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INCOME TAX

Washington Just Says "NO" to B&O Tax Surcharge

Whether vendors have the right to recover their cost of Washington's Business & Occupation Tax from their customers through a separately itemized surcharge has been the subject of extensive litigation in both state and federal courts over the past few years. Most recently, in a decision based largely on the Washington Supreme Court's reassessment of its own prior decision, the U.S. Ninth Circuit Court of Appeals held that a telecommunications provider had violated Washington law by including on customer bills a surcharge to recover its cost of the tax. This article traces the history of these cases and discusses why the state supreme court's latest pronouncement was not only unexpected in light of its prior decision but incorrect from a policy standpoint. The author also comments on how these decisions may impact taxpayers in other states subject to gross receipts taxes.

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SALES AND USE TAX

In its *TIN, Inc.* Decision, the Louisiana Supreme Court Irons Out the Wrinkles in Local Refund Procedures

Louisiana's tax refund procedures have long been a source of confusion and uncertainty for taxpayers and their advisers; and some local jurisdictions have made various arguments to exploit these provisions to deny refunds to taxpayers. This article examines a recent Louisiana Supreme Court decision that reversed the holdings of the lower courts which had adopted some of these novel positions advanced by a local taxing authority to deny refund claims. In holding for the taxpayer on three key issues, the court has brought much-needed clarity and a rational interpretation to this contentious area of Louisiana tax law.

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PROPERTY TAX

Property Owner's Perseverance Pays Off in Rare Decision by Maryland's High Court On Tax Exemption

This article analyzes a recent decision by the Maryland Court of Appeals concerning a property tax exemption for a religious organization. A long-standing tax exemption for a church's apartment complex was revoked by the local Supervisor of Assessments, which led to five levels of administrative and judicial review before the Court of Appeals finally confirmed the exemption. The case represents a rare foray by the Court into property tax law and a meaningful victory for a property owner willing to persevere.

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In this Issue

One More," there is no need to limit your membership recruiting to only one! Enlist as many people as you can to join our organization of professionals and friends. Make sure that you are included in a prize drawing at next year's Conference by signing-up a new member.

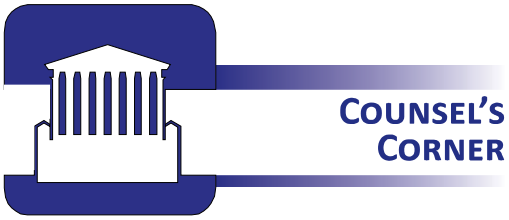
Charles Gilliland, PhD, has agreed to serve as editor of the next edition of IPT's *Property Taxation* which will be published in 2014. If you are interested in writing a chapter or serving on the committee, please contact Charley directly.

I encourage all members to visit IPT's website and look at the qualifications for earning the CMI designation in Income, Property or Sales tax. The CMI designation is highly regarded in the field of taxation and a mark of distinction for all those who hold it. Also, I recommend that you review the slideshow for the CMI orientation/review session for your discipline, because it will answer many of the questions you may have regarding the designation.

The Institute is continuously seeking ways to increase the member benefits and provide more services in a cost-efficient manner. Please drop me a line or give me a call if you have any suggestions.

I look forward to seeing you at the Annual Conference.

Paul A. Wilke, CMI
President



INCOME TAX

Washington Just Says "NO" to B&O Tax Surcharge

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The U.S. Court of Appeals for the Ninth Circuit recently held, in *Riensche v. Cingular Wireless, LLC*,[2] that the members of a class of Cingular Wireless customers were entitled to recover their payments of the Washington Business and Occupation ("B&O") tax that were collected by Cingular as a line item surcharge on the customers' bills. It would be easy to overlook the significance of this brief decision, but it may represent the culmination of a more than seven-year judicial controversy over whether a business can recover or pass on its costs incurred for the Washington B&O tax. In addition, the decision and the often confounding judicial history leading up to it may represent a setback for taxpayers regarding the larger question of whether and how vendors can recover state gross receipts tax costs generally.

Because gross receipts taxes, like the B&O tax, are imposed upon and paid by businesses, vendors are not permitted to collect the tax directly from their customers (like a sales tax). Consequently, businesses seek to recover their costs of a gross receipts tax generally in two principal ways. One way is to increase the sales price of the product or service sold, but in such event the reason for the price increase is likely not evident to the customer and such increase may have adverse competitive consequences (particularly in the area of electronic commerce). Many vendors and service providers who do

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[1] The author acknowledges and thanks Kirsten Wolff, Associate at Morrison & Foerster, LLP, for her contribution to this article.

[2] *Riensche v. Cingular Wireless, LLC*, Nos. 09-35987, 09-36113, 2012 U.S. App. LEXIS 22461 (9th Cir. Wash. Oct. 24, 2012) (finding a right of recovery under the Washington Consumer Protection Act).

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not wish to simply increase the base price of the product (or raise their national rates for services) prefer to recover their tax costs from their customers by adding a separate surcharge for the tax recovery on customer invoices. This allows businesses to inform customers about the existence and degree of a state's gross receipts tax and to recover such tax costs only from customers in states that impose a gross receipts tax. In that respect, the line item surcharge serves to protect customers outside the taxing state from bearing the cost of an exported gross receipts tax through increased national prices, which disproportionately burdens non-taxing state customers without any corresponding benefit.

Public utilities and telecommunications companies – the industry groups most impacted by state gross receipts taxes for many years – have, since the 1980s, included on their monthly billing statements to customers a separate line item charge to recover these gross receipts taxes imposed on their revenues by state or local jurisdictions. Their use of the line item surcharge contributed to the reduced number of states imposing gross receipts taxes, from almost 30 states in the 1980s to only about 10 states by 2004. But since then, several states have either expanded or enacted new gross receipts tax impositions on general businesses, as well as on telecommunications companies and utilities. These included the adoption of such taxes in Ohio,[3] Texas[4] and Kentucky.[5]

By contrast, the Washington B&O tax has been imposed for over 70 years upon the privilege of engaging in almost any business in the state, measured by the gross receipts from the taxed business activities conducted in the state.[6] A provision in the B&O tax law that has long been questioned as a potential barrier to any direct recovery by Washington vendors of the B&O tax from their customers (the "overhead statute") 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.[7]

On its face, the overhead statute says only two things: (1) the B&O tax is imposed upon businesses not customers (and, implicitly, that the tax cannot be imposed upon or collected from the customer); and (2) the B&O tax constitutes part of the business's overhead. The statute does not expressly limit or prohibit a business from recovering the tax as a "cost" of business from the customer, nor does it expressly limit the manner in which the business could recover this cost. Indeed, the Washington Department of Revenue originally construed the overhead statute similarly, by issuing guidance in 2000 (the "Special Notice") stating that it is *not* illegal for a seller to itemize separately the B&O tax cost on a customer invoice, and that while "[t]he statute intends the B&O tax to be a part of the seller's overhead . . . it does not prevent a seller from itemizing and showing the effect of the tax."[8] In effect, the Department determined that it was the seller's choice and a business's decision whether to recover the B&O tax cost from its customers by itemizing it on the customer's bill.

However, in *Nelson v. Appleway Chevrolet, Inc.,* the Washington Court of Appeals refused to defer to the Department's Special Notice and held that an auto dealer's passing-on to and collection from customers of the Washington B&O tax violated the overhead statute.[9] The case involved a situation where the customer and automobile dealer agreed to the price for a vehicle and entered into a written agreement that also listed several other fees and taxes, including a charge for the Washington B&O tax. The court concluded that while the economic burden of a tax is usually passed on to the customer, this does not mean that the legislature cannot design a statute to set forth the manner in which the pass-through must take place. Here, although the statute did not expressly address itemization on customer bills, the court interpreted it to mean that the tax could not be separately passed on to the customer, but that the seller had to consider the tax as an operating expense. Therefore, the court held that the B&O tax could be added to operating overhead but could not be passed on to the customer as a tax.[10]

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3 Ohio Commercial Activity Tax, Ohio Rev. Code Ann. §§ 5751.01 – 5751.99 (2005)

4 Texas Margins Tax, Tex. Tax Code Ann. §§ 171.0001 – 171.501 (2008)

5 Kentucky Multichannel Video Programming and Communications Services Tax ("Gross Revenues Tax"), Ky. Rev. Stat. Ann. §§ 136.600 – 136.660 (2006)

6 Wash. Rev. Code §§ 82.04.010 -82.04.900.

7 Wash. Rev. Code § 82.04.500.

8 Washington State Department of Revenue Special Notice, *What You Need to Know about Itemizing the B&O Tax* (published Sept. 5, 2000, reissued April 2002).

9 *Nelson v. Appleway Chevrolet, Inc.,* 121 P.3d 95 (Wash. Ct. App. 2005).

10 *Id.* at 103.

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On review, the Washington Supreme Court sought to clarify the Court of Appeals' decision by taking a similar but arguably less stringent view of the overhead statute.[11] Although the Court affirmed the Court of Appeals holding that the B&O tax add-on was improper, the Court held that the auto dealer's collection of the B&O tax from customers violated the overhead statute because the charge for the tax was disclosed after the final price had been set.[12] In doing so, the Court appeared to sanction a vendor's recovery of the B&O tax from customers so long as the vendor disclosed and itemized the tax prior to, rather than after the purchase price had been set. For example, the Court stated:

> [t]he Court of Appeals did not prohibit disclosure. Rather it said: "Quite simply, the seller can disclose the B&O overhead charge to the purchaser, but it must be done while setting the final purchase price. The process here involved the negotiation of a price; hence, the information should have been disclosed as part of that process." *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 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.[13]

Later in the decision, where the Court addressed the auto dealer's claim that its First Amendment rights were violated by its inability to disclose or itemize the tax to its customers, the Court rejected the argument and repeated that "Appleway is free to disclose and itemize any tax or cost. Appleway was free to inform Nelson that $ 79.23 of his final purchase price would be used to pay for the B&O tax."[14] The court then concluded: "RCW 82.04.500 [the overhead statute] says nothing about disclosure. Appleway 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."[15]

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[11] *Nelson v. Appleway Chevrolet, Inc.,* 157 P.3d 847 (Wash. 2007).

[12] *Id.* at 850.

[13] *Id.* at 851 (emphasis added) (citation omitted).

[14] *Id.* at 852.

[15] *Id.* at 853. This First Amendment issue took much greater prominence in another series of cases outside of Washington. At or about the same time of *Nelson*, litigation in federal courts challenged whether Kentucky could prevent vendors from recovering their costs of Kentucky's Gross Revenues Tax through line item surcharges because of a statutory provision prohibiting "separately stat[ing] the tax on the bill to the purchaser." Ky. Rev. Stat. Ann. § 136.616(3). In *AT&T Corp. v. Rudolph*, Civil Action No. 06-16, 2007 U.S. Dist. LEXIS 13962 (E.D. Ky. Feb. 27, 2007) ("AT&T"), the United States District Court, Eastern District of Kentucky, addressed a challenge by AT&T, Verizon, and BellSouth to restrain the Kentucky Department of Revenue from enforcing the above provision. See also *BellSouth Telecomm., Inc. v. Farri*s, Civil Action No, 3:06-39, 2007 U.S. Dist. LEXIS 13993 (E.D. Ky. Feb. 27, 2007). Among other arguments, the plaintiffs in *AT&T* maintained that the Kentucky provision violated the free speech protections set forth in the First and Fourteenth Amendments because it prohibited the carriers from placing a written line item on the customer's bill that would notify customers of the origin and amount of the charge to recover the gross receipts tax, and from otherwise communicating with their customers on their billing statements about the gross revenues tax. Both the *AT&T* federal district court, and, on appeal, the Sixth Circuit Court of Appeals in *BellSouth Telecommunications, Inc. v. Farri*s, 542 F.3d 499 (6th Cir. Ky. 2008) (*"BellSouth"*), agreed, holding that the Kentucky provision violated the First Amendment right to free speech by illegally restricting or regulating speech. Both courts recognized the state's legitimate interest in not misleading customers about their liability for the Gross Revenues Tax, but concluded that tax surcharges constituted protective free speech and were not inherently misleading. The courts found that the statute did not directly advance the State's interest in preventing the confusion or misleading of consumers as to which party is responsible for paying the tax and that the statute prohibited substantially more speech than necessary to prevent consumers from being misled by tax line items. The Court of Appeals stressed that before a government may resort to suppressing speech to address a policy problem, it must show that regulating conduct has not sufficed or that as a matter of common sense it could not suffice – in short, that regulating speech must be a last – not first – resort. For a more complete discussion of these cases, see James Kratochvill, *Limiting a Taxpayer's Right to Recover Tax Costs Through Line Item Surcharges*, 50 State Tax Notes 227 (Oct. 27, 2008). While the *BellSouth* decision would appear to prevent states generally from prohibiting recovery of a gross receipts tax cost through use of a line item surcharge, it does not resolve the issue of whether states can legally limit how or when taxpayers recover their tax costs through the use of these line item surcharges. To the contrary, the *BellSouth* decision suggests strongly that states have a legitimate interest in not misleading customers about their liability for gross receipts taxes imposed upon businesses, and can enact less stringent measures that only protect consumers from misleading information, or limit the use of line item surcharges in ways that do not run afoul of the United States Constitution. Accordingly, because the Washington statute, unlike the Kentucky statute, did not prohibit but only limited disclosure and itemization of a tax recovery cost, the *Nelson* decision did not appear to be inconsistent with the federal court decision in *BellSouth* on its face.

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As to the Special Notice from the Department of Revenue, the court found it both ambiguous and unclear. But the ambiguity in the Special Notice identified by the court regarded when, not whether, businesses could itemize and pass on the tax. For example, the court found it uncertain whether the notice could be interpreted to allow businesses to pass the tax on to its customers after a final price has been set or rather that companies could inform customers that part of the final price included the B&O tax. The court explained further that an agency interpretation that conflicts with a statute is given no deference, and concluded that if the April 2002 notice did say businesses could pass through the tax after a final price has been set, then it is wrong and conflicted with the plain language of the overhead statute.[16]

The next time the Washington Court of Appeals addressed the issue of the B&O tax recovery, in *Johnson v. Camp Automotive, Inc.* ("*Johnson*"), it applied the *Nelson* decision to allow another car dealer to pass on its B&O tax cost to a customer.[17] However, this auto dealer, Johnson, negotiated with prospective buyers using a "writeback" document to determine the final price, which writeback listed a B&O tax amount and stated clearly that the tax amount had been "negotiated." Because the court viewed *Nelson* as allowing itemization of the tax if part of the final price, the court found the facts addressed in *Nelson* were distinguishable because Johnson disclosed the B&O charge *during*, not *after,* negotiations, and thus, concluded that Johnson did not violate the overhead statute.[18]

Now we're full circle back to the *Riensche* case. The issue addressed by the Ninth Circuit Court of Appeals had actually resulted from two separate but similar class action suits against Cingular Wireless that challenged its inclusion of a B&O tax surcharge as a line item on monthly service bills. Both classes alleged breach of contract, unjust enrichment, and violation of Washington's Consumer Protection Act, as well as violation of the overhead statute. In each case, relying on the *Nelson* and *Johnson* decisions, a federal district court granted Cingular summary judgment.

Cingular appeared to be on solid ground factually in that it had disclosed its B&O tax recovery cost prior to, not after, setting the price of the service to its prospective customers. As part of the purchase process, Cingular utilized a one-page Wireless Service Agreement for each service plan, which included a statement that Cingular also imposed, among other charges, a gross receipts tax surcharge. The Agreement also incorporated the Terms of Service, which were outlined in a separate brochure, which reiterated that, in addition to the rate plan, Cingular's charges would include applicable taxes and governmental fees, whether assessed directly upon the customer or upon Cingular. Information about gross receipts surcharges was also on the Cingular website. Further, Cingular listed the cost as a B&O *surcharge* not as a tax on customer service bills.

On the basis of these facts, the U.S. District Court for the Western District of Washington first granted Cingular's motion for summary judgment in *Riensche v. Cingular Wireless LLC.*[19] The court relied on the state court decision in *Johnson* and determined likewise that "the B&O surcharge was disclosed during the negotiation process, and it was treated as part of the base amount charged to customers, rather than as a tax added to the final price."[20] "*Johnson* supports the conclusion that Cingular Wireless's past billing practice did not violate RCW 82.04.500, and such ruling is also consistent with *Nelson*, which prohibits only the appending of a previously undisclosed B&O surcharge to the final price."[21] In addition, the district court found Cingular was not required to disclose the computation of the tax or predict the amount of the surcharge.[22] Later, the court similarly granted summary judgment to Cingular in *Bowden v. AT&T Mobility*, *LLC.* [*dba* Cingular Wireless, LLC], relying on its previous *Riensche* decision to hold that Cingular's billing practice did not violate the overhead statute.[23]

With both the *Riensche* and *Bowden* cases pending before it on appeal, the Ninth Circuit Court of Appeals initially was uncomfortable with what it considered an important, *undecided* question of Washington law, namely how the Supreme Court of Washington would apply its precedent in *Nelson* and the Court of Appeals' precedent in *Johnson*.[24] The court saw substantial factual

16 *Id.* at 852.

17 *Johnson v. Camp Auto., Inc.,* 199 P.3d 491(Wash. Ct. App. 2009).

18 *Id.* at 493.

19 *Riensche v. Cingular Wireless LLC,* No. C06-1325Z, 2009 U.S. Dist. LEXIS 95802 (W.D. Wash. Oct. 2, 2009); *rev. in part and rem.* by *Riensche v. Cingular Wireless, LLC*, Nos. 09-35987, 09-36113, 2012 U.S. App. LEXIS 22461(9th Cir. Wash. Oct. 24, 2012).

20 *Id.* at *20.

21 *Id.*

22 *Id.* at n.6.

23 *Bowden v. AT&T Mobility*, *LLC.* [*dba* Cingular Wireless, LLC], No. C09-106Z, 2009 U.S. Dist. LEXIS 116787 (W.D. Wash. Dec. 15, 2009); *question certified* by *Peck v. AT&T Mobility*, 632 F.3d 1123 (9th Cir. Wash. 2011); *question answered* by *Peck v. AT&T Mobility*, 275 P.3d 304 (Wash. 2012).

24 *Peck v. AT&T Mobility*, 632 F.3d 1123 (9th Cir. Wash. 2011).

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differences between the present case and Washington case law. For example, while Cingular disclosed that it would charge and collect a surcharge for gross receipts taxes before Bowden purchased his phone service plan, unlike either *Johnson* or *Nelson*, Cingular did not disclose the actual amount of the surcharge, which would vary depending on the service plan and the monthly usage. Accordingly, the court framed and certified the following question to the Washington Supreme Court:

> 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?[25]

This time the Supreme Court answered "no," surprisingly, given the reliance by many taxpayers and both state and federal courts on *Nelson* for the opposite proposition.[26] The Supreme Court held that the overhead statute prevents a business from recovering B&O tax costs as an added charge to the sales price regardless of prior disclosure; and permits only a B&O tax pass-through as overhead included in the sales price. Revisiting its repeated express language in the *Nelson* decision that a taxpayer could legally disclose and identify the B&O tax charge so long as it was during not after negations to the agreed purchase price, the court took the position that the language had to be read "in context."[27] In what appears to this author to be a revisionist interpretation of its prior *Nelson* decision, the court claimed that neither disclosure nor timing of disclosure was central to the court's holding in that decision and that vendors were free to at any time disclose the tax as included in overhead, or not disclose it, to the customer.

> When read in context, that portion of our *Nelson* decision shows disclosure was not central to our holding, but rather shows we were addressing the seller's claims about disclosure [and its misconstruction of the Court of Appeals decision] . . . The above selection is found at this point in the paragraph. Explaining what the Court of Appeals meant, we clarified that it was lawful for the seller to disclose the B&O charge during negotiations, meaning that the price being negotiated included a B&O charge; it was also lawful for the seller to identify, after negotiations, that the purchase price included a B&O charge as an overhead cost. However, we explained the seller could not add the B&O charge on the agreed-to purchase price. Put simply, whether disclosed or not, the seller could properly pass the B&O tax through as an overhead line itemization, but not as an added charge.[28]

Referring back to its First Amendment discussion in *Nelson*, the court stated that "we explained that a business is free to disclose to its customer that the sales price *included* the B&O tax, whether it was during the course of or even after negotiations."[29]

According to the court, the crux of *Nelson* is that under the overhead statute, a business cannot add on the B&O tax to the sales price. It rationalized in dictum that allowing the tax to be added on to a sales price would equate the B&O tax with the distinctly different sales tax, which is imposed on a purchaser but collected from the seller. Though recognizing Cingular's charge was labeled a "surcharge" not a "tax," it stated that if businesses were allowed to add the tax onto a sales price, "consumers would effectively be taxed twice, making the B&O levy on businesses illusory and rendering RCW 82.04.500 meaningless."[30] The court also presented its view of the lawful treatment of overhead costs.

> Moreover, RCW 82.04.500 provides that persons engaging in business must treat the tax as operating overhead costs . . . These are costs that businesses factor into or include in its sales price; it would be odd for a business, and likely not a wise business practice, to add on separate charges for each of those operating costs. Likewise, under RCW 82.04.500, the B&O tax is to be treated no differently. This is precisely why the tax must be factored in as overhead when a business is establishing its sales price and determining its profit margin. Although in

25 *Id.* at 1126.

26 *Peck v. AT&T Mobility*, 275 P.3d 304, 308 (Wash. 2012).

27 *Id.* at 307.

28 *Id.* (citation omitted).

29 *Id.*

30 *Id.*

(Continued on page 9)

> the end businesses may charge the entire B&O tax amount to its customers as overhead, at least it will be reflected in a sales price that consumers can compare against competitors.[31]

Based on the Washington Supreme Court's guidance, the Ninth Circuit Court of Appeals held in *Riensche v. Cingular Wireless*, *LLC* that members of a consumer class were entitled to recover their payment of Cingular's B&O tax surcharge under the Washington Consumer Protection Act.[32] The court found that the presence of the line item surcharge on customer bills had the capacity to deceive the public into believing that surcharge was legally permissible or even mandated by the government.[33]

Is this the last word on the legality of the B&O tax recovery issue in Washington? Probably. While the argument might be made that the *Cingular* decision (or the Washington Supreme Court's decision in *Peck v. AT&T Mobility*) comes close to conflicting with the *BellSouth* decision (discussed *supra* at footnote 14), the differences in the respective Washington and Kentucky statutes regarding disclosure are likely enough to distinguish them. What disappoints this author is that the Washington Supreme Court's apparent rethinking of its *Nelson* decision was unexpected, and arguably unwarranted. In addition, the Ninth Circuit's portrayal of the line item surcharge as a deceptive business practice in Washington constitutes a setback to --- and could potentially undermine the progress elsewhere (including the *BellSouth* decision) over the last few years in --- the effort to sanction and legitimize the proper use of the line item gross receipts tax surcharge.

Factually, Cingular appeared to take the necessary steps to satisfactorily disclose and identify the tax surcharge as part of and prior to establishing the final price for its service, and thus seemingly met the requirements of both *Nelson* and *Johnson*. In fact, prior to the Washington Supreme Court's revisit of its *Nelson* decision, neither the federal district court nor the Ninth Circuit Court of Appeals found any deception in Cingular's surcharge practice. Moreover, rather than being deceptive, the surcharge generally has served to bring to customers' attention and inform them about the existence and degree of a state's gross receipts tax and protect customers outside the taxing state from bearing the cost of an exported gross receipts tax.[34] While these attributes may no longer have any relevance in Washington, vendors who wish to preserve their right to apply such surcharges should be concerned that the results from the *Cingular* decision may not be confined to Washington, but could give other states added impetus to similarly view or change their statutes to restrict or prevent gross receipts tax surcharges in a similar manner.[35]

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[31] *Id.* at 308. A strong dissenting opinion claimed that the majority had lost sight of what the overhead statute is about and what it is not. *Id.* In particular, the dissent chastised the majority for its overhead costs analysis, saying that their observations went well beyond what the statute requires and that the court should not try to dictate how a business may determine or recover its overhead costs. *Id.* at 311.

[32] *Riensche v. Cingular Wireless*, *LLC.,* Nos. 09-35987, 09-36113, 2012 U.S. App. LEXIS 22461, *5 (9th Cir. Wash. Oct. 24, 2012).

[33] *Id.* at *6. In this respect, however, the court appears to be at odds with the finding by the Sixth Circuit Court of Appeals in *BellSouth* that line item surcharges are not inherently misleading. See *supra,* note 14.

[34] One of the most significant deficiencies of the gross receipt tax is that it is a "stealth" tax with its true burden hidden from taxpayers. John Mikesell, *Gross Receipts Taxes in State Government Finances: A Review of Their History and Performance*, Council on State Taxation (Jan. 2007); Laura Wheeler & Edward Sennoga, *Alternative State Business Tax Systems: A Comparison of State Income and Gross Receipts Taxes*, 45 State Tax Notes 487 (Aug. 20, 2007).

[35] For example, the Ohio Commercial Activities Tax includes a provision similar to Wash. Rev. Code § 84.02.500. Ohio Revised Code Section 5751.02 (B) provides:
"The tax imposed by this section is a tax on the taxpayer and, except as otherwise provided in this section, shall not be billed or invoiced to another person . . . Nothing in division (B) of this section prohibits: (1) A person from including in the price charged for a good or service an amount sufficient to recover the tax imposed by this section . . . ."