Cite as Det. No. 06-0015E, 26 WTD 148 (2007)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Tax Ruling and Tax Assessment of	)	FINAL EXECUTIVE LEVEL DETERMINATION
	)	No. 06-0015E
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .
	)	Docket No. . . .

[1] RULE 245; RCW 82.14B.030: E-911 EXCISE TAX – IMPOSITION – WIRELESS SERVICES – PREPAID. A prepaid wireless service provider was held responsible for remitting to the state enhanced 911 excise taxes for subscriber usage of radio access lines where the place of primary use was within Washington.

[2[RULE 245; RCW 82.14B.020: STATUTORY INTERPRETATION – EXEMPTIONS – INCORPORATED BY REFERENCE. When the Washington State Legislature incorporated by reference a definition for "place of primary use" contained in the federal Mobile Telecommunications Sourcing Act, it only incorporated that specific definition for "place of primary use." It did not incorporate any of the related exemptions also contained in that Act.

[3] MISC: FEDERAL PRE-EMPTION – FEDERAL COMMUNICATIONS ACT OF 1934. Where a wireless telecommunications service provider had already successfully entered the market place in Washington and Washington applied its E-911 tax in a competitively neutral and nondiscriminatory manner, the E-911 tax imposed by RCW 82.14B.030 was not pre-empted by federal law.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Jeffrey B. Mahan, Director's Designee

Okimoto, A.L.J. – A prepaid wireless[1] telecommunications service provider appeals a Department of Revenue (DOR) Taxpayer Information and Education (TI&E) ruling and subsequent Taxpayer Account Administration (TAA) tax assessment requiring that it collect and pay enhanced 911 (E-911) taxes on prepaid wireless telephone services. We sustain TI&E's ruling that Taxpayer must pay the E-911 tax and the subsequent tax assessment.[2]

ISSUES

1) Did the Washington State Legislature subject prepaid wireless telephone services to the E-911 tax under RCW 82.14B?

2) By referring to the definition of "Place of Primary Use" in the federal Mobile Telecommunications Sourcing Act, P.L. 106-252, did the Washington State Legislature also incorporate by reference the exemptions contained in the Act?

3) Does the Communications Act of 1934, as amended by the Telecommunications Act of 1996, federally preempt the imposition of the E-911 tax on Taxpayer's sales?

FINDINGS OF FACT

[Taxpayer] is [an out-of-state] corporation that markets and sells wireless telephones and prepaid wireless telephone services throughout the United States, including the state of Washington. Taxpayer provides an off-the-shelf, pay-as-you-go, prepaid wireless service with no contracts, credit reports, monthly fees, activation fees, security deposits or age restrictions. Taxpayer allows consumers to purchase airtime minutes before they use them, rather than the traditional approach of being retroactively billed for the amount of services used.

Taxpayer's subscribers include low volume users, who, for a variety of reasons, want to avoid long term service commitments as required by most traditional wireless carriers, consumers who want to control their costs by paying for specified quantities of service in advance, and low income users who cannot otherwise meet the stringent credit requirements or security deposit requirements of traditional wireless carriers. Rather than being billed for services already used, Taxpayer's subscribers purchase prepaid cards . . . . Since all of Taxpayer's wireless services are prepaid, Taxpayer does not send monthly billing statements to subscribers.

[1] Even though there are differences in meaning of the terms wireless, mobile, and cellular, for our purposes they are substantially the same, and we have used the terms interchangeably.

[2] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

In order to utilize Taxpayer's wireless telephone service, a subscriber must first purchase one of Taxpayer's wireless phones. . . . Once the phone is purchased, the subscriber must then purchase time or minutes to actually utilize Taxpayer's service. . . . .

Taxpayer also does not own or operate any wireless network facilities. Instead, Taxpayer provides its prepaid wireless services by reselling services which it obtains from . . . licensed wireless network operators across the United States.

On April 23, 2004, Taxpayer requested a letter ruling from TI&E as to whether its prepaid wireless telephone services were subject to Washington's E-911 excise tax. TI&E ruled that Taxpayer's prepaid wireless telephone services were subject to the E-911 tax and Taxpayer appealed that ruling to DOR's Appeals Division. Subsequent to that ruling, the Department's Taxpayer Account Administration Division issued a tax assessment against Taxpayer for underreported E-911 taxes, interest and penalties covering the period November 1, 2003[3] through December 31, 2004 in the amount of $. . . . Taxpayer has asked that its appeal of the audit assessment be combined with our review of TI&E's letter ruling on the same subject. Pursuant to Taxpayer's request, we have consolidated Taxpayer's appeal of the TI&E letter ruling and TAA's audit assessment. . . .

ANALYSIS

[1] RCW 82.14B.030(4)[4] imposes an enhanced 911 excise tax. It states:

> A state enhanced 911 excise tax is imposed on all radio access lines whose **place of primary use** is located within the state in an amount of twenty cents per month for each radio access line. The tax shall be uniform for each radio access line. The tax imposed under this section shall be remitted to the department of revenue by radio communications service companies, including those companies that resell radio access lines, on a tax return provided by the department. Tax proceeds shall be deposited by the treasurer in the enhanced 911 account created in RCW 38.52.540. The tax imposed under this section is not subject to the state sales and use tax or any local tax.

(Underling and bolding added.) The term "place of primary use" is defined as having "the meaning subscribed to it in the federal mobile telecommunications sourcing act, P.L. 106-252." RCW 82.14B.020(9). Under the federal telecommunications sourcing act:

> The term 'place of primary use' means the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which must be –
>
> (A) the residential street address or the primary business street address of the customer; and

[3] The audit period begins on November 1, 2003 because Taxpayer had been reporting E-911 taxes prior to that date.
[4] RCW 82.14B.030(2) authorizes counties to impose a similar E-911 tax on the use of radio access lines whose place of primary use is located within the county.

(B) within the licensed service area of the home service provider.

4 U.S.C. § 124 (8). The same definition for "place of primary use" was adopted by the Washington legislature in 2002 for B&O tax purposes and codified as RCW 82.04.065(13).

The tax imposed by RCW 82.14B.030(4) is collected from subscribers, whose charges are to be identified on billing statements sent to subscribers:[5]

> The state enhanced 911 tax and the county enhanced 911 tax on switched access lines shall be collected from the subscriber by the local exchange company providing the switched access line. The state enhanced 911 tax and the county 911 tax on radio access lines shall be collected from the subscriber by the radio communications service company providing the radio access line to the subscriber. The amount of the tax shall be stated separately on the billing statement which is sent to the subscriber.

RCW 82.14B.040.

The interpretation of both the sourcing and billing provisions are at issue in this case. Over the years, Washington courts have developed several broad rules for interpreting statutes.

> The goal when construing statutory language is to carry out the intent of the Legislature. *Seven Gables Corp. v. MGM/UA Entertainment Co.,* 106 Wash.2d 1, 6, 721 P.2d 1 (1986). When determining intent, this court must interpret the language at issue in the context of the entire statute. *In re Sehome Park Care Ctr., Inc.,* 127 Wash.2d 774, 778, 903 P.2d 443 (1995). Words that are not statutorily defined must, whenever possible, be given their ordinary and usual meaning. *Palmer v. Department of Revenue,* 82 Wash.App. 367, 372, 917 P.2d 1120 (1996). "Strained, unlikely or unrealistic" statutory interpretations are to be avoided. *Bour v. Johnson,* 122 Wash.2d 829, 835, 864 P.2d 380 (1993).
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> An ambiguity arises when a term is fairly susceptible to two or more reasonable interpretations. *Schelinski v. Midwest Mut. Ins. Co.,* 71 Wash.App. 783, 787, 863 P.2d 564 (1993). Generally, this court strictly interprets ambiguities in statutes imposing taxes in favor of the taxpayer. The opposite analysis, however, applies to tax exemption statutes. Thus, a tax exemption statute that creates "doubt or ambiguity" must "be construed strictly, though fairly and in keeping with the ordinary meaning of [its] language, against the taxpayer." *Group Health Coop. of Puget Sound, Inc. v. Washington State Tax Comm'n,* 72 Wash.2d 422, 429, 433 P.2d 201 (1967).
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> When statutory language is ambiguous, this court grants deference to the agency's interpretation, provided the law being interpreted is within the agency's expertise. *Waste*

[5] RCW 82.14B.042(1) further provides that the tax imposed must be paid by the subscriber to the radio communications service company providing the radio access line.

> *Mgt. of Seattle, Inc. v. Utilities & Transp. Comm'n,* 123 Wash.2d 621, 627-28, 869 P.2d 1034 (1994). The taxpayer bears the burden of establishing an exemption. *Deaconess Med. Ctr. v. Department of Revenue,* 58 Wash.App. 783, 788, 795 P.2d 146 (1990).

Sacred Heart Medical Center v. Department of Rev., 88 Wn. App. 632, 946 P.2d 409 (1997).

[2] Taxpayer first argues that by incorporating by reference a definition for "place of primary use" contained in the federal Mobile Telecommunications Sourcing Act, the legislature has also incorporated all related exemptions contained in the act.[6] Taxpayer argues that because 4 U.S.C. 116 (c)(1) specifically excludes prepaid wireless from the Act's application, mobile prepaid wireless services are similarly excluded from Washington's E-911 tax. We disagree. In a statute of specific reference only the appropriate parts of the statute referred to are considered. 2B *Sutherland Stat. Const*., §51.08 (5th ed. 1992), *State ex. rel. Ostrowski v. Haguewood,* 56 Wn. App. 37, 782 P.2d 213 (1989).

Consequently, we conclude that the applicable portion of P.L. 106-252 that the legislature meant to incorporate into Washington law was the specific definition of "place of primary use." We further conclude that even though the federal Mobile Telecommunications Sourcing Act excluded mobile prepaid services from its application, that exclusion was not incorporated into Washington's E-911 act via RCW 82.14B.020.

Next, Taxpayer points to RCW 82.14B.040, which requires the E-911 tax to be "stated separately on the billing statement which is sent to the subscriber."[7] Taxpayer reasons that because it does not bill or otherwise invoice the subscriber for services (since they are prepaid), then the legislature could not have intended for the tax to apply to Taxpayer. Taxpayer also points out that it can not effectively pass the cost of the E-911 tax to subscribers because it often does not have their addresses and is unable to determine how long a subscriber will utilize its radio access line. Some subscribers may use up their one-year card in six months, whereas others may take the full year.

Although, we are sympathetic to Taxpayer's plight, we cannot agree that Taxpayer's prepaid wireless services are not subject to the E-911 tax. Taxpayer relies on the plain-meaning rule of statutory construction. We believe its reliance is misplaced. RCW 82.14B.030(4) imposes the E-911 tax upon "all radio access lines whose place of primary use is located within the state."

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[6] TI&E also rejected this argument stating: "By incorporating the MTSA's definition of "place of primary use," Washington did not adopt other specific exemptions of the federal law. If Washington had desired to exclude prepaid cellular phone calls from the E-911 tax, the legislature would have enacted a specific statutory exclusion. As it is, absent such an exemption, prepaid cellular services fall within the specific definition of 'radio access line' as noted in RCW 82.14B.020(5). Therefore, all mobile telephone service, including prepaid service, that has a place of primary use in Washington is subject to this state's E-911 taxes."

[7] TI&E responded to this argument by stating "The fact that [the Taxpayer] does not send out billing statements does not exempt it, as a radio telecommunications service provider, from the statutorily-mandated obligation to collect E-911 taxes. Nothing prevents [the Taxpayer] from complying with the statutory obligation by notifying its subscribers that E-911 taxes will be due."

Taxpayer has not disputed that its subscribers utilize radio access lines, thus the first element for imposing the tax is satisfied. Furthermore, Taxpayer has presented no evidence that its subscriber's place of primary use is not within the state of Washington. Thus, the second element is also satisfied. These two elements are the only requirements for imposing the tax under the statute. Consequently, we conclude that the plain meaning of RCW 82.14B.030(4) indicates that the E-911 tax applies to Taxpayer's prepaid wireless services.

Next, Taxpayer contends that DOR is converting a tax imposed on a subscriber into a tax imposed on the service provider. We disagree. RCW 82.14B.040 describes how the E-911 tax is to be collected from the subscriber and remitted to the state. RCW 82.14B.040 specifically directs Taxpayer, as a radio communications service company, to collect the E-911 tax from its subscriber and to separately state the amount of tax on a billing statement. The fact that Taxpayer's current business practices do not include billing subscribers for services or the E-911 tax, does not relieve Taxpayer from its responsibility to collect and pay the E-911 tax. To rule otherwise would be to allow a radio communications service company to frustrate the imposition of the E-911 tax by simply failing to bill for the E-911 tax. The cardinal rule of statutory interpretation is to give effect to the intent of the legislature in enacting the statute. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wash.2d 1, 6, 721 P.2d 1 (1986). In this case, the legislature's intent, as reflected by RCW 82.14B.030, was that the E-911 tax should be imposed on "all radio access lines whose place of primary use is located within the state." Furthermore, the plain meaning of RCW 82.14B.040 clearly states that the radio communications service company shall collect the E-911 tax from the subscriber. Although we recognize that the current E-911 collection process imposed by the legislature is not compatible with Taxpayer's business practices, we are without authority to relieve a radio communications service company of its collection responsibilities for those reasons. That remedy is within the discretion of the legislature.

Nor do we believe Taxpayer's references to language contained in other states' E-911 statutes support its case. To the contrary, we note that many states employ similar language to that used in Washington.[8] For example, the state of Kansas has language similar to Washington's in its E-911 imposing statute. K.S.A. 12-5324 provides:

> [There] is hereby established a wireless enhanced 911 grant fee in the amount of $.25 per month per wireless subscriber account with primary place of use in the state of Kansas.

K.S.A. 12-5322 (m) also has a similar definition for its "Primary place of use." It provides:

> "Primary place of use" has the meaning provided in the mobile telecommunications act (4 U.S.C. 116, *et seq*., as in effect on the effective date of this act)."

[8] *See also* F.S.A § 365.172(8); T.C.A. § 7-86-108(a)(1)(B). *But see* Va.Code Ann. § 56-484.17(B); I.C.A. § 34A.7A.(1)(c); R.C. § 4931.61 (all contain specific language imposing the E-911 fee on prepaid wireless charges); and H.R.S. § 138-4(b)(2), which exempts prepaid services from the tax.

Although it is true that the Kansas legislature has enacted a special procedure to allow prepaid wireless telecommunications service providers to remit the E-911 fee differently from billed services, that statutory language is contained in another section. *See* K.S.A. 12-5331(g). Our point is simply that the statutory language imposing Kansas' E-911 fee is similar to the statutory language imposing Washington's E-911 tax. Both impose the tax/fee on a radio access line (Washington) or subscriber account (Kansas) with a place of primary use within the state. We note that if the Washington legislature wishes to enact a similar special reporting procedure for prepaid wireless service providers, as other states have done, it may do so.[9] However, the failure to do so does not negate the fact that the Washington legislature has already imposed the E-911 tax on prepaid wireless service providers.

Next, Taxpayer has cited two recent state administrative rulings in support of its position. We find both cases distinguishable. The first was a ruling issued on November 22, 2005 by the Nebraska Public Service Commission, Application No. 911-013 PI-96, on whether Nebraska's E-911 surcharge applied to prepaid wireless carriers. After considering the language of the statute, the commission concluded that the imposing statute, Neb. Rev. Stat. § 86-457, did not apply to prepaid wireless services as it is currently written. Neb. Rev. Stat. § 86-457 provides:

> Each wireless carrier who has a subscriber with a billing address in Nebraska shall collect a surcharge of not more that fifty cents per month per access line. The wireless carrier shall add the surcharge to each subscriber's billing statement. The wireless carrier is not liable for any surcharge not paid by a subscriber and is not obligated to take legal action to collect the surcharge.

Nebraska's imposing statute is significantly different from Washington's since it only applies to subscribers with a "billing address" in Nebraska. Since prepaid wireless services are prepaid, there is no billing and no billing address in Nebraska. In contrast, Washington's E-911 tax applies to "all radio access lines whose place of primary use is located within the state." There is no requirement of a billing address in Washington for imposition of the tax.

Taxpayer also relies on a Florida Attorney General's Opinion issued on December 12, 2005 (AGO 2005-66). In 2003, the Florida legislature had enacted legislation that specifically implemented a new procedure whereby prepaid wireless services could collect and remit the E-911 tax on their services. In finding that the E-911 fee did not apply to prepaid wireless services prior to the 2003 statutory changes, the AGO stated:

> In light of the legislative determination that this substantive grant of power was necessary to allow the collection of these fees and the limitations on the exercise of substantive power by administrative agencies, I cannot say that a prepaid provider was required to

[9] We note that the Washington legislature enacted special sourcing rules for prepaid telecommunication services in 2003 as part of its implementation of the Streamlined Sales and Use Tax Agreements. RCW 82.32.520. However, RCW 82.14B.030 was not amended to incorporate those changes for the E- 911 tax.

> collect and remit the wireless E911 fee prescribed by section 365.172(8), Florida Statutes, prior to the effective date of the statute, July 1, 2003.

In Taxpayer's case, the Washington legislature has not made a legislative determination that a substantive grant of power is necessary to allow the collection of these fees from prepaid wireless service providers. Therefore, the Florida AGO is inapplicable.

Because the sourcing and payment provisions do not specifically address problems related to its application to prepaid wireless services, Chapter RCW 82.14B when read as a whole is arguably ambiguous.[10] Assuming for purposes of argument that the statutory language is ambiguous, we may look to legislative history to determine the intended meaning of the statute. *See, e.g., Odessa Trading Co. v. Federal Crop Ins. Corp.*, 6 Wn. App. 423, 493 P.2d 809 (1972).

The legislative history of 911 taxes shows the intent to broaden the base over time. In 1981 the Washington State Legislature first adopted a basic "911" emergency response system. The original bill allowed counties to assess a tax on each switched telephone access line to fund an emergency services communication system. The tax was collected by local exchange companies from subscribers and paid to counties to administer the program. The basic "911" system allows a person to contact emergency assistance by dialing "911" but the caller must identify his or her location to the 911 system operator. With advances in technology, the basic system evolved into an enhanced 911 system[11] for those counties with sufficient funding. This resulted in an uneven patchwork of programs, with the most populated counties having E-911 services, some counties having only basic 911 services, and some rural counties having no 911 emergency services at all. Believing that access to E-911 services was important to all residents, the legislature passed a referendum[12] in 1991 that made county E-911 taxes mandatory and imposed an additional state E-911 tax on each switched telephone access line in the state. RCW 82.14B.030. The bill also required that E-911 services be implemented statewide by 1998.

In November of 1993 the DOR completed a report to the legislature entitled *Taxation of Cellular Communications in Washington State*, Department of Rev. (1993). The report confirmed that the existing basic 911 and E-911 emergency systems were mainly funded by the state and county 911 taxes imposed on local exchange telephone customers and listed as a separate line item on monthly bills. In the report DOR made several key findings. First, it noted that customers of wireless telephone services did not pay the 911 tax, even though they had access to 911 services. It also found that the volume of wireless calls to the 911 systems had increased tenfold from 1989 to 1993, thereby increasing the workloads for 911 call receivers. It further found that the workload for a wireless 911 call could be greater than the workload for a wireline call because the phone number of the wireless caller was not automatically identified and because the 911

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[10] *See* Recommended Decision of the Public Service Commission of West Virginia, dated May 4, 2005 Case No. 04-1285-C-GI stating that the imposing E-911 statutory language was vague and unenforceable against prepaid wireless providers. *But see* Attorney General Opinion 2002-295, 07/26/2002 (Alabama).

[11] With an enhanced 911 system the caller's phone number and location are automatically displayed at the public safety answering point.

[12] The referendum was subsequently adopted and ratified by the people at the November 5, 1991 general election.

operator needed to question the caller to determine the caller's location. The report further found that wireless companies provided free air time for 911 calls to their customers. As a result of these findings, DOR made several recommendations, including: that DOR conduct further study in the area of long term funding of E-911 services and that the cellular industry pay 25 cents per customer per month to the counties to help fund 911 services on an interim basis. During the following 1994 legislative session, the legislature acknowledged and implemented the findings and recommendations of the DOR report by passing HB 2601, which authorized counties to impose an E-911 tax up to 25 cents per customer per month on the "use of radio access lines located within the county."

In 1998, the legislature examined another DOR study on long-term funding of E-911 services. The study noted that the existing funding of E-911 services was provided through county and state excise taxes. At that time all counties levied an excise tax on each switched telephone access line up to a maximum rate of 50 cents. Counties were also authorized to levy an excise tax of 25 cents per month on each radio access line. Although the state levied a maximum tax of 20 cents per switched telephone access line, there was no state tax on radio access lines. The 1998 Legislature adopted several of the recommendations by passing Substitute House Bill 1126, but it did not impose a state tax on radio access lines.

The legislature next addressed long-term funding of E-911 services in 2002. At that time, it passed House Bill 2595 that re-designated the county 25 cent per month tax on each radio access line to be an E-911 tax and increased it to 50 cents. In addition, it reduced the county tax base to cover only wireless lines whose place of primary use was within the county instead of any "use of radio access lines located within the county." At the same time, the legislature also imposed a new state E-911 tax of 20 cents per month on each radio access line whose place of primary use was within the state.

While addressing the long-term funding requirements of E-911 services, the 2002 legislature concurrently implemented the federal Mobile Telecommunications Sourcing Act by passing Senate Bill 6539. The federal act sought to create a more uniform system for taxing mobile telecommunications and required that all charges for mobile telecommunication services be sourced to the customer's "place of primary use." The federal law defined "place of primary use" as either the residential or primary business street address of the customer within the licensed service area of the provider. Under SB 6539, the new sourcing rules applied to state B&O taxes, state and local retail sales taxes, city utility taxes, and state and local telephone access line taxes (E-911 taxes).

During the following 2003 legislative session, the legislature continued its movement to make Washington's laws more uniform with other states by participating in a nationwide effort to standardize certain retail sales and use tax statutes among states. This effort is commonly referred to as the Streamlined Sales and Use Tax Agreement. The legislature passed Senate Bill 5783, codified as RCW 82.32.520. This bill specifically addressed retail sales and use tax sourcing rules for both wired and wireless telecommunication services and provided specific

sourcing rules for both wired prepaid services and wireless prepaid services. But that statute did not amend the E-911 tax sourcing provisions.

The legislative history evinces the intent to be more inclusive, and nothing indicates the intent to exclude prepaid wireless services from its scope. Nothing in the history leads us to a conclusion different from that previously reached in our interpretation of the statute. Although we are sympathetic to the problems faced by the taxpayer in collecting the tax, this is a matter more appropriately left to the legislature, including any amendment to the act to conform with sourcing rules provided under RCW 82.32.520.

[3] Next, Taxpayer argues that Washington's E-911 taxes are pre-empted by Section 253 of the federal Communications Act of 1934 as modified by the Telecommunications Act of 1996. Taxpayer contends that forcing it to pay the E-911 tax places Taxpayer at a competitive disadvantage with service providers that bill for services because its unique business practices make it very difficult to collect E-911 taxes from customers.

47 U.S.C.A. § 253 provides in part:

> (a) In general
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority.
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C.A. § 253(a) only provides that states are prohibited from enforcing a statute that would have the effect of prohibiting Taxpayer from providing its interstate or intrastate telecommunications services. We fail to see how requiring Taxpayer to pay a 70 cent per month per county and state E-911 tax on radio access lines whose place of primary use is within a county or state would have a prohibiting effect. Taxpayer has the option of raising the price of its prepaid card to recover the cost of paying the tax, as it must do for any unanticipated but recurring cost. Furthermore, we note that Taxpayer has already successfully entered the marketplace for providing wireless services to Washington customers. Taxpayer has been selling its prepaid wireless services in Washington since 2001 and for periods prior to November of 2003, remitted the E-911 tax. Consequently, we conclude that requiring Taxpayer to collect and remit the E-911 tax on its services from subscribers would not prohibit or have the effect of prohibiting Taxpayer's ability to provide its interstate or intrastate telecommunications services.

Next, even assuming for the sake of argument, that a 70 cent per month tax is prohibitive, the tax is not preempted because DOR has applied the tax on a competitively neutral and nondiscriminatory basis. RCW 82.14B.030 allows the state and counties to impose the E-911

tax upon "**all** radio access lines whose place of primary use is located within the state." The E-911 tax applies to both wireless prepaid and billed services, alike. It is competitively neutral and nondiscriminatory and therefore falls within the safe harbor allowed by 47 U.S.C.A. § 253(b).

We find Taxpayer's reliance on *RT Communications v. FCC*, 201 F.3d 1264 (2000) to be misplaced. *RT Communications* involved a Wyoming statute that granted certain incumbent local exchange carriers protection from competition in order to allow the carriers to recover moneys previously expended to upgrade services. The incumbent carriers were essentially allowed a veto over any new carrier that wanted to provide telecommunications services in the area. On review, the FCC and the Court of Appeals held that the Wyoming statute was preempted by 47 U.S.C.A. §253(a) because it "clearly has the effect of prohibiting telecommunications companies from obtaining a concurrent CPCN to provide intrastate phone service." *Id.* at 1268.

The court went on to hold that the Wyoming statute was not saved by 47 U.S.C.A. §253(b) because it was not "competitively neutral" to the local exchange telecommunications market as a whole. The court cited with favor the FCC's analysis:

> Neither the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market-new entrants and not to the market as a whole, including the incumbent LEC."

Id. at 1268.

In this case, the DOR has not applied the E-911 tax collection procedures to only one portion of the wireless market, but to the market as a whole. That market includes all radio communications service companies, both prepaid and billed.

Finally, Taxpayer argues that the collection responsibilities of the E-911 tax should be placed on the retail vendors and not on Taxpayer. Taxpayer explains that the retail vendors have the vendor-purchaser relationship with the customer and are in the best position to collect the E-911 tax at time of sale. As we noted above, however, the legislature has exercised its discretion to impose the duty to collect the E-911 tax upon the radio communications service companies.

DECISION AND DISPOSITION

Taxpayer's petition to overrule reporting instructions contained in a DOR TI&E letter is denied.

Dated this 1st day of February 2006.