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NO. 91072-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STEVEN KLEIN, INC., d/b/a KLEIN HONDA,

Appellant,

v.

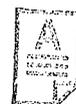
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

Petitioner
SUPPLEMENTAL BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves imposition of the business and occupation (“B&O”) tax on “dealer cash,” a credit given by American Honda Company (“American Honda”), the manufacturer/distributor, to Klein Honda, a retail dealer. The credit is one of several that American Honda uses to incentivize dealers in various ways. Some credits require Klein Honda to perform additional tasks in order to receive the credit—advertise or do warranty work, for example. Klein Honda pays B&O tax on the credits that are tied to additional work. Other credits simply reduce the dealer’s costs—flooring credits, for example, that offset interest charges on inventory. These credits are not taxable.

Dealer cash is given to spur sales of particular models by crediting the dealer certain amounts—typically \$500 or \$1000—when the dealer sells that particular model within a specific time period. American Honda does not extract any promises from the dealer in exchange. American Honda announces the opportunity in a marketing bulletin to dealers. It gives the dealer additional flexibility in its price negotiations with consumers, but the dealer is not required to take action in any way. The dealer does no additional work to cash in on the offer. If the dealer sells the particular model, it documents the sale to American Honda in the same way it documents other sales. The dealer’s report of the VIN number on

the regular sales report electronically triggers American Honda to credit the dealer cash.

Klein Honda pays B&O tax on the gross proceeds of the sale, the tax base applicable to retailing, but it does not pay tax on the dealer cash, which simply reduces its costs in the same way as the flooring credit. The dealer cash offer and payments are components of Klein Honda's retailing business.

The Department of Revenue ("Department") nevertheless seeks to tax dealer cash. Its problem, however, is that the B&O tax is imposed on "business activities." The only activity associated with dealer cash is retail sales, upon which the Department concedes the tax was properly paid. To get around that inconvenient fact, the Department asserts that some service or "other" activity is involved.

The Board of Tax Appeals ("BTA"), the fact finder in this case, did not find that Klein Honda performed a separate or additional service for the dealer cash. Instead the BTA, and subsequently the Court of Appeals in a split decision, held that the income itself was taxable, with or without an activity; and, in the Court of Appeals' view, accepting a payment is an activity subject to tax on its own. *Steven Klein, Inc. v. Department of Revenue*, 184 Wn. App. 344, 336 P.3d 663 (2014). This holding turns the B&O tax from a tax on the privilege of doing business

into an income tax, and erases the careful distinctions in the Washington tax code between the tax base applicable to different types of business. This Court should adhere to the statutory tax scheme, in which dealer cash is not a separate taxable activity, and reverse the BTA and Court of Appeals.

II. ASSIGNMENTS OF ERROR AND ISSUES

1. The Court of Appeals erred as a matter of law in holding that the B&O tax is imposed on gross income and not on the privilege of engaging in a business activity.

2. The Court of Appeals, and the BTA before it, erred in holding that a taxpayer can have taxable income without engaging in a distinct business activity.

3. The Court of Appeals erred in holding that the sales activities associated with dealer cash were separate from Klein Honda's general sales activities.

III. STATEMENT OF THE CASE

Klein Honda fully briefed the facts in its Court of Appeals Opening Brief at 3-6, and hereby incorporates them by reference.

IV. ARGUMENT

The Court of Appeals majority made two fundamental errors in deciding this case, both of which were called out in the dissent. First, the

majority failed to understand the nature of the B&O tax as a tax on the privilege of engaging in business activities, instead enforcing the B&O tax as a tax on gross income. And second, to the extent the majority identified any activities that could be subject to tax, those activities were subsumed in selling vehicles at retail, upon which the applicable retailing taxes had been paid.

A. The B&O Tax Is Imposed on Business Activities, Not Income.

A B&O tax is an excise tax imposed upon the act or privilege of engaging in business activities and is measured by the application of a legislatively set rate against a valuation of the operation of the business, which is established by some standard such as gross revenues, gross sales, gross income, or the valuation of products. *P. Lorillard Co. v. Seattle*, 83 Wn.2d 586, 521 P.2d 208 (1974); *Greyhound Lines, Inc. v. Tacoma*, 81 Wn.2d 525, 503 P.2d 117 (1972); RCW 82.04.220; 16 E. McQuillin, *Municipal Corporations* § 44.191 (3d ed. 1984); Comment, *The Scope of Washington's Business & Occupation Tax*, 35 Wash. L. Rev. 121 (1960). The B&O tax is levied on the *privilege* of acquiring income through engaging in a business activity, not on the income itself. *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 407, 25 P.2d 91 (1933).

In *Ford Motor Company v. City of Seattle*, 160 Wn.2d 32, 156 P.2d 185 (2007), this Court set forth the three basic elements of a taxing statute:

First there must be an incident that triggers the tax. The “taxable incident” is the activity that the legislature has designated as taxable. Second there must be a base that represents the value of the taxable incident. This is known as the “tax measure.” Third, there must be a “tax rate, which when multiplied by the tax measure, determines “the amount of tax due.”

Id. at 39 (internal citations omitted).

A major determinant of B&O tax liability is the classification of the taxed activity. *Id.* For instance, retailers are taxed at .471 percent on the gross proceeds of sales. RCW 82.04.250. Manufacturers are taxed at .484 percent on the value of their products (RCW 82.04.240) unless they make semiconductors, in which case they are taxed at .275 percent on the value of their products (RCW 82.04.2404). And manufacturers of commercial airplanes and components are, of course, in a separate category taxed at .2904 percent on the gross income of the business. RCW 82.04.260(11). Rates vary by business activity from .138 percent to 1.5 percent and are levied on different bases. In order to determine the proper tax base and rate, one needs to know how the activity is classified.

Notwithstanding this statutory scheme, the Court of Appeals majority held that “the B&O tax is not a tax on only specific enumerated

business activities, but rather on the ‘gross revenues received in the course of doing business’” and that merely receiving a payment is a business activity. 184 Wn. App. at 353 (quoting *Budget Rent-A-Car v. Dept. of Revenue*, 81 Wn.2d 171, 173, 500 P.3d 764 (1972)). The majority’s holding has no precedent as a matter of legal substance; it confuses “business activity” with the measure of tax; and it raises unnecessary constitutional questions.

1. The Majority Opinion Is Not Supported by Precedent.

The Court of Appeals majority’s ostensible precedent was *Budget Rent-A-Car*. The majority stated that the B&O tax “is on the gross revenues received in the course of doing business,” but failed to recognize the factual context in which this Court made that statement. The entire sentence reads: “*Whether a profit is realized on the transactions is immaterial*, for the tax is on the gross revenues received in the course of doing business.” *Id.* at 173 (emphasis added). The *Budget Rent-A-Car* court was stating that an entity need not make a profit to be engaged in a business activity. It was not analyzing the proper tax base, which in that case was “gross proceeds of sales.” And it was not extending that tax base to include absolutely all receipts – such an issue was simply not in the case.

While the rhetoric of *Budget Rent-A-Car* emphasizes the sweep of the definition of business and of the receipts subject to tax, in fact the range of business activities that are *not* taxed, and the range of receipts that are *not* taxed, are also sweeping.

- For example, deposit-taking by financial institutions is not taxed, despite the influx of billions of dollars into Washington financial institutions in customer deposits. Determination No. 90-63 at 27, 9 WTD 107 (1990).
- Similarly, business borrowing is not taxed, despite the influx of billions of dollars from lenders into business expansion projects, residential construction, business working capital and inventory financing, etc. *Id.*
- Bargaining for discounts from vendors is generally not taxed. For example, Klein Honda might negotiate with its employee health care insurer for a reduction in premiums. The value of that reduction might be expressible precisely but it is not taxed, despite being as valuable to the business as any cash payment. Discounts and rebates taken by a business simply reduce the cost of doing business.

- Monies that are received by an agent on behalf of a principal are generally not taxed. See WAC 458-20-111; *Rho Co. v. Department of Revenue*, 113 Wn.2d 561, 782 P.2d 98 (1989).

The Court of Appeals majority opinion actually conflicts with precedent. Since 1933, this Court has upheld the B&O tax because it was a tax on business activity and not income: “This act does not concern itself with the income that has been acquired, but only the privilege of acquiring.” *Stiner*, 174 Wash. at 407. This is the bedrock understanding of the B&O tax as a type of excise tax. See also the cases cited in the Petition for Review at 8-9.

2. The Majority Confused the Measure of Tax and the Business Activity Being Taxed.

The Court of Appeals majority confused the measure of tax (or tax base) with the business activity being taxed. Again citing *Budget Rent-A-Car*, the majority relied on the definition of “gross income of a business” to find that all receipts are taxable. But as pointed out in the dissent: “Gross income is taxable only after identification of a business activity that is subject to taxation.” 184 Wn. App. at 356. In order to determine the correct tax base, one needs to know what business activity is being performed.

The majority skipped this analysis and appeared to assume that “gross income of a business” is the statutory tax base for all businesses. That is hardly the case. For example, for retailing and manufacturing (not insignificant categories), the tax bases are “gross proceeds of sales” and the “value of products,” respectively. Each covers a different and normally more limited array of receipts than “gross income of a business.” “Gross income of a business” was not even the tax base at issue in *Budget Rent-A-Car*.

3. The Majority Raises Constitutional Questions About the B&O Tax.

In 1933, this Court handed down two cases that have shaped our state’s tax system to this day. In *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933), the Court struck down the income tax because it was a property tax that was not uniform, as the state constitution requires. The Court then upheld the B&O tax in *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 P.2d 91 (1933), because it was an excise tax imposed on the privilege of engaging in business activities and not a tax on the income from those activities.

In 1935, the Legislature enacted a new B&O structure to conform with the Court’s decisions:

From and after the first day of May, 1935, there is hereby levied and there 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 the value of products, gross proceeds of sales, or gross income of the business, *as the case may be . . .*

1935 Wash. Laws, ch. 180, sec. 4 (emphasis added), *codified at RCW* 82.04.220. The succeeding subsections specified the “cases” or classifications of business activities – extractors, manufacturers, retailers, wholesalers, and service providers and other – and provided varying rates and tax bases to go with each, “as the case may be.” This structure—and even this language—has changed little in the intervening 80 years. The Legislature has changed rates and added categories to reflect the changing nature of commerce in the state, but the structure and the tax-imposing language remain the same. The classification determines the tax base and rate.

The plain language of the statute and the legislative intent are clear. The 1935 Legislature intended to enact a tax on business activity, not income, in order to comply with this Court’s interpretation of the state constitution. If, notwithstanding this clarity, this Court were to agree with the Court of Appeals that the B&O tax is a business income tax, then the next case will surely attack the tax as a non-uniform property tax under *Culliton*. And even if *Culliton* were overruled, and if the receipt of

business income were treated as an excise-taxable event, the plethora of different measures and rates would be subject to challenge under an equal protection theory because the newly perceived legislative purpose – taxing business income – would not necessarily be rationally related to such different classifications. The excise tax scheme enacted and maintained by the Legislature is not compatible with an income tax.

B. Dealer Cash Is Not a Separate Business Activity.

Klein Honda engages in two separate business activities; it sells Honda vehicles at retail and it provides services to American Honda Motor Company in the form of pre-delivery inspections and warranty work. The Department does not dispute that Klein Honda paid the proper tax on each of these activities.

The Department wants, however, to split the retailing category into two categories. The Department argues that Klein Honda renders a further service to American Honda when it sells vehicles that are subject to dealer cash “because moving vehicles out of Klein Honda’s inventory . . . put[s] Klein Honda in a position to make more wholesale purchases from American Honda.” Respondent’s Brief at 23. As the dissent notes: “The problem with this argument is that, to be taxable under RCW

82.04.290(2)(b), the service rendered may not constitute a sale at retail.”¹
184 Wn. App. at 358. Selling a vehicle to which a dealer cash bulletin applies, just like selling any other vehicle, is a retail sale, the tax for which is measured by the purchase price the customer pays. Klein Honda paid this retailing B&O tax on the vehicles subject to dealer cash just like every other vehicle it sold. The fact that one sale benefits the manufacturer, American Honda, under one set of competitive circumstances does not distinguish that sale from any other sale under other competitive circumstances, *so far as Klein Honda’s own activities are concerned*. American Honda’s retroactive pricing adjustments do not transform Klein Honda’s sale into a service.

Alternatively, the Department argues that dealer cash is taxable under the “other” prong of the “services and other” business activity, RCW 82.04.290(2)(a). But even this prong requires an identifiable activity separate from selling vehicles; it is imposed “upon every person engaging within this state in any business activity *other than or in addition to an activity taxed explicitly under another section in this chapter . . .*” *Id.* (emphasis added). The Court of Appeals majority

¹ RCW 82.04.290(2)(b) provides in relevant part: “This subsection (2) includes, among others . . . persons engaged in the business of rendering any type of service which does not constitute a ‘sale at retail’ or a ‘sale at wholesale.’”

identified the activity as “accepting the offer of American Honda to apply for dealer cash, selling specific models during specific times, documenting those sales as required by the manufacturer, applying to the manufacturer for the dealer cash, and accepting payment.” As the dissent points out, these activities are subsumed in making sales at retail. 184 Wn. App. at 359.

Moreover, the record shows that these activities are substantially the same for all vehicles, not just those subject to dealer cash. There is no acceptance of the offer of dealer cash by Klein Honda apart from the actual sale of the vehicle. There is no application for dealer cash apart from the electronic transmission of the sale document to American Honda. The electronic form does not change when there is dealer cash involved—the VIN number tells the American Honda computer that the vehicle is subject to dealer cash. American Honda generates a credit invoice, which also appears on the monthly reconciliation statement that summarizes *all* transactions between the factory and dealer except the original wholesale vehicle purchases. These activities are clearly part of selling at retail when no dealer cash is involved. There is no reasonable justification for treating them as a separate activity when they are performed for a vehicle subject to dealer cash so that they can be taxed again.

This is not the first case in which the Department has gone in search of a taxable event in order to tax a particular receipt or flow of value more steeply. In a number of other cases, this Court has rejected the taxing agency's attempts to increase revenues through an artificial segmentation of a taxpayer's business. In this case, similarly, the Court should recognize the correctness of the dissent's understanding that dealer cash accounting and payments are business functions incidental to retail auto sales. Numerous decisions of this court support the dissent's view.

- *Peshastin Lumber & Box, Inc. v. State*, 61 Wn.2d 413, 378 P.2d 420 (1963): The Department wanted to treat roadbuilding by a logging company as an activity separate from the taxpayer's logging operation and to treat the value of the road building, which was a precise figure represented by a credit against the price of timber, as taxable income. The Court acknowledged that Peshastin received value, but refused to apply the tax because the activity was buying lumber, not roadbuilding.
- *Pacific First Federal Savings & Loan Assn. v. State*, 92 Wn.2d 402, 598 P.2d 387 (1979): The Department wanted to treat the S&L's short-term investment of liquid funds, which was managed entirely in Washington, as an isolated activity

disconnected from the taxpayer's deposit-taking and mortgage-lending functions and therefore not subject to the interstate apportionment statute. The Court rejected this position, recognizing that the three "functions are integrated and interdependent," even though the receipts were from different sources.

- *Community Telecable v. City of Seattle*, 164 Wn.2d 35, 186 P.3d 1032 (2008): The City wanted to bifurcate Comcast's transmission of Internet traffic from the function of providing an Internet connection and to tax the former as a "telephone business. The Court rejected this position, holding that the "transmission component of Internet service cannot be separated from the actual service," *id.* at 44, and that "[i]t is appropriate that our state statute, consistent with federal and other state laws, disfavors the kind of artificial division of Internet service components the City advocates." *Id.* at 45.

As in each of these cases, the Court in this case should carefully apply the statutes and not be led astray by short-hand statements drawn from the Court's precedents, taken out of context, that the B&O tax applies to all of a taxpayer's gross revenues or the total money taken in in the course of business.

The dissent's view that making sales of specified vehicles within a specified period of time in accordance with a conditional rebate offer "is subsumed within the business of making sales at retail" is also supported by the fact that American Honda's dealer cash offers were part of a continuous, coordinated strategy for selling cars. American Honda made such offers on a regular basis.² BTA Decision at 3 (AR 20). At any given time, Honda offered dealer cash on several models. VTP 51. The Dealer Agreement between Klein Honda and American Honda requires that Klein Honda follow American Honda's marketing strategies and section 12.9 specifically provides that "[a]ll written directives, suggestions, Policies and Procedures contained in any of its bulletins . . . will be deemed a part of the requirements of this article" AR 324. This original contract obligates Klein Honda to sell vehicles in accord with Honda marketing strategies. The actual "dealer cash" bulletin required nothing further. As the BTA found: "Klein Honda is not required to do nor is it prevented from doing any specific marketing or advertising or even pass the savings along to customers." BTA Decision at 3 (AR 20).

² Although a regular part of Klein Honda's business, dealer cash amounted to a tiny fraction of Klein Honda's gross income as reported for federal purposes (always less than 1%, ranging from 0.17% to 0.78% of total income during the audit period). *See* CP 795 (Department's audit schedule identifying amounts of annual dealer cash receipts); CP 627, 643, 675, 694 (federal tax returns identifying annual gross receipts for federal income tax purposes).

C. Dealer Cash Is Not Part of Klein Honda's Gross Income, But Instead Reduces Its Costs.

Contrary to the Court of Appeals majority view, even the Department recognizes that not all payments are taxable. The Department publishes an Auto Dealers Industry Guide, which states that “[p]ayments that are bona fide cash discounts taken by the dealer or represent an adjustment to the dealer’s purchase price are not subject to tax.” AR 174. The Department further explained bona fide discounts in an Excise Tax Advisory directed to the grocery industry:

Generally, a bona fide discount negotiated by the grocer upon purchase of the goods does nothing more than encourage the grocer to make sales they were already going to make. However, if a grocer performs a service in addition to selling the goods in exchange for the discount then the discount is not bona fide.

ETA 3173.2013 at 1 (Appendix A to Klein Honda’s Opening Brief). Substitute “vehicle dealer” for “grocer” and the Excise Tax Advisory states the rule of decision in this case. The BTA, the factfinder in this case, did not find that any services were performed, nor did the Court of Appeals.³ Dealer cash is properly considered a nontaxable adjustment to the vehicle dealer’s costs for the reasons set forth in Section C of Klein Honda’s Reply Brief.

³ The regular nature of dealer cash, including the contract references discussed in the prior section, show that dealer cash is contemplated by the parties at the time of vehicle purchase. This understanding is also reflected in the original invoice stating: “Dealer’s invoice may not reflect dealer’s ultimate vehicle cost given any rebates, allownacees, collections, discounts, holdback, incentives, etc.” AR 765.

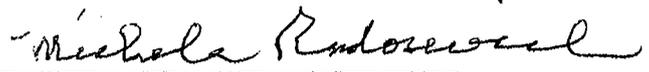
As the Dissent noted, the Court does not need to characterize dealer cash as a rebate or adjustment in the purchase price in order to find that it is not taxable. However, the hallmark of a rebate is the fact that no additional business activity was performed in exchange. The key to the decision under either analysis is whether the payment was made to the retailer in exchange for something other than retailing. Here it clearly was not.

V. CONCLUSION

For the above stated reasons, this Court should reverse the BTA and the Court of Appeals.

RESPECTFULLY SUBMITTED this 4th day of May, 2015.

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Attached please find Supplemental Brief of Appellant to be filed in the above matter.

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