RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2011 SEP 19 P 3:06
BY RONALD R. CARPENTER
CLERK

No. 85581-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JARED PECK,

Plaintiff,

and JAMES BOWDEN

Plaintiff-Appellant,

v.

CINGULAR WIRELESS LLC, et al.,

Defendants-Appellees.

FILED
SUPREME COURT
STATE OF WASHINGTON
2011 SEP 27 A 9:29
BY RONALD R. CARPENTER
CLERK

BRIEF OF AMICUS CURIAE CTIA – THE WIRELESS ASSOCIATION

Robert L. Mahon, WSBA No. 26523
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
Attorneys for Amicus Curiae
CTIA – The Wireless Association

TABLE OF CONTENTS

Page

I. IDENTITY AND INTEREST OF AMICUS 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT 2

A. A Customer's Agreement to Pay a Gross Receipts Surcharge Does Not Transform the B&O Tax into a Tax on the Customer or Alter the Seller's Liability for the B&O Tax. 3

B. A Customer's Agreement to Pay a Gross Receipts Tax Surcharge Does Not Change the Facts that B&O Tax Is Part of the Seller's Cost of Doing Business and Is Part of the Seller's Overhead 5

C. There Is No Requirement that the Precise Amount of the Surcharge Be Identified in Advance When the Fact of the Surcharge Is Disclosed in Advance of Contracting and on a Monthly Basis Thereafter and the Amount of the Surcharge Varies Based on the Customer's Consumption of the Service. 7

IV. CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Nelson v. Appleway Chevrolet, Inc., ("*Appleway*"), 160 Wn.2d 173, 157 P.3d 847 (2007) 7, 8

Sprint Spectrum, L.P./Sprint PCS v. City of Seattle, 131 Wn.App. 339, 127 P.3d 755 (2006), *rev. den.*, 158 Wn.2d 1015, 149 P.3d 377 (2006) 6

Statutes

RCW 82.02.010(3) 5

RCW 82.04.050(5) 3

RCW 82.04.070 4

RCW 82.04.090 4

RCW 82.04.250 4

RCW 82.04.250(1) 3, 4

RCW 82.04.4284(1) 4

RCW 82.04.500 ..... passim

RCW 82.16.090(2) 7

RCW 82.32.045 4

RCW 82.32.090 5

RCW 82.32.100 5

RCW 82.32.240 5

Washington Laws, 1st Sp. Sess., ch. 23, § 1101 9

TABLE OF AUTHORITIES
(continued)

Page

Regulations

WAC 458-20-196(3)(a) 4

WAC 458-20-197(2) 4

WAC 458-20-207(3)(b) 6

WAC 458-20-228(2)(a) 4

I. IDENTITY AND INTEREST OF AMICUS

CTIA – The Wireless Association is a nonprofit membership organization that has represented the wireless communication industry since 1984. CTIA's membership includes numerous wireless carriers doing business in the State of Washington. CTIA coordinates the wireless industry's voluntary efforts to provide consumers with a variety of choices and information regarding wireless products and services. CTIA frequently participates in regulatory and judicial proceedings and coordinates efforts to educate government agencies and the public about wireless industry issues. CTIA has participated as *amicus curiae* in other cases around the country involving issues of great importance to the wireless industry.

CTIA's members do business in Washington and have a significant interest in the outcome of this appeal. ***All*** wireless carriers operating in Washington recover the costs of their B&O taxes through the fees they charge customers. The issue presented in this certified question is whether carriers are prohibited from doing so in a manner that makes the recovery and the amount of the B&O taxes transparent to the consumer. Carriers' the practice of recovering B&O taxes as part of the purchase price through an explicit surcharge, disclosed in advance of the sale of a monthly service contract and itemized on each monthly bill, is both consistent with

RCW 82.04.500 and sound public policy. CTIA has a strong interest in explaining why this is so.

II. STATEMENT OF THE CASE

CTIA adopts the Statement of the Case set forth by Defendants-Appellees in Appellees' Opposing Brief on Certification from the Ninth Circuit Court of Appeals. Defendants-Appellees' Br. at 3-9.

III. ARGUMENT

The only question certified for this Court in this case is the narrow question: "Under Revised Code of Washington section 82.04.500, may a seller recoup its business and occupation taxes where, prior to the sale of a monthly service contract, the seller discloses that in addition to the monthly service fee, it collects a surcharge to cover gross receipts taxes." This Court should answer in the affirmative.

RCW 82.04.500 provides that "[i]t 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." Thus, the statute has three components:

- An expression of legislative intent that B&O taxes not be "construed as taxes upon the purchasers or customers."
- An expression of legislative intent that B&O taxes "be levied upon, and collectible from, the person engaging in the business activities."
- An expression of legislative intent that B&O taxes "constitute part of the operating overhead of such persons."

A seller's recoupment of the cost of its B&O taxes when they are disclosed prior to sale and in the circumstances presented in this case, which matches other wireless carriers' practice, is consistent with each of the three elements of RCW 82.04.500 and the decisions of this Court and is sound public policy.

A. A Customer's Agreement to Pay a Gross Receipts Surcharge Does Not Transform the B&O Tax into a Tax on the Customer or Alter the Seller's Liability for the B&O Tax.

The B&O tax is imposed on sellers of wireless telecommunication services. RCW 82.04.250(1) ("Upon every person ... engaging within this state in the business of making sales at retail ... the amount of tax with respect to such business is equal to the gross proceeds of sales of the business ...."); RCW 82.04.050(5) (defining "sale at retail" to include "the

providing of ... 'telecommunications service' ... to consumers.")[1] Nothing in an agreement between a wireless carrier and its customers changes the fact that the legal incidence of the tax is and remains with the wireless carrier as the retailer.

The carrier's status as a retailer under RCW 82.04.250(1) has significant legal consequences that remain regardless of any agreement with its customers. Moreover, a carrier's recovery of its B&O tax costs through a gross receipts tax surcharge on customers does no constitute a tax on customers. First, the carrier—and not the customer—is legally obligated to report the B&O tax on its combined excise tax return filed with the Washington Department of Revenue (the "Department"). RCW 82.32.045; WAC 458-20-228(2)(a). Second, the carrier is legally obligated to pay the B&O tax when it accrues the revenue related to its provision of service regardless of when or whether the customer ultimately pays for the service. WAC 458-20-197(2); *see also* RCW 82.04.090 (defining "value proceeding or accruing" for B&O tax purposes).[2] Third,

---

[1] Wireless carriers can be subject to B&O tax under classifications other than the retailing classification. For example, many carriers sell telecommunications service at wholesale and are taxable under the wholesaling classification on that activity. RCW 82.04.270. Because this case is focused on the provision of services to consumers, CTIA will limit its discussion to the retailing B&O tax, RCW 82.04.250.

[2] Carriers are entitled to a deduction for bad debt if they are ultimately unable to collect the revenue for the services provided. RCW 82.04.4284(1). However, carriers are not entitled to take the deduction until the debt is "written off as uncollectible in the taxpayer's books and records" and is "eligible for a bad debt deduction for federal income tax purposes." RCW 82.04.4284(1); WAC 458-20-196(3)(a).

if a carrier does not pay its B&O tax obligations, the Department may assess the tax, penalties, and interest against the carrier. RCW 82.32.090, 82.32.100; 82.32.240. The Department has no authority to pursue a consumer for a carrier's unpaid or underpaid B&O taxes regardless of any agreement between the carrier and the consumer. *See* RCW 82.02.010(3) (defining "taxpayer"), Ch. 82.32 RCW (setting forth the provisions related to the Department's administration of the B&O tax and other excise taxes).

In short, a customer's agreement to pay a gross receipts tax surcharge does not transform the B&O tax into a tax "upon the purchasers or customers." Consistent with RCW 82.04.500, the B&O tax remains "levied upon, and collectible from, the person engaging in the business activities"—the carrier.

B. A Customer's Agreement to Pay a Gross Receipts Tax Surcharge Does Not Change the Facts that B&O Tax Is Part of the Seller's Cost of Doing Business and Is Part of the Seller's Overhead.

The Legislature has also expressed its intent that the B&O tax "constitute part of the operating overhead of such persons." RCW 82.04.500. As with the legal incidence of the tax, a customer's agreement to pay a gross receipts tax surcharge does nothing to change the fact that the B&O tax is part of the carrier's cost of doing business and is part of carrier's overhead. RCW 82.04.250 imposes tax on all retailers "equal to the gross proceeds of sales of the business." "Gross proceeds of

sales" means "the value proceeding or accruing from the sale of ... services rendered, without any deduction on an account of ... taxes ...." RCW 82.04.070.

As with any item of overhead that a carrier or other taxpayer charges to its customer as part of the purchase price for a good or service, a gross receipts tax surcharge is itself taxable revenue to the carrier. *See Sprint Spectrum, L.P./Sprint PCS v. City of Seattle*, 131 Wn. App. 339, 127 P.3d 755 (2006), *rev. den.*, 158 Wn.2d 1015, 149 P.3d 377 (2006) (holding that recovery of its city utility tax costs was part of a carrier's gross receipts under definitions substantially similar to the state B&O tax). This is consistent with the B&O tax treatment of any other cost or item of overhead itemized for and recovered from a customer in exchange for the provision of goods or services. For example, when an attorney itemizes and includes in her bill charges for telephone, postage, electronic research, and other overhead costs, such costs are still part of the attorney's gross income for providing legal services. WAC 458-20-207(3)(b).

As noted above, all wireless carriers recover the costs of their B&O taxes and other overhead through the fees they charge customers. The only question is whether it is permissible to recover some of that overhead in a manner that makes the carrier's state and local gross receipts tax costs transparent to the consumer. Nothing in RCW 82.04.500 or the

decisions of this Court preclude a business from itemizing and recovering its overhead and other costs from customers. This is as true for B&O taxes as any other cost of doing business.

Further, nothing in RCW 82.04.500 or elsewhere in Washington law suggests a public policy against transparency. Indeed, in the context of electric and gas utilities, the Legislature went so far as to ***require*** the disclosure of "the rate, origin and approximate amount of each tax levied upon the revenue of the light and power business or gas distribution business and added as a component of the amount charged to the customer." RCW 82.16.090(2). Although RCW 82.16.090 primarily addresses utility taxes, it implies that such transparency is permitted (but not required) for B&O taxes: "customer billing need not include ... taxes levied under ... 82.04 RCW [the B&O tax]."

C. There Is No Requirement that the Precise Amount of the Surcharge Be Identified in Advance When the Fact of the Surcharge Is Disclosed in Advance of Contracting and on a Monthly Basis Thereafter and the Amount of the Surcharge Varies Based on the Customer's Consumption of the Service.

In *Nelson v. Appleway Chevrolet, Inc.*, ("*Appleway*"), 160 Wn.2d 173, 180, 157 P.3d 847 (2007), this Court held that an automobile dealer contravened RCW 82.04.500 when it "added $79.23 in B&O tax ***after*** Appleway and Nelson negotiated a final price of $16,822." This Court further explained: "Appleway may itemize the tax if it is part of the final

purchase price. In other words, it is lawful for Appleway to disclose a B&O tax charge to Nelson ***during*** the course of negotiating a purchase price or later identify any claimed element of overhead. However, Appleway may not add a B&O charge as one of several fees and taxes ***after*** Appleway and Nelson negotiated and agreed upon a final purchase price." *Id.* at 181.

Unlike *Appleway*, which dealt with a single large transaction (the sale of an automobile), sales of wireless service are recurring and commonly billed on a monthly or periodic basis. As with the business arrangements of other wireless carriers, in this case the carrier disclosed to customers prior to contracting that the carrier would include as part of the purchase price for wireless service a surcharge to cover any gross receipts taxes imposed on the carrier by any state or local government. Not only would the disclosure have been made upfront before the consumer would have received any service or incurred any legal obligation, but the charge also appeared on each monthly bill. The first such charge would typically appear within the time frame during which a customer may cancel its service for any reason.

Because of the nature of wireless service (unlike the sale of an automobile), it is not generally possible at the time of the initial service contract to quantify the specific amount of the gross receipts tax surcharge

(e.g., $3.23). This is because the purchase price that the customer has agreed to pay for the service, including the gross receipts tax surcharge, depends on the customer's future use of the service. For example, depending on the customer's wireless plan, the price for the wireless service varies based on numerous of factors, including the amount of wireless service used by the consumer (e.g., minutes used in excess of the base plan), the time of use (e.g., different charges for different days of the week or times of the day), where the consumer uses the wireless service (e.g., international roaming), who the consumer is calling (e.g., customers of the same carrier or family members), and where the customer resides or moves (e.g., local gross receipts taxes on wireless service that turn on the residential address of the consumer, which can change after a customer enters its monthly service agreement). Furthermore, the ultimate B&O tax also depends on tax rates that the Legislature can change. *See, e.g.*, Washington Laws, 1st Sp. Sess., ch. 23, § 1101 (increasing the B&O tax rate for some B&O tax classifications—although not retailing—beginning May 2010).

Ultimately, there is nothing in RCW 82.04.500 or the decisions of this Court that prohibit a carrier from disclosing a gross receipts tax surcharge to a customer prior to the sale of a monthly service contract or the customer agreeing to pay a surcharge to cover the carrier's gross

receipts taxes associated with the provision of wireless service. The fact that the computation of the price, including the surcharge, is not possible until the monthly service is provided does not change this result.

Finally, not only is the disclosure and recovery of a gross receipts tax surcharge not prohibited, but any decision to the contrary would also undermine transparency and unnecessarily obscure information from consumers. However one feels about taxes, it is useful—and certainly not harmful—for consumers to understand that state and local governments impose gross receipts taxes on carriers' provision of wireless service and the amount of such imposition. These gross receipts taxes impact the carriers' cost of providing service and must be recovered through increased prices for wireless service. All carriers recover the costs of these taxes through the prices charged to consumers. The issue before this Court is whether Washington law prohibits transparency in the pricing of wireless telephone service. It does not.

IV. CONCLUSION

For the foregoing reasons, CTIA respectfully urges this Court to answer the question certified by the Court of Appeals in the affirmative. That is, under RCW 82.04.500, a seller may recoup the cost of its B&O taxes as part of the price charged for providing wireless service where, prior to the sale of a monthly service contract, the seller discloses that in

addition to the monthly service fee, it collects a surcharge to cover gross receipts taxes.

DATED: September 19, 2011

PERKINS COIE LLP

By: _____

Robert L. Mahon, WSBA No. 26523
RMahon@perkinscoie.com
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Amicus Curiae
CTIA – The Wireless Association