changes the fundamental nature of the tax.

For instance, in *United Nuclear Corp. v. Revenue Div.*, 648 P.2d 335, 340 (N.M. Ct. App. 1982), the State of New Mexico imposed a severance tax, akin to the B&O tax here, on the gross proceeds received from the sale of uranium-bearing materials. The seller obtained agreement from consumers that they would pay the severance tax and separately itemized the severance tax on consumer invoices. The court indicated that the “fact that the [seller] separately stated an amount for taxes” was “irrelevant” and held that the seller’s decision to itemize the tax did not change the legal incidence of the tax, which remained on the seller. *Id.* at 340; *see id.* (citing *Canteen Serv., Inc. v. State*, 83 Wash.2d 761, 522 P.2d

847 (1974)); accord *GTE Southwest Inc. v. Taxation & Rev. Dep't*, 830 P.2d 162, 170 (N.M. Ct. App. 1992) (tax stated as a separate line item did “not change the incidence of the tax,” which “is a cost of doing business, just as rent and wages are” and “is imposed on [the telephone carrier], not on customers of [the telephone carrier]”).

Likewise, in *Pure Oil Co. v. State*, 12 So. 2d 861 (Ala. 1943), the taxpayer excluded from its “gross sales” – upon which a privilege tax was levied – certain amounts, representing other taxes levied on the taxpayer and passed on to the consumer. The State sued the taxpayer, and the court ruled in the State’s favor, explaining:

True, the economic burden of the tax is generally passed on to the purchaser, and finally to the consumer. We make no criticism of making invoices disclose the tax burdens of the seller, rendering the public tax-conscious, maybe reacting on legislative bodies when framing tax laws. But in fact and in law . . . [the] tax items are legal obligations of [the business], constituting, in economic sense, part of the overhead of the seller’s business . . . . *Invoices or bookkeeping cannot change the fact that the purchaser is paying the sale price fixed by the seller, nothing more nor less. They cannot stipulate the purchaser into the position of a taxpayer, and the seller into the position of a tax collector.* The tax is payable to the State only, and by the seller.

*Id.* at 863 (emphasis added); accord *Watkins Cigarette Serv., Inc. v. Arizona State Tax Comm'n*, 526 P.2d 708, 711 (Ariz. 1974) (“The fact that the vendors denote the luxury tax as one passed on to the purchaser does not change the character of the tax. The crucial question is: Who is liable for the tax? It is clear that the responsibility for paying the tax falls on the vendor for the privilege of engaging in a specific business.”); see also *City of Tucson v. Tucson Hotel Equity Ltd. Partnership*, 2 P.3d 110, 112 (Ariz. Ct. App. 2000) (rejecting argument that hotel did not shift tax onto consumers where hotel calculated charges to consumers “by adding a percentage component representing the tax rates it thought were applicable” even though hotel “charge[d] its customers a single amount . . . without a separate or additional charge for taxes”); cf. *Arizona Dep’t of Revenue v. Canyoneers, Inc.*, 23 P.3d 684, 687 (Ariz. Ct. App. 2001) (where court ruled that taxpayers’ business was not subject to sales tax after the taxpayers had already collected the sales tax from consumers and remitted the sales tax to the Department of Revenue, taxpayers were entitled to unconditional refund; Department of Revenue could not condition refund on taxpayers’ promise to return sales tax to consumers simply because the taxpayers had separately itemized the sales tax; there was no basis for the Department of Revenue to issue unconditional refunds

to taxpayers who had not itemized the sales tax on consumer invoices while imposing conditions on taxpayers that had itemized the sales tax).

Similarly, in *Ferrara v. Director, Division of Taxation*, 317 A.2d 80 (N.J. Super. Ct. 1974), a retail dealer of motor fuel deducted from “gross sales” (upon which a privilege tax was imposed) federal and state excise taxes. The federal and state gasoline taxes were collected by the distributor or producer of the gasoline from the retail dealer by means of a billing invoice whereby the amount of the tax was listed separately from the actual price of the motor fuel. The retail dealer, in turn, collected the taxes from consumers. The retail dealer argued that the monies it collected reflecting federal and state excise taxes were actually consumer taxes and, therefore, should not be included in its “gross sales” for taxation purposes. The Court rejected the retail dealer’s argument, concluding that the federal and state taxes were not consumer taxes because they were not the legal liability of the consumer (even though the economic burden of the tax fell on consumers). The court also rejected the retail dealer’s argument that the fact that the taxes were separately itemized compelled a contrary conclusion, stating “*the use by a producer or distributor of a billing invoice wherein the federal tax is separately listed cannot affect its true legal incidence.*” *Id.* at 83 (emphasis added).

The unifying theme of all of these cases is that itemizing a tax imposed on businesses and passing it on to consumers does not alter the fundamental nature of the tax. The same is true here. It is equally legal to include the tax as part of overhead as it is to itemize it.

**e. It Would Be Unreasonable and Defy Common Sense To Construe the Statute as Penalizing Disclosure of Pricing Information to Consumers.**

The Superior Court has construed Washington tax law (1) to permit businesses to pass on the B&O tax to consumers but, at the same time, (2) to forbid businesses from disclosing to consumers what they are doing. The Superior Court declined to consider the odd consequences of its construction of the statute, stating that whether the dealerships' practice is "more consumer friendly" is "just simply not relevant" to the Court's construction of the statute. RP 56:3-11 (8/13/04 Hearing). The Superior Court erred as a matter of Washington law, which holds that statutes should not be construed to yield absurd, strange, or strained results when they are susceptible of a reasonable interpretation. *See, e.g., Thurston County v. City of Olympia*, 151 Wash. 2d 171, 175, 86 P.3d 151, 153 (2004); *State v. Contreras*, 124 Wash. 2d 741, 747, 880 P.2d 1000, 1003 (1994); *Martin v. Dep't of Soc. Sec.*, 12 Wash. 2d 329, 331, 121 P.2d 394, 396 (1942). Thus,

courts must consider the consequences of competing statutory interpretations.<sup>5</sup>

To interpret Washington's tax law as permitting passing on the excise tax but precluding clearly disclosing and itemizing the tax would be a strange result indeed. Indeed, one court has held that such a prohibition would likely be unconstitutional. In *Bloom v. O'Brien*, 841 F. Supp. 277 (D. Minn. 1993), the Minnesota legislature imposed a gross revenue tax on health care providers and allowed the health care providers to pass on the tax to consumers. But, at the same time, the legislature expressly "prohibit[ed] the health care providers from itemizing the cost of

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<sup>5</sup> See, e.g., *Pudmaroff v. Allen*, 138 Wash. 2d 55, 977 P.2d 574 (1999) (holding that Washington State traffic laws protecting pedestrians in crosswalks must also apply to bicyclists in crosswalks, to avoid the absurd result that a bicyclist, when crossing the street with a pedestrian, would not have the same legal protection as the similarly situated pedestrian); *State v. Ammons*, 136 Wash. 2d 453, 457-458, 963 P.2d 812, 814 (1998) (rejecting as absurd a statutory interpretation that would find "a defendant who worked for a part of his or her work crew sentence and then failed to return guilty of the crime of escape, but finding a defendant who never showed up at all not guilty"); *American Legion Post No. 32 v. City of Walla Walla*, 116 Wash. 2d 1, 9, 802 P.2d 784, 788 (1991) (refusing, in interpreting a local gambling tax regulation, to attribute to the Legislature the absurd "intent that municipalities spend money even though it was not needed"); *State v. Vela*, 100 Wash. 2d 636, 640-641, 673 P.2d 185, 188 (1983) (rejecting an interpretation yielding "the anomalous consequence" that a person leaving the scene of an accident could avoid liability if someone was injured or killed, while being guilty of a misdemeanor if no one was hurt because, "[t]he Legislature could not have intended such a result, nor will we adopt a course that would bring about such absurd consequences").

the gross revenue tax on invoices.” 841 F. Supp. at 278. The health care providers sought to enjoin the law, arguing that the prohibition on itemization violated the First Amendment. The State argued that the prohibition was lawful because it “protecte[d] the public from misleading information.” *Id.* at 279. The court granted a preliminary injunction, citing the chilling effect this restriction would place on the health care providers’ free speech, and squarely rejecting the argument that itemizing the tax would mislead the public:

Itemizing the specific dollar amount of the gross revenue tax being passed along to a patient would simply inform consumers that, in addition to charges for the medical services provided, they were also paying a share of the tax imposed on the health care provider. . . . A bill which accurately states the amount and the nature of the charge is not inherently misleading. . . . [The prohibition on itemization] is hardly an effective means to accurately convey the information which is of most concern to individual consumers, that is, the amount of money which the consumer is paying to offset the health care provider’s gross revenue tax.

*Id.* at 281, 282; *cf. Branson v. Port of Seattle*, 152 Wash.2d 862, 875, 101 P.3d 67,70-74 (Wash. 2004) (“In 1997, Dollar Rent A Car objected to [a] provision [precluding car rental companies from separately stating fees on a customer’s bill based on concession fees or any other airport charge] on

First Amendment grounds. The Port [of Seattle] concluded that the company's objection was reasonable.”).

Washington law clearly favors disclosure to consumers. *See, e.g.*, RCW § 18.51.540 (requiring that nursing homes disclose patient charges for health care); RCW § 19.146.030 (requiring disclosures by mortgage companies of fees and interest rate lock-in policies); RCW § 19.182.070 (requiring consumer reporting agencies to report, upon request, information about the consumer maintained by the reporting agency); RCW § 48.84.050 (requiring insurance contracts or policies to disclose to consumers costs the consumer is responsible for in order to enjoy the benefits of the policy or contract); *see also Sheldon v. Am. States Preferred Ins. Co.*, 123 Wash. App. 2d 12, 18, 95 P.3d 391, 394 (2004) (“Full disclosure [of the costs of insurance] benefits the policyholder.”). The Court should not construe Washington tax law to penalize full and clear disclosure, particularly when the plain language of the statute nowhere prohibits it, and any such prohibition is constitutionally questionable.

**4. The Superior Court Should Have Deferred to the Department of Revenue's Special Notice Concluding that Itemization of the B&O Tax Is Lawful.**

The statutory language is clear – there is no prohibition on passing on or disclosing the B&O tax to consumers – but if there were any

ambiguity, the Superior Court should have deferred to the statutory interpretation of the DOR, the agency that administers the statute and is responsible for the assessment and collection of the B&O tax. The DOR addressed the precise issue that was before the Superior Court and concluded that the practice of itemizing the B&O tax on consumer invoices is lawful. *See supra* Section C.1. In a Special Notice, the DOR stated:

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. . . . *It is not illegal for a seller to itemize the B&O tax. . . .* [The] decision [whether to itemize the tax] 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.

CP 23-24 (Ex. C) (emphasis added). The DOR also posted on its web site additional statements confirming the legality of itemizing the B&O tax. *See* CP 523-32 (including Exs. A & B) (“Some businesses choose to separately itemize the B&O tax. . . . There is nothing in state law that prohibits a business from itemizing its costs to its customers.”); *id.* (stating

that some automobile dealers “are choosing to itemize a separate charge for the B&O tax on sales invoices”).<sup>6</sup>

The Superior Court erred in refusing to defer to the DOR, whose construction of the statute was clearly correct and, *a fortiori*, “a plausible construction of the language of the statute.” *Seatoma Convalescent Ctr. v. Dept. of Soc. & Health Servs.*, 82 Wash. App. 495, 518, 919 P.2d 602, 613 (1996) (“The agency’s interpretation should be upheld if it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent.”); *Marquis v. City of Spokane*, 130 Wash. 2d 97, 111, 922 P.2d 43, 50 (1996) (Courts typically “give great weight to the statute’s interpretation by the agency which is charged with its administration, absent a compelling indication that such interpretation conflicts with the legislative intent.”).

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<sup>6</sup> While denying the importance of the Special Notice as a factor in the Court’s decision-making process, Mr. Nelson at the same time relies on a purportedly contrary statement by the DOR in a September 2004 Fact Sheet that the “B&O tax is a cost of doing business and should not be billed to your customer as a separately stated item (as is the sales tax).” CP 465. The quoted statement does not directly contradict the Special Notice. It simply states that the B&O tax should not be treated like a sales tax – which is billed to consumers, for which consumers are legally liable, and which itself is *not* subject to tax. In contrast, consumers are not legally liable for the B&O tax, which *is* subject to sales tax. There is no indication that the DOR considered the statement in the September 2004 Fact Sheet contrary to its Special Notice, which specifically addresses the precise issue before the Court, or its other pronouncements regarding the B&O tax, quoted above.

**5. Mr. Nelson Has No Claim Because He Suffered No Cognizable Injury, and the Dealerships Were Not Unjustly Enriched.**

Even assuming *arguendo* that Mr. Nelson could establish that the dealerships violated the law by itemizing the B&O tax, he could not establish that the alleged legal violation resulted in any damages to him (or any other consumer) or “unjust enrichment” to the dealerships. The Court recognized – and Mr. Nelson conceded – that the law permits businesses to recoup the B&O tax from consumers, as they might recoup any other cost. *See supra* Section B.2. Thus, the fact of itemization cannot be said to have harmed Mr. Nelson or enriched Appleway Volkswagen in any way. *See, e.g., Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wash. App. 719, 732, 741 P.2d 58, 64-65 (1987) (enrichment alone is not sufficient; rather, enrichment must be unjust and contrary to equity).

Absent injury or unjust enrichment, Mr. Nelson has no claim. *See supra* Section D.2. The Superior Court, however, appeared to believe that Mr. Nelson could obtain declaratory and injunctive relief *even without establishing damages*, and the Superior Court declined to enter summary judgment in favor of defendants-appellants based on Mr. Nelson’s failure to show damages or unjust enrichment. The Superior Court stated:

At this juncture, whether or not Mr. Nelson or other people similarly situated have suffered damages . . . doesn't define whether or not the practice [of itemizing the B&O tax] is illegal. If the practice is not statutorily sanctioned, then the fact that an individual may not have been damaged doesn't necessarily make it legal.

RP 57:3-9 (8/13/04 Hearing). In declining to dismiss Mr. Nelson's claim based on his failure to plead a cognizable injury or unjust enrichment, the Superior Court committed clear legal error.<sup>7</sup>

**6. Mr. Nelson Is Not Entitled to Declaratory or Injunctive Relief Because He Has an Adequate Remedy at Law.**

Equitable relief typically is not appropriate when the plaintiff has an adequate remedy at law. *See, e.g., Corrigan v. Tompkins*, 67 Wash. App. 475, 477, 836 P.2d 260, 261-62 (1992) (dismissing complaint for declaratory judgment and injunctive relief where plaintiff could not "meet the threshold requirements for obtaining equitable relief – a showing of inadequate remedy at law and a serious risk of irreparable harm"). Here, since Mr. Nelson is claiming (erroneously) monetary injury, Mr. Nelson has an adequate remedy at law. Mr. Nelson has not alleged that there is any prospect of similar future harm or that any such harm could not

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<sup>7</sup> For this same reason (that Mr. Nelson sustained no cognizable injury), Mr. Nelson lacks standing to proceed. *See supra* Section D.2.b.

be fully remedied by a monetary recovery. Thus, Mr. Nelson is not entitled to declaratory or injunctive relief.

**7. Mr. Nelson Lacks Standing To Represent a Class.**

For the reasons discussed above, *see supra* D.2-6, Mr. Nelson has no claim against any defendant-appellant. Under Washington law a plaintiff who cannot state a claim on his or her own behalf lacks standing to represent a class. *See, e.g., Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash. App. 106, 115, 780 P.2d 853, 859 (1989) (a class representative “cannot litigate a claim against a defendant who the representative cannot sue individually”). The Superior Court turned this principle on its head, finding that equitable relief was appropriate “[i]n light of class certification and the fact that this practice is not limited to the plaintiff.” CP 582. In so concluding, the Superior Court committed clear legal error, because Washington law precludes precisely this kind of bootstrapping by the named plaintiff.

**8. Mr. Nelson Is Ineligible for Class Certification under CR 23(b)(2), Because His Damages Claim Predominates Over His Claim for Equitable Relief.**

Even if Mr. Nelson did not lack standing to represent the proposed class, a class still should not have been certified under CR 23(b)(2). CR 23(b)(2) authorizes class certification where, *inter alia*, the “primary claim [is for] . . . injunctive or declaratory relief,” and “the

monetary damages sought are merely incidental to [such] . . . relief.” *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wash. App. 245, 252, 63 P.3d 198, 203 (2003) (internal quotation omitted).

Neither Mr. Nelson nor any class member would benefit from any declaratory or injunctive relief, since each class member has already allegedly paid the unlawful B&O tax, and no class member alleges any prospect of future harm. *See* CP 380-81. Moreover, Mr. Nelson and the proposed class are seeking potentially millions of dollars reflecting fees that allegedly were collected unlawfully on behalf of a class of “at least . . . tens of thousands” of class members. CP 93. Thus, Mr. Nelson’s claim for monetary relief clearly predominates over his request for declaratory or injunctive relief. *See Nelsen v. King County*, 895 F.2d 1248, 1254-55 (9th Cir. 1990) (affirming district court denial of class certification under 23(b)(2) where plaintiffs “did not possess the requisite standing to assert a claim of injunctive relief”); *Fry v. Hayt, Hayt & Landau*, 198 F.R.D. 461, 469 n.8 (E.D. Pa. 2000) (where entire plaintiff class sought \$453,000, request for monetary relief of this “significance” predominated over injunctive relief and 23(b)(2) class could not be certified); *Kaczmarek v. International Business Machines Corp.*, 186 F.R.D. 307, 313 (S.D.N.Y. 1999) (23(b)(2) certification denied where “[m]oney damages . . . are an adequate remedy at law, making injunctive relief inappropriate”);

*Davenport v. Gerber Prods. Co.*, 125 F.R.D. 116, 120 (E.D. Pa. 1989) (Rule 23(b)(2) class improper where “[m]oney damages is the only adequate method by which plaintiffs could be recompensed”).

Relying on *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998), Mr. Nelson advances the proposition that it does not matter that he is seeking enormous monetary damages on behalf of the class or that the sole driving force of this litigation is monetary relief. The Fifth Circuit in *Allison*, however, held that to qualify as “incidental,” damages must

flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief. . . . Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual’s case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations.

*Allison*, 151 F.3d at 415; *see* CP 449-51.

Mr. Nelson argues that his class meets the *Allison* test because calculating damages for himself and the class would require no individual determinations – damages for each class member would simply be the amount paid for B&O tax and B&O sales tax. *See* CP 450. But one cannot know how much B&O tax and B&O sales tax a particular class member actually paid simply by looking at the amount itemized. It is

undeniable that automobile purchasers routinely negotiate the terms and price of their purchase. Thus, any given class member may have agreed to a certain price by negotiating an all-inclusive bottom-line price, from which the dealer backs out (and itemizes) taxes and fees, including the B&O tax, or a certain monthly payment, from which the dealer backs out (and itemizes) certain taxes and fees, including the B&O tax. Further, in the course of negotiating his or her vehicle price, a given class member may have objected to the payment of the B&O tax, and the sales person may have reduced the vehicle price to offset the tax (while still itemizing the tax). Alternatively, a given class member may have been told that he or she would be charged the vehicle price plus the B&O tax, and, thereafter, the class member may have negotiated a substantial price cut exceeding the amount of the itemized B&O tax. The mere possibility that any such scenario occurred with respect to any of the class members would require the Court to conduct an individualized damages inquiry for every one of “at least . . . tens of thousands” of class members. CP 93.

As the Fifth Circuit explained in *Robinson v. Texas Automobile Dealers Assoc.*, 387 F.3d 416 (5th Cir. 2004), in reversing class certification:

Plaintiffs assume that [a separately-itemized Vehicle Inventory Tax] represents an additional charge that artificially increases

the final purchase price for every consumer in the class. . . . Such an assumption defies the realities of the haggling that ensues in the American market when one buys a vehicle. Although some purchasers certainly negotiate a price that excludes taxes, titles, and fees, others negotiate a with an eye to the 'bottom line.' . . . To determine whether a purchaser negotiated in a top-line or a bottom-line fashion, a court would have to hear evidence regarding *each purported class member and his transaction*.

*Id.* at 423-24 (emphasis in original).

For similar reasons, Mr. Nelson's proposed class is not viable. The Superior Court abused its discretion in concluding that Mr. Nelson could prosecute an alleged violation of Washington's excise tax law for declaratory and injunctive relief and that Mr. Nelson's claim on behalf of the class for potentially millions of dollars, which would have to be adjudicated on an individualized basis for each class members, was incidental to his claim for equitable relief. Applying the correct standard, the Superior Court should not have certified the class.

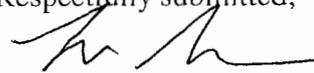
#### **E. Conclusion**

Defendants-Appellants respectfully request that this Court reverse the Superior Court's Order denying their Motions for Reconsideration on summary judgment and class certification and remand

the case with instructions that the Superior Court de-certify the class and enter summary judgment in favor of defendants-appellants.

March 9, 2005

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on March 9, 2005, I furnished true and correct copies of the foregoing Brief of Defendants-Appellants to the following counsel by Federal Express.

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Luba Shur

**F. APPENDIX**

RCW § 82.04.220	A-1
RCW § 82.04.500	A-2
Washington Department of Revenue Special Notice	A-3 to A-4

West's RCWA 82.04.220

**C**

West's Revised Code of Washington Annotated Currentness

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.04. Business and Occupation Tax (Refs & Annos)

**→82.04.220. Business and occupation tax imposed**

There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

**CREDIT(S)**

[1961 c 15 § 82.04.220. Prior: 1955 c 389 § 42; prior: 1950 ex.s. c 5 § 1, part; 1949 c 228 § 1, part; 1943 c 156 § 1, part; 1941 c 178 § 1, part; 1939 c 225 § 1, part; 1937 c 227 § 1, part; 1935 c 180 § 4, part; Rem. Supp. 1949 § 8370-4, part.]

West's RCWA 82.04.220, WA ST 82.04.220

Current through Chapter 2 of 2005 Regular Session

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West's RCWA **82.04.500**

**C**

West's Revised Code of Washington Annotated Currentness

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.04. Business and Occupation Tax (Refs & Annos)

**→ 82.04.500. Tax part of operating overhead**

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.

CREDIT(S)

[1961 c 15 § 82.04.500. Prior: 1935 c 180 § 14; RRS § 8370-14.]

West's RCWA **82.04.500**, WA ST **82.04.500**

Current through Chapter 2 of 2005 Regular Session

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WASHINGTON STATE DEPARTMENT OF REVENUE

# SPECIAL NOTICE

September 5, 2000

For further information contact:

Telephone Information Center

(360) 786-6100 or 1-800-647-7706

Alternate Formats (360) 753-3217

Teletype 1-800-451-7985

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

Washington State Department of Revenue  
General Administration Building, PO Box 47450  
Olympia, Washington 98504-7450



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Frederick C. Kiger  
Director

<http://dor.wa.gov>

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

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.