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Tax Law Update

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Washington Supreme Court "Clarifies" That Sellers Cannot "Add" B&O Tax to the Selling Price Regardless of Disclosure, But Can "Include" B&O Tax as Part of the Selling Price

The Washington Supreme Court recently held that businesses are statutorily barred from recouping Business and Occupation ("B&O") tax as an *added* charge to the selling price, regardless of disclosure. In answering a question certified to it by the U.S. Ninth Circuit Court of Appeals, the Washington Supreme Court undertook to "reconcile" two earlier cases and "clarify any confusion" regarding the itemization of B&O tax. (*Peck v. AT&T Mobility*, Wn.2d, April 26, 2012). Thus, the Court clarified that it would be permissible to include the B&O tax as an itemized part of the selling price, but provided no guidance on how to distinguish between an impermissible addition to the selling price and a permissible inclusion in the selling price.

In 2007 the Washington Supreme Court held that an automobile dealer's practice of adding B&O tax to the negotiated sales price of a vehicle was prohibited. (*Nelson v. Appleway Chevrolet*, 160 Wn.2d 173.) In *Nelson*, the Court explained that it would have been "lawful for Appleway to *disclose* a B&O tax to Nelson during the course of negotiating a purchase price," leading many, including the Ninth Circuit, to interpret *Nelson* as permitting itemization of B&O taxes so long as it was disclosed before the sales price was finalized. In 2009 the Washington Court of Appeals, following *Nelson*, held that a different automobile dealer's itemization of B&O tax was permitted because, in that case, "the Johnsons negotiated with Camp about the B&O tax before reaching the agreed price." (*Johnson v. Camp Automotive*, 148 Wn. App. 181.)

In *Peck*, the Court rejected the proposition that disclosure had any bearing on its *Nelson* decision, holding that RCW 82.04.220 absolutely prohibits a seller from *adding* the B&O tax to the final purchase price "regardless of disclosure." The Court reconciled *Nelson* and *Johnson* by emphasizing that in *Nelson* the B&O tax had been added to the negotiated price, while "in *Johnson* the B&O tax was included in, not added to, the sales price."

Chief Justice Barbara Madsen authored a dissenting opinion arguing that whether an itemized B&O tax is barred by RCW 82.04.500 depends on whether the business has impermissibly imposed the tax on the buyer, or whether the business properly treated the tax as an overhead cost. She argued that circumstances surrounding disclosure to the consumer could prove relevant to this inquiry. According to the Chief Justice, the majority's "distinction between 'adding on' and 'including in,' is neither an appropriate nor a reliable test; it is confusing and

ultimately defies logic — because either way the price of the goods and services can be exactly the same and either way part of the price could constitute permissible B&O cost overhead or an impermissibly imposed tax."

For more information, please contact the Tax Law Practice Group at Lane Powell: taxlaw@lanepowell.com