XVI. Business Gross Receipts Taxes

Business gross receipts taxes are levied on the privilege of doing business within a jurisdiction. These taxes are known as mercantile or business privilege taxes, but are now collectively referred to as business gross receipts taxes. Despite the different names, they are essentially the same tax. Mercantile taxes on wholesale and retail trade were generally levied first because they are defined somewhat by the rate limits imposed on wholesale dealers, retail dealers and restaurants under Section 311(2) of the Local Tax Enabling Act. Mercantile taxes are generally understood as limited to these classes of business. Business privilege taxes are also levied on the privilege of doing business within a jurisdiction. They are generally of two types: The first applies to all business except those subject to a mercantile tax; the second is a universal business privilege tax covering all businesses where the jurisdiction has no separate mercantile tax. The differences between mercantile and business privilege taxes have become more semantic than real. Much depends on the wording of the local ordinances.

The pattern for a mercantile tax on wholesale and retail transactions and a separate business privilege tax on all other businesses was established by Pittsburgh. The city first levied a mercantile tax, then enacted a business privilege tax on all other businesses. The Pennsylvania Supreme Court outlines the difference between the two Pittsburgh taxes: "While the ordinance here involved does tax the privilege of engaging in business, it is no way limited, as the mercantile tax, to the transactions of merchants who sell at wholesale or retail; its scope, subject to the exclusions, reaches all persons engaged in any business in the city of Pittsburgh."[1] Beginning in the 1970s, municipalities and school districts first levying the tax did so with a single universal business privilege tax covering all businesses, including those covered by older mercantile tax ordinances in other jurisdictions.

Business gross receipts taxes are measured by the gross receipts of the person doing business. To be valid, tax liability must be measured by the actual gross receipts.[2] The tax is imposed on the taxpayer, or the person engaged in business without regard to the number of establishments maintained. It is not a tax on separate places of business.[3] Business gross receipts tax ordinances usually exclude political subdivisions, employment for a wage or salary and businesses where power to tax is withheld by law.

Business gross receipts taxes are distinct from earned income taxes and occupational privilege taxes. Each is levied on a different tax base with a different group of taxpayers. The privilege of engaging in an occupation is different than the privilege of engaging in a business.[4] For instance an attorney employed by a company is engaging in an occupation, while an attorney in private practice is engaging in a business as well as an occupation.

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Statutory Authorization

Business gross receipts taxes are levied under the general power to tax persons, transactions, occupations or privileges under the authority of the Local Tax Enabling Act.[1] The Local Tax Enabling Act authorizes levy of business gross receipts taxes subject to a limit of one mill on wholesale vendors and one and one-half mills on retail dealers and restaurants, except in Pittsburgh where the authorized limit is one mill on wholesale dealers and two mills on retail vendors and restaurants.[2] Gross receipts taxes on wholesale and retail businesses and restaurants are subject to sharing provisions when levied by both municipality and school district under the Local Tax Enabling Act. Taxes on other types of businesses, such as services, are not limited by the Act and are not subject to the sharing provisions.[3]

The Public School Code authorizes the Pittsburgh School District to levy a mercantile tax, but also includes amusement and recreation businesses and is subject to a rate limit of one-half mill on wholesale business and one mill on retail business.[4] In addition, although the district is authorized to levy a gross receipts tax under the provisions of the Local Tax Enabling Act,[5] other than imposing the aforementioned mercantile tax on wholesale and retail businesses, the Pittsburgh School District may not impose a tax on the gross receipts of other types of businesses.[6] Additionally, beginning with 2010 the business privilege tax was repealed in the city of Pittsburgh.[7]

Philadelphia repealed its mercantile license tax levied under the authority of the Sterling Act. It now levies a business privilege tax on all business within the city measured by gross receipts and net income under special statutory authorization.[8]

Second, second class A and third class cities are authorized to levy business license taxes on a flat rate basis.[9] There is no limit on second and second class A cities. Third class cities may levy the tax at a maximum rate of $100. These taxes may be levied in addition to business privilege taxes levied under the Local Tax Enabling Act.[10]

The imposition of any new business gross receipts tax is prohibited after November 30, 1988 under the terms of the Local Tax Reform Act.[11] Even though most of the Act never became effective because of the defeat of the constitutional amendment in 1989, the court found this prohibition to be in effect. The Act also prohibits rates of business gross receipts taxes from being increased above levels in effect on November 30, 1988, or extended to subjects not taxed as of that date. The only exception to this freeze during the past 10 years came in 1997 when Upper Darby Township was authorized to reenact its business gross receipts tax to extend it to all businesses.[12]

The freeze established in the Local Tax Reform Act does not prohibit new flat rate business privilege taxes. In an appeal to a $100 flat rate business privilege tax enacted by Newtown Borough in 1990, the Commonwealth Court ruled the Local Tax Reform Act does not prohibit flat rate taxes, only those measured by gross receipts.[13]

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8. 53 P.S. §§ 16181 et seq.; First Class City Business Tax Reform Act.
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Imposition of Tax

Under the Local Tax Enabling Act, business is defined an enterprise, activity, profession or any other undertaking of an unincorporated nature conducted for profit or ordinarily conducted for profit whether by a person, partnership, association or any other entity.[1] All businesses, trades and professions where any service is offered to the public are generally liable for payment of this tax. Two broad areas of enterprise are excluded under the terms of the Local Tax Enabling Act, those qualifying for the manufacturing exclusion and those subject to preempting state taxes or license fees.

Many of the business gross receipts taxing schemes of Pennsylvania local governments impose taxes only on the sale of goods by wholesale and retail merchants and restaurants. The validity of such an arrangement was challenged by the owner of a restaurant in Uniontown, asserting that by not taxing service businesses, the city was

applying the gross receipts tax to only 237 of the approximately 800 businesses operating there. The Commonwealth Court agreed and held that the city's tax was unconstitutional as violating the uniformity clause of the Pennsylvania Constitution and the equal treatment clause of the 14th Amendment to the United States Constitution.[2] However, the Commonwealth Court subsequently upheld a business privilege tax levied by the City of Allentown at one rate on services and another on sales at retail or wholesale.[3] The Pennsylvania Supreme Court dismissed the appeal from *City of Allentown v. MSG Associates, Inc.,* effectively affirming the Commonwealth Court's decision.[4]

Activities Taxable. In an early case, the Pennsylvania Supreme Court ruled so-called passive income earned from rents on property and dividends from stock was not exempt from business privilege taxes. The court said the test was neither the character of the receipt nor the size of business, but the nature of the activity producing the receipt.[5] Critical differences occur in how property was acquired or the circumstances under which it was retained, how it is used, the services performed by way of management and the overall objectives of the owner. In this case, although the company did not manage its properties, it actively engaged in acquisition and leasing of properties after its formation. Subsequent cases have upheld application of business privilege taxes to companies active in acquiring and renting commercial properties, even where they did not actively engage in managing their properties.[6] Corporation income from stock dividends and capital gains from sale of stock have also been held to be business income taxable under gross receipts taxes.[7] Taxpayer's gross media receipts arising from television broadcast of football games were "copyright royalties" and subject to the business privilege tax.[8]

Services held to be taxable under business gross receipts taxes have been defined to include school and educational services conducted by corporations organized for profit.[9]

The Pennsylvania Supreme Court upheld inclusion of revenues from sale of admissions tickets in calculating the gross receipts of a movie theater business.[10] The Court held the prohibition in the Local Tax Enabling Act against taxing movie admissions was limited to a direct tax on admissions and did not apply to a tax on the privilege to do business as measured by gross receipts.

The Supreme Court also held that a business privilege tax assessed against a general building contractor, who constructed new residential dwellings, was imposed upon the privilege of conducting business within the city and school district as determined by the gross receipts of the business, and was not a tax on the construction of a residential dwelling or the issuance of a building permit. The tax could be calculated from amounts listed on the residential building permits and did not duplicate the realty transfer tax.[11]

The assessment of a township's business privilege tax on gross receipts from rental commercial property was upheld by the Pennsylvania Commonwealth Court.[12] In that case, the taxpayer was assessed a business privilege tax for 15 years of gross receipts tax attributable to a rental commercial property. The court ultimately found that the rental of the commercial property was a performance of services that was carried on for profit and was thus subject to the township's ordinance which imposed tax on gross receipts from any activity carried on or exercised for gain or profit in the township.[13]

A corporation that provided financial and management services to other companies in an affiliated group was subject to a township's business privilege tax even though the corporation claimed that it did not offer services to the general public or a limited group thereof.[14] The Commonwealth Court reasoned that the taxpayer was a separate legal entity from the affiliated companies, but the affiliated companies which the corporation provided services to were members of the public and corporation's services were normal business services subject to the tax.[15]

Additionally, the courts have also found that jurisdictions are precluded from imposing business privilege taxes on leases or rental income since the Local Tax Enabling Act specifically prohibits tax on lease or lease transactions.[16]

Tax Base Exemptions. Section 301.1(f)(12) of the Act now excludes certain transactions from the tax base.[17] These include the following items:

1. Cash discounts to purchasers for prompt payment of bills.
2. Freight delivery or transportation charges paid by the seller for the purchaser.
3. Sales of trade-ins up to the amount given the prior owner as a trade-in allowance.
4. Refunds or credits given customers for defective goods returned.
5. Pennsylvania sales tax.
6. Trades between sellers of identical goods, but the exemption does not extend to any additional cash payment accompanying the trade.
7. Sales to other sellers at the same price the first seller acquired the merchandise.
8. Transfers between one department, branch or division of a business entity and another recorded on the books as interdepartmental transfers.

A 1996 amendment to the Second Class City Law prohibits Pittsburgh from levying its business gross receipts tax on brokers or dealers of securities and investment fund management companies or other regulated financial services institutions.[18]

Rate Limits. Business gross receipts taxes are subject to the limits found in Section 311(2) of the Local Tax Enabling Act when they apply to wholesale vendors, retail dealers and proprietors of restaurants.[19] Where business privilege or mercantile taxes are levied by both school district and municipality, the maximum limit is subject to the sharing provisions of the Act. This will also occur if one jurisdiction is levying a mercantile tax and the other is levying a business privilege tax. However, in a case where a home rule municipality levied its mercantile tax under authority of the Home Rule Law, the Commonwealth Court ruled that the school district was not subject to the tax sharing provisions of the Local Tax Enabling Act.[20] Where taxpayers challenged a business privilege tax as excessive and unreasonable, the court held they had to prove it was entirely disproportionate to a tax rate controlled by the limits in Section 311 of the Act for a comparable tax.[21]

This limitation had earlier been applied to Pittsburgh's institution and service privilege tax levied against nonprofit organizations.[22] The court upheld the tax as applied to a private club, but stated the tax, otherwise six mills, was limited to two mills on receipts from food and beverage sales to members under the terms of Section 311(2) of the Act.

In ruling on the validity of Pittsburgh's business privilege tax in general, the Supreme Court upheld different tax rates on various classes in the taxing ordinance. Although the general tax rate was six mills, it was reduced to one mill when applied against wholesalers. The rate of taxation need be equal only with respect to taxpayers that are within the same class. In this case several of the variations were based on specific limitations set by the Local Tax Enabling Act or other state laws.[23]

The rate limits and sharing provisions apply only to wholesale vendors, retail dealers and restaurants. There are no limits and no sharing provisions for business gross receipts taxes levied on service businesses.[24]

Classification. The Act sets separate rates for wholesale dealers and retail vendors and restaurants. Differing tax rates for these classifications have been upheld by the courts; the difference between a wholesale dealer and retail vendor is a genuine distinction recognized in the business world.[25]

Determination of whether a business is wholesale or retail lies in the activities of the buyer. If the buyer buys to sell again, then the business is a wholesaler. If the business's customers buy to consume the materials in producing different products, then they are not vendors of the specific goods they buy and the business is a retail dealer. In the case of prefinished kitchen and bathroom cabinets sold to building contractors, the court held they were purchased for resale. The cabinets were not altered. By being affixed to walls, they did not lose their essential identity and were not subsumed into the housing unit, but remained separately recognizable units.[26]

If the company's customers buy materials to consume in the production of different products, they are not vendors of the specific goods they buy and the taxpayer is a retail dealer. Craftspeople are not dealers because they do not buy to sell again in the sense a merchant buys to sell.[27] In the case of building materials sold to contractors where the contractors changed and used the parts to create a new product, the sale of the building materials was a retail sale, rather than wholesale.[28] Likewise paint sold to painting contractors is a retail sale, since it is sold for the use of the painters in performing their task. Sales of products like plumbing fixtures and oil burners are held to be wholesale, since they are installed in the same form and character in which they were purchased and they remain readily identifiable.[29]

Brokers are neither wholesale dealers nor retail vendors, since their business is to bring buyer and seller together. They negotiate contracts of sale between merchants who are parties to the transactions, but they are not party to the sale themselves.[30] Distributors who buy from suppliers and then sell to customers on their own terms qualify as dealers, since they are a party to two separate transactions, even where some direct shipments are made from the manufacturer to the distributor's customer.[31]

A deduction that the city's business privilege tax ordinance provided for real estate brokers, which excluded from gross receipts the commissions paid from one broker to another, violated the uniformity clause of the Pennsylvania Constitution because no constitutionally valid distinction existed between brokers and other taxpayers that paid for work performed.[32]

A dealer or vendor does not have to maintain inventories to fall within the classification under the business gross receipts taxes. A person can buy and sell without inventories.33 Neither does a specific charge have to be made for the individual product when the cost of the product is included in the price of other products sold with it.[33]

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Manufacturing Exclusion

The Local Tax Enabling Act prohibits any local gross receipts tax on any privilege, act or transaction relating to the business of manufacturing from being levied on manufacturers.[1] Manufacturing generally consists of giving new shapes, new qualities or new combinations to matter which has already gone through some other artificial process. A thing is a manufactured article when the product is a new and different article with a distinctive name, character and use. The process of manufacturing brings about the production of some new article by applying skill and labor to the original substances or material out of which the new product emerges.

In a case involving the application of business gross receipts taxes to television and radio broadcasting companies, the Supreme Court defined manufacturing for the purpose of the exclusion from the Local Tax Enabling Act authority.

"Manufacturing," as used in a legislative enactment, is given its ordinary and general meaning. It consists in the application of labor or skill to material whereby the original article is changed into a new, different and useful article. Whether or not an article is a manufactured product depends upon whether or not it has gone through a substantial transformation in form, qualities and adaptability in use from the original material, so that a new article or creation has emerged. If there is merely a superficial change in the original materials without any substantial and well signalized transformation in form, qualities and adaptability in use, it is not a new article or new production.[2]

Manufacturers selling their own products are excluded from business gross receipts taxes. Because the manufacturing exclusion is not an exemption, any doubt is resolved in favor of the taxpayer.[3] Although manufacturers sell their wares, they are not dealers because they do not sell what they buy.[4]

The manufacturing exclusion applies no matter where manufacturers sell their products. By selling its own products at a place other than the factory where they were produced, the manufacturer has not abandoned the role so as to become a dealer subject to the tax.[5] The exclusion for processing byproducts of manufacturing was applicable to slag processing by a company other than the original manufacturer.[6]

Metal Products. Courts have found a maker of custom aluminum awnings[7] and a custom steel fabricator and engineering firm[8] to be manufacturers. A company selling automotive and industrial parts who rebuilt engines and other heavy equipment,[9] and a scrap dealer[10] did not constitute manufacturers and were held liable for local mercantile taxes. The process of annealing and galvanizing rolled steel does not qualify as manufacturing.[11]

Textiles, Garments. Likewise, a company engaged in dyeing and finishing cloth was held not to be engaged in manufacturing.[12] Even though the finished cloth was different from the original in color, dimension, stretch, stain, heat and water resistance, texture and bulk, the product remained cloth, not a new and different article. Likewise the business of treating unfinished cloth is not manufacturing.[13] Production of apparel is considered manufacturing.[14] But printing designs on ready-made clothing (T-shirts and sweatshirts) is not manufacturing because there is no substantial change in the product.[15]

Food Products. Preparation of certain food products by cooling does not constitute manufacturing.[16] Preparing fruit drinks by adding water to slurry or powered mix is not manufacturing.[17] A wholesale meatpacking and processing facility cannot qualify as manufacturing.[18]

Television. The court held broadcasting was essentially transmission rather than manufacturing and the company was subject to the business privilege tax.[19] The same conclusion was reached in the case of a cable television business.[20]

Publishing. As opposed to broadcasting, printing has always been considered manufacturing. In a case where Pittsburgh exempted newspaper circulation receipts, but attempted to levy its tax on advertising revenues, the court held printing and circulating of advertising content is manufacturing as well as printing of news content.[21] Preprinted advertising supplements inserted in a newspaper were considered component parts of the newspaper and excluded from the tax under the manufacturing exemption.[22] Where a newspaper sold advertising and conducted substantial photographic, graphic and typesetting activities it qualified as manufacturing even though the actual printing was done elsewhere.[23] But a publisher who contracted out all printing and binding was found not to be a manufacturer,[24] nor did a business which prepared a newsletter but did not actually print it.[25] Bookbinding qualifies as manufacturing[26] but commercial illustration[27] and photocopying do not.[28]

Paper Products. A processor of scrap cardboard used to create packaging was found to be a manufacturer.[29] The manufactured article does not have to be sold separately to qualify for the exclusion. Where a heavy construction company operated an asphalt plant, it was entitled to the manufacturing exclusion both for asphalt sold to others and asphalt used in its own paving contracts.[30] Income from manufactured articles does not have to come from sales to qualify for the manufacturing exclusion. Profits from leasing manufacturing equipment were held to fall within the manufacturing exclusion.[31] The exclusion applies to out-of-state manufacturers doing business in Pennsylvania, as well as Pennsylvania manufacturers.

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State Preemption

Both the Local Tax Enabling Act and the Sterling Act contain a preemption clause prohibiting local taxation of a privilege, transaction, subject, occupation or personal property subject to a state tax or license fee.[1] The First Class City Business Tax Reform Act under which Philadelphia's business privilege tax is levied does not contain such a

preemption clause. For other jurisdictions levying business gross receipts taxes, a series of court cases sets forth criteria to determine when preemption of a local tax by a state measure has occurred.

In *Philadelphia Tax Review Board v. Smith, Kline and French Laboratories,* a pharmaceutical company asked for a refund of mercantile license taxes on the grounds payment of registration fees to the state under the Drug, Devices and Cosmetic Act preempted Philadelphia's prior mercantile license tax.[2] The court's opinion reviewed recent precedents establishing the interpretation of "license fee" to mean a measure adopted to pay for the cost of regulating the industry under the state's police powers. A previous case had drawn a distinction between a "license fee" where the charge was sufficient to pay for the cost of regulation and a "registration fee" where a nominal charge merely covered clerical costs of issuing licenses.[3] In that case, the court held that true license fees based on the costs of regulation preempted local taxation while mere registration fees did not, and outlined four criteria for distinguishing between license and registration fees.[4] This distinction was overruled in *Smith*. The *Smith* court set the critical distinction for preemption purposes between license fees levied for regulatory purposes and those levied for general revenue purposes. The court overturned its previous decision by holding that local powers of taxation are preempted "only when the legislature has enacted a revenue producing measure covering the same person, transaction, occupation, activity, privilege, subjects or personal property."[5] Payment of a license fee intended merely to cover the cost of regulation and inspection will not act to preempt local taxing power.

The *Smith* court set forth two criteria to determine whether a particular fee is a state revenue measure: (1) whether a large monetary income is derived to the state and (2) whether the income is large compared to the cost of collection and supervision. The court proceeded to determine the fee paid by the company was a regulatory license fee and not a revenue producing measure, thus the mercantile license tax was not preempted.

Preemption by State Tax. In the following year, the Supreme Court invalidated a ten percent tax on retail liquor sales by the Philadelphia School District. The court held two state taxes levied on the sale of liquor preempted the school district's tax. In this case the court found the local tax was imposed directly on the specific transaction on which the state is dependent for revenues.[6] But the court carefully distinguished a prior case upholding the application of the gross receipts tax on holders of state liquor licenses.[7] In the prior case, the gross receipts tax was levied against the business generally, rather than specifically levied on liquor sales.

Another important test was implemented in a case where the court held that preemption occurs only where the local tax duplicates a state tax.[8] The test of duplication is if the tax falls on the same subject matter and is measured by the same tax base. The court held that local mercantile or business privilege taxes did not duplicate the state corporate franchise tax.[9] Also a local tax was not preempted by the state realty transfer tax paid by construction contractors.[10] In a 1977, the Commonwealth Court found a local gross receipts tax was not superseded by the state gross premiums tax on insurance premiums paid by insurance agents,[11] but 20 years later, without expressly overruling its prior decision in *Man*, the court held that a township's business privilege tax was preempted by the State's gross premium tax.[12]

Preemption by State License Fee. Application of these judicial doctrines has validated local business privilege taxes levied on persons paying some sort of state license fee in a number of instances. The Commonwealth Court held local business privilege taxes were not superseded by the state registration fee for used car dealers,[13] by the state license fee paid by nursing homes,[14] or by the state license fee paid by realtors.[15] Common pleas courts have held local business gross receipts taxes were not superseded by state license fees paid under the Securities Act by stockbrokers,[16] or by fees paid to the Disciplinary Board of the Supreme Court by attorneys.[17]

Preemption by Pervasive State Regulation. The Supreme Court created a new doctrine of preemption when it held that nontraditional businesses of banks were not taxable under Pittsburgh's business privilege tax. The court held that state banking legislation shows the legislature's intention to exclusively occupy the banking field. The tax was held invalid as it applies to banks because it impermissibly impinges on this regulated area in contravention of the legislative preemption for the commonwealth.[18]This doctrine of preemption by exclusive control by the state was followed and applied to malt and brewed beverage distributors.[19] The court held the legislature's scheme of regulation was so pervasive that it had preempted any local legislative control by regulation or taxation. But since the *Wilsbach* decision, the Commonwealth Court has pulled away from any further application of the preemption

by pervasive regulation doctrine. The legal profession,[20] insurance business,[21] the dairy industry,[22] nursing homes[23] and securities dealers[24] were found to be subject to local business gross receipts taxes. The registration fees they paid to the state and the state's control of their activities were not pervasive enough to preempt the imposition of local taxes.

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11. *Man, Levy & Nogi, Inc. v. Scranton School District,* 375 A.2d 832, 31 Pa. Cmwlth. 75, 79 (1977).
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13. *City of Wilkes-Barre v. Ebert,* 349 A.2d 520, 22 Pa.Cmwlth. 356 (1975).
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15. *Helsel, Inc. v. City of Harrisburg,* 564 A.2d 546, 129 Pa. Cmwlth. 1 (1989).
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18. *City of Pittsburgh v. Allegheny Valley Bank of Pittsburgh,* 412 A.2d 1366, 488 Pa. 544, 549 (1980). *But see City of Philadelphia v. Clement & Muller, Inc.,* 552 Pa. 317, 715 A.2d 397 (1998) (holding that the First Class City Business Tax Reform Act apparently overruled *Allegheny Valley* insofar as it applies to first class cities).
19. *Commonwealth v. Wilsbach Distributors, Inc.,* 519 A.2d 397, 513 Pa. 215 (1986). *But see City of Philadelphia v. Clement & Muller, Inc.,* 552 Pa. 317, 715 A.2d 397 (1998) (Distinguishing Wilsbach and finding that first class cities could collect business privilege tax from beer distributor due to the express language of the First Class City Business Tax Reform Act).
20. *Reiders, Travis, Mussina, Humphrey & Harris v. City of Williamsport,* 578 A.2d 618, 134 Pa. Cmwlth. 298 (1990).
21. *Yorkco Agency, Inc. v. Casaletto,* 488 A.2d 1206, 88 Pa. Cmwlth. 243 (1985); *Industrial Valley Title Insurance Co. v. School District of Philadelphia,* 661 A.2d 497 (Pa. Cmwlth. 1995).
22. *Township of Muhlenberg v. Clover Farms Dairy Co.,* 665 A.2d 544 (Pa. Cmwlth. 1995).
23. *Rose View Manor, Inc. v. City of Williamsport,* 630 A.2d. 474, 157 Pa. Cmwlth. 410 (1993).
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Situs

Because the tax is levied on the privilege of doing business within the taxing jurisdiction, the situs of the tax depends on the definition of "doing business."[1] Because of the widespread and complex nature of commercial transactions, there is considerable confusion as to where transactions are taxable. There generally must be a minimal nexus between the taxing district and a business before the business can be subjected to taxation. Over the last several decades, Pennsylvania courts have decided a multitude of cases in determining whether a taxpayer is subject to a jurisdiction's business privilege tax. The cases can generally be split into two categories: mercantile taxes on sales and gross receipts taxes on services.

Situs of Sales. Within the purview of mercantile license taxes, "doing business" has been defined by the "solicitation plus" doctrine, meaning that there must be other activities in addition to the solicitation of business.[2] The Supreme Court has held that "[d]oing business requires proof that the taxpayer was actually affecting sales of its products and performing acts regularly and continuously which, in a direct as opposed to an incidental manner, effect the taxpayer's objectives."[3] One court noted that the test is "not whether a company is 'doing business' within the artful meaning of those words, but more narrowly, whether the company is a 'vendor or dealer.'"[4] Often only a small part of a complete sale will occur within a jurisdiction. "The mercantile tax is not laid on a completed piece of business, but only on so much of it as, occurring locally, is more than solicitation and constitutes one a vendor or dealer."[5]

The taxable event for mercantile license taxes has been held to be the effecting of the order.[6] A sale is effected when a salesman or the district office receives an order and instructs a distribution center to ship goods to the customer. Mere solicitation will not make a person be categorized as a dealer or vendor. The situs of the tax is where the decision to accept the customer's order is made and shipment of the goods is ordered. The place where the shipment is made cannot determine the situs of the sale.

In one case a company with no office, facility or plant in Philadelphia was found to be outside the jurisdiction of the school district's tax because its promotion personnel active in the city were simply goodwill agents and could not bind the company.[7] In another case a company with personnel promoting products on a regular basis was found to be engaging only in solicitation.[8] Even though Philadelphia customers ordered and purchased the company's products in substantial quantities, it did not constitute doing business since all sales were effected outside Philadelphia.

The fact that a mercantile transaction involves interstate commerce does not prohibit taxation locally. The tax is exacted on the privilege of doing business in the jurisdiction. In one case, all business dealings between the seller and buyer - placing purchase orders, their acceptance and payment - occurred in Pittsburgh and even though delivery was made outside the state, the tax was held valid.[9] Even where a transaction as a whole may be in interstate commerce, there may be local activities that permit imposition of a local tax, since sales are considered consummated where accepted at the level of the company with discretion to order shipment of goods.[10]

Situs of Services. Determining where services are taxable has been more difficult than for sales of merchandise. Often a company with a place of business in one municipality will provide services to customers in many surrounding jurisdictions.

Historical Background. In 1986 the Supreme Court decided the Gilberti case, which initially became solidified as precedent for how Pennsylvania courts would address the situs of the business privilege tax. In Gilberti, an architect maintaining his sole office in Pittsburgh excluded from his calculation of gross receipts such income as he maintained was derived from on-site supervision of a construction project outside the city limits.[11] The taxpayer did not maintain a place of business outside the city. The Court held that maintaining a business office in the city was an exercise of a taxable privilege within the limits of the taxing district. Further, the Court held that the city could determine the amount of tax based on gross receipts of the business, including income derived from services provided outside city limits, because having a place of business inside the city enabled the taxpayer to manage, direct and control business activities occurring both inside and outside city limits. The Court held that the city's taxing power was broad enough to encompass the contribution to out-of-city activities provided by the taxpayer maintaining a base of operations within the city.

Following *Gilberti,* the Commonwealth Court ruled that the entire intrastate gross receipts of a highway construction company were subject to the business privilege tax of the township where the company had its sole permanent office.[12] The township ordinance excluded receipts attributable to interstate or foreign commerce or to an office or place of business regularly maintained outside the township limits. The Court found that all intrastate receipts could be taxed by the township even though almost all services were performed outside the township, because the root of all of the company's business was at its sole permanent business headquarters.

The *Gilberti* base of operations test was similarly applied to the entire gross receipts of an automobile leasing company, even for transactions enacted outside township limits, because the company operated from its headquarters within the township[13] The Court reached the same result in a case dealing with an engineering firm with a large amount of interstate business.[14] In that case, the fact that a portion of the firm's revenues were derived from interstate commerce did not alter the benefit it enjoyed from conducting its activities from its established base of operations within the township. The Commonwealth Court subsequently held that a taxpayer was not subject to the business privilege tax of Lower Merion Township because the taxpayer's base of operations was in Radnor, not Lower Merion.[15] In another case, although *Gilberti* would have otherwise allowed the imposition of tax on receipts from business activities outside the taxing jurisdiction, the Commonwealth Court held that a taxpayer was not liable for city business privilege tax on the gross receipts earned outside the city's territorial limits because the tax ordinance only provided for tax on gross volume of business "transacted within the territorial limits of the city."[16]

In 2007, the Pennsylvania Supreme Court decided the *V.L. Rendina* case, which imparted a substantial change to how prior courts had interpreted *Gilberti*.[17] In *V.L. Rendina* the Court found that a taxpayer may be subject to the a jurisdiction's business privilege tax regardless of whether the taxpayer had a base of operations within the jurisdiction.[18] In that case, a contractor with headquarters outside the City of Harrisburg was working on an office building in the City of Harrisburg and maintained a jobsite trailer in the City to run the project. The Court held that the maintenance of an in-city base of operations from which the taxpayer conducted business *may have* been a condition which would allow the City's taxation of such business, but it was not a strict requirement. Rather, the Court held that the presence of business activities within the jurisdiction was the main focus of whether the Local Tax Enabling Act permitted the imposition of the tax.[19] Thus, the contractor's presence in the City at the construction jobsite was the appropriate nexus for taxing the contractor's gross receipts.

Shortly after *V.L. Rendina*, an unreported case in the Commonwealth Court (A&L, Inc.) found that the jurisdiction containing a taxpayer's base of operations could tax the gross receipts earned at any business location in the Commonwealth.[20] When combined with the Court's prior ruling in *V.L. Rendina*, a taxpayer's non-home jurisdiction could tax receipts earned within its jurisdiction through application of *V.L. Rendina* and a taxpayer's home-jurisdiction could tax receipts earned in any in-state location through application of A&L and former base of operation cases. Thus, double taxation could result from such rulings.

Statutory Authority. In order to address the aforementioned conflicting case law as well as ambiguity in the law, the General Assembly enacted Act 42 of 2014. Act 42 amended Section 301.1 of the Local Tax Enabling Act to specify that the business privilege tax may be levied on a business if it conducts transactions in the levying jurisdiction for all or part of fifteen (15) or more calendar days within a year or if the business is operated through a base of operations in the levying jurisdiction.[20] Act 42 defines a base of operations as "an actual, physical and permanent place of business from which a taxpayer manages, directs and controls its business activities at that location."[21] Additionally, Act 42 provides that a taxpayer can be credited in its home jurisdiction (i.e., the location of the base of operations) for the gross receipts tax paid to a jurisdiction pursuant to the 15 day rule.[22]

Thus, the question as to whether a business privilege tax may be levied on a business will now be resolved under the statutory authority of Act 42.

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4. *Standard Brands, Inc. v. Pittsburgh,* 170 A.2d 568, 403 Pa. 590, 593 (1961).
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23. 53 P.S. § 6924.301.1(a.1)(1).

Nonprofit Organizations

It is possible to tax gross receipts of nonprofit organizations, as long as the organization does not qualify for exemption from taxation as a purely public charity. The fact that an organization is a nonprofit corporation does not mandate that it should be exempt from taxation. Exemption from federal income taxes does not qualify an organization for exemption from Pennsylvania taxes. The organization must meet the tests to qualify as a purely public charity.[1]

Early cases involved the application of Pittsburgh's mercantile tax to nonprofit operations. These ran afoul of the wording of the mercantile tax ordinance. The mercantile tax was held to be "a levy on the privilege of conducting a commercial enterprise for profit."[2] Where a manufacturing company operated a cafeteria for its employees at a loss, sales of food in the cafeteria were not subject to the mercantile tax.[3] Similarly, private clubs selling food, liquor, and tobacco to their members at a loss were not subject to the mercantile tax.[4] The clubs were found to be providing services, not for profit, but for the convenience and comfort of their members. Losses incurred on meals were absorbed by income from membership dues.

Where a profit making company sells novelty items to nonprofit organizations for resale, such sales were to be considered retail.[5] Because nonprofit organizations are excluded from the definition of retail vendors, the supplier could not be considered a wholesaler.

Beginning in 1969, Pittsburgh levied a privilege tax on nonprofit institutions at a rate of six mills on gross receipts. The tax is limited to taxpayers not subject to the city's mercantile and business privilege taxes.[6] In a challenge to the validity of the tax, the Supreme Court held the tax could not be applied against hospitals and other institutions of purely public charity.[7] The court relied on the exemption from "all taxes" for charities in the General County Assessment Law. Further, the court noted the longstanding rule that broad taxing statutes do not cover charities unless the legislature specifically states they are to be included.

The tax has been upheld as applied against private clubs organized as nonprofit corporations. The common pleas court found charges for meals, rooms and other services to members do not constitute membership dues or fees exempted under Section 301.1(f)(7) of the Local Tax Enabling Act.[8] The tax was upheld even though it applies to only a limited number of taxpayers after charitable institutions were declared exempt.

Since 1982, Lower Merion Township has levied an Institution and Service Privilege Tax.[9] The ordinance levies a one mill tax against the gross receipts of social or recreational nonprofit organizations regularly providing food, beverage or tobacco services to the public or any limited group of the public, or renting space for social events. All governments, schools, nursing homes, colleges or universities are exempted, as are membership dues or member assessments. The ordinance specifically includes country clubs and veterans organizations within the meaning of institution.

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Payroll Preparation Tax

In Pittsburgh, the Business Gross Receipts Taxes have been replaced with Payroll Tax, not to exceed 0.55% on payroll amounts generated as a result of an employer conducting business activity within Pittsburgh.[1] This is a tax levied on an employer's total payroll amounts. Similar to Business Gross Receipts Taxes, entities that are acting as a purely public charity can be exempt from the Payroll Tax.[2]

Additionally, distressed municipalities that currently impose Business Gross Receipts Taxes may, through the Coordinator's plan and court approval, impose a Payroll Tax to replace their existing Business Gross Receipts Taxes.[3] This Payroll Tax is identical to the one imposed by Pittsburgh, except that the rate is based on current revenues generated by the Business Gross Receipts Taxes. That is, the rate of the Payroll Tax may not exceed a rate that is sufficient to produce revenues equal to revenues collected as a result of the Business Gross Receipts Taxes in the preceding fiscal year.[4] After approval by the court of that tax rate, the distressed municipality may levy the tax in any subsequent year without additional court approval, including any year after the termination of the municipality's distressed status, at a rate not to exceed that initially approved by the court.

REFERENCES

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2. 53 P.S. § 6924.303(a.1).
3. 53 P.S. § 11701.123(d)(2); Municipalities Financial Recovery Act, Section 123(d)(2).
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