

77985-6

No. 77985-6

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondent-Appellee,

v.

APPLEWAY CHEVROLET, INC., *et. al.*,

Petitioners-Appellants.

FILED
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AP

**AMICUS CURIAE MEMORANDUM OF
CHARTER COMMUNICATIONS LLC
IN SUPPORT OF PETITION FOR REVIEW**

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REASONS TO ACCEPT REVIEW

I. This Case Involves Issues of Substantial Public Importance That Should Be Determined by This Court.

Charter Communications LLC (“Charter”) submits this amicus curiae memorandum because shortly after the appellate court issued its erroneous decision, Charter was hit with a putative class action alleging that RCW 82.04.500 prohibits Charter’s itemization of the Washington Business and Occupation (“B&O”) Tax on customer bills.¹ The plaintiff in *Brown*—like respondent here—seeks multiple years of itemized B&O tax billings that Charter affiliates collected from customers in this State. The *Brown* plaintiff seeks to recover—in addition to the itemized billings—“treble and other damages” and attorney fees from Charter. The tax statute at issue here and in *Brown* states in full:

82.04.500. Tax part of operating overhead

It is not the intention of this chapter that the [B&O] 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.

Multiple authorities confirm what the plain face of this statute shows: it says *nothing at all* about B&O tax itemization on customer bills. What it *does* say is quite different: by specifying the B&O tax as a business tax chargeable to “operating overhead,” it effectively requires

¹ A copy of the “Complaint for Class Action” served upon Charter in *Brown v. Charter Communications, LLC* on or about November 14, 2005 is attached hereto as Exhibit A.

businesses to report any B&O tax recovery from customers as part of taxable “gross proceeds of sale.” This, in turn, effectively obliges taxpaying businesses to remit *more* in B&O taxes than they collect from customers. The Washington Department of Revenue (“DOR”) Special Notice issued in September 2000 confirms this. So, too, do Washington and Connecticut Supreme Court decisions addressing the taxability of itemized business tax collections from customers.

The appellate court here declined to follow these authorities and, in so doing, contravened fundamental canons of statutory construction. This Court’s intervention is urgently needed now to correct the misinterpretation which has spawned multiple tax class actions across the State against Charter and others.

II. RCW 82.04.500 Does Not Prohibit B&O Tax Bill Itemization.

The appellate court agreed with the petitioner that RCW 82.04.500 does *not* prohibit Washington businesses from “passing-through” B&O taxes to their customers. Slip op. p. 17. The sole interpretive issue, therefore, is whether RCW 82.04.500 prescribes a “pass-through” *methodology*. *Id.*, p. 21. The appellate court held that it does. According to its ruling, a business may not add the B&O tax as a separate item to customer bills. *Id.* Instead, in order to “pass-through” the tax lawfully, the business must add the tax to the customer’s “final purchase price,” but only after disclosing the tax charge during price negotiations. *Id.*

In fact, the plain face of RCW 82.04.500 says nothing about these matters. Quite simply, the text does *not* prohibit or regulate bill

itemization. The appellate court’s ruling to the contrary essentially confuses it with out-of-state statutes – like a repealed one from New York – that expressly prohibit bill itemization.² The lack of any textual prohibition here mandates reversal.

Indeed, as this Court has ruled in the past, Washington courts are not at liberty to graft new text onto clear tax statutes. Illustrative in this regard is *Vita Food Products, Inc. v. State*, 91 Wash.2d 132, 587 P.2d 535 (1978). In that case, this Court flatly refused to “add words” to a tax statute. *Id.* at 134-35, 587 P.2d at 536. Such refusal succinctly demonstrates that the plain terms of RCW 82.04.500 *as written* must govern.

III. The Appellate Court’s Ruling Is Contrary to the Heretofore Settled Understanding of RCW 82.04.500.

The lack of itemization prohibition is confirmed by the heretofore settled understanding of the tax effect of RCW 82.04.500. The statute simply ensures that B&O tax collections from customers are treated as taxable “gross proceeds of sale.” In other words, by specifying that the business, rather than the customer, is the taxpayer, RCW 82.04.500 confirms that a business must pay B&O taxes on any tax collections from customers. This ensures a tax-on-tax effect in favor of the State.

In September 2000, the Department of Revenue (“DOR”)

² “[T]he tax imposed by this section shall be charged against and be paid by the utility *and shall not be added as a separate item to bills rendered by the utility to customers or others*, but shall constitute a part of the operating costs of such utility.” N.Y. Tax L. § 186-a(6) (pre-2000 version) (emphasis added).

authoritatively explained in a “Special Notice” to the Washington business community this tax-on-tax effect.³ Since then, countless Washington businesses have relied on that explanation.⁴ Aptly captioned “*What You Need to Know about Itemizing the B&O Tax*,” the DOR’s Notice specifically advised that “it is *not* illegal ... to identify the business and occupation (B&O) tax as a separate item on the invoice.” Notice, Exhibit C hereto (emphasis added).

Equally significant, the Notice went on to advise that bill itemizers in particular must consider the tax-on-tax effect for customer tax collections. *Id.* at 1-2. Such collections are not excludable from taxable “gross proceeds of sale.” *Id.* at 2. RCW 82.04.500 confirms that such exclusions are improper, because according to its terms, the B&O tax is a tax on the business, not on its “purchasers or customers,” and “constitute[s] a part of [its] operating overhead.” The DOR Notice described the “tax implication” for itemizers as follows:

Let’s compare two examples. Two Seattle retailers selling the same product 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)... 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)....”

³ Attached hereto as Exhibit C is a true copy of DOR's Special Notice.

⁴ Attached hereto as Exhibit B is a copy of a Washington State Auto Dealers Association bulletin dated January 16, 2001 which advises members in detail about the DOR’s Notice addressing B&O tax invoice itemization.

Id., p.2.

As the DOR’s illustration reflects, businesses that collect – but do not itemize on bills – B&O taxes are less likely to attempt excluding customer tax collections from taxable income. Unlike itemizers, their tax collections are a component of the retail sales price which, in turn, indisputably generates taxable “gross proceeds of sales” as defined by RCW 82.04.070.⁵

By contrast, a business that collects itemized tax billings is more apt to view the itemized collections as excludable from taxable “gross proceeds of sales.” This is because such collections *arguably* fall outside the plain face of the statutory definition.⁶ RCW 82.04.500 effectively fills the definitional gap by confirming that the B&O tax is a business tax that is chargeable to “operating overhead.” This Court ruled years ago that the purpose of such distinction is to confer a tax-on-tax effect for itemized customer tax collections. *Public Utility District No. 3 of Mason County v. Washington*, 71 Wash.2d 211, 212, 427 P.2d 713, 715 (1967) (holding that itemized public utility tax collections are themselves taxable because such

⁵ “‘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 expenses whatsoever paid or accrued and without any deduction on account of losses.” RCW 82.04.070 (emphasis added).

⁶ *E.g.*, *Public Utility District No. 3 of Mason County v. Washington*, 71 Wash.2d 211, 212, 427 P.2d 713, 714-15 (1967) (public utility argued that because itemized bill collections fell outside statutory definition for “gross revenue” from the sale of electric energy, they were not separately subject to public utility tax).

tax is “designed to be borne by the [business] as a part of its cost of doing business as a utility.”).

This was unequivocally confirmed by the Connecticut Supreme Court in *Texaco Refining and Marketing Co., Inc. v. Commissioner of Revenue Services*, 522 A.2d 771 (Conn. 1987). In that case, the State tax commissioner sued a petroleum company over an alleged tax underpayment, arguing that the gross receipts tax (“GRT”) required the company to pay tax on its GRT billing itemizations from customers. *Id.*, at 772-73. In response, the company argued that because the bill itemizations fell outside taxable “gross earnings,” there could be no tax-on-tax effect.

The Connecticut Supreme Court agreed with the company insofar that the statutory definition for “gross earnings” was ambiguous. *Id.*, at 777-78. The court nevertheless found a tax-on-tax effect. It did so precisely because a second tax statute – *which is a virtual duplicate of RCW 82.04.500* – specified that the GRT was a business tax rather than a purchaser tax. *Id.* at 778-79.⁷ According to the *Texaco* court, the statute evinced a legislative intent to “construe ‘gross earnings’ ... in such a way that the tax ‘constitute[d] a part of the operating overhead’ of companies.” *Id.* at 779. Precisely by filling this definitional gap, the

⁷ Conn. Gen. Stat. § 12-599(a) states in full: “It is not the intention of the general assembly that the tax imposed under section 12-587 be construed as a tax upon purchasers of petroleum products, but that such tax shall be levied upon and be collectible from petroleum companies as defined in section 12-587, and that such tax shall constitute a part of the operating overhead of such companies.”

statute confirmed that the company's itemized GRT collections from customers were separately taxable. *Id.*, at 778-79.

As the foregoing authorities establish, RCW 82.04.500 does *not* prohibit – but rather simply confirms a tax-on-tax effect for – itemized customer tax collections. For this additional reason, this Court's intervention is needed at this juncture to correct the misinterpretation.

IV. The Appellate Court's Decision Runs Contrary to the Vital Policies of Certainty, Consistency, and Fair Notice.

Even if the legislative intent of RCW 82.04.500 was disputable (it is not), this Court has adopted the axiom that “if there is doubt as to the meaning of a taxing statute, it is to be construed *in favor of the taxpayer.*” *Vita Food Prods., Inc.*, 91 Wash.2d 132, 134, 587 P.2d 535, 536 (emphasis added).⁸ The policies underlying this principle are straightforward: tax laws “should ... be intelligible to those who are expected to obey them.” *White v. Aronson*, 302 U.S. 16, 20-21 (1937). Accordingly, “[t]ax laws should be construed and interpreted as far as possible so as to be susceptible of easy comprehension and not likely to become pitfalls for the unwary.” *Board of Assessors of Town of Brookline v. Prudential Ins. Co. of America*, 38 N.E.2d 145, 154 (Mass. 1941).

⁸ See also, e.g., *Estate of Hemphill v. Department of Revenue*, 153 Wash.2d 544, 552, 105 P.3d 391, 395 (2005) (“Ambiguities in taxing statutes are construed most strongly against the government and in favor of the taxpayer.”); *Group Health Co-op. of Puget Sound, Inc. v. Department of Revenue*, 106 Wash.2d 391, 401, 722 P.2d 787, 793 (1986) (“If a tax statute is ambiguous the statute must be construed most strongly against the taxing authority.”); *In Re Gunderson's Estate*, 93 Wash.2d 808, 818, 613 P.2d 1135, 1137 (1980) (“When there is doubt, tax statutes are construed against the government and in favor of the taxpayer.”).

The appellate court's decision runs contrary to the vital policies of certainty, consistency, and fair notice that this settled interpretative canon is designed to serve. These policies are especially applicable here in light of the directly on point, five year-old DOR Special Notice that is independently supported by *Public Utility Dist. No. 3* and *Texaco Refining*. "The settled interpretation of a tax statute ought not to be lightly disturbed." *Commissioner of Revenue v. Oliver*, 765 N.E.2d 742, 748 (Mass. 2002). Rather, "[s]tability of interpretation is signally desirable in [tax] matters." *Id.*

Hence, while Charter agrees with petitioners that the DOR's construction of § 82.04.500 deserves deference, this Court should adopt the DOR's construction for an additional reason: the public policy favoring consistent interpretations of tax statutes militates in favor of adopting the taxing authority's construction where, as here, no compelling reasons warrant rejecting it. The DOR of necessity must interpret the statutes it enforces, and the legislature certainly intends that the public rely upon the DOR's interpretations. As this Court observed recently:

DOR is charged with enforcing the tax code and hence has the authority to interpret it. Interpreting statutes is consistent with administering and enforcing the statutes. As one treatise says, ... "*Every legislature wants agencies to determine the meaning of the law they must enforce and to inform the public of their interpretations so that members of the public may follow the law.*"

Association of Washington Bus. v. Department of Rev., 155 Wash.2d 430, 439, 120 P.3d 46, 49-50 (2005) (emphasis added) (quoting Arthur Earl

Bonfield, STATE ADMINISTRATIVE RULE MAKING § 6.9.1, at 280 (1986)).

Here, the DOR – supported by authoritative and on-point case law – has for years advised the Washington business community that RCW 82.04.500 *allows* itemized B&O tax recovery on customer bills. The Washington State Auto Dealers Association bulletin from January 2001 confirms the taxpayers’ longstanding reliance. Exhibit B. The vital policies of certainty, consistency and fair notice compel a statutory interpretation consistent with that reliance.

V. **The Appellate Court’s Interpretation Does Not Harmonize with Other Washington Statutes.**

Finally, the appellate court’s construction does not harmonize with another Washington statute which expressly references § 82.04.500. RCW 82.16.090 specifies that for certain public utilities, “[t]axes ... to be listed on the customer billing *need not* include taxes ... levied under chapter[] ... 82.04 RCW.” (emphasis added).

This statute demonstrates that when the Washington legislature intends to regulate B&O tax bill itemizations, it is perfectly capable of doing so in clear language. Furthermore, in stating that utilities “need not” itemize B&O taxes, RCW 82.16.090 confirms that there is no absolute prohibition against bill itemization. Otherwise, RCW 82.04.500 would surely use mandatory language (*i.e.*, a utility “must not” disclose B&O taxes) rather than permissive language (*i.e.*, “need not”). When a court construes tax statutes, “all provisions should be harmonized so that no words or phrases are rendered superfluous or meaningless.” *City of*

Puyallup v. Pacific NW Bell Tel. Co., 98 Wash.2d 443, 448-49 656 P.2d 1035, 1038 (1982).

Other Washington statutes that belie the appellate court's interpretation include those of the Washington Consumer Protection Act, RCW 19.86, *et seq.* ("CPA"). As the appellate court observed here, the CPA does *not* prohibit or regulate tax recovery through itemized billings to customers. Slip op., p. 11.⁹ That the Washington legislature indisputably chose *not* to regulate such practice under the CPA undercuts the appellate court's determination that the legislature chose to do so under a tax statute which, like the CPA, is textually silent on the topic.

VI. Conclusion

For all of the foregoing reasons, Charter petitions this Court to accept discretionary review of the appellate court's unsupportable statutory construction which has spawned a wave of class action tax litigation against Charter and others in the Washington business community.

⁹ See also *Branson v. Port of Seattle*, 152 Wash.2d 862, n.2, 101 P.3d 67 (2004) (citing *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wash. App. 104, 108-09, 22 P.3d 818 (2001), *review denied*, 145 Wash.2d 1004, 35 P.3d 381 (2001)).

DATED this 27th day of January, 2006.

Respectfully submitted,

FILED AS ATTACHMENT
TO E-MAIL

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11/14

FILED

NOV 14 2005

SIRI A. WOODS
CHELAN COUNTY CLERK

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 2 COUNTY OF CHELAN
 3 JAMES A. BROWN, a single person,) NO. **05-2 01218 2**
 4 individually and on behalf of others)
 5 similarly situated,) COMPLAINT FOR CLASS ACTION
 6 Plaintiffs,)
 7 vs.)
 8 CHARTER COMMUNICATIONS, LLC, a)
 9 Delaware limited liability company,)
 10 Defendant.)

10 Plaintiff James A. Brown, individually and on behalf of others similarly
 11 situated, by and through his attorneys of record, Jeffers, Danielson, Sonn &
 12 Aylward, P.S., by James M. Danielson and Brian C. Huber, brings this Complaint
 13 for Class Action against Defendant Charter Communications, LLC, a Delaware
 14 limited liability company, alleging as follows:

I. PARTIES

16 1.1 Representative Plaintiff. James A. Brown is a single person and a

COMPLAINT FOR CLASS ACTION
Page 1
528784

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COPY

EXHIBIT A
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1 resident of Chelan County, Washington. Brown has agreed to act as class
2 representative in this matter.

3 1.2 Defendant. Charter Communications, LLC ("Charter") is a
4 Delaware limited liability company doing business in Chelan County,
5 Washington.

6 1.3 Putative Class Members. The members of the relevant class
7 include all persons:

8 (a) Who have purchased or received services provided by
9 Charter Communications, LLC, and

10 (b) Who, within the applicable statute of limitations, were
11 charged Washington State business and occupation (B&O) tax as an itemized
12 charge on their monthly bill.

13 **II. JURISDICTION AND VENUE**

14 2.1 The acts complained of in this lawsuit occurred in whole or in part in
15 Chelan County, Washington.

16 2.2 Jurisdiction and venue are proper pursuant to RCW 4.12.020,
17 4.12.025, and other applicable law.

18 **III. PROPRIETY OF CLASS ACTION PROSECUTION**

19 3.1 Impracticality of Joining All Members of the Class as Parties Due to
20 Size of Class - CR 23(a)(1). The exact number of persons and/or entities
21 similarly situated to the Representative Plaintiff is now unknown. However,

1 Charter is one of the largest providers of cable television service, digital
 2 television service, and high speed internet service in the state of Washington,
 3 and it is estimated that the number of such persons is in the hundreds of
 4 thousands. The exact number of such persons may be identified from Defendant
 5 Charter's records of customers in Washington State, and such persons may be
 6 identified with particularity through appropriate judicial discovery procedures,
 7 such that it would be possible to give such persons actual notice of these
 8 proceedings, if required.

9 3.2 Existence of Questions of Law or Fact Common to the Class - CR
 10 23(a)(2). There exist questions of law and fact common the Representative
 11 Plaintiff's claim and the claims of the putative class members, such as those set
 12 forth for Representative Plaintiff James Brown individually in paragraphs 4.1
 13 through 9.5.

14 3.3 Claims of the Representative Party are Typical of Claims of the
 15 Class - CR 23(a)(3). The claims of the Representative Plaintiff are similar to all
 16 others in that the Plaintiffs are or have been customers of Charter, and have
 17 been and are continuing to be, charged Washington State B&O tax as an
 18 itemized charge on their monthly bills from Charter.

19 3.4 The Representative Party Fairly and Adequately Protects the
 20 Interest of the Class - CR 23(a)(4). The Representative Plaintiff comes before
 21 this Court in the same capacity as any other litigant seeking redress for

1 | grievances and to seek class relief for all of those persons exposed to the same
2 | harm for which he is aggrieved. The adequacy of the Representative Plaintiff's
3 | ability to fairly and adequately protect the interest of the class does not depend
4 | upon his financial status but rather upon:

5 | (a) The capacity of chosen counsel to adequately prosecute the
6 | case on his behalf and on the behalf of the putative class. Plaintiffs' counsel are
7 | experienced trial attorneys who have engaged in extensive trial practice and
8 | have considerable experience in all aspects of class action litigation from several
9 | other class action cases. Plaintiffs' counsel has the necessary skills, expertise,
10 | and competency to adequately represent the Plaintiffs' interest in those of the
11 | class.

12 | (b) The fact that the Representative Plaintiff does not have any
13 | interests which are antagonistic to those of the class;

14 | (c) The fact that the Representative Plaintiff is ready and willing
15 | to bring this class action in a representative capacity on behalf of the putative
16 | class.

17 | 3.5 This Class Action is Maintainable Under CR 23(b). In addition to
18 | satisfying CR 23(a), the Plaintiffs' claims satisfy the conditions of CR 23(b)(1), (2)
19 | and (3).

20 | (a) CR 23(b)(1)(A) and (B). The prosecution of separate actions
21 | by individual members of the class would create a risk of inconsistent or varying

1 adjudications which would establish incompatible standards of conduct for the
 2 Defendant and would also create the risk of adjudication with respect to
 3 individual members of the class which would, as a practical matter, be dispositive
 4 of the interests of other persons not party to the adjudication.

5 (b) CR 23(b)(2). The defendant has acted on grounds generally
 6 applicable to all putative class members, making final injunctive relief appropriate
 7 with respect to the class as a whole.

8 (c) CR 23(b)(3). Alternatively, the resolution of the numerous
 9 legal and factual questions pertaining to the putative class members
 10 predominates over any questions affecting only individual members such that the
 11 prosecution of a class action is superior to other available methods for the fair
 12 and efficient adjudication of this controversy. In this regard, there should be little,
 13 if any, interest in individual members of the class controlling the prosecution of a
 14 separate action for this relief since the relief sought is to apprise the entire class
 15 membership of their rights to damages or reductions in charges. This action is a
 16 superior method in preventing future economic and pecuniary loss to thousands
 17 of Washington citizens and members of the public at large in purchasing cable
 18 television services, digital television services, and high speed internet services.
 19 This action is uniquely directed to preserve the integrity and safety of Washington
 20 citizens, the sanctity of business ventures, and to ensure that all Washington
 21 citizens are protected in the future by providing that businesses operating in

1 Washington State may not pass along B&O tax to consumer customers as an
 2 itemized charge. The class will benefit by redress from the ongoing action which,
 3 if left to hundreds of thousands of individual actions, would greatly congest the
 4 forums of the Superior Courts of the state of Washington. Any difficulties which
 5 may be encountered in this action will be slight compared to the impracticality of
 6 having hundreds of thousands of individuals bringing individual actions and
 7 thereby unnecessarily burdening the courts throughout the state of Washington.
 8 The class litigation is a fair, efficient and expeditious vehicle for providing redress
 9 to both unnamed and named plaintiffs and to as yet unidentified class members.
 10 This action is superior to any other available method for the fair and efficient
 11 adjudication of the controversy.

12 **IV. FACTS**

13 4.1 Over the past several years Plaintiff James A. Brown purchased
 14 cable television service and high speed internet service from Charter.

15 4.2 Brown continues to be a customer of Charter.

16 4.3 Brown's monthly bill from Charter has included an itemized charge
 17 for Washington State B&O tax for the monthly cable television service and high
 18 speed internet service provided by Charter.

19 4.4 It is unlawful for a business operating in Washington to pass along
 20 Washington State B&O tax to customers by including such as an itemized charge
 21 on a bill or invoice.

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V. FIRST CAUSE OF ACTION: DECLARATORY RELIEF

5.1 Brown has a statutory legal right under RCW 82.04.500 that is capable of judicial protection.

5.2 Pursuant to Washington's Uniform Declaratory Judgments Act (RCW 7.24), Brown seeks a declaratory judgment that Charter has violated RCW 82.04.500 by the manner in which it collects the B&O tax from its customers.

5.3 Brown also seeks further relief in this declaratory action pursuant to RCW 7.24.080, as set forth below.

VI. SECOND CAUSE OF ACTION: INJUNCTIVE RELIEF

6.1 Brown requests that the Court issue an injunction permanently enjoining Charter from assessing, collecting, passing through or itemizing the B&O taxes from customers in Washington.

VII. THIRD CAUSE OF ACTION: RESTITUTION

7.1 Brown requests that the Court enter judgment against Charter so that Brown and the other class members may receive restitution. Restitution should be awarded to the extent Charter has been unjustly enriched by assessing, collecting, passing through or itemizing the B&O taxes from its customers in Washington.

VIII. FOURTH CAUSE OF ACTION: BREACH OF CONTRACT

8.2 Charter's unlawful assessment, collection, passing through or itemization of the B&O taxes to its Washington customers as herein alleged

1 | constitutes breach of contract. Brown therefore seeks judgment in favor of
 2 | Brown and the other class members for any damages caused by Charter's
 3 | breach of contract.

4 | **IX. FIFTH CAUSE OF ACTION: VIOLATION OF THE WASHINGTON**
 5 | **CONSUMER PROTECTION ACT, RCW 19.86, et. seq.**

6 | 9.1 Charter engaged in unfair or deceptive acts by passing along the
 7 | Washington State B&O tax by including such as an itemized charge on
 8 | customers' monthly bills.

9 | 9.2 Charter violated RCW 82.04.500.

10 | 9.3 Charter's above-described actions occurred in the conduct of its
 11 | trade or commerce.

12 | 9.4 Charter's above-described actions affect the public interest.

13 | 9.5 Charter's actions caused injury to Plaintiffs in an amount to be
 14 | determined at trial.

15 | **IX. PRAYER FOR RELIEF**

16 | WHEREFORE, Plaintiff James A. Brown, individually and on behalf of
 17 | others similarly situated, prays that the court grant the following relief:

18 | 1. For declaratory judgment that Charter has violated RCW 82.04.500
 19 | by the manner in which it collects the B&O tax from its customers.

20 | 2. For a permanent injunction against Charter enjoining Charter from
 21 | engaging in the above-described unlawful and/or unfair or deceptive business

1 acts.

2 3. For an award of restitution to the extent Charter has been unjustly
3 enriched.

4 4. For an award of damages based on Charter's breach of contract.

5 5. For an award of treble and other damages for violation of the
6 Washington Consumer Protection Act, RCW 19.86, et. seq.

7 6. For an award of reasonable attorney's fees and costs based on
8 RCW 19.86, et. seq., or other legal or equitable bases.

9 7. For such and other further relief as the court deems just and
10 proper.

11 DATED this 14 day of November, 2005.

12 JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

13
14 By  ~~FILED AS ATTACHMENT~~
~~TO E-MAIL~~
15 JAMES M. DANIELSON, WSBA #01629
16 BRIAN C. HUBER, WSBA #23659
17 Attorneys for Plaintiff
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WASHINGTON STATE 

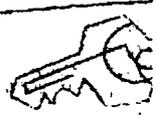
Auto Dealers Association

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- Dealer Day in the District
- 2004 DOR Tax Workshop



Find a NADA Dealer



Industry Bulletins

Title : Tax updates, installment sales, MSRP List

Date: 1/16/2001 12:00:00 AM

Type: Industry Bulletins 2001

Region:

Topic:

Content: January 16, 2001
Volume 2, Number 1

- In this issue**
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 - Social Security Administration announces rate changes for 2001
 - How to itemize B&O taxes
 - Taxes need to be paid for car "shuttlers"
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- Dealer Day in Olympia on February 15
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Legislative Session 2001, began January 8

The Regular Session of 57th Legislature convened on Monday, Jan 8. Issues of the Bulletin will provide updates on the status of legislator Washington franchised dealers.

Tax information

IRS announces mileage rate increase of two cents

The Internal Revenue Service (IRS) announced the standard mileage cost of operating a vehicle is now 34.5 cents per mile for all business use of a vehicle when providing services to a charitable organization per mile. The standard mileage rate to use when computing deductibles increased to 12 cents per mile.

Changes in the tax rates and base(s) for 2001

Social Security announces rate changes for 2001

The Social Security Administration (SSA) has announced that the 2001 wage base will be \$80,400 - an increase of \$4,200 from the 2000 wage base. As in prior years, there is no limit to the wages subject to the 1.45 percent

The FICA (Federal Insurance Contributions Act) tax rate, which is the combined social security tax rate of 6.2 percent and the Medicare tax rate of 1.45 percent for 2001. However, the maximum social security tax employable each pay in 2001 is \$4,984.80. This is an increase of \$260.40 from \$4,724.40.

The SSA has also announced that the amount of earnings needed to qualify for social security benefits will be \$830 in 2001, up from \$780 in 2000.

How to itemize B&O taxes

(From the Washington State Department of Revenue)

A number of businesses are contacting the Department of Revenue asking if it is illegal to identify the business and occupation (B&O) tax as a separate business expense on the buyer's return. Business are also asking if the buyer can take an offsetting credit on the Combined Excise Tax Return.

The answer to both questions is no. It is not illegal for a seller to itemize B&O taxes if there are any deductions or credits available to persons making purchases from the seller. The statute intends the B&O tax to be part of a seller's overall tax liability. This does not prevent a seller from itemizing and showing the effect of the B&O tax on the Combined Excise Tax Return.

According to RCW 82.04.070:

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

Sellers choosing to itemize the B&O tax as a separate cost item must be aware of certain tax implications associated with doing so.

Virtually all persons conducting business activities in Washington pay a B&O tax. For sales of goods and services, the tax is computed using the "gross proceeds" of the sale. Under RCW 82.04.070, "Gross proceeds of sales means the amount accruing from the sale of tangible personal property and/or for services.

any deduction on account of losses."

Thus, for purposes of computing the B&O tax, a business may not be imposed on it from the gross proceeds of sale. Furthermore, B&O tax and exemptions are limited to those specifically provided by Chapter 82.01. 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 gross proceeds of sale that is subject to tax. This means that the B&O tax classification increases by the amount of the itemized tax sale, the amount subject to sales tax likewise increases by the amount of tax.

The following are two examples. Two Seattle retailers selling the same \$20,000 sale. One retailer doesn't itemize the B&O tax while the other who doesn't itemize the B&O tax owes \$94.20 (\$20,000 multiplied by the 4.71 percent rate.) The amount of sales tax the retailer must collect from the buyer 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 4.71 percent rate). The amount of sales tax this same retailer must collect from its customer (\$20,094.20 multiplied by the 8.6 percent sales tax rate.)

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

The Association would like to hear from you on your practice of itemizing. Please send a fax to WSADA (425-251-9485) stating the name of your business and whether or not you itemize B&O tax. Those who have e-mail may send an e-mail to jartman@uswest.net stating whether or not you itemize to jartman@uswest.net. Thank you.

Taxes need to be paid for car "shuttlers"

According to the U.S. Division of Employment Security, auto dealers who shuttle cars from one location to another for a specific fee as well as the proper amount of tax. Dealers who are not in compliance will be liable for taxes.

Federal Revenue Rule 66-381 reads as follows: "Car shuttlers engaged in the business of shuttling cars from one location to another, who are required to deliver the cars at the time and place specified for a designated fee, may not use the car for delivery to the location specified nor transport any person or property on a job basis as employees of the agency."

Warning: National Fuels vouchers remain unpaid

A company called National Fuels Corporation (NFC) has been selling vouchers to car dealers, which the dealers can then distribute to their customers. The vouchers have been honored by NFC. Calls to the headquarters remain unanswered. The group falsely claims to be based in Seattle, however the address listed is only a mail drop. At this writing, the Association has heard of only one dealer who has been impacted. As a result of WSADA's early efforts to stop the sale of National Fuels is currently being investigated by state and federal agencies.

Update on E-commerce vehicle dealerships licensed in Washington
As of January 2001, five vehicle Internet businesses have been licensed by the Department of Licensing to conduct business in Washington State. Below is a brief description of each business.

Imotors.com-uses the Internet to attract customers to a physical location to view and purchase vehicles.

OneGoodCar.com-sells used vehicles on the Internet and delivers them to the customer.

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ManufacturedHomeSeller.com-sells manufactured homes.

Greenlight.com-portal for Amazon.com. Brings customer and dealer both. However in Washington State, they will act as a buyer's agent customer only.

CarsDirect.com-sells new vehicles. In Washington State they will :

Dealers who do business with an unlicensed Internet company may face sanctions.

Business groups object to federal and state ergonomics regulations. In November 2000, OSHA released the new federal ergonomics standards. Around the country are protesting that the rule is too broad and vague. National Auto Dealers Association (NADA) say that by failing to target new ruling will impose unnecessary and costly new burdens on auto small businesses without preventing real ergonomic injuries.

In brief, the federal rule, which became effective on January 15, 2001, will increase workers' compensation claims, rates and premiums by 20-40 percent. Organizations opposed to the rule claim it would reduce or eliminate work and would promote fraud. The regulation also includes incentives for ergonomic injury, including giving employees up to six months off at pay, and a provision that the workplace need not be the cause of an injury to contribute to it. The NADA and other affected industries have filed suits against the 90 percent pay element and other provisions.

In Washington State, a coalition of state employers, including the Washington Business (AWB), is planning a legal challenge to the Labor and Industries' latest regulations regarding workplace ergonomics that the rules are expensive and intrusive. WSADA encourages dealers to contact members of the Washington Senate Labor, Commerce and Finance Committee, and ask them to put the State rules on hold. Members of the Commerce and Financial Institutions Committee are:

- Margarita Prentice (chair), Renton, 360-786-7818
- Georgia Gardner (vice chair), Bellingham, 360-786-7682
- Darlene Fairly, Lake Forest Park, 360-786-7662
- Rosa Franklin, South Tacoma, McChord, 360-786-7656
- Julia Patterson, Sea-Tac, 360-786-7664
- Marilyn Rasmussen, Eatonville, 360-786-7602
- Debbie Regala, Tacoma, 360-786-7652
- Shirley Winsley, West Pierce County, 360-786-7654
- Don Benton, Eastern Clark, Western Skamania, 360-786-7632
- Alex Deccio, Yakima/Union Gap/Selah, 360-786-7626
- Harold Hochstatter, Grant, Adams, Kittitas and Yakima counties, 360-786-7684
- Jim Honeyford, Benton, Yakima, Klickitat counties, 360-786-7684
- Jim West, Spokane, 360-786-7610

Installment legislation and appropriations bill signed

On December 28, 2000, President Clinton signed the installment sales act which provides relief for small businesses by retroactively reinstating the installment method for accrual basis taxpayers. Dealers on an accrual basis were disallowed the installment method when selling assets in their businesses. This bill disallowed the installment method.

Earlier in the year, Clinton signed the Department of Transportation appropriations bill (H.R. 4475). The bill included a one-year freeze on fuel economy (CAFE) standards and allows for a study of the issue by the Academy of Sciences. The CAFE standards program was enacted to improve automobile fuel efficiency and prevent future oil shortages. Since it is clear that CAFE standards have not reduced our nation's reliance on oil, a vehicle.

MSRP list for 2000 through early 2002 soon available on DOL website

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The Department of Licensing (DOL) released the Manufacturer's Suggested Retail Price (MSRP) information for 2000, 2001 and early 2002 model year passenger vans, and pickup trucks. As a budget cutting measure, the Department no longer provides each dealership with a paper copy of the information. The Department of Licensing has added basic title and licensing information to the website at <http://www.wa.gov/dol/main.htm>. If the information you find is inaccurate or outdated, the DOL asks that Washington dealers let them know by calling 6319. The Vehicle RTA Tax Calculator is available through <http://vs.dol.wa.gov/calculaterta/index.asp>.

If you do not have access to the DOL website, WSADA will send you a list.

Dealer Day in Olympia on February 15

Dealers from all legislative districts are encouraged to be a part of Dealer Day on February 15, beginning at 9 a.m. at the Ramada Inn, Gove Capitol Way in Olympia. Participants will lobby the passage of prior legislation that impacts Washington dealerships. Among the priorities are:

- B&O tax exemption on wholesale used car sales
- VIN inspection relief
- An equitable transportation funding package that doesn't negatively impact dealerships

Each dealership has been mailed a green brochure with the schedule and information needed for sign-up. For assistance, call WSADA at 1-800-998-9723.

Discount on secure odometer forms

WSADA members who purchase five or more boxes of Secure Odometer Extension forms will save \$20 per box. A box, which contains 1,000 forms, regularly sold for \$145 will be sold for \$125.

Articles in the Bulletin are intended to inform members, not to advise. No one should rely on or interpret any law without the aid of an attorney who is fully advised of the facts.

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→ *Contact Us For A Membership Application*

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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
Telephone 1-800-431-7985

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 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 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 474000
Olympia, Washington 98512-7400



Serving the People of Washington

Fredrick C. Kipps
Director

http://dor.wa.gov

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PAGE 1 OF 2

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

To inquire about the availability of this document in an alternate format for the visually impaired, please call (360) 753-3217. Teletype (TTY) users, please call 1-800-451-7985.

CERTIFICATE OF SERVICE

The foregoing was served by mail, first-class postage prepaid, on this 27th day of January, 2006, to:

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Washington, D.C. 2005

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/s/ Kimberley Hanks McGair
Kimberley Hanks McGair, WSBA #30063
Attorneys for Charter Communications LLC

Rec. on 1-27-06

-----Original Message-----

From: Bonnie Cargill [mailto:BCargill@farleighbitt.com]

Sent: Friday, January 27, 2006 2:28 PM

To: OFFICE RECEPTIONIST, CLERK

Cc: Kim McGair; RWAGNER@thompsoncoburn.com

Subject: Document Filing

Herbert Nelson v. Appleway Chevrolet, Inc., et al., Supreme Court of the State of Washington, Case No. 77985-6

Attached for filing in the above-referenced matter are:

- 1) Reply in Support of Motion of Amicus Charter Communications for Permission to Submit an Amicus Curiae Memorandum; and
- 2) Amicus Curiae Memorandum of Charter Communications LLC in Support of Petition for Review.

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A "100 Best Companies to Work for in Oregon,"
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