Peck & Bowden v. AT&T Mobility, et al.

No. 85581-1

MADSEN, C.J. (dissenting)—The majority has lost sight of what RCW 82.04.500 is about and what it is not. First, RCW 82.04.500 is a section of chapter 82.04 RCW, "Business and occupation tax." It is located in Title 82 RCW, which is entitled "Excise taxes." It is not found within chapter 19.86, "Unfair business practices—consumer protection." Second, the majority strays into issues that are not even mentioned in RCW 82.04.500, such as how a business must or should account for its overhead costs when passing them on to consumers as part of the price of products it sells, whether consumers can easily comparison shop, and the relationship between the business and occupation (B&O) tax and fair market value, among other things. The statute does not address any of these things—it merely places the responsibility for paying B&O taxes on the business owner and then allows the business owner to pass that through to consumers as a cost of overhead.

The statute says two things: (1) the B&O tax is levied on and collectible from the business and (2) B&O taxes are part of the business's overhead. From these two

mandates, two principles emerge: (1) because the tax is on the business, not on the buyer of the goods and services sold, a business cannot impose the *tax* or collect the *tax* from the buyer, and (2) because the B&O tax is properly an overhead cost, it can be considered in setting price and can be passed on to the customer as a cost of *overhead*. From these two principles, one rule should result: All of the facts and circumstances should be considered in order to determine whether a business has impermissibly imposed the tax on or collected it from the buyer, rather than treating it as overhead cost that can be recovered from the buyer through pricing goods or services.

The sole question here is whether the business has shifted the tax itself to the customer.[1] The answer to the question is, in every case, a matter of what the evidence shows. The 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. But if all the evidence surrounding a sales transaction is considered, meaningful distinction can be made between instances where the tax correctly remains the obligation of the seller and instances where the seller effectively levies the tax on and collects it from the buyer.

Evidence on this question may be direct or circumstantial. Direct evidence exists

[1] I doubt that the legislature intended that RCW 82.04.500 be enforced except by the Department of Revenue in a collection action against the business owner. *See Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 191, 157 P.3d 847 (2007) (Madsen, J., dissenting). If a business owner engaged in a deceptive act in order to recoup its B&O tax as a cost of doing business, the complaint would fall under the Consumer Protection Act, RCW 19.86.010 et seq. Such a claim is not present in this case.

if, for example, the seller specifically identifies the amount on a sales invoice as "B&O *tax*." There is little doubt that the seller intends that the buyer pay the tax or that the buyer is going to believe that this is a tax on goods for which he or she is responsible (or at least is going to be aware that this is what the seller represents). Then, when the buyer pays, the seller has effectively collected the tax from the buyer. Other direct evidence that the seller has collected the *tax itself* from the buyer might exist, such as entries under a particular bookkeeping system or as identified through other business records. There may be testimony from the buyer that the seller said the B&O *tax* was added or that the buyer must pay the B&O tax.

Evidence that reasonably indicates under the circumstances that the buyer was obligated to or did pay the B&O tax is also evidence that should be considered on the issue of whether the tax was invalidly collected from the buyer. A contract listing an amount for "B&O Charges" that is added on at the end of a transaction or is identified in fine print may be circumstantial evidence indicating the tax itself is being passed on to the customer to pay.

When a price is negotiated, as in *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 157 P.3d 847 (2007) and *Johnson v. Camp Automotive, Inc.*, 148 Wn. App. 181, 199 P.3d 491 (2009), the circumstances may strongly indicate the tax itself is being passed on to the buyer, as in *Nelson* when the price was negotiated but the B&O tax was added after the negotiations. Conversely, it may show that the tax is part of the overhead costs being included in the price, as in *Johnson*, where the B&O charges were addressed during the

course of the negotiations.

But the price of most goods and services are not negotiated. As the court acknowledged in *Nelson* and the majority reiterates, *there is no problem passing on the exact amount of the B&O tax as an overhead cost and this can be accomplished as a line item.*

The seller is as entitled to include the cost of paying the B&O tax when pricing goods and services as in the case of any other cost of overhead when pricing goods and services. It may not be the ordinary practice to specifically allocate overhead costs to specific goods sold, but *nothing* in RCW 82.04.500 precludes a business from doing so. Thus, evidence that the seller has included the exact amount of the B&O tax, alone, is not enough to show that a tax, rather than an overhead cost, has been included.

Evidence of disclosure and the nature and timing of what has been disclosed may be relevant. In this case, the Ninth Circuit Court of Appeals certified the question whether a seller can recoup B&O taxes where the seller discloses in advance that in addition to a monthly fee under a monthly service contract it will be collecting a surcharge to recover gross receipt taxes.

The majority believes that disclosure is *not* the relevant point of inquiry. However, evidence concerning what disclosure is made may be highly relevant on the issue of whether the B&O tax has itself been passed on to the customer for payment or whether it is part of the price to recoup this overhead cost. When a seller discloses to a buyer in advance that the final price will include an amount that will reimburse the seller

for the "cost of B&O tax overhead," this will be relevant to the question whether the seller has permissibly passed on overhead costs. For example, the seller might say, "I am going to include an amount that will cover my overhead cost of paying state taxes when I total your amount due." This would be evidence that suggests an overhead cost, rather than a tax, though any other evidence should be considered as well. On the other hand, if the seller discloses that the final price will include "the B&O tax," this would be evidence that the tax is being charged to the buyer. Whatever relevant disclosures are made would be evidence that should be considered.

The timing of when the overhead charge is added to price or when disclosure is made is evidence that also may be relevant. If a charge is included in the total price as an item sits on the shelf, this will likely weigh more in favor of the conclusion that no impermissible transfer of the obligation to pay the B&O tax has been attempted. But even here there could be, hypothetically speaking, contradictory evidence if, for example, the price sticker said, "Price: $401.88 (includes $1.88 B&O tax)." By identifying the amount payable as a "tax," the seller would open the evidentiary gate to the claim that he was passing on to the customer the tax itself or lead to the buyer perceiving that he or she was obligated to pay the tax.

Also relevant to timing, any late disclosure or late inclusion of an amount to represent the cost of B&O tax overhead should be carefully considered, as late timing of either event may tend to show or reinforce evidence suggesting the tax itself is being charged to the buyer.

In short, the statute calls for a limited inquiry: whether the seller has lawfully included the amount the seller pays as B&O tax in the price of goods to be passed on to the buyer as an overhead cost or has unlawfully imposed the tax on the buyer. Ultimately, this inquiry is a matter of considering all the evidence, which may include evidence of whether, when, and what kind of disclosures have been made, how the amount has been described on a sales invoice or in a contract, any other communications, when and how the price has been adjusted to reflect the amount paid in B&O taxes, and any other relevant evidence.

I cannot anticipate or describe all of the evidence that may be relevant. However, I know what is *not relevant*—whether a customer can readily comparison shop or the fair market value of items sold. Indeed, the majority's holding and other considerations that are identified in the majority opinion do not reflect the statute's purpose or conform to its plain language.

First, the majority's holding does not conform to the plain language or the purpose of RCW 82.04.500. The majority holds that the statute prevents a business from recouping the B&O tax as "an added charge" to the price of goods or services. The majority distinguishes between the B&O tax charge being included in the price, which is permissible, and adding the charge to the price, which is not. This holding seems to miss the most important part of the statutory inquiry: whether the *tax* is included in or added to the price. In *Nelson* the court explained that the seller "can *disclose or itemize costs* associated with the purchased item, but unlike a sales tax, it cannot add a B&O *tax* to the

purchase price." *Nelson*, 160 Wn.2d at 185 (emphasis added). The critical point is that a B&O *tax* cannot be added.

Moreover, while RCW 82.04.500 contemplates that the cost of paying the tax may be reflected in price to recoup the overhead cost, it *does not* address the method by which the seller may recoup its overhead cost of paying B&O taxes. Rather, the statute's only message about the matter is what the seller cannot do: the seller cannot collect the tax itself from the buyer nor impose the tax on the buyer. This being the case, what is the actual difference between passing on the amount equal to the B&O taxes paid as a line item overhead charge, as the majority acknowledges is permissible, majority at 10,[2] but not as an added charge, which the majority says is not, majority at 2, 8, 10? Simply because an amount equal to the B&O tax is added at the end should not be dispositive of whether a seller is imposing the tax on or collecting the tax from the buyer or instead pricing to reflect overhead—particularly if there is other evidence tending to show the amount is charged as overhead, such as disclosure of this fact in advance.

Other considerations mentioned in the majority are not relevant. For example, what possible difference does it make to the statute's purpose whether a customer can readily comparison shop? See majority at 11. There is nothing in the statute that suggests this was a concern of the legislature when it provided that B&O taxes are levied on and collectible from the business but shall constitute overhead. *RCW 82.04.500 is not a consumer protection statute.*

[2] *Nelson* states that the seller "can . . . itemize costs associated with the purchased item." *Nelson*, 160 Wn.2d at 185.

Rather, its purpose is to assure that, at the end of the day, the tax is levied against and collected from the business owner. "The burden of the business and occupation tax falls on the business itself." *Commonwealth Title Ins. Co. v. City of Tacoma*, 81 Wn.2d 391, 396, 502 P.2d 1024 (1972). The statute allows a business to legally recoup the cost of B&O taxes as overhead, as is true of other costs of overhead. Doing so is not contrary to the statute, which says nothing about any notice or disclosure requirement, fairness of overall pricing, consumer protection, or the ability to comparison shop.

The majority also comments on the fair market value of items sold, in connection with its misguided comment about comparison shopping. Majority at 11-12. Again, the statute says nothing about the fair market value of an item, just as it says nothing about the ability to comparison shop.

Next, the majority says that it would likely be an unwise business practice to add separate charges to a sales price for each individual item of overhead and under RCW 82.04.500 the B&O tax is not to be treated differently. Therefore, the majority says that the tax must be factored in as overhead when the business is determining its price and its profit margin. Majority at 11. These observations go well beyond what the statute requires.

RCW 82.04.500 says nothing about how a businessperson must set prices for goods or services, how a business can or must determine overhead costs, or about the propriety, wisdom, or feasibility of separately including individual items of overhead costs in the price of an item. Moreover, these statements by the majority are at odds with

the majority's own recognition that the seller can properly include the B&O charge as a line item. The court should not try to dictate how a business may or may not determine its overhead costs.

Rather, the court should focus on the core purpose of the statute that the seller, not the buyer, bears the obligation of paying the B&O tax. The evidence in any given case can be assessed by the trier of fact to determine whether there is compliance with the statute. The question is whether the amount is a cost of business, whether included in *or* added to the total price, or is instead a tax, whether included in *or* added to the total price.

In summary, 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.

The statute only says two things. A B&O tax is a tax that is imposed "for the act or privilege of engaging in business activities." RCW 82.04.220(1). The first thing that RCW 82.04.500 does is to plainly say that B&O taxes are not to be construed as taxes on the consumers but "shall be levied upon, and collectible from" the businessperson. From this it is equally plain that the tax cannot be imposed on the customer and it cannot be "passed through" to the customer as a tax. A buyer has no liability to the State to pay the B&O tax and the Department of Revenue cannot pursue the buyer if the B&O tax is not paid. In this way, the B&O tax is distinct from the state sales tax, for which liability is on the buyer and not on the seller, who simply acts as the State's agent in collecting the sales

tax.[3]

The second thing that RCW 82.04.500 says is that B&O taxes "shall constitute" part of the overhead of the businesspersons paying them. From this, it is obvious that the seller can include its cost in the price of goods to recoup this cost, just as the seller can recoup other overhead costs through its pricing.

Therefore, the true issue in this case is how a court and parties can determine whether the businessperson is collecting the tax from or imposing it on the buyer or whether, instead, the seller is legitimately pricing items to include an amount to cover this cost of overhead. That is all that required. In examining this issue, the court should keep in mind that there is no bar to the seller passing on its costs of paying the B&O tax as an overhead cost, just as a businessperson does with respect to real property or personal property taxes paid on business property, and nothing prohibits the seller from stating the B&O overhead costs as a line item.

Turning to this case in particular, there is considerable evidence that suggests that Cingular Wireless was transferring its own B&O tax liability to its customers. For example, there was testimony from a Cingular senior tax manager that a B&O tax surcharge was charged to its customers "very much like a transactional tax, which you would think that was a sales tax, et cetera." 2 ER at 129.[4] The Terms of Service that are

[3] *See* RCW 82.08.050; *Kaeser v. City of Everett*, 47 Wn.2d 666, 667, 289 P.2d 343 (1955); *Morrow v. Henneford*, 182 Wash. 625, 632, 47 P.2d 1016 (1935). Unlike in the case of the B&O tax, the department is authorized to proceed against the buyer if the buyer does not pay the sales tax. RCW 82.08.050(10).

[4] "ER" refers to the appellants' Excerpts of Record.

part of the 2004 Contract state in part that "[c]harges include . . . applicable *taxes* and governmental fees, whether *assessed* directly upon you or upon Cingular." SER at 97 (emphasis added).[5] Each month, an additional charge was imposed based on the charges for the month's services. Thus, Cingular billed its customers for a "'B&O surcharge'" in addition to prices set in the contracts between the parties, that was described by its tax manager as a tax charge on the monthly recurring charge (at, for example, $39.95 per month) that would be charged in "the same way you would be charged sales tax, federal excise tax at the time or any other taxes." 2 ER at 107.

Other evidence may also suggest the charge to the customers was the B&O tax itself, rather than a means to recoup overhead costs. During this litigation Cingular took the position that imposition of the B&O surcharges was not assailable under state law because a provision of the Federal Communications Act prohibited state regulation of telecommunications carriers' rates. *See Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1055 (9th Cir. 2008); 2 ER at 127 (Cingular's tax manager testified that "Cingular has charged the B&O surcharge to customers as a separate line item because we're allowed to"; "we're allowed to do that under federal preemption"). If there is evidence showing that Cingular believed at the time it entered the relevant contracts that it could lawfully pass the B&O tax itself through to its customers and deliberately wrote its contracts to reflect this position, this would be relevant evidence on the issue of whether Cingular passed the tax itself on to its customers.

[5] "SER" refers to the Supplemental Excerpts of Record.

It is not the province of this court, however, to make the factual determination. Doing so is the province of the federal courts. We review certified questions from federal court as questions of law. *In re F5 Networks, Inc.*, 166 Wn.2d 229, 236, 207 P.3d 433 (2009). Our jurisdiction is limited to the question certified. *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 76, 10 P.3d 374 (2000). Applying the legal principles announced by this court when answering a certified question from a federal court is a matter for that federal court, which retains jurisdiction over all matters except the local question that is certified. *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 817, 231 P.3d 166 (2010).

Second, the parties have focused on the issue whether and to what extent disclosure in advance of the charges being imposed will satisfy RCW 82.04.500. Indeed, Cingular urges in its brief "that businesses can pass the B&O tax to consumers 'so long as the tax is disclosed to the consumer during the course of negotiating a purchase price.'" Appellees' Opening Br. on Certification from the Ninth Circuit Ct. of Appeals at 12 (quoting *NVER Enters., Inc. v. Newmar Corp.*, No. C08-5577 FDB, 2009 U.S. Dist. LEXIS 106759, at 7 (W.D. Wash. Nov. 16, 2009) (unpublished)). But deciding whether the *tax* itself is disclosed or not is certainly not the issue, as the *tax* itself cannot be assessed against the buyer whether disclosed or not. (Moreover, when deciding whether the B&O tax itself is being imposed on or collected from the buyer, disclosure is only one among a myriad of possible evidentiary considerations.)

As should be apparent from the discussion above, I believe it is appropriate to

reformulate the certified question to focus more closely on the meaning and scope of RCW 82.04.500, i.e., whether the B&O tax has been improperly imposed on or collected from the *buyer* rather than having been levied on and collectible from the *seller*, and in this context disclosure of the charge may be a relevant consideration.

The Ninth Circuit Court of Appeals should be advised that RCW 82.04.500 prohibits levying the B&O tax on or collecting the B&O tax from the buyer and instead mandates that the cost of paying the B&O tax is levied on and is collectible for the seller. The seller may set prices to account for the overhead cost of paying the B&O tax. The statute mandates no particular method of determining overhead or how overhead can be made part of the price of items sold. Since the court held in *Nelson* that an item may be priced with the specific cost of B&O tax in mind for that item, there is no bar to pricing a particular item to include the exact cost of the B&O tax payable on that item. Disclosure may be relevant evidence on the question whether the business has properly charged the customer for cost of overhead or has improperly imposed the tax on and collected it from the customer.

With this legal interpretation of the statute, the parties would then need to present all of their relevant evidence in federal court together with their arguments specifically geared to the actual issue under the statute. As noted, at this stage Cingular, at least, seems to misapprehend the legal import of the statute.

Conclusion

I would tell the federal court that the statute's purpose is to assure that the B&O

tax is paid by the business and not the buyer, that the B&O taxes paid by the business are properly its overhead costs, and that all of the facts and circumstances must be considered to determine whether a seller has properly priced its goods and services to include the overhead cost of paying the B&O tax rather than imposing the tax on the buyer. The content and timing of any disclosures about the price may be relevant evidence that should be considered.

So long as the evidence shows that a seller in Cingular's position properly charges its customers for its B&O tax overhead cost and does not impose the B&O tax itself on the customer, it may disclose its intent to do so in advance and charge for the overhead when it bills for the month's services. Alternatively, the seller can include the amount in each month's charges without disclosing in advance its intent to do so, provided again that it properly does so as an overhead cost and does not impose the B&O tax itself on the buyer.

I dissent from the majority opinion.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: