



# TaxNewsFlash

United States



No. 2020-314  
May 13, 2020

## Washington State: Additional B&O tax imposed on financial institutions violates Commerce Clause

A Washington State superior court granted summary judgment for banking associations, holding that the state's additional 1.2% business and occupation (B&O) tax imposed on certain financial institutions violates the "Commerce Clause" of the U.S. Constitution because it discriminates against out-of-state financial institutions.

### **Additional B&O tax for "specified financial institutions"**

Effective January 1, 2020, an additional B&O tax is imposed on "specified financial institutions." These are defined as financial institutions that are members of a consolidated financial institution group that reported on its consolidated financial statement for the previous calendar year annual net income of at least \$1 billion. The additional tax is imposed at a rate of 1.2% of gross income taxable under the "Service and Other Activities" classification, thus making the effective B&O tax rate for these institutions 2.7%.

### **Lawsuit challenging the additional B&O tax**

A lawsuit challenging the constitutionality of the additional tax was filed in November 2019. The plaintiffs, two associations representing financial institutions, argued that the additional tax violated the Commerce Clause because the \$1 billion threshold effectively limits the application of the tax to certain out-of-state banks only. The additional tax, the banking associations also alleged, directly discriminates against interstate commerce because liability is tied to a financial institution's net income from all operations, including interstate and foreign operations that the state has no legitimate power to tax. Finally, the banking associations asserted that the additional tax fails the internal consistency test because if every state imposed a similar tax, the burden on interstate commerce would be significantly greater than on intrastate commerce.

The Washington State Department of Revenue countered that the additional tax did not discriminate against interstate commerce because it applied evenly to any financial institution that met the \$1 billion threshold and applied only to income apportioned to Washington State.

A state superior court judge at a virtual hearing on May 8, 2020, granted summary judgment for the banking associations on the basis that the additional 1.2% tax discriminated against out-of-state financial institutions. There is no written opinion at this point.

### **What's next?**

It is not yet known whether this grant of summary judgment will be appealed. It has been reported that the Department may seek direct review before the Washington State Supreme Court.

### **KPMG observation**

The additional B&O tax is reported on the monthly excise tax report, meaning taxpayers need to consider whether to continue to remit the additional tax and seek a refund if the additional tax is ultimately held to be unconstitutional. If a taxpayer decides to no longer remit the additional tax, and the tax is later declared constitutional, the taxpayer will owe the tax plus interest.

For more information, contact a KPMG State and Local Tax professional:

Michele Baisler | [mbaisler@kpmg.com](mailto:mbaisler@kpmg.com)

The information contained in TaxNewsFlash is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230, as the content of this document is issued for general informational purposes only, is intended to enhance the reader's knowledge on the matters addressed therein, and is not intended to be applied to any specific reader's particular set of facts. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

KPMG International is a Swiss cooperative that serves as a coordinating entity for a network of independent member firms. KPMG International provides no audit or other client services. Such services are provided solely by member firms in their respective geographic areas. KPMG International and its member firms are legally distinct and separate entities. They are not and nothing contained herein shall be construed to place these entities in the relationship of parents, subsidiaries, agents, partners, or joint venturers. No member firm has any authority (actual, apparent, implied or otherwise) to obligate or bind KPMG International or any member firm in any manner whatsoever.

Direct comments, including requests for subscriptions, to [Washington National Tax](#). For more information, contact KPMG's Federal Tax Legislative and Regulatory Services Group at +1 202.533.4366, 1801 K Street NW, Washington, DC 20006-1301.

To unsubscribe from TaxNewsFlash-United States, reply to [Washington National Tax](#).

[Privacy](#) | [Legal](#)