Received 3/12/2018 3:31:25 PM Supreme Court Eastern District

Filed 3/12/2018 3:31:00 PM Supreme Court Eastern District
2 EAP 2018

IN THE SUPREME COURT OF PENNSYLVANIA

Docket Nos. 2, 3 EAP 2018

LORA JEAN WILLIAMS; GREGORY J. SMITH; CVP MANAGEMENT, INC. d/b/a or t/a CITY VIEW PIZZA; JOHN'S ROAST PORK, INC. f/k/a JOHN'S ROAST PORK; METRO BEVERAGE OF PHILADELPHIA, INC. d/b/a or t/a METRO BEVERAGE; DAY'S BEVERAGES, INC. d/b/a or t/a DAY'S BEVERAGES; AMERICAN BEVERAGE ASSOCIATION; PENNSYLVANIA BEVERAGE ASSOCIATION; PHILADELPHIA BEVERAGE ASSOCIATION; and PENNSYLVANIA FOOD MERCHANTS ASSOCIATION,

Plaintiffs-Appellants,

v.

CITY OF PHILADELPHIA and FRANK BRESLIN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PHILADELPHIA DEPARTMENT OF REVENUE,

Defendants-Appellees.

BRIEF FOR APPELLANTS

On appeal from an Order of the Commonwealth Court of Pennsylvania, in Nos. 2077, 2078 C.D. 2016, entered June 14, 2017, affirming Orders of the Court of Common Pleas of Philadelphia County in September Term 2016, No. 01452, entered December 19, 2016

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I. INTRODUCTION

Municipalities have only the taxing authority that the General Assembly gives them. In the Sterling Act, the General Assembly gave Philadelphia authority to impose taxes within its borders, but carved out an important exception: Philadelphia may not impose a tax on anything the Commonwealth already taxes. *See* Act of August 5, 1932, P.L. 45, *as amended*, 53 P.S. § 15971.

In 2016, Philadelphia decided to impose a tax on soft drinks sold within the City. Because the Commonwealth already taxes retail sales of those beverages, *see* Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §§ 7201(a), (m) & 7202, Philadelphia had to get creative. It devised a Tax to accomplish the City's goal while looking like it does something else. Although the Tax is generally collected from those who *distribute* the drinks to retailers, it is imposed *only* where the drinks are sold or intended to be sold at *retail* in Philadelphia. *See* PHILA. CODE § 19-4103(1). In substance, then, the City tried to accomplish indirectly what it could not do directly.

This Court should not allow the City to evade the Sterling Act this way. In the light of the Act, the Tax can only be seen as having the same subject as the Commonwealth's sales tax, because the Tax is triggered *solely* when a Philadelphia retail sale of soft drinks is completed or intended. In other words, as the dissent below put it, "no retail sale in the City equals no tax." Dissent at 6. The Sterling Act does not permit such double taxation. It bars the City's Tax.

The precedent most on point rejected a nearly identical attempt by Philadelphia to draw a technical Sterling-Act-distinction between distribution and retail liquor transactions. *See United Tavern Owners of Phila. v. Sch. Dist.,* 272 A.2d 868 (Pa. 1971) (plurality op.). That decision and many others hold that substance governs over form in tax law, and that the taxing authority conferred by the General Assembly to the Commonwealth's municipalities is strictly construed. These principles mean little if the City can sidestep the Sterling Act by dressing up a tax on selling retail products as a tax on "distribution transactions." This Court should hold that the City's Tax violates the Sterling Act and reverse the order below.

II. STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over the Commonwealth Court's final order under 42 PA.C.S. § 724(a).

III. ORDER IN QUESTION

The Commonwealth Court's order is included as part of Appendix A:

AND NOW, this 14th day of June, 2017, the orders of the Philadelphia County Court of Common Pleas dated December 19, 2016, at No. [sic] September Term, 2016 No. 01452, are AFFIRMED.

[signed]

MICHAEL H. WOJCIK, Judge

IV. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Plaintiffs challenge the trial court's order sustaining the City's preliminary objections in the nature of a demurrer. This Court's standard of review is *de novo*. *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 56 (Pa. 2014). Because a demurrer presents the question "whether, on the facts averred, 'the law says with certainty that no recovery is possible,' . . . [i]f doubt exists concerning whether the demurrer should be sustained, then 'this doubt should be resolved in favor of overruling it.'" *Id.* (citations omitted).

V. STATEMENT OF THE QUESTION INVOLVED

Does the City's Tax violate the Sterling Act, 53 P.S. § 15971, which prohibits Philadelphia from imposing a tax on a transaction or subject that the Commonwealth already taxes?

The majority below answered this question in the negative.

VI. STATEMENT OF THE CASE

A. Form of Action and Procedural History

Plaintiffs filed this civil action in the Philadelphia County Court of Common Pleas against the City of Philadelphia and Frank Breslin, in his official capacity as

Commissioner of the Philadelphia Department of Revenue (collectively, "the City"). (R.R. 23a) The lawsuit challenges Philadelphia's "Sugar-Sweetened Beverage Tax," PHILA. CODE ch. 19-4100 (the "Tax").

The City filed preliminary objections to Plaintiffs' complaint. Plaintiffs opposed and filed a petition for a special injunction. The Court of Common Pleas sustained the City's objections, dismissed Plaintiffs' complaint in its entirety, and denied Plaintiffs' petition for a special injunction as moot. A divided Commonwealth Court, sitting *en banc*, affirmed.

B. Prior Determinations

This Court denied Plaintiffs' application for extraordinary relief under 42 PA.C.S. § 726 or the exercise of King's Bench Powers under 42 PA.C.S. § 502 on November 2, 2016. It later denied a similar request from the City, after the Common Pleas Court's decision, on February 13, 2017.

C. Judges Whose Determinations Are to Be Reviewed

Judge Gary S. Glazer, of the Court of Common Pleas of Philadelphia County, entered the orders appealed to the Commonwealth Court. Judge Michael H. Wojcik authored the majority opinion and order in the Commonwealth Court, joined by Judges Mary Hannah Leavitt, Robert Simpson, Julia K. Hearthway, and Joseph M. Cosgrove. Judge Anne E. Covey authored a dissent, which was joined by Judge Renée Cohn Jubelirer.

D. Chronological Statement of the Facts

1. The General Assembly Authorizes Philadelphia to Impose Taxes That Do Not Duplicate the Commonwealth's Taxes.

In 1932, Representative Philip Sterling introduced a bill to enable Philadelphia, for the first time, to pass its own tax ordinances.[1] The Sterling Act, as it came to be known, remains Philadelphia's source of general taxing authority today. In its current form, the Act's key provision states:

> [T]he council of any city of the first class shall have the authority by ordinance, for general revenue purposes, to levy, assess and collect, or provide for the levying, assessment and collection of, such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city of the first class, as it shall determine, ***except that such council shall not have authority to levy***, assess and collect, or provide for the levying, assessment and collection of, ***any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee***.

53 P.S. § 15971(a) (emphasis added). This language authorizes Philadelphia to tax whatever "persons, transactions, occupations, privileges, subjects [or] personal property" it wishes, provided that they (1) are "within the limits of [the] city" and (2) are not "subject to a State tax." *Id.* From the beginning, it was well understood that this second condition prohibited the City from taxing anything taxed by the Commonwealth. As one newspaper reported, "the new law provides [Philadelphia]

[1] The law also granted such authority to Pittsburgh, but that authority expired in 1935. *See* Act of August 5, 1932, P.L. 45, § 4.

can only tax things which are not subject to State taxation." *New City Taxes Again in Prospect*, Evening Bulletin, Aug. 6, 1932.

2. The General Assembly Imposes State Taxes on Soft Drinks.

As far back as 1932, there were murmurs of soft drink taxation at both the local and state levels. Philadelphia was contemplating (among many other options) a tax on "soda fountains and other places where soft drinks are sold," while the General Assembly, for its part, was debating "[b]ills authorizing the Commonwealth to tax . . . soft drinks." *Id.*

In 1947, the General Assembly decided to enact a statewide tax on soft drinks. Act of May 14, 1947, P.L 249. The Soft Drink Tax Law was the first of several tax laws passed by the General Assembly targeting soft drinks. After that law expired, the General Assembly amended its Selective Sales and Use Tax in 1959 to include soft drinks among the items taxed. Act of August 20, 1959, P.L. 729.

Today's state sales tax on soft drink retail sales was enacted as part of the Tax Reform Code of 1971. The tax generally falls on retail sales of tangible personal property, 72 P.S. § 7202, which the statute expressly defines to include soft drinks, *id.* § 7201(a), (m). As a result, soft drinks sold in the Commonwealth have been subject to a 6% state sales tax for decades.

3. Frustrated with the General Assembly for Not Passing Revenue-Raising Legislation, Philadelphia Proposes a Regressive Soft Drink Tax.

In 2016, Philadelphia proposed a new soft drink tax. By that point, the City had long imposed its own 2% sales tax on retail commerce, including soft drinks. *See* PHILA. CODE ch. 19-2700. Although that sales tax duplicates the state sales tax, it does not run afoul of the Sterling Act because the General Assembly gave the City express permission to enact that limited tax in two separate statutes. Act of June 5, 1991, P.L. 9, No. 6 § 503, *as amended*, 53 P.S. § 12720.503; Act of July 9, 2013, P.L. 270, No. 52 § 5.1, 72 P.S. § 7201-B(a)(1).

For its new soft drink tax, the City initially proposed a 3-cents-per-ounce tax solely on drinks sweetened with sugar. (R.R. 127a) The tax's critics argued, among other things, that such a tax would be passed along to retail consumers in Philadelphia and would "be felt disproportionately by the poor." (*Id.*)

In defense of the proposed tax, the City's Mayor agreed that the tax would raise Philadelphia consumers' costs to some extent and said he could "understand the concerns of the bodega owners and small businesspeople." (R.R. 129a) But he said that if Philadelphia consumers did not want to pay the higher passed-on costs for a soft drink subject to the proposed tax, they could "choose not to buy that item" and select a product not subject to the tax instead. (R.R. 127a). He further maintained that a new source of tax revenue was worth it and criticized the General Assembly for not passing revenue-raising legislation on its own: "a lot of this has to do with the

fact that the state of Pennsylvania and the legislature won't do what they're supposed to do . . . . [I]f they were to provide the money necessary for us . . . we wouldn't have a lot of these problems." (R.R. 128a)

4. Philadelphia Passes the Tax, Which Applies Only to Soft Drinks Held out for Retail Sale in Philadelphia.

The City Council passed a modified version of the proposed tax on June 20, 2016. (R.R. 307a) The Tax was still called the "Sugar-Sweetened Beverage Tax," but that title was now a misnomer because the Tax was no longer limited to beverages sweetened with sugar. As enacted, the Tax covers soft drinks of many kinds, whether sweetened with caloric sugar-based sweeteners or non-caloric substitutes. PHILA. CODE § 19-4101(3)(a). That includes all sodas; "non-100%-fruit drinks; sports drinks; flavored water; energy drinks; pre-sweetened coffee or tea; and non-alcoholic beverages intended to be mixed into an alcoholic drink." *Id.* § 19-4101(3)(d). Virtually every beverage covered by the Tax is already subject to the Commonwealth's sales tax, and vice versa. 72 P.S. § 7201(a), (m) and § 7202; R.R. 58-60a.

The Tax is generally collected when covered beverages are transferred from a distributor, wherever located, to a Philadelphia retailer, which the Tax calls a "dealer." PHILA. CODE § 19-4103(1). Apart from such transfers, the Tax also is collected in connection with the "transport of any [covered] beverage into the City by a dealer." *Id.* This guarantees that the Tax applies even if a retailer handles its own distribution.

In all cases, the Tax applies *only* if the transfer or transport "is for the purpose of the dealer's holding out [the drink] for retail sale within the City." *Id.*

Although the obligation to collect the Tax generally falls on distributors, because some distributors operate entirely outside of Philadelphia's jurisdiction, retailers bear obligations of their own to make the Tax work. In general, Philadelphia retailers are prohibited from selling beverages unless they come from registered distributors who have agreed to pay the Tax. *Id.* § 19-4102(1)(a). Philadelphia retailers also must notify their distributors about the Tax. *Id.* § 19-4104(1). Distributors may then register "regardless whether the distributor does or does not do business in the City." *Id.* § 19-4102(2). If a retailer nevertheless sells beverages acquired from an unregistered source, it faces fines of up to $1,000 for every "separate sale" and may lose its commercial activity license. *Id.* § 19-4108(1); Regulations § 702.[2]

Retailers also assume obligations to pay the Tax in various circumstances. They may owe the Tax, for example, if they fail to provide the required notice to their distributors. *Id.* § 19-4105(2). They also owe the Tax if a court rules that it cannot lawfully "be applied to a distributor with respect to any transaction or class of transactions." *Id.* § 19-4105(4). Retailers may owe the Tax if they "transport"

[2] The current version of the "Sugar-Sweetened Beverage Tax Regulations," dated August 4, 2017, is attached as Appendix E and available on the City's website at https://beta.phila.gov/documents/philadelphia-beverage-tax-regulations/.

beverages into the City on their own, without going through a distributor. *Id.* § 19-4103(1). And they may apply for permission to sell beverages from an unregistered source, in which case they must pay the Tax themselves. *Id.* § 19-4107.

The amount owed under the Tax is determined by the volume of beverage to be sold at retail, at a rate of 1.5 cents per fluid ounce. *Id.* § 19-4103(2)(a)-(b). For the typical beverage distributed in a can or bottle, that volume is the same as the volume transferred from distributor to retailer. But for some products, the volume transferred to the retailer differs from the volume sold to the consumer. For instance, some beverages are distributed as syrups or concentrates and then prepared at the retail location for sale to the ultimate consumer, as with fountain drinks. For these beverages, the amount of Tax owed is determined by the volume of the final *retail* product, not the product distributed. *Id.* § 19-4103(2)(b).

5. Plaintiffs File This Lawsuit Challenging the Tax.

A group of consumers, retailers, distributors, producers, and trade groups filed this suit in the Court of Common Pleas of Philadelphia County. Seeking a special injunction preventing the Tax's enforcement, Plaintiffs challenged the Tax on several different grounds and were motivated by different concerns.

Consumer Lora Jean Williams, for example, uses food stamps to pay for groceries and worries that the City's significant new tax will hurt her ability to afford her monthly groceries. (R.R. 42a, 100a) For example, a 2-liter soda with a retail price

of $0.68 carries a tax of $1.01, an effective tax rate of 149.12%. (R.R. 48-49a) The effects of the Tax for other soft drink products are quite significant as well. (*Id.*)

The retailer and distributor plaintiffs—City View Pizza, John's Roast Pork, Metro Beverage, and Day's Beverages—have been forced to raise prices in response to the Tax, which vastly exceeds the margins they make on the sales of most covered beverages. (R.R. 43-46a) They challenge the Tax because they know these significant price increases cost them customers. (*Id.*)

6. The Court of Common Pleas and a Divided Commonwealth Court Reject Plaintiffs' Challenge.

The City filed preliminary objections to Plaintiffs' complaint. The Court of Common Pleas sustained those objections, dismissed Plaintiffs' complaint, and denied the request for an injunction as moot.

Sitting *en banc*, a divided Commonwealth Court affirmed. In an opinion by Judge Wojcik, the majority agreed with the trial court that the Tax falls on distribution-level transactions rather than retail sales. Majority Op. at 19. In the majority's view, because the Tax and the Commonwealth's sales tax ostensibly target a different level in the commercial chain, the Tax did not violate the Sterling Act's prohibition on double taxation. *Id.* The majority brushed aside this Court's decision in *United Tavern Owners,* 272 A.2d 868—which held that distribution-level and retail-level transactions are not separately taxable transactions for Sterling Act purposes—

because it was a "plurality opinion [that] has never been adopted by a majority of the Supreme Court." Majority Op. at 21 n.20.

Judge Covey, joined by Judge Cohn Jubelirer, dissented. They disagreed with the majority that the Tax actually operates as a distribution-level tax, highlighting that the Tax's "entire underpinning is the retail sale mandate," Dissent at 4, and that "no retail sale in the City equals no tax," *id.* at 6. In addition, they concluded that *United Tavern Owners* controls and requires judgment for Plaintiffs. That case "cannot be distinguished from the facts of the instant matter," "has never been overruled," and "remains good law." *Id.* at 7. At the very least, the dissenting judges explained, the Tax's unprecedented attempt to blur the lines between distribution and retail levels presented a "case of first impression," *id.*, which should have been resolved against the City under the rule that tax statutes must be strictly construed "against the government"—a rule that the dissent faulted the majority for failing to apply. *Id.* at 8. The dissent endorsed Plaintiffs' other arguments against the Tax as well. *Id.* at 8 n.5.

This Court granted allowance of appeal on January 30, 2018.

VII. SUMMARY OF THE ARGUMENT

The Sterling Act permits Philadelphia to tax many "subjects" and "transactions," but not "subjects" or "transactions" that are already taxed by the Commonwealth. The City's Tax violates this prohibition, and thus is barred by the Sterling Act, for four primary reasons.

First, the Tax is incompatible with the Sterling Act's plain language because it shares the same subject as the Commonwealth's sales tax: selling soft drinks. While the City insists that the two taxes nevertheless fall on different "transactions"—the Commonwealth's tax on retail transactions and the City's Tax on distribution transactions—the City's characterization of its Tax is wrong. Under the Sterling Act, the City may not tax any "transactions" unless they occur in Philadelphia, and yet it is irrelevant to the Tax's applicability whether any distribution transaction occurs within the City. For instance, if a distributor never sets foot in the City and instead delivers soft drinks to the retailer's storage facility outside Philadelphia, the Tax is still owed on any beverage the retailer later transports into the City for retail sale there. What really matters to the Tax's applicability is whether the soft drinks are offered for retail sale in the City, and the brunt of the Tax is ultimately borne by Philadelphia retail consumers. The Tax therefore must be understood as a tax not on distribution transactions, but on Philadelphia retail commerce involving soft drinks. Because the Tax falls on the same subject as the Commonwealth's sales tax, the Sterling Act forbids it.

Second, the precedent most on point goes against the Tax. The plurality opinion in *United Tavern Owners* soundly rejects the same position taken by the City in this case—that distribution transactions and retail transactions are separately taxable under the Sterling Act. Thus, even if the Tax could plausibly be construed as a tax on distribution transactions (it cannot), it still would be impermissibly duplicative of the

Commonwealth's sales tax. To conclude otherwise, as the majority below did, one has to adopt the view of the *United Tavern Owners* dissent, which a majority of this Court wisely rejected.

Third, if any doubt remained about the City's authority to pass the Tax, such doubt would have to be resolved against the City. This Court has repeatedly instructed that tax-enabling statutes are to be strictly construed in favor of taxpayers. That principle applies with special force in challenges to municipal taxes under the Sterling Act, because municipalities only have the power to tax that the General Assembly has given them—and that power must be plainly and unmistakably conferred. The majority below failed to adhere to these principles.

Fourth, affirmance would severely undermine the General Assembly's authority over municipal taxation. Municipalities around the Commonwealth are watching to see whether the Court will accept the City's novel argument that municipalities can impose new taxes on top of existing sales taxes—at whatever by-volume rate they please—so long as they couch those taxes as distribution transaction taxes. Rather than give municipalities that blank check to tax in competition with the Commonwealth for tax revenues, the Court should enforce the General Assembly's existing prohibition against duplicative taxation.

The City's Tax is unlawful under the Sterling Act for all these reasons, and the decision below should be reversed.

VIII. ARGUMENT

In relevant part, the Sterling Act does two things. It first grants "any city of the first class," *i.e.*, Philadelphia, general authority to impose local taxes, and then carves out an important exception barring the City from taxing what the Commonwealth already taxes. 53 P.S. § 15971(a). In the statute's words, the City "shall not have authority" to tax anything "subject to a State tax." *Id.* In this Court's words, that means no "double taxation of the same thing." *Murray v. City of Philadelphia*, 71 A.2d 280, 284 (Pa. 1950) (invalidating under the Sterling Act Philadelphia's tax on dividend income from corporations paying the Commonwealth's capital stock tax).

The Tax exceeds the City's authority under the Sterling Act because the Tax unlawfully duplicates the Commonwealth's tax on the retail sale of the same soft drinks. Under the Tax Reform Code, the Commonwealth imposes a 6% sales tax on the retail sale of practically every beverage covered by the Tax. 72 P.S. § 7201(a), (m)(1) (defining nonalcoholic beverages subject to state sales tax); R.R. 58-60a (comparing the beverages covered by the Tax with those covered by the state sales tax). Although cast as a tax on distribution, the City's Tax is inextricably tied to retail sales and is ultimately borne by the same Philadelphia consumers who already pay the Commonwealth's sales tax. As a result, the City is taxing the same thing as the Commonwealth, in violation of the Sterling Act's prohibition on double taxation. That conclusion follows from the text of the Sterling Act, the practical operation of

the Tax, the precedent of this Court, and the principles of municipal tax law. The contrary decision of the Commonwealth Court should be reversed.

A. The Text of the Sterling Act Forecloses the City's Tax.

The first half of the Sterling Act's key sentence gives the City broad taxing authority. The City may impose "such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city of the first class, as it shall determine." 53 P.S. § 15971(a). As this Court has noted while interpreting similar language in another enabling statute, "in authorizing local taxes on such things as 'transactions,' 'privileges,' and 'occupations,' the General Assembly used terms that are broad, overlapping, and imprecise." *V.L. Rendina, Inc. v. City of Harrisburg*, 938 A.2d 988, 995 (Pa. 2007).

But what the General Assembly has given, the General Assembly has also limited. Using the very same broad and overlapping terms, the Sterling Act expressly limits the City's power to tax by forbidding duplicative taxes: the City "shall not have authority to levy . . . any tax on a privilege, transaction, subject or occupation, or on personal property, which is . . . subject to a State tax." 53 P.S. § 15971(a).

Of the terms used in this section of the Sterling Act, the City and the majority below have latched onto "transaction." Specifically, they argue that the Tax is a tax on distribution-level transactions—*i.e.*, between wholesalers and retailers—while the state sales tax as a tax on different, retail-level transactions. Majority Op. at 19. According to this argument, the Tax is valid because it operates on a different

transaction than the Commonwealth's sales tax. But the City's interpretation of the Tax cannot be squared with the Sterling Act's language and how the Tax operates in practice.[3]

Under the Act, the City may tax "transactions" (and the other delineated categories) only if they occur "within the limits of" the City. 53 P.S. § 15971(a). This Court has noted and applied this geographic limitation in several cases. *See City Stores Co. v. City of Philadelphia*, 103 A.2d 664, 667 (Pa. 1954) (holding that transactions outside of Philadelphia are "not 'within the limits of such city'" under the Sterling Act); *In re N. Am. Rayon Corp.*, 119 A.2d 205, 208-09 (Pa. 1956) (explaining that Sterling Act does not permit Philadelphia to tax transactions outside the City); *cf. V.L. Rendina*, 938 A.2d at 995 (explaining that under the similarly worded enabling statute for Pittsburgh, "any . . . transaction tax levied by Pittsburgh as to commercial transactions occurring wholly outside of Pittsburgh would be *ultra vires*, as the act only enabled Pittsburgh 'to tax transactions "within the limits" of the City.'" (citations omitted)). The Tax here, however, is not designed to tax distribution-level transactions if and only if they occur in Philadelphia.

Instead, the Tax is triggered by four events all united by a common connection to soft drink retail commerce within Philadelphia: (1) "the supply of any sugar-

[3] Even if the Tax could be construed as a tax on distribution-level transactions, that would not settle whether it is impermissibly duplicative because, as discussed below, it falls on the same subject as the state sales tax—selling soft drinks. *See infra* pp. 20-23 and Section VIII.B.

sweetened beverage to a dealer," (2) "the acquisition of any sugar-sweetened beverage by a dealer," (3) "the delivery to a dealer in the City of any sugar-sweetened beverage," and (4) "the transport of any sugar-sweetened beverage into the City by a dealer." PHILA. CODE § 19-4103(1). Not all of these events are obviously "transactions" in the first place. For instance, the transport of a beverage into the City by a dealer is not a transaction, and the delivery of a beverage to a dealer may occur at a different time than its sale by a distributor to a dealer and therefore would not be a transaction. But even setting aside that threshold problem, the City's interpretation of its Tax—as a tax on distribution-level transactions—falters because the connection that the Tax draws between soft drink commerce and the City's geographic boundaries is at the retail level, not the distribution level. The Tax expressly says that the four events give rise to the Tax "only when the supply, acquisition, delivery or transport is for the purpose of the dealer's holding out for *retail sale within the City* the sugar-sweetened beverage or any beverage produced therefrom." *Id.* (emphasis added). The ordinance's definition likewise defines "dealer" as "[a]ny person engaged in the business of selling sugar-sweetened beverage for *retail sale within the City*." *Id.* § 19-4101(1) (emphasis added). As a consequence, only the retail-to-consumer transactions are tied to Philadelphia; the location of any distributor-to-retailer transaction or other distribution-level event is irrelevant.

The City's implementing regulations illustrate how the Tax is owed even when the distribution-level event occurs outside of Philadelphia. The regulations discuss a

hypothetical grocery chain that obtains deliveries of covered beverages at a warehouse facility outside the City. Regulations Example 4. If the retailer brings a portion of the acquired beverages into the City for sale at its Philadelphia retail locations, the distributor must pay the Tax owed for those specific beverages. *Id.* The grocery chain must notify the distributor what percentage of the inventory is destined for Philadelphia retail; otherwise the distributor must assume that 100% of the delivery is subject to the Tax. *Id.*

Conversely, distribution-level events *within* the City may go *untaxed*. Because the Tax is imposed "only when the supply, acquisition, delivery or transport is for the purpose of the dealer's holding out [the covered beverage] for retail within the City," PHILA. CODE § 19-4103(1), no Tax is due if, for example, an out-of-City retailer operates a Philadelphia warehouse at which it acquires inventory for sale someplace else.

As these examples show, a distribution transaction within the City is neither necessary nor sufficient for imposition of the Tax. The actual lynchpin for the Tax is retail commerce within the City. The City's defense of its Tax must fail, then, because "[i]n determining whether double taxation results . . . the practical operation of the two taxes is controlling." *Murray*, 71 A.2d at 284. Substance governs over form, for "irrespective of how taxes are described, reviewing courts assess their validity based on how they operate in practice." *Shelly Funeral Home, Inc. v. Warrenton Township*, 57 A.3d 1136, 1141 (Pa. 2012) (citations omitted); *see also, e.g.*, *Pittsburgh Rys. Co. v. City of*

Pittsburg, 60 A. 1077, 1089 (Pa. 1905) ("[N]o matter what the municipal authorities call [the tax], the question is, what is it?"). Here, the Tax's actual operation shows it is not truly a tax on distributor-to-retailer "transactions."

Thus, contrary to the City and the majority below, for the Tax to be lawful it must be as a Tax on a "*subject*[] . . . within the limits of [the City]" not already "subject to a State tax." 53 P.S. § 15971(a) (emphasis added). It is crucial to keep a "meaningful analytic boundary between transaction [taxes] . . . and other taxes authorized by" the Sterling Act and similar statutes. *V.L. Rendina*, 938 A.2d at 998 n.4 (Baer, J., concurring). Otherwise municipalities would be "free to recharacterize their tax ordinances at will," as Philadelphia has plainly sought to do here, "to avoid any legislative prohibition on [their] taxes, a result inconsistent with legislative intent." *Id.*

The "subject" of the City's "Sugar Sweetened Beverage Tax" is readily apparent. The Tax was intended to and in fact does operate on selling soft drinks in Philadelphia. As the dissent below explains, virtually *every* feature of the Tax shows that it operates in practice like a retail tax on the same soft drinks and other covered beverages as the Commonwealth sales tax. Dissent at 3-7. Each of the five substantive sections of the Tax ordinance explicitly connects the Tax's operation to "retail" sales of soft drinks in Philadelphia, using the word no fewer than ten times. PHILA. CODE §§ 19-4101 to 19-4105; Dissent at 4. Most significantly, the unifying principle that determines whether the Tax is imposed, is whether the retailer aims to sell the beverages in Philadelphia retail transactions. PHILA. CODE § 19-4103(1).

To be sure, the City has tried to design the Tax to circumvent the Sterling Act's no-duplication rule. But these features only reinforce the conclusion that the Tax is impermissibly duplicative of the Commonwealth's tax:

Identity of the Taxpayer. Although the Tax is generally collected from distributors, Philadelphia's retailers of soft drinks bear significant obligations under the Tax including, in many cases, the obligation to pay it. For instance, retailers must pay the Tax if they acquire beverages from unregistered distributors or if they fail to give their distributors the statutorily required notice of the Tax. *Id.* §§ 19-4105(2), 19-4108(1). Philadelphia retailers also may seek permission to sell beverages from unregistered sources, in which case the retailers assume the obligation to pay the Tax. *Id.* § 19-4107; Regulations Example 5 (suggesting such scenario if the retailer imports beverages from a source outside the United States or from an internet retailer). Furthermore, if a court someday holds that distributors operating outside of Philadelphia cannot be required to pay the tax because they are beyond Philadelphia's territorial reach, the Tax provides that the obligation for beverages acquired from such distributors automatically shifts to the retailers. PHILA. CODE § 19-4105(4). The obligation to comply with the Tax thus begins, and in many instances ends, with the retailer.

In any event, the identity of the person formally obligated to pay the Tax has little practical significance. Both the distributors and the retailers pass the costs of the Tax along to Philadelphia consumers. That effect was always expected, if not

intended, and is confirmed in the day-to-day experience of all Philadelphians. (R.R. 42a-43a, 48a-49a, 100a, 102a, 129a) Philadelphia consumers thus bear the ultimate cost of the Commonwealth's sales tax and the City's Tax alike. To uphold the Tax because the distributor, not the retailer, more frequently remits payment would be to elevate form over substance.

By-Volume Measure of the Tax. As this Court has recognized, "the measure of the tax, *i.e.*, the base or yardstick by which the tax is applied," often sheds light on its true focus. *Commonwealth v. Nat'l Biscuit Co.*, 136 A.2d 821, 825-26 (Pa. 1957). Here, the Tax's measure confirms that the Tax's true focus is not distribution transactions. When the beverage is distributed to retailers in quantities that differ from the volume eventually sold to the retail consumer—as with fountain soft drink syrups or concentrates—the Tax provides that the volume sold to the retail consumer controls, not the volume transferred to the retailer by the distributor. In the ordinance's words, the 1.5 cents-per-ounce rate is applied "on the resulting beverage, prepared to the manufacturer's specifications." PHILA. CODE § 19-4103(2)(b). If the Tax were really a tax on distribution rather than retail, it would be based on the volume of product distributed, not the product sold at retail.

Imposing the Tax as Soon as the Soft Drinks Are Held out for Retail Sale. The City has made much of the fact that it imposes the Tax as soon as the retailer decides to hold a beverage out for sale in the City, even if the retailer never succeeds in selling that beverage. But that does not diminish the Tax's retail focus. It shows only that the

City has chosen to extract its Tax for successful and unsuccessful soft drink sales alike.

* * *

The Tax cannot be squared with the language of the Sterling Act. It shares the same "subject" as the Commonwealth's sales tax and does not fall on a different "transaction." It should be struck down accordingly.

B. *United Tavern Owners* Forecloses the City's Tax.

The most on-point precedent addressing the issue presented by this appeal unmistakably rejects the City's position: *United Tavern Owners*, 272 A.2d 868. Although a plurality opinion, the Court's decision is the closest—indeed the only—authority on the precise question presented by this case, and its resolution of that question has never been called into question. Most important, the opinion faithfully reflects the text and purposes of the Sterling Act, and promotes other principles deeply embedded in this Court's precedents. The majority below was wrong to brush it off in a single sentence. Majority Op. at 21 n.20.

In *United Tavern Owners*, this Court struck down a strikingly similar attempt by the City to impose a new tax on already taxed beverages. Specifically, the City enacted an ordinance authorizing a 10% local tax on the retail sale of liquor in Philadelphia's hotels, restaurants, taverns, and clubs. 272 A.2d at 869. The Commonwealth already imposed its general 6% sales tax on liquor and an 18% tax on liquor sold by the state liquor control board. *Id.* But the Commonwealth's two taxes, unlike Philadelphia's

alcohol retail sales tax, were collected when the beverages were transferred from distributor to retailer. *Id.* at 872. This Court nonetheless invalidated the tax under the Sterling Act.

The facts and arguments in *United Tavern Owners* mirror those here: According to the City in that case, its retail-level sales tax did not violate "the Sterling Act because it [was] imposed on a different transaction than that on which the two state taxes [were] imposed." *Id.* at 873. To wit, the City's tax was "imposed on the transaction between the holder of the retail liquor license . . . and the consumer." *Id.* The Commonwealth's taxes, on the other hand were "imposed on the transaction between the holder of the liquor license and his distributor, the state liquor store." *Id.*

The plurality opinion rejected the City's arguments: "We hold today that because the sales of liquor are already subject to two state taxes, the state has preempted the specific field of liquor sales for taxation purposes and Philadelphia is barred from enacting the ordinance in question." *Id.* Although the Commonwealth's two taxes were "imposed on the transaction between the [retailer] and his distributor," they were "classic sales taxes" just like the City's retail-level tax. *Id.* *United Tavern Owners* thus squarely rejected the argument that prevailed below—*i.e.*, that distribution-level and retail-level transactions involving the same beverages are sufficiently distinct under the Sterling Act to be separately taxable transactions. *See* Majority Op. at 19.

United Tavern Owners was correct. First, as a textual matter, it is improper to assume, *see* Majority Op. at 19, that a City tax is automatically permissible so long as it in some sense taxes a different, but obviously closely related, transaction. That is not what the Sterling Act says. It prohibits any City tax on the same "transaction" *or* "subject" as the state tax. 53 P.S. § 15971(a). Courts "must give effect to every word of the statute." *S&H Transp., Inc. v. City of York*, 140 A.3d 1, 7 (Pa. 2016) (citations omitted); *see also* 1 PA.C.S. §§ 1921(a), 1922(2). As in *United Tavern Owners,* here the "subject" of the City tax is the same as the "subject" of the Commonwealth tax: sales of the beverages taxed. If the word "subject" in the Sterling Act has an independent meaning at all, the Tax cannot be sustained.[4]

Second, the plurality opinion in *United Tavern Owners* can claim further support from the structure and purpose of the Commonwealth's sales tax. That tax specifically excludes from taxation distribution-level transactions that transfer an item "for the purpose of resale." 72 P.S. §§ 7201(k)(8)(i), 7202(a). It does so for the purpose of preventing duplicative taxation at the distribution and retail levels, as this Court has noted. The General Assembly wanted "to prevent 'tax pyramiding,' *i.e.*, to insure that the sales and use tax is paid only once in the sequence from creation of the

[4] The Tax here violates the Sterling Act even more brazenly than the tax in *United Tavern Owners*. In that case, it was at least beyond question that the tax fell on a different level of transaction than the state tax. Here, as discussed in Section VIII.A above, the Tax does not fall on distribution transactions within the City and must have some other incidence.

commodity or service to the consumer, to prevent a tax on a tax situation." *Commonwealth v. Lafferty*, 233 A.2d 256, 259-60 (Pa. 1967). As the Court has explained, "[s]ince the consumer pays the sales tax, any requirement that the retailer or middleman should be obligated for an additional sales levy effects double taxation with respect to the same item of commerce." *Commonwealth v. Wetzel*, 257 A.2d 538, 539 (Pa. 1969). This shows that taxes on distributor-to-retailer transactions (assuming that the Tax actually targeted such transactions) have the same subjects as taxes on retailer-to-consumer transactions when both transactions involve the same "item[s] of commerce." *United Tavern Owners* was therefore right not to treat distribution and retail as separately taxable kinds of transaction.

Third, *United Tavern Owners* is supported by the legislative purposes behind the Sterling Act's prohibition on duplicative taxation. The Commonwealth should not have to compete with local governments for tax revenues. Duplicative taxation leads to such competition, even if the local tax falls at a different juncture in the stream of commerce. As *United Tavern Owners* explains, "when the state decides to enter a specific area for the purposes of raising state revenues, a municipal tax in the same area could pose a threat, either by causing a diminution of the taxed activity or by increasing the costs of collection." 272 A.2d at 873. That same concern is implicated here. Because of lost sales from higher consumer prices, Philadelphia's Tax is estimated to cost Pennsylvania between $2.7 and $7.8 million in lost state sales tax

revenues annually. (R.R. 63a, 273-74a) It is a threat to the General Assembly's taxing authority and should be invalidated under the Sterling Act.

C. The City Cannot Establish the Tax's Legality Beyond Any Doubt.

The foregoing arguments conclusively show that the Tax exceeds the City's power under the Sterling Act. But at a minimum, they raise substantial doubts about the City's power here, and that alone is enough to invalidate the Tax. The General Assembly's express instructions, which the Commonwealth Court majority completely ignored, are that tax laws are "strictly construed" against the government. *See* 1 PA.C.S. § 1928(b)(3). That principle applies with special force in challenges to municipal taxes under the Sterling Act and similar local tax enabling statutes. Because "municipal corporations can levy no taxes . . . unless the power be plainly and unmistakably conferred," the General Assembly's "grant of such right is to be strictly construed, and not extended by implication." *Murray*, 71 A.2d at 283 (citations omitted).

In practice, this means that statutory exceptions to the taxing authority conferred on municipalities—including the Sterling Act's prohibition on double taxation—are construed broadly if there is any uncertainty about how far the exception extends. *See Lynnebrook & Woodbrook Assocs., L.P. ex rel. Lynnebrook Manor, Inc. v. Borough of Millersville*, 963 A.2d 1261, 1265 (Pa. 2008); *Fish v. Twp. of Lower Merion*, 128 A.3d 764, 770 (Pa. 2015) (reaffirming *Lynnebrook*'s conclusion that tax exceptions must "be broadly construed in favor of the taxpayer"). "Any reasonable doubt

concerning the meaning of statutory language involving an exception" to the local government's taxing authority must be "resolved in favor of the taxpayer." *S&H Transp.*, 140 A.3d at 3 n.9 (citation omitted). Or, as this Court declared when interpreting this provision of the Sterling Act in *Murray*, "[i]n cases of doubt the construction should be against the government"—*i.e.*, the City. 71 A.2d at 283 (citations omitted).[5]

Tax exceptions are broadly construed in taxpayers' favor not only because of this specific principle of construction, but also because of the more general principle that courts should apply legislation in accordance with the General Assembly's intentions. As *Lynnebrook* explains: "considering the necessity for the [exception] (restricting the grant of authority), the object to be attained (restricting municipal taxation authority) and the mischief to be remedied (overweening municipal authorities imposing taxes beyond the [statute's] authorization) supports an interpretation that *most restricts* the taxing authority." 963 A.2d at 1267 (emphasis added).

These established principles of construction require reversal of the Commonwealth Court's decision.

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[5] Here, as in *Lynnebrook*, the relevant statutory language manifestly constitutes a tax "exception" rather than a tax "exemption." After granting the City some general taxing power, the Sterling Act continues, "*except* that such council *shall not have authority* to" impose duplicative taxes. 53 P.S. § 15971(a); *see Lynnebrook*, 963 A.2d at 1265-66 (construing similar language as a tax exception).

D. Upholding the City's Tax Would Improperly Shift Taxing Authority away from the General Assembly to Municipalities.

Although statutory text and ample precedent justify reversal on their own, the Court need not and should not ignore the practical problems that would result from upholding the Tax. There are over 2,500 local taxing jurisdictions in Pennsylvania. If this Tax is upheld, nothing would stop hundreds of copycat taxes on for-retail-sale distribution on top of preexisting state and local sales taxes. The Local Tax Enabling Act's restriction on duplicative taxation in other municipalities mirrors the Sterling Act. *See* Act of December 31, 1965, P.L. 1257, *as amended*, 53 P.S. § 6924.301.1(a), (f)(1) (authorizing political subdivisions to impose taxes "on persons, transactions, occupations, privileges, subjects and personal property within the limits of such political subdivisions" but not "on a privilege, transaction, subject, occupation or personal property which is now or does hereafter become subject to a State tax").

Nor would additional duplicative taxes necessarily be restricted to soft drinks. Municipalities including Philadelphia could target virtually *any* item sold at retail within local borders for a new tax, at whatever rates they please—including electronics, cars, over-the-counter pharmaceuticals, or anything else that attracts attention. And as for soft drinks, municipalities could do what Philadelphia has not done and impose new soft drink taxes actually targeting distribution transactions within their borders, forcing distributors to collect *multiple* taxes on the soft drinks they handle.

All of this would create the sort of competition between state and local taxation that the Sterling Act was designed to prevent—and that *United Tavern Owners* aimed to avoid. As retailers across Pennsylvania raise prices on retail products in response to a flood of new taxes modeled on Philadelphia's Tax, retail consumption will go down or leave the Commonwealth altogether in favor of neighboring states where prices remain low. The Treasury will suffer not only millions of dollars in annual losses from Philadelphia's Tax, R.R. 63a, 273-74a, but potentially still greater losses from other duplicative taxes in Philadelphia or other municipalities. If this effect is multiplied across taxing jurisdictions and different items, the Commonwealth will have no choice but to raise taxes or cut services.

That result would turn the Commonwealth's division of taxing authority upside down. Again, municipalities have no inherent authority to tax; they get their authority from the General Assembly, and that authority must "be plainly and unmistakably conferred." *Lynnebrook*, 963 A.2d at 1265 (quoting *Fischer v. City of Pittsburgh*, 118 A.2d 157, 158 (Pa. 1955)). The General Assembly has conferred *no* power—let alone conferred it plainly and unmistakably—on Philadelphia or any other municipality to upend the way that retail goods are taxed in the Commonwealth. It has not authorized taxes on whatever retail good, in whatever amount, that local governments choose.

Quite the opposite. Consistent with its approach to other taxes, the General Assembly has given municipalities very *restricted* authority to impose sales taxes.

Philadelphia has the greatest sales taxing authority of any municipality: It may, and does, impose a 2% sales tax on top of the Commonwealth's tax under express grants of authority from the legislature. *See* 53 P.S. § 12720.503; 72 P.S. § 7201-B(a)(1). But if the Tax here is permissible, why stop there? Given the (understandable) lure of revenue-raising, upholding the Tax would only encourage Philadelphia to enact additional taxes on commerce within its borders and other municipalities to follow Philadelphia's example.

That is not how municipal taxation is supposed to work. The General Assembly has already told Philadelphia it cannot impose duplicative taxes—and the burden is not on the General Assembly to be clearer in its prohibitions, but on the City to show that the tax here is not duplicative. Because the City has not carried that burden, the Court should hold that the Tax impermissibly exceeds the City's taxing authority.

IX. CONCLUSION

For all these reasons, the Order of the Commonwealth Court should be reversed and the Tax declared unlawful.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

I certify that this brief complies with PA.R.A.P. 2135(a)(1) because it includes 7,707 words according to the word count feature of Microsoft Word 2010, excluding the parts exempted by PA.R.A.P. 2135(b).

/s/ Marc J. Sonnenfeld
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Dated: March 12, 2018

CERTIFICATE OF CONFIDENTIALITY COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, a true and correct copy of the foregoing was served on the following via first class mail, which satisfies the requirements of PA.R.A.P. 121:

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APPENDIX "A"

The Majority Opinion of the en banc Commonwealth Court,
dated June 14, 2017

LM

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lora Jean Williams; Gregory J. Smith; CVP Management, Inc. d/b/a or t/a City View Pizza; John's Roast Pork, Inc. f/k/a John's Roast Pork; Metro Beverage of Philadelphia, Inc. d/b/a or t/a Metro Beverage; Day's Beverages, Inc. d/b/a or t/a Day's Beverages; American Beverage Association; Pennsylvania Beverage Association; Philadelphia Beverage Association; and Pennsylvania Food Merchants Association,	:	
Appellants	:	
v.	:	No. 2077 C.D. 2016
	:	No. 2078 C.D. 2016
City of Philadelphia and Frank Breslin, in His Official Capacity as Commissioner of the Philadelphia Department of Revenue	:	Argued: April 5, 2017

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE JULIA K. HEARTHWAY, Judge
HONORABLE JOSEPH M. COSGROVE, Judge

OPINION BY JUDGE WOJCIK FILED: June 14, 2017

Lora Jean Williams, *et al.* (Objectors) appeal the orders of the Philadelphia County Court of Common Pleas (trial court) sustaining the preliminary objections of the City of Philadelphia and Frank Breslin, Commissioner of the Philadelphia Department of Revenue (Department) (collectively, City) and dismissing Objectors' complaint regarding the validity of

the Philadelphia Beverage Tax (PBT), and denying Objectors' petition for a special injunction.[1] We affirm.

In June 2016, the City enacted Ordinance No. 160176. In Section 1, the City amended the Philadelphia Code, imposing the PBT effective January 1, 2017, to be paid quarterly. Phila. Code §19-4103(1); §19-4106(1). The PBT applies broadly to "sugar-sweetened beverages," which are defined as "[a]ny non-alcoholic beverage that lists as an ingredient" either "any form of caloric sugar-based sweetener" or "any form of artificial sugar substitute," and "[a]ny non-alcoholic syrup or other concentrate that is intended to be used in the preparation of a beverage and that lists" either of the foregoing sweeteners as an ingredient. Phila. Code §19-4101(3)(a), (b). The PBT provides the following as examples of "sugar-sweetened beverages": "soda; non-100% fruit drinks; sports drinks; flavored water; energy drinks; pre-sweetened coffee or tea; and non-alcoholic beverages intended to be mixed into an alcoholic drink." Phila. Code §19-4101(3)(d). The PBT specifically excludes: (1) baby formula; (2) "medical food" as defined under the Orphan Drug Act;[2] (3) any product that is milk by more than 50% of volume; (4) any product that is fresh fruit, vegetable, or a combination more than 50% of volume; (5) unsweetened drinks to which sweetener can be added at the point of sale by the purchaser or seller; and (6) any syrup or other concentrate that the purchaser combines with other ingredients to create a beverage. Phila. Code §19-4101(3)(c).

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[1] As the trial court explained, Objectors "are consumers, retailers, distributors and trade associations who allege injury from the PBT when implemented." Trial Court 12/19/16 Opinion at 2.

[2] 21 U.S.C. §§360aa—360ff-1.

The PBT defines "dealer" as "[a]ny person engaged in the business of selling sugar-sweetened beverages for retail sale within the City" and defines "distributor" as "[a]ny person who supplies sugar-sweetened beverages to a dealer." Phila. Code §19-4101(1), (2). The PBT states that "[n]o dealer may sell at retail, or hold out or display for sale at retail any sugar-sweetened beverage . . . unless . . . [t]he sugar-sweetened beverage was acquired by the dealer from a registered distributor; and . . . [t]he dealer has complied with the notification requirements[3] . . . and received confirmation from the registered distributor of such notification, as well as confirmation that the distributor is a registered distributor . . . ." Phila. Code §19-4102(1).

The PBT imposes a 1.5¢ per fluid ounce tax, generally payable by a distributor, "upon each of the following: the supply of any sugar-sweetened beverage to a dealer; the acquisition of any sugar-sweetened beverage by a dealer;

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[3] Section 19-4104 of the Philadelphia Code states, in relevant part:

> (1) [N]o dealer shall accept any sugar-sweetened beverage from a registered distributor, for purpose of holding out for retail sale in the City such sugar-sweetened beverage or any beverage produced therefrom, without first notifying the registered distributor that such dealer is a dealer subject to this Chapter. Notice shall be provided in the form of a Commonwealth of Pennsylvania sale for purpose of resale exemption certificate, so long as such certificate clearly indicates that the dealer is located in [the City]; or in such other form as the Department may provide.
>
> (2) Upon receipt of notification pursuant to subsection (1) above, no registered distributor shall supply any sugar-sweetened beverage to a dealer without providing to the dealer, contemporaneously, (i) confirmation of notification; and (ii) a receipt detailing the amount of sugar-sweetened beverage supplied in the transaction and the amount of tax owing on such transaction; all in form satisfactory to the Department.

the delivery to a dealer in the City of any sugar-sweetened beverage; and the transport of any sugar-sweetened beverage into the City by a dealer." Phila. Code §19-4103(1), (2)(a). "The tax is imposed only when the supply, acquisition, delivery or transport is for the purpose of the dealer's holding out for retail sale within the City the sugar-sweetened beverage or any beverage produced therefrom." Phila. Code §19-4103(1). The PBT is also imposed upon "the per ounce of syrup or other concentrate that yields [1.5¢] per fluid ounce on the resulting beverage, prepared to the manufacturer's specifications." Phila. Code §19-4103(2)(b).[4]

"The tax shall be paid to the City by the registered distributor; and the dealer shall not be liable to the City for payment of the tax; so long as the registered distributor has received from the dealer notification . . . that the recipient is a dealer." Phila. Code §19-4105(1). However, "a dealer who fails to provide the notification [of dealer status]; and a dealer who sells at retail, or holds out or displays for sale at retail, any sugar-sweetened beverage in violation of §19-4102(1), shall be liable to the City for payment of any tax owing under this Chapter . . . ." Phila. Code §19-4105(2).

Moreover, "[w]here a dealer is also a registered distributor, no additional tax shall be owing on the supply of any sugar-sweetened beverage by such dealer/distributor to another dealer if the tax already has been imposed on the supply or delivery of the beverage to the dealer/distributor or the acquisition of the beverage by the dealer/distributor." Phila. Code §19-4105(3). Nevertheless, "[i]n

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[4] However, "[u]pon a determination that the application of these rates to any particular product is unfair or unreasonable, the Department is authorized to issue regulations imposing the tax at an alternate rate on that particular product, to approximate as closely as possible the rate [of 1.5¢ per fluid ounce]." Phila. Code §19-4103(2)(b).

the event that a court of competent jurisdiction rules in a decision from which no further appeal lies that any portion of this Chapter cannot be applied to a distributor . . . then any dealer that holds out for retail sale in the City sugar-sweetened beverages . . . shall be liable to the City for the tax on those sugar-sweetened beverages." Phila. Code §19-4105(4).

The Ordinance further provides that "a violation of §19-4102(1) (sale of product purchased from other than a registered distributor or without proper notification to a registered distributor) shall constitute a Class II Offense . . . and each separate sale, transaction or delivery shall constitute a separate offense," but that "the Department may grant a full or partial waiver to a dealer from the provisions of §19-4102(1)" "[u]pon a showing of extraordinary circumstances, where distribution channels would make purchase of sugar-sweetened beverage from a registered distributor substantially impracticable . . . ." Phila. Code §§19-4107(1), 19-4108(1).

In September 2016, Objectors filed the instant complaint in the trial court seeking declaratory and injunctive relief. In Count I, Objectors assert that the City's authority to enact the PBT under the statute commonly referred to as the Sterling Act[5] is expressly preempted by Section 202(a) of the Pennsylvania Tax

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[5] Act of August 5, 1932, Ex.Sess., P.L. 45, *as amended*, 53 P.S. §15971-15973. Section 1(a) of the Sterling Act states, in relevant part:

> [T]he council of any city of the first class shall have the authority by ordinance, for general revenue purposes, to levy, assess and collect, or provide for the levying, assessment and collection of, such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city of the first class as it shall determine, except that such council shall not have authority to levy, assess and collect, or provide for the levying, assessment and collection of, any tax on a privilege,

(Footnote continued on next page...)

Reform Code of 1971 (Tax Code)[6] imposing a tax on the retail sale of "soft drinks" (Sales Tax) because the Sterling Act precludes the imposition of a tax on the same subject of the state tax. In Count II, Objectors contend that the PBT is implicitly

(continued...)

> transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee.

53 P.S. §15971.

[6] Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §7202(a). Section 202(a) provides, in pertinent part, that "[t]here is hereby imposed upon each separate sale at retail of tangible personal property or services . . . within this Commonwealth a tax of six per cent of the purchase price, which tax shall be collected by the vendor from the purchaser, and shall be paid over to the Commonwealth . . . ." In turn, Section 201 defines "tangible personal property" as including "soft drinks," and "soft drinks" are defined as:

> All nonalcoholic beverages, whether carbonated or not, such as soda water, ginger ale, coca cola, lime cola, pepsi cola, Dr. Pepper, fruit juice when plain or carbonated water, flavoring or syrup is added, carbonated water, orangeade, lemonade, root beer or any and all preparations, commonly referred to as "soft drinks," of whatsoever kind, and are further described as including any and all beverages, commonly referred to as "soft drinks," which are made with or without the use of any syrup. The term "soft drinks" shall not include natural fruit or vegetable juices or their concentrates, or non-carbonated fruit juice drinks containing not less than twenty-five per cent by volume of natural fruit juices or of fruit juice which has been reconstituted to its original state, or natural concentrated fruit or vegetable juices reconstituted to their original state, whether any of the foregoing natural juices are frozen or unfrozen, sweetened or unsweetened, seasoned with salt or spice or unseasoned, nor shall the term "soft drinks" include coffee, coffee substitutes, tea, cocoa, natural fluid milk or non-carbonated drinks made from milk derivatives.

72 P.S. §7201(a), (m).

preempted because it conflicts with Sections 201(k)(8) of the Tax Code[7] precluding a tax on the resale of "soft drinks," and 202(a) by obstructing the Commonwealth's collection of the tax and reducing the amount of tax collected. In Count III, Objectors submit that the PBT is implicitly preempted because it conflicts with Section 2013(a) of the federal Food Stamp Act,[8] the federal regulations related thereto,[9] and Section 204(46) of the Tax Code[10] prohibiting the imposition of a tax on items purchased with food stamps. In Counts IV through VII, Objectors also claim that the PBT violates the Uniformity Clause of Article 8, Section 1 of the

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[7] 72 P.S. §7201(k)(8). Section 201(k)(8) states, in pertinent part, that "[t]he term 'sale at retail' shall not include . . . any such transfer of tangible personal property or rendition of services for the purpose of resale . . . ."

[8] 7 U.S.C. §2013(a). Section 2013(a) states, in relevant part:

> [T]he Secretary [of the Department of Agriculture (USDA)] is authorized to formulate and administer a supplemental nutrition assistance program [(SNAP)] under which, at the request of the State agency, eligible households within the State shall be provided an opportunity to obtain a more nutritious diet through the issuance to them of an allotment, except that a State may not participate in the [SNAP] if the Secretary determines that State or local sales taxes are collected within that State on purchases of food made with benefits issued under this chapter.

[9] *See* 7 C.F.R. §272.1(b)(1), (2) ("A State shall not participate in the Food Stamp Program if State or local sales taxes or other taxes or fees, including but not limited to excise taxes, are collected within the State on purchases made with food stamp coupons. . . . State and/or local law shall not permit the imposition of tax on food paid for with coupons. [The USDA's Food and Nutrition Service] may terminate the issuance of coupons and disallow administrative funds otherwise payable . . . in any State where such taxes are charged.").

[10] 72 P.S. §7204(46). Section 204(46) states that "[t]he tax imposed by section 202 shall not be imposed upon . . . [t]he sale at retail or use of tangible personal property purchased in accordance with the Food Stamp Act . . . ."

Pennsylvania Constitution[11] because it is non-uniform and creates unequal burdens at the retail price and distributor levels; creates an unreasonable class of distributor taxpayers and imposes an unequal burden across the class; is non-uniform and creates an unequal burden across a class of retailers; and is non-uniform and creates unequal burdens across the class of consumers.[12]

The City filed preliminary objections to the complaint, alleging that: (1) the Sterling Act expressly authorizes and does not preempt the PBT; (2) the PBT does not conflict with the Tax Code regarding retail sales; (3) the PBT does not conflict with the prohibition on collecting tax on purchases made with federal supplemental nutrition assistance program (SNAP) benefits; (4) the trial court was without jurisdiction to consider the SNAP benefits claim because it was a question for the Secretary of the Department of Agriculture (USDA); and (5) Objectors fail to state a claim that the PBT violates the Uniformity Clause.

In December 2016, the trial court issued an order and opinion disposing of the City's preliminary objections. The trial court first sustained the preliminary objections to Counts I and II of the complaint and dismissed those counts, holding that the PBT is expressly authorized by the Sterling Act and is not duplicative of the Sales Tax so it is not expressly or impliedly preempted. The court stated that "[t]he purpose of the Sterling Act is to prohibit double-taxation

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[11] Pa. Const. art. VIII, §1. Section 1 states that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

[12] Objectors also filed an Emergency Application for the Exercise of King's Bench Powers that the Supreme Court denied on November 2, 2016, at No. 148 EM 2016. Likewise, the Supreme Court denied the City's Unopposed Application for Extraordinary Relief or the Exercise of King's Bench Powers on February 13, 2017, at No. 2 EM 2017.

where two governmental units, the state and its political subdivision, are seeking revenue from a tax or license fee on the same base. However, merely because a business is taxed on a certain aspect of its operations by the Commonwealth, the Sterling Act does not preclude a tax by a political subdivision on a different aspect of its operations." Trial Court 12/19/16 Opinion at 5 (footnote omitted). The court explicated:

> In determining whether a tax duplicates another tax and results in double taxation, the incidence of the two taxes is controlling. The incidence of tax embraces the subject matter thereof and more importantly, the measure of the tax, i.e. the base or yardstick by which the tax is applied. If these elements inherent in every tax are kept in mind, the incidence of the two taxes may or may not be duplicative. Applying this test to the instant matter, this court finds as a matter of law that the PBT is not duplicative of the Commonwealth's Sale and Use Tax and is therefore not preempted. This conclusion is not only supported by the language of the PBT, but also by the longstanding legal precedent addressing duplication.

Id. at 5-6.

The court noted that "[t]he PBT is a tax on the distribution of [sugar-sweetened beverages] on a per ounce basis and legal liability to pay the tax remains on distributors and, in certain instances, dealers," while "[t]he Commonwealth's [Sales Tax] is a 6% tax on the 'sale at retail of tangible property or services'" which "is applied to the purchase price of retail sales of personal property and legal liability to pay the tax falls on the consumer." Trial Court 12/19/16 Opinion at 6 (footnote omitted). The court explained that "[t]he respective taxes apply to two different transactions, have two different measures and are paid by different taxpayers" because "[t]he subject of the PBT is a non-

retail, distribution level tax on [sugar-sweetened beverages];" it "is only triggered when the [sugar-sweetened beverages] are distributed by the distributor, irrespective of whether the dealer sells the product to the consumer;" and "[t]he tax is measured by the volume of fluid ounces of the [sugar-sweetened beverage] and is imposed on the distributor." *Id.* The court stated that, in contrast, "the Commonwealth's [Sales Tax] is imposed on a sale at the retail level, is measured by the purchase price of the retail sale and is paid by the consumer." The trial court rejected Objectors' assertion "that the incidence of the tax is the same because the PBT will cause the distributor to pass the economic burden of the tax onto the dealer who will then pass the economic burden to the consumer" because "the ultimate economic burden of the tax may be imposed upon the purchaser-consumer, but the legal incidence is on the distributor." *Id.* at 7, 8.

The trial court sustained the City's preliminary objection to Count III of the complaint and dismissed that count, holding that the PBT is not implicitly preempted by the Section 2013(a) of the federal Food Stamp Act, its regulations, and Section 204(46) of the Tax Code. The court stated:

> The scope of SNAP is limited to the "purchase [of] food *from retail food* stores." The PBT is not a sales tax on the consumer, but rather a tax on the distributor. [T]he incidence of taxation is assessed by examining the statute's intended taxpayer, and not the economic impact of the tax. Under the plain terms of the PBT, the tax is not collected upon "purchases" at "retail" made with food stamps, but only upon non-retail, distributor-level transactions. Since the PBT's incidence of taxation is not on the consumer and the tax is not paid using SNAP benefits, the PBT is not preempted.

Trial Court 12/19/16 Opinion at 9-10 (footnotes omitted and emphasis in original).

Finally, the trial court sustained the City's preliminary objections to Counts IV through VII and dismissed those counts, holding that the PBT does not violate the Uniformity Clause. The court noted that Objectors "allege that the PBT is not uniform because it falls on four different classes, soft drinks, distributors, retailers and consumers, on an unequal basis," and "that the PBT results in an enormous range of tax burdens across the classes subject to the tax because it imposes a flat tax per unit of volume regardless of the market price or wholesale price of the [sugar-sweetened beverage]." Trial Court 12/19/16 Opinion at 10. "However, [the court set forth,] the only classes created by the PBT are distributors and arguably [sugar-sweetened beverages] which are one and the same for purposes of this analysis," and that "[t]he consumer and retailer classes identified by [Objectors] are not classes created by the PBT and are, therefore, not subject to tax liability under the PBT." *Id.*

The court stated that "[t]he PBT's manner and measure of calculating the tax is uniformly applied to distributors" because "[t]he PBT levies a tax on per fluid ounce of [sugar-sweetened beverages] distributed in the City to dealers at a rate of 1.5 cents per ounce." *Id.* at 12-13. As a result, the court held that "all distributors are subject to the same tax calculation formula and therefore no disparate treatment exists within a distributor class in regard to the formula and rate of tax." *Id.* at 13. The court explained that the PBT "is not a property tax since the legal incidence of the tax is based on the privilege of distributing [sugar-sweetened beverages] in [the City]" so "it need not be assessed *ad valorum*" and it does not violate the Uniformity Clause. *Id.* at 13-14. Based on its dismissal of all counts of the complaint, the trial court also dismissed as moot Objectors' request

for a special injunction and Objectors filed the instant appeals of the trial court's orders.[13, 14]

I.

Objectors first claim that the trial court erred in holding that the PBT is expressly authorized by the Sterling Act and erred in concluding that it is not expressly or impliedly preempted by state law. Specifically, Objectors assert that the incidence of the PBT is impermissibly duplicative of the Sales Tax imposed

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[13] This Court *sua sponte* consolidated the appeals for disposition and granted Objectors' Application for Emergency Relief to expedite argument and disposition of the appeals.

[14] In reviewing a trial court's order sustaining "preliminary objections, the standard of review is *de novo* and the scope of review is plenary." *Keller v. Scranton City Treasurer*, 29 A.3d 436, 443 n.12 (Pa. Cmwlth. 2011). "In order to sustain such a preliminary objection, it must appear with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, that doubt should be resolved by a refusal to sustain it." *Muncy Creek Township Citizens Committee v. Shipman*, 573 A.2d 662, 663 (Pa. Cmwlth. 1990).

Regarding the trial court's denial of a special injunction, this Court has stated:

> The Pennsylvania Rules of Civil Procedure refer to 'preliminary injunction' and 'special injunction.' Pa. R.C.P. No. 1531. The terms are often used interchangeably because both remedies are commonly sought to preserve the status quo until final hearing. Goodrich–Amram 2d §1531(a)(1). The [instant] motion for 'preliminary injunction,' however, will be deemed a request for relief in the nature of a special injunction since it sought "relief which is auxiliary to the main relief requested in the complaint." *In re Franklin Township Board of Supervisors*, [379 A.2d 874, 879 (Pa. 1977)].

East Stroudsburg University v. Hubbard, 591 A.2d 1181, 1183 n.5 (Pa. Cmwlth. 1991). Our review of the trial court's order denying the injunction is highly deferential; it is limited to examining the record to determine if there were any apparently reasonable grounds for the court's action. *Warehime v. Warehime*, 860 A.2d 41, 46 (Pa. 2004).

under the Tax Code so it is not authorized under the Sterling Act. Objectors also contend that the PBT is preempted by the Tax Code because it subverts the exception in Section 201(k) relating to the resale of items at retail.

As the Pennsylvania Supreme Court has explained:

> The matter of preemption is rooted in the relationship between the constitutional provisions vesting the legislative power of the Commonwealth in the General Assembly, Article II, Section 1, and providing for local government, Article IX, Section 1. In providing for the general welfare of the Commonwealth's citizens, the General Assembly may choose to leave a subject open to control by local governmental bodies, it may enact laws of statewide application that simultaneously allow for local regulation, or local ordinances may be prohibited entirely.
>
> There is generally no difficulty of application where a statute explicitly removes a given subject from local control. Similarly, where some local regulation is permitted its outer bounds can usually be clearly determined; municipal ordinances are valid if they are not contradictory to or inconsistent with the statutory law. In such situations any questions are readily resolved because, almost by definition, the intention of the General Assembly is plain. Difficulties arise only when the legislative intent is not explicit but must be inferred.

City of Philadelphia v. Clement & Muller, Inc., 715 A.2d 397, 398 (Pa. 1998).

As the Court further explicated:

> In *Department of Licenses and Inspections, Board of License and Inspection Review v. Weber*, [147 A.2d 326 (Pa. 1959)], this Court explained two of the three closely related forms of preemption as follows:
>
> > Of course, it is obvious that where a statute specifically declares it has planted the flag of preemption in a field, all ordinances on the subject die away as if they did not exist. It is also apparent

> that, even if the statute is silent on supersession, but proclaims a course of regulation and control which brooks no municipal intervention, all ordinances touching the topic of exclusive control fade away into the limbo of 'innocuous desuetude.'
>
> *Id.* at 327. In addition to those two forms of preemption, respectively "express" and "field preemption," there is also a third, "conflict preemption," which acts to preempt any local law that contradicts or contravenes state law. *See Mars Emergency Med. Servs. v. Township of Adams*, [740 A.2d 193, 195 (Pa. 1999)] (citing, *inter alia*, *W. Pennsylvania Rest. Ass'n v. Pittsburg*h, [77 A.2d 616, 619-20 (Pa. 1951)]).

Nutter v. Dougherty, 921 A.2d 44 (Pa. Cmwlth.), *aff'd*, 938 A.2d 401, 406 (Pa. 2007).[15]

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[15] In *Nutter*, 921 A.2d at 59-60 n.6, this Court outlined cases in which local regulation was held to have been preempted by state statute:

> *See, e.g., Ortiz* [*v. Commonwealth*, 681 A.2d 152 (Pa. 1996)] (holding that Philadelphia and Pittsburgh ordinances banning certain types of assault weapons within municipal boundaries were preempted by state law as the ordinances purported to regulate ownership, use, possession or transfer of certain firearms, or matters of statewide concern because ownership of firearms is constitutionally protected); [*Commonwealth v.*] *Wilsbach Distributors*[, *Inc.*, 519 A.2d 397 (Pa. 1986)] (noting that no other area of state exercise of police power is more plenary than in regulation and control of use and sale of alcoholic beverages and holding that local business privilege and mercantile tax ordinance imposing tax on importing distributor of malt and brewed beverages was preempted by Liquor Code, [Act of April 12, 1951, P.L. 90, *as amended*, 47 P.S. §§1-101 – 10-1001,] which regulates in plenary fashion every aspect of alcoholic beverage industry through Liquor Control Board, the designated arm of enforcement); [*City of Pittsburgh v.*] *Allegheny Valley Bank of Pittsburgh*[, 412 A.2d 1366 (Pa. 1980)] (holding local business privilege tax ordinance taxing bank revenue was preempted by state law as applied to state banks where the Banking Code of

(Footnote continued on next page...)

As stated above, Section 1(a) of the Sterling Act empowers the City "to levy, assess and collect . . . such taxes on . . . transactions, . . . privileges, subjects and personal property . . . as it shall determine except that [it] shall not have authority to levy, assess and collect . . . any tax on a privilege, transaction, subject . . . or on personal property, which is now or may hereafter become subject to a State tax . . . ." 53 P.S. §15971. Thus, "[u]nder the Sterling Act . . . the city has broad powers to levy taxes for revenue purposes." *Blauner's v. City of Philadelphia*, 198 A. 889, 891 (Pa. 1938). Nevertheless, the above-cited provision "was intended to prevent double taxation of the same thing; in other words, the city was instructed that it could not tax subjects taxed by the state. . . . If, therefore, the tax proposed to be collected pursuant to the [Sterling Act] results in such double

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> 1965, Act of November 30, 1965, P.L. 847, *as amended*, 7 P.S. §§101–2204, and establishment of a Department of Banking to supervise activities of state banking institutions show legislative intent to exclusively occupy state banking field); *Harris–Walsh* [*Inc. v. Dickson City Borough*, 216 A.2d 329 (Pa. 1966)] (holding local ordinance regulating within borough limits future mining of anthracite coal by strip mine method preempted by state law because legislature expressly retained exclusive jurisdiction over regulation of the anthracite strip mining industry through Department of Mines); and *Duff* [*v. Township of Northampton*, 532 A.2d 500 (Pa. Cmwlth. 1987), *aff'd*, 550 A.2d 1319 (Pa. 1988)] (holding that local ordinance making it illegal to hunt or kill game through use of bow and arrow or firearm or weapon from which shot or other object is discharged within area designated as township safety zone was preempted by the [former version of the Game and Wildlife Code, 34 Pa. C.S. §§101-2965], which indicated legislative intent to retain exclusive control over the regulation of hunting). In these cases the legislature provided clear intent to preempt the various fields in which it has legislated.

taxation, it is unauthorized and must be restrained." *Murray v. City of Philadelphia*, 71 A.2d 280, 284 (Pa. 1950).

In *Pocono Downs, Inc. v. Catasauqua Area School District*, 669 A.2d 500, 502 (Pa. Cmwlth. 1996), quoting *Commonwealth v. National Biscuit Co.*, 136 A.2d 821, 825-26 (Pa. 1957), *appeal dismissed*, 357 U.S. 571 (1958), this Court stated:

> In determining whether a tax duplicates another tax and results in double taxation prohibited to local taxing authorities, *the operation or incidence of the two taxes is controlling as against mere differences in terminology* from time to time employed in describing taxes in various cases. The incidence of a tax embraces *the subject matter thereof and, more important, the measure of the tax, i.e.*, the base or yardstick by which the tax is applied. If these elements inherent in every tax are kept in mind, the incidence of the two taxes may or may not be duplicative. [(Emphasis in original).]

However, a tax's "operation or incidence" refers to the substantive text of the ordinance and does not concern the post-tax economic actions of private actors in response to the imposition of the PBT. *See, e.g., Gurley v. Rhoden*, 421 U.S. 200, 204 (1975) (citations omitted) ("[T]he decision as to where the legal incidence of either tax falls is not determined by the fact that petitioner, by increasing his pump prices in the amounts of the taxes, shifted the economic burden of the taxes from himself to the purchaser-consumer. The Court has laid to rest doubts on that score . . . at least under taxing schemes, as here, where neither statute required petitioner to pass the tax on to the purchaser-consumer.").

As noted above, under Sections 19-4102(1) and 19-4105(1) of the Philadelphia Code, the PBT is paid by a distributor and a dealer is not liable so long as the dealer notifies the distributor, receives confirmation of that notification,

and receives notification that the distributor is a registered distributor.[16] Section 19-4105 outlines the circumstances under which a dealer may assume a distributor's PBT liability, but there is no provision in the Philadelphia Code that ever shifts liability for the PBT to the ultimate purchaser at retail.[17] Likewise, Example 2 of the Regulations, at page 19, explains that "[t]he tax is not a sales tax; the tax is imposed upon the supply of the [sugar-sweetened beverage] to the Dealer or the acquisition of the [sugar-sweetened beverage] by the Dealer, not upon the sale of [the sugar-sweetened beverage] by the Dealer to its customers." The subject matter of the tax, the non-retail distribution of sugar-sweetened beverages for sale at retail in the City, and the measure of the tax, per ounce of sugar-sweetened beverage, are distinct from the Sales Tax imposed under the Tax Code upon the retail sale of the sugar-sweetened beverage to the ultimate purchaser. Thus, the dissent's claim that the PBT is duplicative of the Sales Tax is incorrect.

Likewise, Objectors' claim that the PBT may be refunded if the sugar-sweetened beverage is not ultimately sold at retail is not correct. While Section 19-4107(1) states that "the Department may grant a full or partial waiver to a

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[16] *See also* Section 301(a) of the Sugar-Sweetened Beverage Tax Regulations (Regulations) ("In general, [P]BT shall be paid to the City by the Registered Distributor; and the Dealer that acquires the [sugar-sweetened beverage] from the Registered Distributor shall not be liable to the City for payment of the tax as long as the Registered Distributor has received from the Dealer notification . . . that it is a Dealer.").

[17] In this regard, Section 301(b) of the Regulations states that "[w]here a Dealer is also a Registered Distributor, such Dealer is liable to the City for payment of [P]BT; no additional [P]BT shall be owing on the supply of any [sugar-sweetened beverage] by such Dealer/Distributor . . . ." Additionally, Section 302(b) states that "[a] Registered Dealer is any Dealer that elects to register as if it were a Distributor and agrees to assume all of the obligations of a Distributor with respect to the Dealer's acquisition of any [sugar-sweetened beverage], including payment of [P]BT to the Department."

dealer from the provisions of §19-4102(1)" "[u]pon a showing of extraordinary circumstances, where distribution channels would make purchase of sugar-sweetened beverage from a registered distributor substantially impracticable . . . ," there is no indication that the non-sale of a sugar-sweetened beverage is such an "extraordinary circumstance" warranting a refund of the PBT. Section 501(f) of the Regulations states:

> When a Taxpayer discovers an overpayment of tax, the Taxpayer shall file an amended return to claim a credit or, if the Taxpayer is no longer required to file a [P]BT return, the Taxpayer will be entitled to claim a refund of the overpaid [P]BT. A credit or refund may be claimed only if the later filed [sugar-sweetened beverage] return or refund claim is filed by the Taxpayer no later than three (3) years after the later of the date of payment of the overpaid [P]BT or the due date for such payment.[18]

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[18] Example 11 of the Regulations, at page 32, sets forth, with respect to a refund of the tax already paid on 15 cases of sugar-sweetened beverages that are not ultimately sold at retail in the City:

> As long as [the Dealer] has documented that 15 cases of [sugar-sweetened beverage] intended for sale in [the City] actually were sold outside the City, if [the Dealer] has sufficient non-[City] inventory, [the Dealer] may elect to replenish its [City] inventory with 15 cases of [sugar-sweetened beverage] from its non-[City] inventory (on which no [P]BT was paid). In the extraordinary situation where [the Dealer] will not be placing any future [City] orders for that [sugar-sweetened beverage] (either because it will cease to carry that [sugar-sweetened beverage] or because it no longer will have a [City] location), [the Dealer] can notify the Distributor of the change in the retail sale location and the Distributor can claim a credit or refund, as appropriate, in accordance with Section 501([f]) of these regulations. Any recovery by [the Dealer] is entirely at the discretion of the Distributor.

As outlined above, the PBT taxes non-retail distribution transactions and not retail sales to a consumer. As a result, the PBT does not violate the duplicative-tax prohibition in the Sterling Act or encroach upon a field preempted by the Sales Tax because the taxes do not share the same incidence and merely have related subjects. As the Supreme Court has explained, "in several cases the United States Supreme Court has upheld taxes on the use of personal property as a form of excise tax.[19]" *John Wanamaker v. School District of Philadelphia*, 274

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[19] "The use and ownership of property are distinct and separate. The right to use property is just one of the several rights incident to ownership[.]" *John Wanamaker v. School District of Philadelphia*, 274 A.2d 524, 526 (Pa. 1971) (citations omitted). Regarding taxes imposed upon the use of property, this Court has stated:

> While the distinctions between property taxes, income taxes, franchise taxes, excise taxes and privilege taxes have not been honed to a very sharp edge by the courts, there are certain guidelines. It is true that the characterization of the nature of the tax is not controlling but it is also true that such characterization is entitled to much weight. Here the legislature has clearly categorized this tax as an excise tax. One standard for distinguishing a property tax from a franchise or excise tax is the method adopted for imposing the tax and for fixing the amount thereof.

Philadelphia Saving Fund Society v. Commonwealth, 467 A.2d 420, 423 (Pa. Cmwlth. 1983) (citations omitted). "A tax is an 'excise' or 'transfer' tax if the government is taxing 'a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property.' *Fernandez v. Wiener*, 326 U.S. 340, 352 [(1945)]." *In re Estate of Hambleton*, 335 P.3d 398, 403-04 (Wash. 2014). *See also John Wanamaker*, 274 A.2d at 527 ("While economically the incidence of the tax is on the property itself, its legal incidence is on the privilege of using, making it a true excise tax."); *Blair Candy Company, Inc. v. Altoona Area School District*, 613 A.2d 159, 161-62 (Pa. Cmwlth. 1992) (holding that a cigarette tax was an excise tax, and not a sales tax, so that the income received from cigarette stamping was subject to a local mercantile tax and was not subject to exemption under the Tax Code prohibiting duplication of taxes because the cigarette tax was imposed at specific rate on specific item, was named an excise tax, was payable by a licensed tax stamp agency, and the income received from stamping was compensation for affixing such stamps).
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As stated above, Section 19-4103(1) of the Philadelphia Code provides that the PBT "is imposed only when the supply, acquisition, delivery [of a sugar-sweetened beverage to a dealer] or transport [of a sugar-sweetened beverage into the City by a dealer] is for the purpose of the dealer's holding out for retail sale within the City the sugar-sweetened beverage or any beverage produced therefrom." Section 19-4103(2) imposes the PBT at a rate of 1.5¢ per fluid ounce of sugar-sweetened beverage or upon "the per ounce of syrup or other concentrate that yields [1.5¢] per fluid ounce on the resulting beverage, prepared to the manufacturer's specifications." Because the PBT taxes "a particular use or enjoyment" of sugar-sweetened beverages or "the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of" sugar-sweetened beverages, it is an excise tax.

Similarly, Section 11-19-2 of the West Virginia Code imposes an excise tax on soft drinks based on volume stating, in relevant part:

> [A]n excise tax is hereby levied and imposed . . . upon the sale, use, handling or distribution of all bottled soft drinks and all soft drink syrups, whether manufactured within or without this State, as follows:
>
> (1) On each bottled soft drink, a tax of one cent on each sixteen and nine-tenths fluid ounces, or fraction thereof, or on each one-half liter, or fraction thereof contained therein.
>
> (2) On each gallon of soft drink syrup, a tax of eighty cents, and in like ratio on each part gallon thereof, or on each four liters of soft drink syrup a tax of eighty-four cents, and in like ratio on each part four liters thereof.
>
> (3) On each ounce by weight of dry mixture or fraction thereof used for making soft drinks, a tax of one cent or on each 28.35 grams, or fraction thereof, a tax of one cent.
>
> Any person manufacturing or producing within this State any bottled soft drink or soft drink syrup for sale within this State and any distributor, wholesale dealer or retail dealer or any other person who is the original consignee of any bottled soft drink or soft drink syrup manufactured or produced outside this State, or who brings such drinks or syrups into this State, shall be liable for the excise tax hereby imposed. The excise tax hereby imposed

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A.2d 524, 526 (Pa. 1971) (citations omitted). Based on this precedent, the Court held that the City's business use and occupancy tax imposed on the use or occupancy of real estate for commercial or industrial activity was not an impermissible direct tax on the real estate because the tax liability flowed from the voluntary election by the owner to use the real property in a certain manner. *Id.* at 526-28.[20]

In *Blauner's, Inc.*, 198 A. at 891, the Supreme Court held that a City ordinance imposing a sales tax did not "invade the field pre-empted by the Commonwealth" under a capital stock tax because "the ordinance taxes neither the

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> shall not be collected more than once in respect to any bottled soft drink or soft drink syrup manufactured, sold, used or distributed in this State.

W. Va. Code, § 11-19-2.

[20] Objectors' reliance on *United Tavern Owners of Philadelphia v. School District of Philadelphia*, 272 A.2d 868 (Pa. 1971), is misplaced because that plurality opinion has never been adopted by a majority of the Supreme Court and later cases invalidating local alcohol taxation rested on field preemption and not an express preemption by the Tax Code. *See, e.g., Clement & Muller, Inc.*, 715 A.2d at 398. Objectors' reliance on *Murray*, 71 A.2d at 284, is also misplaced because, as stated by this Court, in *Murray* the City "passed a net income tax which purported to tax dividend income in the hands of stockholders" which was "a tax on the property itself, and since the dividends as property had already been taxed while in the hands of the corporation by the state capital stock tax . . . the city tax [was] a second tax on the same property." *Man, Levy & Nogi, Inc. v. School District of the City of Scranton*, 375 A.2d 832, 835 (Pa. Cmwlth. 1977). As outlined above, the PBT and the Sales Tax are imposed on differing subjects and are measured on differing bases. *See id.* ("As already stated, the local and state taxes under consideration in the instant case are privilege taxes levied upon separate and distinct business privileges, and the attempted analogy to property taxes cannot control."). Likewise, Objectors' reliance on *Pocono Downs, Inc.*, 669 A.2d at 503, is misplaced because in that case, "both taxes [were] on the same subject matter, patrons' wagers, and [were] measured on the same base, the amount of wagers."

same subject nor the same person as the State taxes referred to." The Court also held that the ordinance did not impermissibly duplicate the state net income tax:

> We have held an income tax to be a property tax, and the corporate net income tax specifically to be such[.] The sales tax and the net income tax vary widely. The former is an excise tax on sales and services; the latter is a property tax upon income from any source. The former is a tax on "transactions," whereas the latter is a tax on "property." The persons taxed are wholly different. The sales tax is imposed upon the purchaser or consumer; the net income tax is on the corporation receiving the income.

Id. (citations omitted).

The Court also held that the ordinance did not invade the field preempted by the state mercantile license tax, stating:

> The state mercantile license tax and the city sales tax are similar in that they are both excises, but the similarity goes no further. The city tax is a levy on sales, the state tax is a levy imposed for the privilege of conducting a particular kind of business, albeit the amount of the tax is measured by gross sales. The sales tax is imposed upon the transaction whereby the property is acquired; the mercantile tax is an imposition for the privilege of doing business.

Id. at 892. The Court concluded "that the city sales tax ordinance and the Mercantile License Tax Act do not tax the same subject, nor the same person, and that the field covered by the ordinance had not been preempted by the mercantile license tax." *Id.*[21] Correspondingly, in this case, the PBT and the Sales Tax do not

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[21] *See also Fish v. Township of Lower Merion*, 128 A.3d 764, 770-71 (Pa. 2015) (holding that a township's imposition of a business privilege tax on businesses whose sole income consisted of rent payments on leased real property was not barred by Section 301.1(f)(1) of the Local Tax Enabling Act (LTEA), Act of December 31, 1965, P.L. 1257, *as amended*, 53 P.S. §6924.301.1(f)(1), limiting its authority to "levy, assess, or collect . . . any tax on . . . leases or **(Footnote continued on next page...)**

tax the same subject, or the same person, and the field covered by the PBT has not been preempted by the Sales Tax.

Finally, Objectors' argument that the exception of "transfer[s] . . . for the purpose of resale" from the application of the Sales Tax in Section 201(k) of the Tax Code somehow limits the City's authority to enact the PBT under the Sterling Act is unpersuasive.[22] In *Provident Mutual Life Insurance Company v. Tax Review Board*, 750 A.2d 942 (Pa. Cmwlth. 2000), Provident Life Insurance Company (Provident) merged with Covenant Life Insurance Company (Covenant) which held mortgages on a number of properties in the City. After Provident subsequently acquired the properties by deed in lieu of foreclosure, the City assessed a realty transfer tax pursuant to Section 19-4103(1) of the Philadelphia

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(continued...)

lease transactions[.];" *School District of Scranton v. Dale & Dale Design & Development, Inc.*, 741 A.2d 186, 189 (Pa. 1999) (holding that a school district's imposition of a business privilege tax on a contractor's receipts from residential construction was not barred by Section 301.1(f)(11) of the LTEA, 53 P.S. §6924.301.1(f)(11), limiting its authority to "levy, assess, or collect a tax on the construction of or improvement to residential dwellings . . . .").

[22] Similarly, we also reject Objectors' assertion that the imposition of the PBT constitutes impermissible "tax pyramiding." *See* 71 Am. Jur. 2d State and Local Taxation §33 (2017) ("The view is also supported by considerable authority that in accordance with the qualification sometimes made in defining double taxation in the invidious sense, that the two taxes must be imposed with respect to the same taxable subject, the exaction of two or more excise taxes with respect to the same person or property is not invalid as double taxation where the privileges or activities taxed are clearly separable and distinct.") (footnotes omitted). *See also Blair Candy Co., Inc.*, 613 A.2d at 161 ("The cigarette tax is an *excise tax* imposed at the specific rate of one and fifty-five hundredths of a cent per cigarette. Therefore, the cigarette tax is a *specific* tax, imposed at a stated dollar amount per item. By contrast, the Pennsylvania sales tax as set forth in Article II of the [Tax Code] is an *ad valorem* tax imposed on each separate sale at retail of tangible personal property or services at a rate of six percent of the purchase price to be collected by the vendor.") (emphasis in original).

Code.[23] Provident sought a refund of the tax, asserting that the transfers were exempt under Section 19-4105(14) of the Philadelphia Code,[24] but the City's Tax Review Board found that the tax exclusion did not survive Provident's merger with Covenant and the exclusion was not available to Provident. On appeal, the trial court affirmed.

On further appeal to this Court, Provident argued, *inter alia*, that the City did not have the authority to impose the tax under Section 1301(b) of the Local Tax Reform Act[25] or the Sterling Act because the transfer of realty as in that

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[23] Section 19-4103(1) of the Philadelphia Code states, in pertinent part, that "[e]very person who . . . accepts ownership of real estate situate within the City, shall be subject to pay for and in respect to the transaction or any part thereof . . . a tax based on the value of the real estate represented by such document . . . ." In turn, Section 19-4102(14)(b) states, in relevant part, that "upon a deed in lieu of foreclosure . . . the actual monetary worth of the real estate as determined by adjusting the assessed value of the real estate, as determined by the Board of Revision of Taxes for City real estate tax purposes, for the common level ratio factor for the City . . . ."

[24] Section 19-4105(14) states, in pertinent part, that "[t]he tax imposed by Section 19-4103 shall not be imposed upon . . . [a] transfer . . . by a mortgagor to the original grantor holding the purchase money mortgage whether such a transfer is pursuant to a deed in lieu of a foreclosure or a transfer pursuant to a judicial sale."

[25] Act of December 13, 1988, P.L. 1121, 72 P.S. § 4750.1301(b). Section 1301(b) states, in relevant part:

> (1) [T]he council of [the City] shall have the authority, by ordinance, for general revenue purposes, to levy, assess and collect or provide for the levying, assessment and collection of a tax upon a transfer of real property . . . within the geographical limits of [the City] . . . to the extent that the transactions are subject to the tax imposed by Article XI-C of the [Tax Code].
>
> (2) In addition, [the City] may impose a local real estate transfer tax upon additional classes or types of transactions and may establish standards to be used by the [City] to determine the

(Footnote continued on next page...)

case is specifically exempt from the state real estate transfer tax under Section 1102-C.3(16) of the Tax Code.[26] We rejected Provident' s arguments, explaining:

> The [trial] court addressed the City's authority to tax under the Sterling Act and did not find Provident's argument persuasive. The [trial] court noted that this Court previously addressed this issue. In *Equitable Assurance Soc. v. Murphy*, [621 A.2d 1078 (Pa. Cmwlth. 1993)], this Court held that the Sterling Act authorized the City to tax a transfer of stock in a real estate corporation when the real estate owned by the corporation was located within the City where the City had a real estate transfer tax in place. Although the present situation is not identical, it is similar insofar as the City has enacted a real estate transfer tax and has taxed a transfer of real estate within the City.
>
> Further, we cannot agree that because a particular transaction is mentioned but not specifically designated as taxable in the [Tax Code] that this means the City has no authority to tax the transaction under Section 1301(b)(2) of the [Local Tax Reform] Act. Section 1301(b)(2) provides that the City may impose a local real estate transfer tax upon additional classes or types of transactions if the real estate transfer tax is imposed pursuant to the Sterling Act. Section 1 of the Sterling Act provides that the City may tax transactions within the City if that transaction is not "subject to a State tax or license fee." 53 P.S. §15971(a).

(continued...)

> monetary value to be applied to a transaction for the purpose of taxation, if the tax was or is imposed by the [City] pursuant to the Sterling Act, or pursuant to this act.

[26] Added by the Act of July 2, 1986, P.L. 318, *as amended*, 72 P.S. §8102-C.3(16). Section 1102-C.3(16) states, in pertinent part, that "[t]he tax imposed by section 1102-C shall not be imposed upon . . . [a] transfer by a mortgagor to the holder of a bona fide mortgage in default in lieu of a foreclosure . . . ."

> Here, this transaction is not subject to a state tax or license fee because this transaction, the transfer of property from a mortgagor to the holder of the mortgage through a deed in lieu of foreclosure, is specifically exempt from the state realty transfer tax as contained in the [Tax Code] as enacted by the General Assembly. Therefore, because this transaction is not subject to a state tax, the City may levy the Tax on this class of transaction, the conveyance of property through a deed in lieu of foreclosure, pursuant to the Sterling Act and in compliance with Section 1301(b)(2) of the Local Tax Reform Act. Further, the General Assembly did not explicitly state that a Tax on this transaction is prohibited. To the contrary, the General Assembly granted broad authority to the City to tax under the Local Tax Reform Act and the Sterling Act. The [trial] court properly rejected the proposition that the City exceeded its authority by assessing the Tax.

Provident Mutual Life, 750 A.2d at 946. Based on the foregoing, it is clear that the exception contained in Section 201(k) of the Tax Code does not limit the City's authority to enact the PBT under the Sterling Act.[27]

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[27] Moreover, and quite importantly, as indicated above, Section 19-4104(1) of the Philadelphia Code provides, in pertinent part:

> [N]o dealer shall accept any sugar-sweetened beverage from a registered distributor, for purpose of holding out for retail sale in the City such sugar-sweetened beverage or any beverage produced therefrom, without first notifying the registered distributor that such dealer is a dealer subject to this Chapter. *Notice shall be provided in the form of a Commonwealth of Pennsylvania sale for purpose of resale exemption certificate*, so long as such certificate clearly indicates that the dealer is located in [the City]; or in such other form as the Department may provide. (Emphasis added).

Thus, a dealer must first provide a Commonwealth sale for the purpose of resale exemption certificate before accepting a sugar-sweetened beverage for retail sale.

In sum, the trial court did not err in determining that the City was empowered to enact the PBT under the Sterling Act and Objectors' claims that the City's authority in this regard is explicitly or impliedly preempted by Commonwealth statutes are without merit. As a result, the trial court did not err in sustaining the City's preliminary objections to Counts I and II of the complaint and dismissing those counts.

II.

Objectors next claim that the trial court erred in holding that the PBT is not implicitly preempted by the Section 2013(a) of the federal Food Stamp Act, its regulations, and Section 204(46) of the Tax Code, which preclude the imposition of a tax on items purchased at retail with food stamps. Objectors assert that the PBT's conflict with this state-law exemption jeopardizes the Commonwealth's eligibility to participate in the federal program and erodes the purchasing power of those Objectors who use food stamps to purchase groceries.

As stated above, Section 2013(a) of the Food Stamp Act states, in relevant part, that "States may not participate in [the program] if the Secretary determines that State or local sales taxes are collected within that State on purchases of food made with [program] benefits." 7 U.S.C. §2013(a). Likewise, Section 272.1(b) of the federal regulations provides:

> A State shall not participate in the Food Stamp Program if State or local sales taxes or other taxes or fees, including but not limited to excise taxes, are collected within the State on purchases made with food stamp coupons. . . . State and/or local law shall not permit the imposition of tax on food paid for with coupons. [The USDA's Food and Nutrition Service] may terminate the issuance of coupons and disallow administrative funds otherwise payable . . . in any State where such taxes are charged.

7 C.F.R. §272.1(b)(1), (2). To this end, the General Assembly enacted Section 204(46) of the Tax Code which prohibits the imposition of the Sales Tax under Section 202 on the sale of goods purchased with food stamps. 72 P.S. §§7202, 7204(46).

Section 2020(g) of the Food Stamp Act[28] empowers the federal government to enforce the foregoing provisions. Nevertheless, as a United States District Court has explained:

> A number of courts have recognized an implied private right of action to enforce provisions of the Food Stamp Act, but the defendants in all of these cases were public officials, and the plaintiffs were all individuals who had been denied Food Stamp benefits. *See, e.g., Victorian v. Miller*, 813 F.2d 718, 720–21, 724 n. 13 (5th Cir. 1987) (action against Texas Department of Human Services officials); *Haskins v. Stanton*, 794 F.2d 1273, 1274 (7th Cir. 1986) (holding indigent persons denied food stamp benefits had "a private right of action to

[28] *See* 7 U.S.C. §2020(g) ("If the Secretary determines, upon information received by the Secretary, investigation initiated by the Secretary, or investigation that the Secretary shall initiate upon receiving sufficient information evidencing a pattern of lack of compliance by a State agency of a type specified in this subsection, that in the administration of the [SNAP] there is a failure by a State agency without good cause to comply with any of the provisions of this chapter, the regulations issued pursuant to this chapter, the State plan of operation submitted pursuant to subsection (d) of this section, the State plan for automated data processing submitted pursuant to subsection (o)(2) of this section, or the requirements established pursuant to section 2032 of this title the Secretary shall immediately inform such State agency of such failure and shall allow the State agency a specified period of time for the correction of such failure. If the State agency does not correct such failure within that specified period, the Secretary may refer the matter to the Attorney General with a request that injunctive relief be sought to require compliance forthwith by the State agency and, upon suit by the Attorney General in an appropriate district court of the United States having jurisdiction of the geographic area in which the State agency is located and a showing that noncompliance has occurred, appropriate injunctive relief shall issue, and, whether or not the Secretary refers such matter to the Attorney General, the Secretary shall proceed to withhold from the State such funds authorized under sections 2025(a), 2025(c), and 2025(g) of this title as the Secretary determines to be appropriate, subject to administrative and judicial review under section 2023 of this title."),

> enforce compliance with the Food Stamp Act by . . . state officials"); *Johnson v. Madigan*, [(N.D. Ga., Civ. A. No. 1:91–CV1412MHS, filed March 26, 1992), slip op. at 2-4] (action against Secretary of Agriculture and Commissioner of Georgia's Department of Human Resources); *Dubuque v. Yeutter*, 728 F. Supp. 303, 304-05 (D. Vt. 1989) (action against Secretary of the U.S. Department of Agriculture and the Commissioner of Vermont's Department of Social Welfare).
>
> Plaintiff has not cited, and research has not disclosed, any case in which a court has found that a food stamp recipient has a private right of action under the Food Stamp Act against a retail food store participating in the Food Stamp Program.

Posr v. City of New York, (S.D.N.Y., No. 11 Civ 986 (PGG)), filed September 25, 2012), slip op. at 10.[29]

Objectors' claims in the instant matter are without merit because the federal statute and regulations only prohibit the imposition of a tax on retail purchase transactions, and not a tax on non-retail distribution transactions within the reach of the PBT. As outlined above, the PBT is never "collected" upon "purchases" at "retail," let alone transactions "made with [program] benefits;" the PBT is only collected from either distributors or dealers upon distribution transactions, and no recipient of program benefits is ever liable for the payment of the PBT. The fact that the PBT may be passed on to recipients through higher

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[29] *See Stone Crushed Partnership v. Kassab Archbold Jackson & O'Brien*, 908 A.2d 875, 883-84 n.10 (Pa. 2006) (stating that the decision of an inferior federal court interpreting federal law should be treated as persuasive, but not binding, authority); *In re Dolph*, 215 B.R. 832, 835 (6th Cir. 1998) (explaining that although unpublished decisions are not binding precedent, they may be cited if persuasive, especially where there are no published decisions that will serve as well). *But cf. Delaware County v. Raymond T. Opdenaker & Sons*, 652 A.2d 434, 437 n.2 (Pa. Cmwlth. 1994), *appeal dismissed*, 669 A.2d 929 (Pa. 1995) (refusing to consider a memorandum opinion of a federal district court).

retail prices does not alter the incidence of the PBT nor transform it into a prohibited tax within the purview of Section 2013(a) of the Food Stamp Act, its regulations, or Section 204(46) of the Tax Code.

Moreover, the City has no responsibility for regulating either distributors or dealers with respect to the Food Stamp Act, *see* 7 U.S.C. §§2020, 2021 (outlining the federal and state responsibilities under the Food Stamp Act), and Objectors do not allege any special relationship between the City and the distributors and dealers upon whom the PBT is imposed.[30] The trial court properly concluded that "[s]ince the PBT's incidence of taxation is not on the consumer and the tax is not paid using SNAP benefits, the PBT is not preempted." Trial Court 12/19/16 Opinion at 10. As a result, the trial court did not err in sustaining the City's preliminary objection to Count III of the complaint and dismissing that count.

III.

Objectors next claim that the trial court erred in holding that the PBT does not violate the Uniformity Clause of the Pennsylvania Constitution[31] because

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[30] *See, e.g., Posr*, slip op. at 9 ("The fact that 'a private entity performs a function which serves the public does not make its acts state action.' 'Actions of a private entity are attributable to the State if "there is a sufficiently close nexus between the State and the challenged action of the . . . entity so that the action of the latter may be fairly treated as that of the State itself."' However, 'conduct by a private entity is not fairly attributable to the state merely because the private entity is a business subject to extensive state regulation or affected with the public interest.'") (citations omitted).

[31] As this Court has noted, "[a] taxpayer challenging the constitutionality of tax legislation bears a heavy burden. . . . It is well-established that tax legislation is presumed to be constitutionally valid and will not be declared unconstitutional unless it 'clearly, palpably, and plainly violates the Constitution.' Furthermore, '[a]ny doubts regarding the constitutionality of tax legislation should be resolved in favor of upholding its constitutionality.'" *DelGaizo v.*
(Footnote continued on next page...)

it is a property tax based on the dealers' inventory of covered beverages and that a property tax violates the Uniformity Clause if "it is imposed on a quantity and not an *ad valorem* basis." *In re Lawrence Township School District 1947 Taxes*, 67 A.2d 372, 383 (Pa. 1949) citing *Commonwealth ex rel. Department of Justice v. A. Overholt & Co.*, 200 A. 849, 852 (Pa. 1938).[32]

However, Objectors' argument in this regard is based on the faulty premise that the PBT is a property tax.[33] As stated above in footnote 17, the PBT is an excise tax "imposed only when the supply, acquisition, delivery [of a sugar-sweetened beverage to a dealer] or transport [of a sugar-sweetened beverage into the City by a dealer] is for the purpose of the dealer's holding out for retail sale within the City the sugar-sweetened beverage or any beverage produced

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(continued...)

Commonwealth, 8 A.3d 429, 433 (Pa. Cmwlth. 2010), *exceptions overruled*, 23 A.3d 610 (Pa. Cmwlth. 2011), *aff'd*, 65 A.3d 289 (Pa. 2013) (citations omitted).

[32] As the Pennsylvania Supreme Court has stated:

> 'Taxes are either specific or *ad valorem*. Specific taxes are of a fixed amount by the head or number, or by some standard of weight or measurement and require no assessment other than a listing or classification of the subjects to be taxed. An *ad valorem* tax is a tax of a fixed proportion of the value of the property with respect to which the tax is assessed, and requires the intervention of assessors or appraisers to estimate the value of such property before the amount due from each taxpayer can be determined. * * *'

A. Overholt & Co., 200 A. at 852 (citation omitted).

[33] Thereby distinguishing the cases cited in support of Objectors' argument in this regard.

therefrom." Phila. Code §19-4103(1). Likewise, Section 201 of the Regulations states:

> [The PBT] is imposed upon each of the following: the supply of any [sugar-sweetened beverage] to a Dealer; the acquisition of any [sugar-sweetened beverage] by a Dealer; the delivery to a Dealer in the City of any [sugar-sweetened beverage]; and the transport of any [sugar-sweetened beverage] into the City by a dealer. The tax shall be imposed only once with respect to any individual item of [sugar-sweetened beverage]. The tax is imposed only when the supply, acquisition, delivery or transport is for the purpose of the Dealer's holding out for retail sale within the City either the [sugar-sweetened beverage] or a beverage produced therefrom.

The PBT is not imposed on the ownership of the sugar-sweetened beverages or on their sale; rather, it is only imposed if the beverages are supplied, acquired, delivered, or transported for purposes of holding them out for retail sale in the City. As a result, the PBT is properly assessed at a specific rate per fluid ounce of sugar-sweetened beverage or its equivalent and not on an *ad valorem* basis. *See, e.g., South Union Township v. Commonwealth*, 839 A.2d 1179, 1191 (Pa. Cmwlth. 2003) ("Each 'operator of a municipal waste landfill [pays] ... a disposal fee of $4 per ton for all solid waste disposed . . . .' 27 Pa. C.S. §6301(a). Petitioners have simply not pleaded facts to show that this disposal fee is not imposed uniformly or that the classification *clearly, palpably, and plainly* violates the Constitution. Petitioners' unsupported, conclusory allegations are insufficient to overcome the strong presumption of constitutionality.") (citation omitted and emphasis in original); *Blair Candy Co., Inc.*, 613 A.2d at 161 ("The cigarette tax is an *excise tax* imposed at the specific rate of one and fifty-five hundredths of a cent per cigarette. Therefore, the cigarette tax is a *specific* tax, imposed at a stated dollar amount per item. By contrast, the Pennsylvania sales tax as set forth in

Article II of the [Tax Code] is an *ad valorem* tax imposed on each separate sale at retail of tangible personal property or services at a rate of six percent of the purchase price to be collected by the vendor.") (emphasis in original). Based on the foregoing, the trial court did not err in sustaining the City's preliminary objections to Counts IV through VII of Objectors' complaint and dismissing those counts.

IV.

Finally, Objectors claim that the trial court erred in denying their request for a special injunction. In general:

> Although the former equity rules made minor distinctions between "special" and "preliminary" injunctions, the current Rules of Civil Procedure treat them exactly alike and the words are used interchangeably.
>
> A special injunction, like a preliminary injunction, is commonly sought to preserve the status quo until the final hearing. A special injunction may be asked for during the pendency of an equity action, and it may be granted at any stage of the proceedings, whenever it is necessary to preserve the status quo.

15 Standard Pennsylvania Practice 2d §83:11 (2017) (footnotes omitted).

The essential prerequisites for the issuance of such an injunction are as follows:

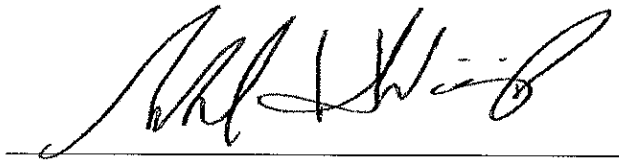
> (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the

> merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest.

SEIU Healthcare Pa. v. Commonwealth, 104 A.3d 495, 502 (Pa. 2014) (citing *Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004)). Because the grant of a preliminary injunction is an extraordinary remedy, the failure to establish a single prerequisite requires the denial of the request for an injunction. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1000 (Pa. 2003).

As outlined above, Objectors cannot prevail on the merits of their claims regarding the purported invalidity of the PBT. As a result, Objectors were not entitled to the requested injunctive relief and the trial court had apparently reasonable grounds for denying Objectors' request.

Accordingly, the trial court's orders are affirmed.



MICHAEL H. WOJCIK, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lora Jean Williams; Gregory J. Smith; CVP Management, Inc. d/b/a or t/a City View Pizza; John's Roast Pork, Inc. f/k/a John's Roast Pork; Metro Beverage of Philadelphia, Inc. d/b/a or t/a Metro Beverage; Day's Beverages, Inc. d/b/a or t/a Day's Beverages; American Beverage Association; Pennsylvania Beverage Association; Philadelphia Beverage Association; and Pennsylvania Food Merchants Association,	:	
Appellants	:	
v.	:	No. 2077 C.D. 2016 No. 2078 C.D. 2016
City of Philadelphia and Frank Breslin, in His Official Capacity as Commissioner of the Philadelphia Department of Revenue	:	

ORDER

AND NOW, this 14th day of June, 2017, the orders of the Philadelphia County Court of Common Pleas dated December 19, 2016, at No. September Term, 2016 No. 01452, are AFFIRMED.

MICHAEL H. WOJCIK, Judge

Certified from the Record

JUN 14 2017

and Order Exit

APPENDIX "B"

The Dissenting Opinion of Judge Covey, joined by Judge Cohn-Jubelirer, dated June 14, 2017

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lora Jean Williams; Gregory J. Smith; CVP Management, Inc. d/b/a or t/a City View Pizza; John's Roast Pork, Inc. f/k/a John's Roast Pork; Metro Beverage of Philadelphia, Inc. d/b/a or t/a Metro Beverage; Day's Beverages, Inc. d/b/a or t/a Day's Beverages; American Beverage Association; Pennsylvania Beverage Association; Philadelphia Beverage Association; and Pennsylvania Food Merchants Association,	:	
Appellants	:	
v.	:	
City of Philadelphia and Frank Breslin, in His Official Capacity as Commissioner of the Philadelphia Department of Revenue	:	No. 2077 C.D. 2016 No. 2078 C.D. 2016 Argued: April 5, 2017

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE JULIA K. HEARTHWAY, Judge
HONORABLE JOSEPH M. COSGROVE, Judge

DISSENTING OPINION BY
JUDGE COVEY FILED: June 14, 2017

I respectfully dissent from the Majority's conclusion that "the [portion of the Philadelphia Code known as the Philadelphia Beverage Tax (]PBT[)[1]] does not violate the duplicative-tax prohibition in [the statute commonly referred to as] the

[1] Phila. Code §§ 19-4101 – 4108.

Sterling Act[2] or encroach upon a field preempted by the [Commonwealth's tax on the retail sale of soft drinks (]Sales Tax[)[3]] because the [PBT and the Sales T]ax[] do not share the same incidence and **merely have related subjects**." Majority Op. at 19 (emphasis added).

While I acknowledge that the PBT does not *appear* to be duplicative of the Sales Tax because it is not explicitly labeled a **retail sales** tax, the Majority ignores that the PBT is **only triggered when there is a retail sale** involved. The Majority states: "[A] tax's 'operation or incidence' refers to the substantive text of the ordinance and does not concern the post-tax economic actions of private actors in response to the imposition of the PBT." Majority Op. at 16. A review of the PBT in its entirety reveals that it is in fact duplicative of the Sales Tax. "To learn and give effect to the legislative intention expressed in a statute or ordinance is the cardinal objective of construction. **An ordinance must be construed as an entirety, and the legislative intention that is contained within it must be determined accordingly, and not from a part thereof.**" *Detweiler v. Derry Twp. Mun. Auth.*, 370 A.2d 810, 812 n.2 (Pa. Cmwlth. 1977) (emphasis added; citations omitted); *see also Snyder Bros., Inc. v. Pa. Pub. Util. Comm'n,* ___ A.3d ___ (Pa. Cmwlth. Nos. 1043, 1175 C.D. 2015, filed March 29, 2017).

When considering the relevant portions of the PBT and the Pennsylvania Tax Reform Code of 1971 (Tax Code),[4] it is important to be mindful of what constitutes a "tax." "Tax" is defined as: "A charge, usu[ally] monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue. Most broadly, **the term embraces all governmental impositions on the** person, **property**, privileges, occupations, and enjoyment of the people, and includes duties,

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[2] Act of August 5, 1932, Ex.Sess., P.L. 45, *as amended*, 53 P.S. §§ 15971-15973.

[3] Section 202(a) of the Act of March 4, 1971, P.L. 6, *as amended*, Pennsylvania Tax Reform Code of 1971, 72 P.S. § 7202(a), imposing a tax on the retail sale of soft drinks.

[4] 72 P.S. §§ 7101-10004.

imposts, and excises." *Black's Law Dictionary* 1594 (9th ed. 2009) (emphasis added).

Section 202(a) of the Tax Code provides:

> There is hereby **imposed upon each separate sale at retail** of tangible personal property or services, as defined herein, within this Commonwealth **a tax** of six per cent of the purchase price, which tax shall be collected by the vendor from the purchaser, and shall be paid over to the Commonwealth as herein provided.

72 P.S. § 7202(a) (emphasis added). Section 19-4103(1) of the PBT mandates:

> a tax is imposed upon each of the following: the supply of any sugar-sweetened beverage to a dealer; the acquisition of any sugar-sweetened beverage by a dealer; the delivery to a dealer in the City [of Philadelphia (City)] of any sugar-sweetened beverage; and the transport of any sugar-sweetened beverage into the City by a dealer. **The tax is imposed only when the supply, acquisition, delivery or transport is for the purpose of the dealer's *holding out for retail* sale within the City the sugar-sweetened beverage or any beverage produced therefrom.** The tax is to be paid as provided in [Section 4105 of the PBT, Phila. Code] § 19-4105 (liability for payment of tax) and [Section 4107 of the PBT, Phila. Code] § 19-4107 (waivers).

Phila. Code § 19-4103(1) (italic and bold emphasis added). Section 19-4105(1) of the PBT states: "The tax shall be paid to the City **by the registered distributor**; and **the dealer shall not be liable** to the City for payment of the tax; so long as the registered distributor has received from the dealer notification . . . that the recipient is a dealer." Phila. Code § 19-4105(1) (emphasis added).

However, the PBT defines a **dealer** as: "**Any person engaged in the business of selling sugar–sweetened beverage *for retail sale* within the City**, including but not limited to restaurants; retail stores; street vendors; owners and operators of vending machines; **and distributors who engage *in retail sales*[,]**" and distributor as: "**Any person who supplies sugar-sweetened beverage to a dealer.**"

Phila. Code § 19-4101(1), (2) (italic and bold emphasis added). Section 19-4102 of the PBT further declares:

> (1) **No dealer may *sell at retail*, or hold out or *display for sale at retail*, any sugar-sweetened beverage acquired by the dealer on or after January 1, 2017, unless**:
>
> (a) The sugar-sweetened beverage was acquired by the dealer from a registered distributor; and
>
> (b) The dealer has complied with the notification requirements of [Section 19-4104 of the PBT, Phila. Code] § 19-4104; and received confirmation from the registered distributor of such notification, as well as confirmation that the distributor is a registered distributor, all in form prescribed by the Department.

Phila. Code § 19-4102 (italic and bold emphasis added). Thus, a distributor is **only taxed if the sugar-sweetened beverage is *held out for retail sale***, and **no dealer can sell a sugar-sweetened beverage at retail *unless the tax has been paid.***

In interpreting the ordinance as a whole, like we must, its entire underpinning is the retail sale mandate. The PBT contains only eight sections; one section provides definitions, one speaks to administration and one refers to waivers. Each of the remaining five sections states that **the tax can only be imposed in relation to the retail sale** of sugar-sweetened beverages. Accordingly, the PBT implicates both supply *and* sale at retail, making the PBT a duplicative tax.

Relevantly, the Majority focuses on the fact that the distributor is taxed; thus, isolating the incidence of the tax to the distribution. However, Section 19-4105(4) of the PBT provides:

> In the event a court of competent jurisdiction rules in a decision from which no further appeal lies that any portion of this Chapter cannot be applied to a distributor with respect to any transaction or class of transactions, then ***any dealer that holds out for retail sale*** in the City sugar-sweetened beverages supplied through those transactions

> ***shall be liable to the City for the tax*** on those sugar-sweetened beverages.

Phila. Code § 19-4105(4) (italic and bold emphasis added). In addition, if the dealer does not provide the distributor the required notice, **the dealer is liable to pay the tax**. *See* Phila. Code § 19-4105. Moreover, Section 19-4107(1) of the PBT states:

> Upon a showing of extraordinary circumstances, **where distribution channels would make purchase of sugar-sweetened beverage from a registered distributor substantially impracticable, the Department**, in its discretion, **may grant a full or partial waiver to a dealer** from the provisions of [Section 4102(1) of the PBT, Phila. Code] § 19-4102(1). **In such case**, as well as during the pendency of any application for waiver under this subsection, **the tax shall be paid directly by the dealer to the Department**, in such manner and using such forms as the Department shall prescribe. The Department may require an annual demonstration of continuing extraordinary circumstances in order to continue a waiver.

Phila. Code § 19-4107(1) (emphasis added). Finally, Section 19-4103(1) of the PBT clearly states that the liability for payment of the tax, and thus, the target of the tax is the "dealer's holding out for retail sale." Phila. Code § 19-4103(1). Section 19-4105 of the PBT reads, in pertinent part:

> (1) The tax shall be paid to the City by the registered distributor; and **the dealer shall not be liable** to the City **for payment of the tax; so long as the registered distributor has received from the dealer notification** pursuant to § 19-4104(1) that the recipient is a dealer.
>
> (2) In addition to any penalties provided hereunder, **a dealer who fails to provide the notification** required by § 19-4104(1); ***and*** a dealer **who sells at retail, or holds out or displays for sale at retail, any sugar-sweetened beverage** in violation of § 19-4102(1), **shall be liable** to the City **for payment of** any **tax** owing under this Chapter, and shall file returns with the Department in form prescribed by the Department.

Phila. Code § 19-4105 (italic and bold emphasis added). In the same vein of capturing the tax when the sugar-sweetened beverage is intended for retail sale, Section 19-4108 of the PBT mandates:

> **In addition to any other penalties** provided under this Title, **a violation of** [Section] 19-4102(1) [of the PBT] (**sale of product purchased from other than a registered distributor** or without proper notification to a registered distributor) **shall constitute a Class II Offense** under 1-109; **and each separate sale**, transaction or delivery **shall constitute a separate offense**.

Phila. Code § 19-4108 (emphasis added). Thus, the clear wording of the PBT evidences that the "distributor" is **not** in fact the target of the tax. Contrary to the Majority's conclusion **that the PBT is a "distribution" tax, the PBT is a tax imposed *only* where the sugar-sweetened beverage is sold or intended to be sold *at retail*, and the PBT is imposed regardless of whether there is a distributor involved.** Majority Op. at 19 (emphasis added). Consequently, the "distribution" is **not** the tax incidence as the Majority concludes. *Id.*

The Majority cites "Example 11 of the Regulations" (wherein a distributor is entitled to "a credit or refund" if sugar-sweetened beverages were purchased by the dealer with the intent to sell in the City but the beverages were actually sold outside of the City), to support its position that the existence of the refund does not make it a duplicative tax. Majority Op. at 18 n.18. However, that example buttresses the Dissent's position, i.e., no retail sale in the City equals no tax. Given that the tax will force retailers to sell sugar-sweetened beverages outside the City because of the PBT, the scenario in Example 11 is actually more likely than not. When a retailer cannot move his sugar-sweetened beverages in the City and is driven to sell them outside the City, the City will not get the tax (because the distributor will get a refund), just as no retail sales tax will be obtained if the beverages are not sold.

Importantly, **unlike** the ordinances reviewed in the cases cited by the Majority, **the PBT is *only* triggered when a retail sale is involved**, making this a case of first impression. *See Gurley v. Rhoden,* 421 U.S. 200 (1975); *John Wanamaker v. Sch. Dist. of Phila.*, 274 A.2d 524 (Pa. 1971); *Blauner's v. City of Phila.,* 198 A. 889 (Pa. 1938); *Provident Mutual Life Ins. Co. v. Tax Review Bd.*, 750 A.2d 942 (Pa. Cmwlth. 2000); *Pocono Downs, Inc. v. Catasauqua Area Sch. Dist.*, 669 A.2d 500 (Pa. Cmwlth. 1996).

United Tavern Owners of Philadelphia v. School District of Philadelphia, 272 A.2d 868 (Pa. 1971), is the only case that cannot be distinguished from the facts of the instant matter. Although as the Majority notes: "*United Tavern*, . . . [is a] plurality opinion [that] has never been adopted by a majority of the Supreme Court[,]" it has never been overruled and remains good law. Majority Op. at 21 n.20. As in the present case, it was argued in *United Tavern*

> that the ordinance in question does not violate the preemption provision of the Sterling Act **because it is imposed on a different transaction** than that on which the two state taxes are imposed. According to this argument[,] the local tax would be imposed on the transaction between the holder of the retail liquor license, i.e., the owner of the hotel or bar, and the consumer, whereas the state taxes are imposed on the transaction between the holder of the liquor license and his distributor, the state liquor store.

Id. at 873 (emphasis added). The Court rejected that argument, holding:

> We do not accept this view. [It is] our view, the state taxes on liquor are classic sales taxes. The only reason that the definition of sales in the case of liquor is different from the definition with regard to other items covered by the sales tax is because the existence of a statewide system of state-operated distribution centers for liquor made it possible to assure effective collection of the tax by imposing the tax on the sale at the state store.

Id. While the case before us does not involve liquor, it does involve taxing the distributor "to assure effective collection of the tax[.]" *Id.* As in *United Tavern*, the imposition of the tax on the distributor does not change the nature of what is, in essence, a sales tax.

"[P]reliminary objections **shall only be sustained when they are free and clear from doubt**." *Petty v. Hosp. Serv. Ass'n of N.E. Pa.*, 967 A.2d 439, 443 n.7 (Pa. Cmwlth. 2009) (emphasis added), *aff'd*, 23 A.3d 1004 (Pa. 2011). Our Supreme Court has declared:

> As [a] taxing statute[], [the PBT] **must be strictly construed against the government, and any doubt or ambiguity in the interpretation of their terms must, therefore, be resolved in favor of the taxpayer.** 1 Pa.C.S.[] § 1928; *Skepton v. Borough of Wilson*, . . . 755 A.2d 1267, 1270 ([Pa.] 2000).

Tech One Assocs. v. Bd. of Prop. Assessment, Appeals & Review of Allegheny Cnty., 53 A.3d 685, 696 (Pa. 2012) (emphasis added).

Construing the PBT against the government as mandated, I would hold that the Commonwealth has preempted the field through the Sales Tax, and the PBT is invalid under the Sterling Act. Further, given that this matter is an issue of first impression and the obvious doubt as demonstrated by the numerous positions presented, the determination of whether the PBT is invalid under the Sterling Act is not "**free and clear from doubt,**" and therefore, the preliminary objections to Counts I and II of Appellants' Complaint should be overruled.[5] *Petty*, 967 A.2d at 443 n.7

[5] Because Appellants' Complaint Counts I and II overlap Count III, I would overrule the preliminary objections to Count III as well. Relative to the Uniformity Clause, because the PBT duplicates the Sales Tax, I cannot agree with the Majority's analysis that the PBT is an excise tax. Thus, I would also overrule the preliminary objections to Counts IV through VII. Finally, with respect to the special injunction, while I disagree that Appellants cannot prevail on the merits, I believe that "the injunction is [not] necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages[,]" and for that reason I would deny the injunction. *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 502 (Pa. 2014).

(emphasis added). This result is especially true here where the Majority does not cite with certainty to any legal authority squarely on point.

For all of the above reasons, I would reverse the trial court's order sustaining Appellees' preliminary objections and dismissing Appellants' Complaint, and remand the matter to the trial court for further proceedings.

ANNE E. COVEY, Judge

Judge Cohn Jubelirer joins in this dissenting opinion.

APPENDIX "C"

The Rule 1925(a) Opinion of Judge Glazer, dated January 9, 2017

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

LORA JEAN WILLIAMS, GREGORY SMITH, CVP MANANGEMENT, INC., d/b/a or t/a CITY VIEW PIZZA, JOHN'S ROAST PORK, METRO BEVERAGE OF PHILADELPHIA, INC., d/b/a or t/a METRO BEVERAGE, DAY'S BEVERAGES, AMERCAN BEVERAGE ASSOCIATION, PENNSYLVANIA BEVERAGE ASSOCIATION, PHILADELPHIA BEVERAGE ASSOCIATION, and PENNSYLVANIA FOOD MERCHANTS ASSOCIATION,	:	September Term 2016
Plaintiffs,	:	No. 1452
v.	:	COMMERCE PROGRAM
CITY OF PHILADELPHIA and FRANK BRESLIN, in his official capacity as Commissioner of the Philadelphia Department of Revenue,	:	Nos. 2077 and 2078 C.D. 2016
Defendants.	:	

OPINION

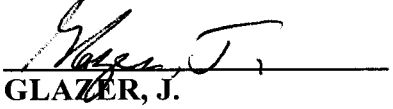
GLAZER, J. **January 9, 2017**

This appeal opinion is submitted relative to appeals filed by Plaintiffs' to this court's order and opinion dated December 19, 2016 sustaining Defendants' preliminary objections to the complaint in its entirely and this court's order dated December 19, 2016 denying Plaintiffs' petition for special injunction. On September 14, 2016, plaintiffs filed this action seeking to invalidate the PBT by asserting three preemption claim challenges and four uniformity clause challenges. Plaintiffs also filed a petition for special injunctive relief. Defendants filed preliminary objections. On December 19, 2016, this court entered two orders, an order sustaining the preliminary objections and dismissing the complaint in its entirety and an order denying the

special injunction. For the reasons set forth in the orders and opinion attached and incorporated herein respectively as Exhibits "A" and "B", this court's orders should be affirmed.

Date: January 9, 2017

BY THE COURT,



GLAZER, J.

EXHIBIT "A"

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

LORA JEAN WILLIAMS, ET. AL.,	:	September Term 2016
Plaintiffs,	:	
v.	:	No. 1452
CITY OF PHILADELPHIA, ET. AL.,	:	
Defendants.	:	Commerce Program
	:	
	:	Control Number 16100940

ORDER

AND NOW, this 19th day of December 2016, upon consideration of Defendants' preliminary objections to Plaintiffs' complaint, Plaintiffs' response in opposition and Defendants' reply, it is hereby

ORDERED

that the preliminary objections are **SUSTAINED** and the complaint is dismissed in its entirety.

BY THE COURT,

GLAZER, J.

Williams Etal Vs City O-ORDRF

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

LORA JEAN WILLIAMS, ET. AL.,	:	September Term 2016
Plaintiffs,	:	
v.	:	No. 1452
CITY OF PHILADELPHIA, ET. AL.,	:	
Defendants.	:	Commerce Program
	:	
	:	Control Number 16100940

OPINION

GLAZER, J. **December 19, 2016**

This is an action seeking declaratory and injunctive relief to invalidate the Philadelphia Beverage Tax ("PBT"). Plaintiffs, Lora Jean Williams, Gregory J. Smith, CVP Management, Inc. d/b/a or t/a City View Pizza, John's Roast Pork, Inc. f/k/a John's Roast Pork, Metro Beverage of Philadelphia, Inc. d/b/a or t/a Metro Beverage, Day's Beverage, Inc. d/b/a or t/a Day's Beverages, American Beverage Association, Pennsylvania Beverage Association, Philadelphia Beverage Association, and Pennsylvania Food Merchants Association (collectively "Plaintiffs") are consumers, retailers, distributors and trade associations who allege injury from the PBT when implemented. Defendants are the City of Philadelphia and Frank Breslin, the Commissioner of the Philadelphia Department of Revenue (collectively "Defendants").

The PBT was passed on June 16, 2016, by the Philadelphia City Council by a vote of 13-4 and was signed into law on June 20, 2016, by the Honorable James Kenney, Mayor of the City of Philadelphia. The PBT will become effective January 1, 2017 and will impose a 1.5 cent per fluid ounce tax by distributors to dealers on the transfer of sugar sweetened beverages ("SSBs") as defined by the ordinance to Philadelphia dealers. The first collection deadline is February 20, 2017.

The PBT states that the tax is imposed only when the "supply, acquisition, delivery or transport is for the purpose of the dealer's holding out for retail sale within the City the sugar-sweetened beverage or any beverage produced therefrom." The PBT defines "sugar-sweetened beverage" as "any non-alcoholic beverage that lists as an ingredient: (1) any form of caloric sugar-based sweetener, including, but not limited to, sucrose, glucose or high fructose corn syrup; or (2) any form of artificial sugar substitute, including stevia, aspartame, sucralose, neotame, acesulfame potassium (Ace-K), saccharin, and advantame."[1] The PBT defines "Distributor" as "any person who supplies sugar-sweetened beverage to a dealer."[2] "Dealer" is defined by the PBT as "any person engaged in the business of selling sugar-sweetened beverage for retail sale within the City, including but not limited to restaurants; retail stores; street vendors; owners and operators of vending machines; and distributors who engage in retail sales."[3]

The PBT specifically excludes the following beverages from the definition of "sugar-sweetened beverages": (1) baby formula; (2) "medical food" as it is defined under the Orphan Drug Act; (3) any product more than fifty percent (50%) of which, by volume, is milk; (4) any product more than fifty percent (50%) of which, by volume, is fresh fruit, vegetables or a combination of the two added by someone other than the customer; (5) unsweetened drinks to which a purchaser can add, or can request that a seller add, sugar at the point of sale, and (6) any syrup or other concentrate that the customer combines with other ingredients to create a beverage.[4]

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[1] Complaint ¶ 44.

[2] Complaint ¶ 45.

[3] Complaint ¶ 46.

[4] Complaint ¶ 47.

The PBT will be imposed only once in the chain of supply, delivery, and distribution and is imposed "only when the supply, acquisition, delivery or transport is for the purpose of the dealer's holding out for retail sale within the City the sugar- sweetened beverage or any beverage produced therefrom."[5] Distributors are generally responsible for the payment of the tax to the City. In the event the dealer does not acquire an affected beverage from a registered distributor and the distributor does not pay the tax, then the dealer is responsible for payment of the tax. The tax requires the distributor to provide "a receipt detailing the amount of sugar-sweetened beverage supplied in the transaction and the amount of tax owing on such a transaction" to the dealer to whom the distributor supplies a "sugar-sweetened beverage."

On September 14, 2016, plaintiffs filed this action seeking to invalidate the PBT by asserting three preemption claim challenges and four uniformity clause challenges. On the same day the complaint was filed, plaintiffs also filed an Emergency Application for the Exercise of King's Bench Powers in the Pennsylvania Supreme Court. On November 2, 2016, the Pennsylvania Supreme Court denied the Emergency Application for King's Bench powers. Defendants filed preliminary objections which are now ripe for decision.[6]

DISCUSSION

I. The PBT is expressly authorized by the Sterling Act, is not duplicative of the Pennsylvania Sales and Use Tax and is not preempted.

In count I of the complaint, plaintiffs claim that the Sterling Act expressly preempts the PBT. All municipalities, including the City of Philadelphia, are creations of the Commonwealth and

[5] Complaint ¶ 49.

[6] In addition to the Emergency Application for the Exercise of King's Bench Powers, plaintiffs also filed a petition for injunctive relief as well as a miscellaneous motion to supplement the complaint with a memorandum of law. The petition for injunctive relief and the miscellaneous motion shall be disposed of in separate orders.

have no inherent powers of their own. Rather, "they possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect."[7] Even where the Commonwealth has granted powers to act in a particular field, such powers do not exist if the Commonwealth preempts the field. The preemption doctrine establishes a priority of laws enacted by various levels of government. Under this doctrine, local legislation cannot permit what a Commonwealth statute or regulation prohibit and cannot prohibit what Commonwealth enactments allow. Preemption may be implicit, as when the Commonwealth regulation occupies the entire field or it may be express where the Commonwealth enactment contains language specifically prohibiting local authority over the subject matter.[8] As it pertains to the matter at issue, the question to be addressed is whether the PBT is preempted by the Commonwealth's Sales and Use Tax. In order to resolve this question, the Sterling Act must be considered.

The Sterling Act empowers the City of Philadelphia to levy, assess and collect certain additional taxes for general revenue purposes under certain restrictions.[9] The Act provides as follows:

> "the council of any city of the first or second class shall have the authority by ordinance, for general revenue purposes, to levy, assess and collect, or provide for the levying, assessment and collection of, such taxes on persons, transactions, occupations, privileges, subjects, and personal property, within the limits of such city of the first or second class, as it shall determine, Except that such council shall not have authority to levy, assess and collect, or provide for the levying, assessment and collection of, any tax on a privilege, transaction, subject or occupation or on personal property which is now or may hereafter become subject to a State tax or license fee." [10]

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[7] *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009) quoting *City of Phila. V. Schweiker*, 579 Pa. 591, 605, 858 A.2d 75, 84 (2004).

[8] *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont, supra.*

[9] *Mastrangelo v. Buckley*, 433 Pa. 352, 376, 250 A.2d 447, 459 (1969)

[10] *United Tavern Owners of Philadelphia v. Sch. Dist. of Philadelphia,* 441 Pa. 274, 283–84, 272 A.2d 868, 872 (1971) citing, Act of August 5, 1932, P.L. 45, s 1, 53 P.S. s 15971.

The purpose of the Sterling Act is to prohibit double-taxation where two governmental units, the state and its political subdivision, are seeking revenue from a tax or license fee on the same base. However, merely because a business is taxed on a certain aspect of its operations by the Commonwealth, the Sterling Act does not preclude a tax by a political subdivision on a different aspect of its operations.[11] For example, the court in *National Biscuit Co. v. Philadelphia*[12] held that the payment of a state corporate income tax does not bar the city from imposing a mercantile tax which is based on the gross volume of business. Similarly, the court in *Philadelphia v. Samuels*[13] held that there was no conflict between the state corporate income tax and a parking lot tax based on gross receipts. Although in both cases the court used the labels "property involved" and "excise tax" to distinguish the taxes involved, the distinction does not rest on labels attached to the tax, but rather on the different aspects of the business which are being taxed. The Sterling Act only forbids a political subdivision from imposing a tax on the same aspect of a business that is also taxed by the Commonwealth.

In determining whether a tax duplicates another tax and results in double taxation, the incidence of the two taxes is controlling. The incidence of tax embraces the subject matter thereof and more importantly, the measure of the tax, i.e. the base or yardstick by which the tax is applied. If these elements inherent in every tax are kept in mind, the incidence of the two taxes may or may not be duplicative. [14] Applying this test to the instant matter, this court finds as

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[11] *Prudential Ins. Co. of Am. v. City of Pittsburgh*, 38 Pa. Cmwlth. 15, 17, 391 A.2d 1326, 1330 (1978).

[12] 374 Pa. 604, 98 A.2d 182 (1953).

[13] 338 Pa. 321, 12 A.2d 79 (1940).

[14] *Pocono Downs, Inc. v. Catasauqua Area School Dist.*, 669 A.2d 500 (Cmwlth. Ct. 1996) citing *Com v. National Biscuit Co.*, 390 Pa. 642, 652, 136 A.2d 821, 825-826 (1957), appeal dismissed, 357 U.S. 571, 78 S.Ct. 1383, 2 L.Ed. 2d 1547 (1958).

a matter of law that the PBT is not duplicative of the Commonwealth's Sales and Use Tax and is therefore not preempted. This conclusion is not only supported by the language of the PBT but also by the longstanding legal precedent addressing duplication.

The PBT is a tax on the distribution of SSBs on a per ounce basis and legal liability to pay the tax remains on distributors and, in certain instances, dealers. Conversely, the Commonwealth's Sales and Use Tax imposes a tax on soft drinks as defined in 72 P.S. § 7201(a). The Commonwealth's tax applies to non-alcoholic drinks including Coca-Cola and Pepsi, lemonade, fruit juice, root beer, and Dr. Pepper. The Commonwealth's tax excludes natural fruit and vegetable juices, milk, coffee, and tea. The Commonwealth's Sales and Use Tax is a 6% tax on the "sale at retail of tangible property or services".[15] The Commonwealth's Sales and Use tax is applied to the purchase price of retail sales of personal property and legal liability to pay the tax falls on the consumer.

The PBT does not tax the same "privilege, transaction, subject or occupation or ....personal property" as the Commonwealth's Sales and Use Tax. The respective taxes apply to two different transactions, have two different measures and are paid by different taxpayers. The subject of the PBT is a non-retail, distribution level tax on SSBs. The PBT is only triggered when the SSBs are distributed by the distributor to the dealer, irrespective of whether the dealer sells the product to the consumer. The tax is measured by the volume of fluid ounces of the SSB and is imposed on the distributor. Alternatively, the Commonwealth's Sales and Use Tax is imposed on a sale at the retail level, is measured by the purchase price of the retail sale and is paid by the consumer. Since the incidence of the PBT and the incidence of the Commonwealth's Pennsylvania Sales and Use Tax are not the same, the PBT is not preempted.

[15] 72 P.S. § 7202(a).

In an attempt to strike down the PBT, plaintiffs argue that the incidence of tax is determined not by its plain meaning and operation but by any post-tax economic consequences experienced in the marketplace. Specifically, plaintiffs argue that the incidence of the tax is the same because the PBT will cause the distributor to pass the economic burden of the tax onto the dealer who will then pass the economic burden to the consumer. While at preliminary objections the court is constrained to accept all well pleaded facts as true as well as all reasonable inferences drawn from those facts, plaintiffs' allegations regarding the economic incidence of the PBT are not relevant to this court's determination of whether the PBT is duplicative of the Commonwealth Sales and Use tax. What is determinative is the how the PBT operates, not what private actors will do in response to the tax to offset the burden of the tax or other post-tax economic transactions.[16] As recognized by the United States Supreme Court in *Gurley v. Rhoden*[17], the economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise. However, the Court found that irrelevant in deciding the statute's constitutionality.

In *Gurley v. Rhoden*,[18] the Supreme Court upheld the fuel tax, finding that the congressional purpose was plainly evident where the statute "place[d] the incidence of tax on the 'producer.'"[19] While the Supreme Court acknowledged that "[t]he ultimate economic burden of the tax rest[ed] upon the purchaser-consumer," it was immaterial because the "legal incidence of

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[16] *Com. v. National Biscuit Co.*, 390 Pa. 642, 136 A.2d 821, 826 (1957).

[17] 421 U.S. 200, 95 S.Ct. 1605, 44 L. Ed. 2d 110 (1975).

[18] Id.

[19] Id. at 421 U.S. at 205.

the tax [was] on the producer."[20] Like the fuel tax in *Gurley*, the ultimate economic burden of the tax may be imposed upon the purchaser-consumer, but the legal incidence is on the distributor.

Blauner's Inc. v. Philadelphia[21] stands for the same proposition. In *Blauner*, the Pennsylvania Supreme Court held that the sales tax and corporate net income tax was not duplicative because the incidence of taxation was "wholly different." The court upheld the validity of the tax because the sales tax was "imposed upon the purchaser or consumer," whereas the net income tax was imposed "on the corporation receiving the income."[22]

The PBT expressly states that the tax is on the distribution of SSBs as opposed to a tax on the SSB property itself.[23] Mere ownership of the SSBs is not enough to trigger the tax. The PBT is triggered once the SSBs are supplied to a dealer by a distributor for retail sale and is not a tax on the same property subject to the Commonwealth's Sales and Use Tax. As such, the PBT is not preempted and the preliminary objection to count I is sustained and the count is dismissed.[24]

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[20] *Id.* at 207 (quoting *Martin Oil Serv., Inc. v. Dep't of Revenue,* 273 N.E.2d 823, 826 (Ill. 1971)); *see also United States v. New Mexico*, 455 U.S. 722, 722 (1982)) (finding that the tax did not violate the United States' immunity from state taxation just because "the tax has an effect on the United States, or because the Federal Government shoulders the entire economic burden of the levy, or because the tax falls on the earnings of a contractor providing services to the Government").

[21] 330 Pa. 342, 198 A. 889 (Pa. 1938)

[22] *Id.*

[23] See Phila. Code § 19-4103(1).

[24] Because the court finds that the PBT was expressly authorized by the Sterling Act and therefore not expressly preempted, conflict preemption does not exist. Accordingly, the preliminary objection to count II is also sustained and the count is dismissed.

II. The PBT is not preempted by SNAP since the tax is not collected on Retail Sales.

In count III of the complaint, plaintiffs claim that the PBT impermissibly conflicts with the Commonwealth's implementation of SNAP because it causes SNAP benefits to be used to pay a sales tax. The Supplemental Nutrition Assistance Program ("SNAP") is a federally funded program whose benefits help supplement an individual's or a family's income to help buy nutritious food. By mandate of the Food Stamp Act of 1977, a state may not receive federal SNAP funds unless it agrees not to impose a sales and use tax on eligible grocery items, including low-calorie and regular soft drinks. [25] Congress amended the Food Stamp Act in 1985 to ensure that states did not circumvent its prohibition on collecting state or local sales taxes on SNAP purchases in order to "put an end to what is, in effect, a transfer of revenues from the federal government to state and local governments at the expense of low income person...Federal dollars provided for food assistance should not be diverted to other purposes."[26] This prohibition however does not apply to the PBT because SNAP recipients, the ultimate consumers, will not pay the PBT, given that the incidence of tax is at the distribution level.

The scope of SNAP is limited to the "purchase [of] food *from retail food* stores."[27] The PBT is not a sales tax on the consumer, but rather a tax on the distributor.[28] As discussed above, the incidence of taxation is assessed by examining the statute's intended taxpayer, and not the economic impact of the tax.[29] Under the plain terms of the PBT, the tax is not collected upon

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[25] Complaint ¶ 12.

[26] Complaint ¶ 13 citing H.R. Rep. 99-271 (1)(1985).

[27] 7 U.S.C.A. § 2013 (a).

[28] Phila. Code § 19-4101(1), (2) (2016) (enacted); See Phila. Code § 19-4103(1) (2016) (enacted).

[29] See, *Gurley v. Rhoden, supra at* 421 U.S. 200, 205 (1975).

"purchases" at "retail" made with food stamps, but only upon non-retail, distributor-level transactions. Since the PBT's incidence of taxation is not on the consumer and the tax is not paid using SNAP benefits, the PBT is not preempted. Accordingly, the preliminary objection to count III is sustained and the count is dismissed.[30]

III. The PBT does not violate the Uniformity Clause of the Pennsylvania Constitution.

Counts IV through VII of plaintiffs' complaint allege that the PBT violates the Uniformity Clause of the Pennsylvania Constitution. Plaintiffs allege that the PBT is not uniform because it falls on four different classes, soft drinks, distributors, retailers and consumers, on an unequal basis. Specifically, plaintiffs allege that the PBT results in an enormous range of tax burdens across the classes subject to the tax because it imposes a flat tax per unit of volume regardless of the market price or wholesale price of the SSB. However, the only classes created by the PBT are distributors and arguably SSBs which are one and the same for purposes of this analysis. The consumer and retailer classes identified by plaintiffs are not classes created by the PBT and are therefore not subject to tax liability under the PBT.

It is clear from the complaint that plaintiffs' uniformity challenge to the PBT is specifically directed to the tax burden to be borne by the respective distributors who supply SSBs to retailers within the City of Philadelphia. According to plaintiffs, the PBT does not operate uniformly since a distributor that sells small quantities of high-cost beverages will owe far less tax than one who distributes large quantities of budget beverages, even if the revenues or profits of the former are higher.

[30] Based on this ruling, the question of subject matter jurisdiction need not be considered.

The Uniformity Clause of the Pennsylvania Constitution states "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." [31] This clause requires that every tax "operate alike on the classes of things or property subject to it."[32] "While reasonable and practical classifications in tax legislation are justifiable and often permissible, when a method or formula for computing a tax will, in its operation or effect, produce arbitrary, unjust, or unreasonably discriminatory results, the uniformity requirement is violated."[33]

The Uniformity Clause requires that all taxpayers in a given class be treated uniformly, without regard to the amount involved.[34] Here, the distributors are taxed based on volume in similar fashion to fuels and alcoholic beverages. [35] The Uniformity Clause does not require absolute equality and perfect uniformity in taxation, and any doubts as to the constitutionality of the statute are to be resolved in favor of upholding the statute.[36] In evaluating a tax for uniformity purposes, the court's sole purpose is to determine the ordinance's constitutionality. It is the responsibility of the legislature to question whether the tax is equitable and just. [37] "[A] tax

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[31] PA. Const. art. VIII, § 1. "All taxes" includes property taxes and specific taxes.

[32] *Commonwealth v. Overholt & Co.*, 331 Pa. 182, 200 A. 849, 853 (1938).

[33] *Clifton v. Allegheny Cnty.*, 600 Pa. 662, 969 A.2d 1197, 1211 (2009).

[34] *Saulsbury v. Bethlehem Steel Company,* 413 Pa. 316, 196 A.2d 664 (1964).

[35] 75 P.S. § 9004 (fuel taxed by gallon), 74 Pa. C.S. § 6121 (aviation fuel taxed by gallon) and 72 P.S. § 9003 (alcohol taxed by ounces).

[36] *Parsowith v. Com. Dept. of Revenue,* 555 Pa. 200, 723 A.2d 659, 663–64 (1999).

[37] Com. v. Girard Life Ins. Co., 305 Pa. 558, 158 A. 262 (1932).

enactment will not be invalidated unless it clearly, palpably, and plainly violates the Constitution."[38]

Plaintiffs' rely upon *Commonwealth v. Overholt,*[39] to support their position that the PBT violated the Uniformity Clause. In *Overholt*, the court held that a $2 per gallon tax on all alcohol stored within Pennsylvania violated the uniformity clause because it did not take into consideration the value of the liquor involved resulting in the owner of cheaper liquor bearing a greater burden than the owners of expensive liquors.[40] The tax was not invalidated based on unequal tax burdens and profit margins when the tax was applied. Rather, after the plaintiff conceded that the tax at issue was a property tax, the tax was invalidated as non-uniform based on how the property to be taxed was valued.[41] Here, valuation of property is not in issue because the PBT is not a property tax but a specific tax on the privilege of distributing SSBs in the City of Philadelphia. Consequently, the PBT, a tax on distribution, unlike the property tax in *Overholt*, need not be assessed on an *ad valorem* basis.[42]

The PBT's manner and measure of calculating the tax is uniformly applied to distributors. The PBT levies a tax on per fluid ounce of SSBs distributed in the City to dealers at a rate of 1.5

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[38] *Wilson Partners, L.P. v. Commonwealth Bd. of Finance and Revenue,* 558 Pa. 462, 737 A.2d 1215, 1220 (1999) (citations and internal quotation marks omitted).

[39] 331 Pa. 182, 200 A. 849 (Pa. 1938)

[40] *Id.* 331 Pa. at 851.

[41] Plaintiffs also rely upon *Amidon v. Kane*, 444 Pa. 38, 279 A.2d 53 (Pa. 1971) which involves a uniformity challenge to an income tax. *Amidon*, however, is distinguishable since an income tax is a property tax.

[42] Taxes are either specific or *ad valorem*. Specific taxes are a fixed amount by the head or number, or by some standard of weight or measurement and require no assessment other than a listing or classification of the subjects to be taxed. An *ad valorem* tax is a tax of a fixed proportion of the value of the property with respect to which the tax is assessed, and requires the intervention of assessors or appraisers to estimate the value of such property before the amount due from each taxpayer can be determined. *Commonwealth v. Overholt & Co.*, 331 Pa. 182, 200 A. 849, 852 (1938). The PBT is a specific tax based on the "supply, acquisition, delivery or transport" of SSBs for the purpose of the dealer's holding out for retail sale within the City of sugar-sweetened beverage.

cents per ounce. As such, all distributors are subject to the same tax calculation formula and therefore no disparate treatment exists within the distributor class in regard to the formula and rate of tax. The PBT is measured by volume of SSBs distributed which is related to the government's interest in having its residents abstain from the range of drinks covered by the PBT.

The case *sub judice* is more akin to *Wanamaker v. Philadelphia School District et al.*[43] In *Wanamaker*, the Supreme Court addressed the issue of whether a Business Use and Occupancy Tax, calculated based on the assessed value of real estate, the amount of square footage used or occupied and the duration of the occupancy violated the uniformity clause. The taxpayers in *Wanamaker* complained that they would bear very different tax burdens as a percentage of their total real estate value depending on the amount of space used or occupied and the time spent occupying that space. Despite the taxpayers' argument of unequal tax burdens, the court found the tax to be uniform since the Business Use and Occupancy Tax was a privilege tax on the use of real estate and not a property tax. In doing so, the Court explained that while economically the incidence of the tax is on the property itself, its legal incidence is on the privilege of using the real estate, making it a true excise tax.[44] The PBT, like the tax in *Wanamaker*, is not a property tax since the legal incidence of the tax is based on the privilege of distributing SSBs in Philadelphia. Consequently, since the PBT is not a property tax it need not be assessed *ad*

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[43] 441 Pa. 567, 274 A.2d 524 (1971).

[44] *Id.* See also, *Paul L. Smith, Inc. v. Southern York Cty. Sch. Dist.*, 44 Pa. Cmwlth. 227, 233, 403 A.2d 1034, 1037 (1979) (tax did not violate the uniformity clause since it was a tax on an owner's privilege of using his realty as a location for his residence); *In re Lawrence Twp. Sch. Dist. 1947 Taxes*, 362 Pa. 377, 383, 67 A.2d 372, 374 (1949)(the tax imposed by the Resolution under consideration is a property tax on coal and violates constitutional requirement of uniformity in that, being a property tax, it is imposed on a quantity and not an *ad valorem* basis.).

valorm. The PBT does not violate the Uniformity Clause of the Pennsylvania Constitution and defendants' preliminary objection to counts IV-VII is sustained and the counts are dismissed.

CONCLUSION

For the forgoing reasons, defendants' preliminary objections are sustained and the complaint is dismissed in its entirety.

BY THE COURT,

GLAZER, J.

EXHIBIT "B"

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

LORA JEAN WILLIAMS, ET. AL.,	:	September Term 2016
Plaintiffs,	:	
v.	:	No. 1452
CITY OF PHILADELPHIA, ET. AL.,	:	
Defendants.	:	Commerce Program
	:	
	:	Control Number 16110127

ORDER

AND NOW, this 19th day of December 2016, upon consideration of Plaintiffs' Petition for Special Injunction, it hereby is

ORDERED

that the Petition is **Denied as Moot**.[1]

BY THE COURT,

GLAZER, J.

DOCKETED

Williams Etal Vs City O-ORDER

16090145200047

[1]Defendants have not yet responded to the Petition for Injunctive Relief, however, since the court has sustained Defendants' preliminary objections, the merits of the Petition for Injunctive Relief need not be addressed and therefore the Petition is denied as moot.

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APPENDIX "D"

The "Sugar-Sweetened Beverage Tax" Ordinance, Phila. Code §§ 19-4100 to 19-4108 (approved June 20, 2016)

City of Philadelphia

City Council
Chief Clerk's Office
402 City Hall
Philadelphia, PA 19107

BILL NO. 160176
(As Amended, 6/8/16)

Introduced March 3, 2016

Councilmember Henon
for
Council President Clarke

Referred to the
Committee of the Whole

AN ORDINANCE

Amending Title 19 of The Philadelphia Code, entitled "Finance, Taxes and Collections," by adding a new Chapter 19-4100, entitled "Sugar-Sweetened Beverage Tax," under certain terms and conditions.

THE COUNCIL OF THE CITY OF PHILADELPHIA HEREBY ORDAINS:

SECTION 1. Title 19 of The Philadelphia Code is hereby amended as follows:

TITLE 19. FINANCE, TAXES AND COLLECTIONS.

* * *

CHAPTER 19-4100. SUGAR-SWEETENED BEVERAGE TAX.

§ 19-4101. Definitions. In this Chapter, the following words and phrases shall have the following meanings, unless the context clearly indicates otherwise:

(1) Dealer. Any person engaged in the business of selling sugar-sweetened beverage for retail sale within the City, including but not limited to restaurants; retail stores; street vendors; owners and operators of vending machines; and distributors who engage in retail sales.

(2) Distributor. Any person who supplies sugar-sweetened beverage to a dealer.

(3) Sugar-sweetened beverage.

(a) Any non-alcoholic beverage that lists as an ingredient:

(.1) any form of caloric sugar-based sweetener, including, but not limited to, sucrose, glucose or high fructose corn syrup; or

(.2) any form of artificial sugar substitute, including stevia, aspartame, sucralose, neotame, acesulfame potassium (Ace-K), saccharin, and advantame.

(b) Any non-alcoholic syrup or other concentrate that is intended to be used in the preparation of a beverage and that lists as an ingredient:

(.1) any form of caloric sugar-based sweetener, including, but not limited to, sucrose, glucose or high fructose corn syrup; or

(.2) any form of artificial sugar substitute, including stevia, aspartame, sucralose, neotame, acesulfame potassium (Ace-K), saccharin, and advantame.

(c) Notwithstanding subsections (a), (b), and (c) sugar-sweetened beverages shall not include:

(.1) Baby formula.

(.2) Any beverage that meets the statutory definition of "medical food" under the Orphan Drug Act, 21 U.S.C. § 360ee(b)(3), as amended.

(.3) Any product, more than fifty percent (50%) of which, by volume, is milk.

(.4) Any product more than fifty percent (50%) of which, by volume, is fresh fruit, vegetables or a combination of the two, added by someone other than the customer.

(.5) Unsweetened drinks to which a purchaser can add, or can request that a seller add, sugar, at the point of sale.

(.6) Any syrup or other concentrate that the customer himself or herself combines with other ingredients to create a beverage.

(d) Examples of sugar-sweetened beverages include, but are not limited to, soda; non-100%-fruit drinks; sports drinks; flavored water; energy drinks; pre-sweetened coffee or tea; and non-alcoholic beverages intended to be mixed into an alcoholic drink.

(e) The Department is authorized to promulgate regulations to clarify the inclusion or exclusion of particular products; and to exclude particular products with respect to which, because of their ingredients or other administrative or health-related reasons, exclusion would be consistent with sound public policy and the purposes of this Ordinance.

(4) Supply. Sell, distribute, transfer, deliver or supply.

§ 19-4102. Distributor Registration; Purchases from Registered Distributors.

(1) No dealer may sell at retail, or hold out or display for sale at retail, any sugar-sweetened beverage acquired by the dealer on or after January 1, 2017, unless:

(a) The sugar-sweetened beverage was acquired by the dealer from a registered distributor; and

(b) The dealer has complied with the notification requirements of § 19-4104; and received confirmation from the registered distributor of such notification, as well as confirmation that the distributor is a registered distributor, all in form prescribed by the Department.

(2) Upon application by any distributor in form prescribed by the Department, the Department shall issue a certificate of registration to a distributor, regardless whether the distributor does or does not do business in the City. Registration by a distributor shall not subject a distributor otherwise not liable for payment of business income and receipts tax to the payment of business income and receipts tax.

§ 19-4103. Imposition and Rate of the Sugar-Sweetened Beverage Tax.

(1) Effective January 1, 2017, and thereafter, a tax is imposed upon each of the following: the supply of any sugar-sweetened beverage to a dealer; the acquisition of any sugar-sweetened beverage by a dealer; the delivery to a dealer in the City of any sugar-sweetened beverage; and the transport of any sugar-sweetened beverage into the City by a dealer. The tax is imposed only when the supply, acquisition, delivery or transport is for the purpose of the dealer's holding out for retail sale within the City the sugar-sweetened beverage or any beverage produced therefrom. The tax is to be paid as provided in § 19-4105 (liability for payment of tax) and § 19-4107 (waivers).

(2) The tax authorized by this Section shall be assessed at the following rates:

(a) For sugar-sweetened beverages under § 19-4101(3)(a), one and one-half cents ($.015) per fluid ounce.

(b) For syrups and other concentrates under § 19-4101(3)(b), the rate per ounce of syrup or other concentrate that yields one and one-half cents ($.015) per fluid ounce on the resulting beverage, prepared to the manufacturer's specifications. Upon a determination that the application of these rates to any particular product is unfair or unreasonable, the Department is authorized to issue regulations imposing the tax at an alternate rate on that particular product, to approximate as closely as possible the rate set forth in subsection (a).

(3) All bills or invoices created by or for a registered distributor in connection with the acquisition of sugar-sweetened beverages by a dealer from that registered distributor, shall separately indicate the total volume of beverages under § 19-4101(3)(a); and, with respect to syrups or other concentrates under § 19-4101(3)(b), the total volume of beverages that may be prepared from such syrups or other concentrates when prepared to manufacturer specifications.

§ 19-4104. Notification of Dealer Status.

(1) Effective January 1, 2017, no dealer shall accept any sugar-sweetened beverage from a registered distributor, for purpose of holding out for retail sale in the City such sugar-sweetened beverage or any beverage produced therefrom, without first notifying the registered distributor that such dealer is a dealer subject to this Chapter. Notice shall be provided in the form of a Commonwealth of Pennsylvania sale for purpose of resale exemption certificate, so long as such certificate clearly indicates that the dealer is located in Philadelphia; or in such other form as the Department may provide. Every dealer shall maintain copies of any notices provided to a registered distributor, as provided in Code § 19-506.

(2) Upon receipt of notification pursuant to subsection (1) above, no registered distributor shall supply any sugar-sweetened beverage to a dealer without providing to the dealer, contemporaneously, (i) confirmation of notification; and (ii) a receipt detailing the amount of sugar-sweetened beverage supplied in the transaction and the amount of tax owing on such transaction; all in form satisfactory to the Department.

§ 19-4105. Liability for Payment of Tax.

(1) The tax shall be paid to the City by the registered distributor; and the dealer shall not be liable to the City for payment of the tax; so long as the registered distributor has received from the dealer notification pursuant to § 19-4104(1) that the recipient is a dealer.

(2) In addition to any penalties provided hereunder, a dealer who fails to provide the notification required by § 19-4104(1); and a dealer who sells at retail, or holds out or displays for sale at retail, any sugar-sweetened beverage in violation of § 19-4102(1), shall be liable to the City for payment of any tax owing under this Chapter, and shall file returns with the Department in form prescribed by the Department.

(3) Where a dealer is also a registered distributor, no additional tax shall be owing on the supply of any sugar-sweetened beverage by such dealer/distributor to another dealer if the tax already has been imposed on the supply or delivery of the beverage to the dealer/distributor or the acquisition of the beverage by the dealer/distributor.

(4) In the event a court of competent jurisdiction rules in a decision from which no further appeal lies that any portion of this Chapter cannot be applied to a distributor with respect to any transaction or class of transactions, then any dealer that holds out for retail sale in the City sugar-sweetened beverages supplied through those transactions shall be liable to the City for the tax on those sugar-sweetened beverages.

§ 19-4106. Administration.

(1) For each calendar quarter, no later than thirty days after the close of the quarter, or at such other times as the Department shall require:

(a) Every registered distributor shall file with the Department a return setting out, in form satisfactory to the Department:

(.1) The amount of sugar-sweetened beverage (separately for fluid and syrup) supplied by the registered distributor to any dealer.

(.2) The amount of tax owing on account of such sugar-sweetened beverage.

(b) Every registered distributor shall pay to the Department such amounts as shown on the return or otherwise required by this Chapter.

(2) The Department may require registered distributors and dealers to submit such other information as the Department deems necessary for proper administration of this tax.

(3) The Department is charged with enforcement and collection of this tax and is empowered to promulgate and enforce reasonable regulations for its enforcement and collection.

§ 19-4107. Waivers.

(1) Upon a showing of extraordinary circumstances, where distribution channels would make purchase of sugar-sweetened beverage from a registered distributor substantially impracticable, the Department, in its discretion, may grant a full or partial waiver to a dealer from the provisions of § 19-4102(1). In such case, as well as during the pendency of any application for waiver under this subsection, the tax shall be paid directly by the dealer to the Department, in such manner and using such forms as the Department shall prescribe. The Department may require an annual demonstration of continuing extraordinary circumstances in order to continue a waiver.

(2) The Department shall grant a waiver to any dealer that elects to register as if it were a distributor and agrees to assume all of the obligations of a distributor with respect to the dealer's acquisition of any sugar sweetened beverage, including payment of the tax to the Department.

§ 19-4108. Penalties.

(1) In addition to any other penalties provided under this Title, a violation of § 19-4102(1) (sale of product purchased from other than a registered distributor or without proper notification to a registered distributor) shall constitute a Class II Offense under § 1-109; and each separate sale, transaction or delivery shall constitute a separate offense. A person who violates § 19-4102(1) more than one time in any twenty-four (24) month period shall be subject to suspension of his or her commercial activity license for such period of time as the Department of Licenses and Inspections deems appropriate.

SECTION 2. This Ordinance shall be effective immediately, and any tax imposed pursuant to this Ordinance shall apply in addition to any other applicable tax imposed under this Title.

SECTION 3. The provisions of this Ordinance are severable, and if any provision, application, section or subsection is held illegal, such illegality shall not affect the remaining provisions. It is the legislative intent of the Council that this Ordinance would have been adopted if such illegal provision had not been included and any illegal

application had not been made. To the extent any illegality can be eliminated by severing one or more provisions, applications, sections or subsections of this Ordinance, it is the intent of the Council that such provision should be severed, so that the remainder of the Ordinance, without the severed provisions, remains valid and enforceable.

Explanation:

[Brackets] indicate matter deleted.
Italics indicate new matter added.

APPENDIX "E"

"Sugar-Sweetened Beverage Tax Regulations," dated August 4, 2017

CITY OF PHILADELPHIA
SUGAR-SWEETENED BEVERAGE TAX ("SBT") REGULATIONS

ARTICLE I GENERAL PROVISION

Section 101. Definitions.

The following words and phrases when used in these Regulations shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) Dealer. Any person engaged in the business of selling Sugar Sweetened Beverage for retail sale within the City, including but not limited to restaurants; retail stores; street vendors; owners and operators of vending machines; non-profits; government agencies; schools; and distributors who engage in retail sales. (See Example 12 for illustration)

(b) Department. The Department of Revenue, in some cases working with the Law Department.

(c) Distributor. Any person who supplies Sugar Sweetened Beverage to a dealer.

(d) Registered Dealer. Any Dealer that has elected to register as if it were a Distributor and agreed to assume all of the obligations of a Distributor, under subsection 302(b) of these Regulations. (See Examples 7 and 9 for illustration)

(e) Registered Distributor. Any Distributor, including a Dealer that is also a Distributor, who applies to obtain a certificate of registration for the purpose of complying with the provisions of the City's Sugar Sweetened Beverage Tax law and receives such certificate from the Department. (See Examples 6 and 8 for illustration)

(f) Sugar-Sweetened Beverage (hereinafter referred as "SB")

(A) Any non-alcoholic beverage that lists as an ingredient:
(.1) any form of caloric sugar-based, including, but not limited to, sucrose, glucose or high fructose corn syrup. The following is a non-exclusive list of caloric sweeteners for purposes of Sections 101 (f)(A)(.1) and 101(f)(B)(.1) of these Regulations as it may be amended from time to time:

- AGAVE
- BEET SUGAR
- BROWN RICE SYRUP
- BROWN SUGAR
- CALORIC SUGAR ALCOHOLS
- CANE JUICE
- CANE SUGAR
- CANE SYRUP
- CLINTOSE

- CONFECTIONER'S SUGAR
- CORN GLUCOSE SYRUP
- CORN SWEET
- CORN SWEETENER
- CORN SYRUP
- DATE SUGAR
- DEXTROSE
- DRIED RAISIN SWEETENER
- FRUCTOSE
- GLUCOSE
- GOLDEN SYRUP
- GOMME
- GRANULAR SWEETENER
- GRANULATED SUGAR
- HIGH FRUCTOSE CORN SYRUP
- HONEY
- INVERT SUGAR
- ISOGLUCOSE
- ISOMALTULOSE
- MALT SWEETENER
- MALT SYRUP
- MALTOSE
- MAPLE
- MAPLE SUGAR
- MAPLE SYRUP
- MIZUAME
- MOLASSES
- NULOMOLINE
- POWDERED SUGAR
- RICE SYRUP
- SORGHUM
- SORGHUM SYRUP
- STARCH SWEETENER
- SUCANAT
- SUCROSE
- SUCROVERT
- SUGAR
- SUGAR BEET
- SUGAR INVERT
- TABLE SUGAR
- TREACLE
- TURBINADO SUGAR

Caloric sweeteners also include sugars from concentrated fruit or vegetable juices that are in excess of what would be expected from the same volume of 100 percent fruit or vegetable juice of the same type. Examples of juice concentrates that can be caloric sweeteners include:

- APPLE JUICE CONCENTRATE
- CHERRY JUICE CONCENTRATE
- DATE JUICE CONCENTRATE
- GRAPE JUICE CONCENTRATE
- ORANGE JUICE CONCENTRATE
- PEAR JUICE CONCENTRATE

Any beverage or syrup or other concentrate containing "added sugar" pursuant to the United States Food and Drug Administration's regulatory definition of "added sugar," 21 C.F.R. § 101.9(c)(6)(iii), as amended, contains caloric sweetener for purposes of Sections 101 (f)(A)(.1) and 101(f)(B)(.1) of these Regulations; or

(.2) any form of sugar substitute or non-nutritive sweetener, including but not limited to stevia, aspartame, sucralose, neotame, acesulfame potassium (Ace-K), saccharin, and advantame. A sugar substitute is any ingredient that causes humans to perceive sweetness in the absence of sugar. The following is a non-exclusive list of sugar substitutes for purposes of Sections 101 (f)(A)(.2) and 101(f)(B)(.2) of these Regulations:

- ACESULFAME POTASSIUM (ACE-K)
- ADVANTAME
- ASPARTAME
- NEOTAME (NUTRASWEET)
- NON-CALORIC SUGAR ALCOHOLS
- SACCHARIN (SWEET'N LOW)
- STEVIA (PUREVIA, TRUVIA)
- SUCRALOSE (SPLENDA)

(B) Any non-alcoholic syrup or other concentrate that is intended to be used in the preparation of a beverage and that lists as an ingredient:
(.1) any form of caloric sugar-based sweetener, including, but not limited to, sucrose, glucose or high fructose corn syrup; or
(.2) any form of sugar substitute, including but not limited to stevia, aspartame, sucralose, neotame, acesulfame potassium (Ace-K), saccharin, and advantame.
A syrup or other concentrate is "intended to be used in the preparation of a beverage" if the manufacturer's packaging, marketing, or instructions reflect an intention for the syrup or other concentrate to be used in the preparation of a beverage, unless the preparation of a beverage is only an incidental use of the syrup or other concentrate.

(C) Examples of sugar-sweetened beverages include, but are not limited to, soda; non-100%-fruit drinks; sports drinks; flavored water; energy drinks; pre-sweetened coffee or tea; and non-alcoholic beverages intended to be mixed into an alcoholic drink.

(D) Examples of beverages that are not sugar-sweetened beverages include any beverage that is 100% juice, or 100 juice concentrate that is nutritionally equivalent to 100% juice when reconstituted with water, with no added sweetener.

(g) Special Dealer. A Dealer that is granted by the Department, under the provisions of subsection 302(a) of these Regulations, a waiver from "Notification of Dealer Status" requirement provided under § 402 of these Regulations for a specific product or products. (See Examples 3 and 5 for illustration)

(h) Supply. Sell, distribute, transfer, deliver or supply.

(i) Taxpayer. Any person liable to pay the Sugar Sweetened Beverage Tax ("SBT"). This includes Registered Distributors, Registered Dealers and Special Dealers; and any Dealer who fails to provide the notification required under § 403 of these Regulations and any Dealer who sells at retail, or holds out or displays for sale at retail, any SB in violation of § 402 of these Regulations. (See Example 6 for illustration)

Section 102. Exclusion

(a) Notwithstanding subsection 101(f) of these Regulations, SB shall not include:

(A) Baby formula.

Only infant formula meeting the Federal Food, Drug, and Cosmetic Act (FFDCA) definition is exempt from SBT. The FFDCA defines infant formula as "a food which purports to be or is represented for special dietary use solely as a food for infants by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk" (FFDCA 201(z)). FDA regulations define infants as persons not more than 12 months old (Title 21, Code of Federal Regulations 21 CFR 105.3(e)).

FDA has requirements for nutrients in infant formulas, which are located in section 412(i) of the FFDCA and 21 CFR 107.100. These nutrient specifications include minimum amounts for 29 nutrients and maximum amounts for 9 of those nutrients. If an infant formula does not contain these nutrients at or above the minimum level or within the specified range, it is an adulterated product unless the formula is "exempt" from certain nutrient requirements. An "exempt infant formula" is "any infant formula which is represented and labeled for use by an infant who has an inborn error of metabolism or low birth weight, or who otherwise has an unusual medical or dietary problem" (FFDCA 412(h)(1)).

(B) Any beverage that meets the statutory definition of "medical food" under the Orphan Drug Act, 21 U.S.C. § 360ee(b)(3), as amended. The Orphan Drug Act provides: "The term 'medical food' means a food that is formulated to be consumed or administered internally under the supervision of a physician and that is intended for the specific dietary management of a disease or condition for which distinctive nutritional requirements, based on recognized scientific principles, are established by medical evaluation."

In order to meet the definition of "medical food," a beverage must meet the following criteria:

a. It is a specially formulated and processed product (as opposed to a naturally occurring foodstuff used in its natural state) for the partial or exclusive feeding of a patient by means of oral intake or enteral feeding by tube, meaning a tube or catheter that delivers nutrients beyond the oral cavity directly into the stomach or small intestine;

b. It is intended for the dietary management of a patient who, because of therapeutic or chronic medical needs, has limited or impaired capacity to ingest, digest, absorb, or metabolize ordinary foodstuffs or certain nutrients, or who has other special medically determined nutrient requirements, the dietary management of which cannot be achieved by the modification of the normal diet alone;

c. It provides nutritional support specifically modified for the management of the unique nutrient needs that result from the specific disease or condition, as determined by medical evaluation;

d. It is intended to be used under medical supervision;

e. It is intended only for a patient receiving active and ongoing medical supervision wherein the patient requires medical care on a recurring basis for, among other things, instructions on the use of the medical food; and

f. It is marketed by the manufacturer as a medical food, either on the product labeling or in other marketing material.

The following are examples of beverages that are not "medical foods":

GATORADE

POWERADE

COCONUT WATER

MUSCLE MILK

SMARTWATER

VITAMINWATER

The following are examples of products identified by their manufacturers as "medical food." The Department may request documentation of "medical food" status and, upon request by the Department, the taxpayer is required to provide such information.

PEDIALYTE

AXONA

NEOCATE

ELECARE JR.

PORTAGEN

ENSURE CLEAR

JUVEN

Adequate Documentation for Medical Food Exemption. A legible copy of marketing materials on which the product manufacturer either (1) states that the product is a medical food or (2) makes a health claim consistent with medical food status that would be prohibited on conventional foods (e.g., a manufacturer claim that a product is for use under medical supervision to address a patient's special dietary needs that exist because of a disease, such as thickened beverages that are specifically marketed for use by people with dysphagia and/or swallowing dysfunction). If the taxpayer believes that a product is a medical food but cannot procure adequate documentation from available marketing materials, the taxpayer may request a written statement from the manufacturer that the product is a medical food pursuant to the Orphan Drug Act, U.S.C. § 360ee(b)(3), as amended, which the taxpayer may submit to the Department. Upon approval by the Department, the manufacturer's statement shall serve as adequate documentation of medical food status.

Further guidance is available at the following URL: http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm054048.htm

(C) Any product, more than fifty percent (50%) of which, by volume, is milk. For the purpose of this tax, milk includes products meeting USDA Nutrition Standards for Fluid Milk Substitution. The following products meet the USDA's criteria for fluid milk substitutes.

- Soy Milk
  - 8th Continent Original Soy Milk
  - Kikkoman Pearl Organic Soy Milk, Vanilla or Chocolate
  - Pacific Natural Ultra Soy Milk, Plain or Vanilla
  - Westsoy Soy Milk Organic Plus, Plain
  - White Wave Silk Soy Milk, Original
- Lactose-free cow's milk- brands such as Lactaid and Horizon or store brands

Soy milk products consistent with Pennsylvania Department of Education and PA WIC approved lists meet all the criteria and would be appropriate substitutes for

fluid milk. On the other hand, rice milk, almond milk and cashew milk do not meet all the criteria and would not be appropriate substitutes for fluid milk if they contain any sweetener as an ingredient. Unsweetened milk substitutes, like all unsweetened beverages, are not subject to this tax.

USDA Minimum Nutrition Standards for Milk Substitutes

Nutrient	Amount per cup (8 fluid ounces)
Calcium	276 milligrams (mg)
Protein	8 grams (g)
Vitamin A	500 international units (IU)
Vitamin D	100 IU
Magnesium	24 mg
Phosphorus	222 mg
Potassium	349 mg
Riboflavin	.44 mg
Vitamin B-12	1.1 micrograms (mcg)

Source: USDA, Food and Nutrition Service, Final Rule
https://www.gpo.gov/fdsys/pkg/FR-2008-09-12/pdf/E8-21293.pdf

Milk solids or dry milk, when reconstituted with water in such a proportion to be nutritionally equivalent to milk shall be considered milk for the purposes of this section.

(D) Any product more than fifty percent (50%) of which, by volume, is fresh fruit, vegetables or a combination of the two, when such fresh fruit or vegetables are added at the point of sale by someone other than the customer . The beverage must be composed of fruit or vegetables that are fresh at the time of retail purchase. This exclusion allows Distributors to distribute syrups and concentrates without payment of SBT if, and only if, the manufacturer's instructions provide that the primary use of the syrup or concentrate is to prepare a beverage and those instructions provide for a beverage that is to be prepared by the dealer, at or near the time of purchase, to which the dealer will add fresh fruit or vegetables in quantities sufficient to constitute at least 50% by volume, of the beverage (*e.g.*, a fresh fruit smoothie). The exclusion does not apply to any product prepared in advance and shipped for retail sale made from fruit juice,

fruit-based syrup or fruit concentrate that contains a caloric sugar-based sweetener, sugar substitute or non-nutritive sweetener. Any juice product, including juice concentrates, that consists of 100% fruit juice and that contains no caloric sugar-based sweeteners, sugar substitutes or non-nutritive sweeteners does not fall within the definition of SB. This rule applies without regard to the actual use by a Dealer or customer.

(E) Unsweetened drinks to which a purchaser can add, or can request that a seller adds, sugar, or artificial sugar substitute, at the point of sale.

(F) Any syrup or other concentrate that the customer himself or herself combines with other ingredients to create a beverage. For example, table sugar, maple syrup, and honey are generally in this category, because they are multi-purpose sweeteners and their manufacturers' packaging, marketing, and instructions do not reflect an intention for use in the preparation of a beverage. Similarly, a bag of sugar with a beverage recipe on it is included in this category, because the use is merely incidental. In contrast, bag-in-box high fructose corn syrup is packaged and marketed as a sweetener for beverages, and its instructions reflect that use; accordingly, it is subject to the tax.

(G) Any syrup or other concentrate that is intended to be used for the preparation of a beverage where the resulting beverage, if prepared according to the manufacturers specifications, would be excluded from this tax. For example, if the manufacturer's instructions called for the resulting beverage to be more than 50% milk or more than 50% fresh fruit added at the time of retail sale.

(b) The Department is authorized by Philadelphia Code Section 19-4101(3)(e) to promulgate regulations to clarify the inclusion or exclusion of particular products; and to exclude particular products with respect to which, because of their ingredients or other administrative or health-related reasons, exclusion would be consistent with sound public policy and the purposes of this Ordinance.

ARTICLE II

IMPOSITION AND RATE OF THE SUGAR-SWEETENED BEVERAGE TAX

Section 201. Imposition

Effective January 1, 2017, and thereafter, a tax ("SBT") is imposed upon each of the following: the supply of any SB to a Dealer; the acquisition of any SB by a Dealer; the delivery to a Dealer in the City of any SB; and the transport of any SB into the City by a Dealer. The tax shall be imposed only once with respect to any individual item of SB. The tax is imposed only when the supply, acquisition, delivery or transport is for the purpose of the Dealer's holding out for retail sale within the City either the SB or a beverage produced therefrom. The tax is to be paid by the Taxpayer as provided in § 301 (liability and payment of tax) and § 302 (waiver) of these Regulations. (See Example 2 for illustration)

Section 202. Rates

(a) For SBs described in paragraph 101(f)(A) of these Regulations, one and one-half cents ($.015) per fluid ounce.

(b) For syrup or other concentrate described in paragraph101(f)(B) of these Regulations, the rate per ounce of syrup or other concentrate that yields one and one-half cents ($.015) per fluid ounce on the resulting beverage, prepared to the manufacturer's specifications. Upon a determination that the application of these rates to any particular product is unfair or unreasonable, the Department is authorized to issue regulations imposing the tax at an alternate rate on that particular product, to approximate as closely as possible the rates set forth in subsection (a). In the event that the manufacturer's specifications for preparation cannot be reasonably obtained, the taxpayer shall make a reasonable estimate. (See Example 9 for illustration). Where a product is produced from more than one syrup or concentrate, the rate on each component shall be calculated, proportionately, so that the combined tax on the total yields one and one-half cents ($.015) per fluid ounce on the resulting beverage.

ARTICLE III

LIABILITY, PAYMENT AND WAIVER

Section 301. Liability and Payment of Tax.

(a) In general, SBT shall be paid to the city by the Registered Distributor; and the Dealer that acquires the SB from the Registered Distributor shall not be liable to the City for payment of the tax as long as the Registered Distributor has received from the Dealer notification pursuant to §402 of these Regulations that it is a Dealer.

(b) Where a Dealer is also a Registered Distributor, such Dealer is liable to the City for payment of SBT; no additional SBT shall be owing on the supply of any SB by such Dealer/Distributor to another Dealer if SBT already has been imposed on the supply or delivery of the beverage to the Dealer/Distributor or the acquisition of the beverage by the Dealer/Distributor. (See Example 2 for illustration)

(c) Where a Dealer is a Registered Dealer, such Dealer is liable to the City for payment of SBT; no additional SBT shall be owing on the supply of any SB by such Dealer to another Dealer if SBT already has been imposed on the supply or delivery of the beverage to the Dealer or the acquisition of the beverage by the Registered Dealer.

(d) Where a Dealer is a Special Dealer, such Dealer is liable to the City for payment of SBT on the product or products for which the waiver was granted pursuant to subsection 302(a) of these Regulations. (See Example 3 for illustration)

(e) In addition to any penalties provided hereunder, a Dealer who fails to provide the notification required under § 403 of these Regulations and a Dealer who sells at retail, or holds out or displays for sale at retail, any SB in violation of § 402 of these Regulations, shall be liable to the City for payment of any SBT owing under § 201 these Regulations, and shall file returns with the Department in form prescribed by the Department. (See Example 1 for illustration)

Section 302. Waiver

(a) Upon a showing of extraordinary circumstances, where distribution channels would make purchase of a particular SB from a Registered Distributor substantially impracticable, the Department, in its discretion, may grant a full or partial waiver to a dealer from the provisions of § 402 of these Regulations. In such case, as well as during the pendency of any application for waiver under this subsection, SBT on such SB shall be paid directly by this Special Dealer to the Department, in such manner and using such forms as the Department shall prescribe. The Department may require an annual demonstration of continuing extraordinary circumstances in order to continue a waiver. (See Example 3 and 5 for illustration)

(b) A Registered Dealer is any Dealer that elects to register as if it were a Distributor and agrees to assume all of the obligations of a Distributor with respect to the Dealer's acquisition of any SB, including payment of SBT to the Department. The Department shall grant a waiver certificate from provisions of §402 and §403 of these Regulations to any Dealer that makes such election. (See Example 4 and 5 for illustration)

ARTICLE IV

DISTRIBUTOR REGISTRATION; PURCHASES FROM REGISTERED DISTRIBUTOR; NOTIFICATION OF DEALER STATUS

Section 401. Distributor Registration

Upon application by any Distributor in form prescribed by the Department, the Department shall issue a certificate of registration to a Distributor, regardless of whether the Distributor does or does not do business in the City. Registration by a Distributor shall not subject a Distributor otherwise not liable for payment of Business Income and Receipts Tax to the payment of Business Income and Receipts Tax.

Section 402. Purchases from Registered Distributors

(a) No Dealer may sell at retail, or hold out or display for sale at retail, any SB acquired by the Dealer on or after January 1, 2017, unless:

(A) The SB was acquired by the Dealer from a Registered Distributor or from a Registered Dealer; and

(B) The Dealer has complied with the notification requirements of § 403 of these Regulations; and received confirmation from the Registered Distributor or the Registered Dealer of such notification, as well as confirmation that the Distributor is a Registered Distributor, all in form prescribed by the Department. (See Example 1 and 2 for illustration)

Section 403. Notification of Dealer Status.

(a) Effective January 1, 2017, no Dealer shall accept any SB from a Registered Distributor or a Registered Dealer, for purpose of holding out for retail sale in the City such SB or any beverage produced therefrom, without first notifying the Registered Distributor or the Registered Dealer, that such dealer is a Dealer as defined under Section 101 of these Regulations. Notice may be provided in the form of a Commonwealth of Pennsylvania sale for purpose of resale exemption certificate, so long as such certificate clearly indicates that the Dealer is located in Philadelphia; or in such other form as the Department may provide. Every Dealer shall maintain copies of any notices provided to a Registered Distributor, as provided in the Philadelphia Code § 19-506. A Distributor shall have no SBT liability with respect to any SBs supplied to a person who does not give notification to the distributor, prior to the sale that the SBs will be held out for retail sale in the City as provided in this section. Once a year notification is sufficient for this purpose if all or a known percentage of every purchase by a Dealer from the Distributor is for retail sale in Philadelphia and the Distributor includes in the receipts the SBT imposed on each transaction as required under subsection 403(b) of this section.

(b) Upon receipt of notification pursuant to subsection (a) above, no Registered Distributor or Registered Dealer, shall supply any SB to a Dealer without providing to the Dealer, contemporaneously, (i) confirmation of notification; and (ii) a receipt detailing the amount of SB supplied in the transaction and the amount of SBT imposed on such transaction, all in form satisfactory to the Department. This notice shall appear either on the invoice to the

dealer or on a form provided by the Department as a supplement to the invoice. (See Examples 4, 7, and 10 for illustration) A receipt will satisfy the requirements of this Section 403(b) if (i) the distributor includes on the receipt either the SBT imposed on the transaction such that the amount of SB supplied can be calculated by dividing the SBT imposed by the SBT rate or the volume of SB supplied and finished product that can be made from syrups and other concentrates such that the amount of SBT can be calculated by multiplying the volume in ounces by $0.015, and (ii) the Distributor maintains records substantiating the amount of SB supplied in such transaction.

ARTICLE V

RETURNS AND REPORTS; MAINTENANCE OF BOOKS AND RECORDS

Section 501. Returns and Reports.

(a) For each calendar month, on or before the 20th day of the month following the calendar month:

(A) Every Taxpayer as defined under Section 101(e) of these Regulations shall file with the Department a return setting out, in form satisfactory to the Department:

(.1) The amount of SB (separately for fluid and syrup) transferred in transactions on which SBT is imposed pursuant to subsection 201 of these Regulations.

(.2) The amount of SBT due on those transactions.

(B) Every Taxpayer shall pay to the Department the amount of SBT due.

(b) All bills or invoices created by or for a Taxpayer in connection with the acquisition of SB by a Dealer from that person, shall separately indicate the total volume of SB under paragraph 101(f)(A) of these Regulations; and, with respect to syrups or other concentrates under paragraph 101(f)(B) of these Regulations, the total volume of SB that would be prepared from such syrups or other concentrates when prepared to manufacturer specifications. This information shall appear either on the invoice to the Dealer or on a form provided by the Department as a supplement that must accompany each invoice to the Dealer.

(c) The Department may require every Taxpayer and Dealer to submit such other information as the Department deems necessary for proper administration of SBT.

(d) The Department is charged with enforcement and collection of SBT and is empowered to promulgate and enforce reasonable regulations for its enforcement and collection. (See Example 3 for illustration)

(e) Any taxpayer required to file a return under this Section and to pay SBT to the Department shall file an amended SBT return correcting an underpayment of SBT and with such amended return Taxpayer shall pay the underpaid SBT and any interest thereon. Such amended return shall be filed within 60 days of discovering the underpayment.

(f) When a Taxpayer discovers an overpayment of tax, the Taxpayer shall file an amended return to claim a credit or, if the Taxpayer is no longer required to file a SBT return, the Taxpayer will be entitled to claim a refund of the overpaid SBT. A credit or a refund may be claimed only if the later filed SB return or refund claim is filed by the Taxpayer no later than three (3) years after the later of the date of payment of the overpaid SBT or the due date for such payment.

Section 502. Electronic Filing and Payment.

(a) Any person liable to pay the SBT will be required to file the tax return and remit the attending tax payment electronically through electronic funds transfer ("EFT"). EFT includes

automated clearinghouse (ACH) debits and/or credits, e-Check, and any other means or technologies that may be available to obtain the funds due the City in an efficient manner. The Department may by policy or announcement provide for additional electronic means/technologies as they become available.

(b) Any Taxpayer who is required by this regulation to electronically file a return and fails to do so will be subject to a penalty of $500 for each occurrence. Every month that such Taxpayer fails to electronically file will constitute a separate occurrence. This penalty is in addition to any penalty due under Philadelphia Code § 19-509(4)(e).

(c) Any Taxpayer who is required by this regulation to make an electronic payment and fails to comply shall in addition to any interest, penalties and fees owed under Philadelphia Code § 19-509 be subject to a penalty for each occurrence as follows:

(1.) If the amount to be paid electronically is less than or equal to $10,000: five percent (5%) of the amount to be paid electronically.

(2.) If the amount to be paid electronically is more than $10,000 but less than $50,000: five hundred dollars ($500).

(3.) If the amount to be paid electronically is $50,000 or more: one percent (1%) of the amount to be paid electronically.

Every month that the Taxpayer fails to make electronic payments will constitute a separate occurrence.

Section 503. Maintenance of Books and Records.

Every Taxpayer and every Dealer is required to maintain for a period of six (6) years after the return is due or actually filed, whichever date is later, books and records, and such other information as the Department deems necessary for proper administration of this tax, and to make them available to the Department upon its request.

ARTICLE VI

POWERS AND DUTIES OF THE REVENUE COMMISSIONER

Section 601. Collect and Receive Tax.

It shall be the duty of the Commissioner to collect and receive SBT.

Section 602. Enforce Collection and Promulgate Regulations.

The Commissioner is charged with enforcing the collection of SBT. The Commissioner is also empowered to prescribe, adopt, promulgate and enforce rules and regulations pertaining to the administration and enforcement of the ordinance authorizing the imposition of SBT.

Questions not specifically answered in these regulations should be submitted in writing to Technical Staff, Department of Revenue, 1401 JFK Blvd., Room 480, Philadelphia, PA 19102 or by email to the Department at Revenue@phila.gov.

Section 603. Examine Books and Records.

The Department, through its authorized agents or employees, is empowered to examine the books, records, copies of reports and returns transmitted to or filed with the City, copies of tax returns filed with other taxing authorities and such other information the Department deems necessary of every Taxpayer and every Dealer. Every Taxpayer and every Dealer is required to provide the duly authorized representative of the Department with the means, facilities and opportunity for such examination.

Section 604. Assess and Collect Underpayments of Tax.

If upon examination by the Commissioner a return is found to be incorrect, the Commissioner is authorized to assess and collect any additional SBT determined to be due and unpaid by any taxpayer. If a return required to be filed under the ordinance authorizing this tax has not been filed, or if although a return has been filed, the tax shown on the return to be due has not been paid in part or in full, the correct amount of tax found by the Commissioner to be owing shall be assessed against, and collected directly from, the person liable for the tax with or without the formality of obtaining a return or amended return.

Section 605. Maintain Confidentiality of Returns.

Consistent with Pennsylvania Law, any information gained by the Commissioner as a result of any returns, investigations, or verifications required to be made pursuant to these Regulations, shall be confidential, except for official purposes.

ARTICLE VII

INTEREST, PENALTIES, FINES AND COSTS

Section 701. Assessment of Interest and Penalty.

Interest plus penalty shall be paid by any person subject to SBT as provided under Section19-509 of the Philadelphia Code and Section 401 of the City of Philadelphia General Regulations if the SBT is not remitted to the City by the due date.

Section 702. Violation, Fines and Costs.

(a) Any person subject to this tax, who violates any of the provisions of the ordinance authorizing the imposition of SBT, in addition to the interest and penalty prescribed under Section 701 of these Regulations, may be subject to additional fines and costs as provided under Section 19-509 of the Philadelphia Code and Section 602 of the City of Philadelphia General Regulations.

(b) In addition to any other penalties provided under Title 19 of The Philadelphia Code, a violation of §§402 and 403 of these Regulations shall constitute a Class II Offense under § 1-109 of the Philadelphia Code. The maximum fine for such offense is one thousand (1,000) dollars for each violation; and each separate sale, transaction or delivery shall constitute a separate offense. (See Example 1 and 2 for illustration)

(c) A person who violates the provisions of § 402 of these Regulations more than one time in any twenty-four (24) month period shall be subject to suspension of his or her Commercial Activity License for such period of time as the Department of Licenses and Inspections deems appropriate.

ILLUSTRATIVE EXAMPLES

Example 1

Company X is a Registered Distributor and Company Y is a Dealer as those terms are defined under Section 101 of these Regulations. Company Y is neither a Registered Dealer nor a Special Dealer. On January 1, 2017, Company X sold SB to Company Y. Upon reviewing the records of Company Y on March 1, 2017, the Department found out that Dealer Y, at the time of purchase, did not notify Company X that it is a Dealer and did not receive confirmation of notification from Company X.

Question:

1. Is this sale/purchase subject to SBT?
2. If so, who is liable to the City for the payment of the tax and why?

Answer:

1. Yes, the supply by a Distributor of any SB to a Dealer or the acquisition of any SB product by a Dealer from a Distributor is subject to SBT.
2. In this case, Dealer Y is liable to the City for payment of SBT. In general, the Registered Distributor is liable to the City for payment of SBT upon supplying SB to a Dealer. However, when a Dealer fails to provide the notification required under §403 of these Regulations, the Dealer is in violation of the SBT law and becomes liable, not only for payment of the tax, but also for penalties and fines. In addition to any other penalties provided under Title 19 of the Philadelphia Code, a violation of §§402 and 403 of these Regulations shall constitute a Class II Offense under § 1-109 of the Philadelphia Code. The maximum fine for such offense is one thousand dollars ($1,000) for each violation; and each separate sale, transaction or delivery shall constitute a separate offense.

Example 2

The same fact pattern as Example 1 above, except that when the Department examined Dealer Y's books and records on March 1, 2017, Dealer Y had not yet sold the SB it purchased from Company X on January 1, 2017. Assume that the Philadelphia store is the only store where Dealer Y sells SB at retail and that all the SB Y acquired from X was for the purpose of retail sale.

Question:

Would your answer be any different from the answer to Example 1 above?

Answer:

No. The tax is not a sales tax; the tax is imposed upon the supply of the SB to the Dealer or the acquisition of the SB by the Dealer, not upon the sale of SB by the Dealer to its customers.

Example 3

On March 1, 2017, XYZ acquired from Distributor A, who is not a Registered Distributor, 100 24-packs of 12 ounce cans of SB. On April 1, 2017, XYZ acquired from Distributor B, who is a Registered Distributor, 100 quarts of pre-made syrup each ounce of which produces, according to the manufacturer's specification, 1 quart of SB. With respect to the SB that XYZ acquired from Distributor A, XYZ is a Special Dealer. XYZ properly informed Distributor B that it is a Dealer and received confirmation notification as specified under Section 402 of these Regulations.

Question:

1. Is either of these transactions subject to SBT? Why?
2. If so, who is liable for the payment of the tax on each of these transactions? Why?
3. What is the amount to tax due on each transaction?
4. What is the due date/dates for filing and paying the tax relating to each transaction?

Answer:

1. Yes, both transactions are subject to SBT. In these transactions, the Dealer (XYZ) acquired from the Distributors (A and B) SB and syrup that is intended to be used in the production of SB. Supply of SB to a Dealer and acquisition of any SB by a Dealer (for the purpose of retail sale in the City) is subject to SBT.
2. Because XYZ is a Special Dealer with respect to the first transaction, it is liable for the payment of the tax on that transaction. A Special Dealer is a Dealer that is granted by the Department, under the provisions of subsection 302(a) of these Regulations, a waiver from "Notification of Dealer Status" requirement provided under § 402 of these Regulations for a specific SB or SBs. The SBT shall be paid directly to the Department by XYZ. Distributor B, who is a Registered Distributor, is liable for the payment of the tax on the second transaction. When a Registered Distributor receives from a Dealer notification and provides the Dealer with confirmation of notification pursuant to Section 402 of these Regulations, the Registered Distributor is liable for the payment of the tax.
3. Amount of SBT due on the first transaction

   Total number of ready to consume ounces of SB: 100*24*12 = 28,800 ounces

   SBT due (28,000*$0.015) = $\underline{\$432.00}$

   Amount of SBT due on the second transaction

Number of quarts of syrup acquired:	100
Number of ounces per quart	32
Amount of syrup acquired in ounces (100*32)	3,200
Total number of ounces of SB to be produced (3,200*32)	102,400

   SBT due (102,400*$0.015) = $\underline{\$1,536.00}$

4. SBT is filed and paid on a monthly basis. For each calendar month, the due date for filing and paying SBT is the 20th day of the month following the calendar month. As such, the due date for filing the return and paying the tax relating to the March 1, 2017 transaction is on or before April 20, 2017. The due date for filing and paying the tax relating to the April 1, 2017 transaction is on or before May 20, 2017.

Example 4

ABC is a large grocery store engaged in retail business in Philadelphia and its surrounding areas. ABC has five stores, two of them located within Philadelphia and the other three outside Philadelphia. ABC has one big storage facility which is located outside the City limit in the suburb of Philadelphia. ABC is neither a Registered Dealer nor is it a Special Dealer. ABC purchases all of its SB from Registered Distributors, who deliver all products to ABC's storage facility located outside Philadelphia. Upon each purchase, ABC properly informs the Registered Distributor that it is a Dealer engaged in retail business in Philadelphia and surrounding areas and receives confirmation of notification from the Registered Distributors.

Question:

1. Are any of the SB delivered to ABC's storage facility located outside the City subject to SBT?
2. If so, what portion of the delivery is subject to SBT and whose responsibility is it to determine the portion subject to the tax? Who is liable to the City for the payment of the tax?
3. If ABC does not inform the Distributors at the time of the transactions what portion of the SB will transfer to the Philadelphia locations, how should the Distributors calculate the tax?
4. Is there a viable alternative to this arbitrary determination of the portion of SB subject to the SBT?
5. If ABC notifies a Registered Distributor that 50% of the SBs sold in a particular transaction will be transferred to Philadelphia locations, but the Distributor erroneously pays tax on the entire amount supplied in such transaction, what is the Distributor's remedy?

Answer:

1. Yes, the SBs that will end up in the two ABC's grocery stores in the City for resale are subject to SBT. The Registered Distributors are liable to the City for the payment of the tax on those SBs.
2. As the Registered Distributors do not have any way of knowing the portion that ABC will transfer from its storage facility to its two Philadelphia location, it is ABC's responsibility to inform the Distributors at the time of the transactions the portion of the SB it will transfer to the Philadelphia locations. Based on that information, the Registered Distributors shall prepare a receipt detailing the amount of SB included in the transactions and the amount of SBT owing on such transactions.
3. If ABC does not inform the Distributors what portion of the SB will transfer to the Philadelphia locations, the Distributors should assume that 100% of the SB is taxable.
4. Yes. The viable alternative is for ABC to be a Registered Dealer and to take the responsibility for the payment of the SBT. As a Registered Dealer, ABC is responsible for payment of the SBT upon transfer of the SB from its storage facility to its two Philadelphia retail locations and would certainly know the amount of SB

subject to the SBT. This responsibility comes under the SBT law with the right to sell SB to other Dealers as long as it provides to such Dealer confirmation of notification as required under Section 403(b) of these Regulations.

5. Upon discovery that SBT has been overpaid, the Distributor should claim a credit against the SBT reported on a later filed SBT return. If the Distributor is no longer required to file a SBT return, the Distributor will be entitled to claim a refund of the overpaid tax (as long as such claim is filed within the time limits of Phila. Code Section 19-1703).

Example 5

Same fact pattern as Example 4 above, except that ABC also directly imports from a foreign country a certain SB product that is popular within the large community of that foreign country in Philadelphia. The product is directly shipped from that foreign country via common carrier to one of the ABC's stores in Philadelphia. The foreign company that sells this product to ABC doesn't do any other business in Philadelphia and is not a Registered Distributor for the purpose of the SBT.

Question:

1. Is this transaction subject to the SBT? Why?
2. If so, who is liable to the City for payment of the tax? Why?

Answer:

1. Yes, the transaction is subject to SBT. Acquisition of any SB by a Dealer (a person engaged in the business of selling SB for retail in Philadelphia) is subject to SBT. The fact that the SB is imported and shipped via common carrier by a foreign company distributor which does not have any other business activity in Philadelphia only indicates that the foreign company may not have sufficient business nexus with Philadelphia to make it subject to the BIRT.
2. ABC is liable for the payment of SBT. The only way ABC could legally sell in Philadelphia any SB that it acquires after January 1, 2017, is either (i) by acquiring the product from a Registered Distributor who is liable to the City for payment of the SBT or (ii) by obtaining from the Department a full or partial waiver, as provided under Section 302 of these Regulations. In this case, ABC is not a Registered Distributor and therefore must apply to the Department for a partial waiver to be a Special Dealer for the purpose of this transaction and directly pay SBT to the City. Otherwise, ABC will be in violation of the law and will be subject, in addition to the payment of the tax, to penalties and costs

Example 6

XYZ is a Dealer who acquired SB from Registered Distributors. XYZ is neither a Registered Distributor nor a Registered Dealer. Upon each purchase, XYZ properly informs the Registered Distributors that it is a Dealer engaged in retail business in Philadelphia and receives from the Registered Distributors (i) confirmation of notification; and (ii) a receipt detailing the amount of SB supplied in the transaction and the amount of tax owing on such transaction. BCD, a Dealer who is neither a Registered Dealer nor a Special Dealer, engaged in retail business in Philadelphia, purchased SB from XYZ. Prior to purchase, BCD notified XYZ that it is a Dealer engaged in retail business in Philadelphia and XYZ informed BCD that it is neither a Registered Distributor nor a Registered Dealer. XYZ gave a written statement to BCD that all SB it is selling to BCD was acquired from Registered Distributors who were notified that XYZ was a Dealer and who paid tax on all the SB.

Question:

1. Upon audit by the Department, BCD provides the documents showing that it acquired the SB from XYZ and the written statement it receives from XYZ that XYZ acquired all its SB from Registered Distributors who were notified and paid tax. BCD believes that no additional tax is due on its purchase of SB from XYZ because the tax already has been imposed on and paid by Registered Distributors on the supply of the SB to XYZ. Is BCD's understanding correct?
2. If BCD's understanding is not correct, what are the consequences of its erroneous understanding of the law?
3. Should there be any penalty on XYZ for selling SB to BCD after being informed by BCD that it is a Dealer engaged in retail business in Philadelphia?

Answer:

1. BCD's understanding is not correct. Except when the Dealer is also a Registered Distributor or a Registered Dealer, no Dealer may sell at retail, or hold out or display for sale at retail, any SB acquired by it unless: a) The SB was acquired from a Registered Distributor or from a Registered Dealer who would be liable to the City for payment of the tax; and b) The Dealer has complied with the notification requirements of § 403 of these Regulations; and received confirmation from the Registered Distributor or from the Registered Dealer of such notification, as well as confirmation that the Distributor is a Registered Distributor or a Registered Dealer. In the instant case, XYZ properly informed BCD that it is neither a Registered Distributor nor a Registered Dealer, and BCD knew that it did not acquire the SB from a Registered Distributor or from a Registered Dealer. The fact that BCD requested and received a written statement from XYZ that XYZ acquired all SB it carries in its Philadelphia store from Registered Distributors who are liable to the City for payment of the tax does not make XYZ a Registered Distributor or a Registered Dealer.

2. Because BCD acquired the SB from a source other than a Registered Distributor or a Registered Dealer, BCD is liable to the City for payment of any penalties, fines and costs as provided under Section 702 of these Regulation. Because SBT has already been paid by the Registered Distributor upon the supply of SB to XYZ, BCD shall not be liable for payment of SBT.
3. There should not be any penalty on XYZ for selling SB to BCD. There is nothing in the SBT law that prohibits XYZ from selling at retail to any person, including to another Dealer, SB it properly acquires from Registered Distributors. When acquiring all SB it carries in its Philadelphia store from Registered Distributors, XYZ properly fulfilled its notification requirement under the SBT law and properly received from the Registered Distributors (i) confirmation of notification; and (ii) a receipt detailing the amount of SSB supplied in the transaction and the amount of tax owing on such transaction.

Example 7

The same fact pattern as Example 6 above, except that XYZ incorrectly notified BCD that (a) it is a Registered Dealer (b) as a Registered Dealer, it has the obligation to pay SBT to the City and the right to sell SBs to other Dealers and (c) no additional SBT must be paid by BCD if it purchases SB from XYZ to sell in Philadelphia at retail. Relying on XYZ's statements, BCD acquired the SB from XYZ, and XYZ provided BCD with confirmation of notification and with a receipt detailing the amount of SB supplied and SBT due on the transaction. XYZ did not pay SBT to the City on the transfer to BCD.

Question:

1. Is XYZ in violation of the law? What is the penalty imposed on XYZ for such violation? Is XYZ liable for the payment of SBT?
2. Is BCD in violation of the law? What is the penalty imposed on BCD for such violation? Is BCD liable for the payment of SBT?
3. Would your answer to question 1 and 2 be any different if XYZ is actually a Special Dealer and pays the tax?

Answer:

1. XYZ is in violation of the law for falsely identifying itself to BCD as a Registered Dealer, and for providing BCD with invalid confirmation of notification and with a receipt detailing the amount of SB supplied in the transaction and the amount of tax owing on such transaction. By so doing, XYZ intentionally misled BCD and should be liable to the City for payment of penalties, fines and costs. Because the tax has already been paid by the Registered Distributors upon supplying the SB to XYZ, XYZ shall not be liable for the payment of additional SBT.
2. No. BCD was intentionally misled by XYZ to believe that XYZ was a Registered Dealers and therefore BCD did not violate the SBT law.
3. The answer to question one is essentially the same. A Special Dealer is a Dealer that is granted, upon showing of extraordinary circumstances, a waiver by the Department to make purchase of SB from other than Registered Distributors and, as a result, assumes responsibility for payment of the tax to the Department. However, a Special Dealer is not a Registered Dealer and its responsibility to pay the SBT does not include the right to sell SB to other Dealers. Even though XYZ pays the tax on the transaction with BCD, misinforming BCD and acting as if it were a Registered Dealer is still a violation of the law, and XYZ should be liable to the City, at a minimum, for payment penalties and costs provided under Sections 701 and 702 of these Regulations.

   The answer to question 2 remains the same.

Example 8

Company A is a Registered Distributor for purposes of SBT. Company B is a Dealer engaged in retail sale business within Philadelphia. B acquired from A and A delivered to B's business location in Philadelphia, the following beverages: a) 50 24-packs of 16 ounce cans of SB that includes sucrose as an ingredient, b) 50 36-packs of 12 ounce cans of SB that includes stevia as an ingredient, c) 50 12-packs of 16 ounce cans of product that contains 60% milk by volume, and d) 50 12-packs of 16 ounce cans of SB that contains 45% fresh fruit by volume.

Question:

1. Calculate the amount of SBT Company A is liable to pay to the City.
2. Would your answer be any different if B, upon purchase, informed A that it is going to use the 45% fresh fruit SB as a mix to produce a beverage that is 75% fresh fruit by volume?

Answer:

1. Amount of SBT due on the SB that includes or contains

Sucrose as an ingredient:	(50*24*16)*$0.015	$288.00
Stevia as an ingredient:	(50*36*12)*$0.015	$324.00
45% fresh fruit by volume:	(50*12*16)*$0.015	$144.00
60% milk by volume:	Not subject to SBT	0.00
Total SBT due		**$756.00**

2. No, the answer would be the same; the tax is imposed upon the supply of the SB to the Dealer and taxability of the beverage sold to the Dealer depends on the manufacturer's specifications known to the Distributer at the time of the transaction takes place. The fact that the Dealer intends to mix the otherwise taxable SB with another beverage to produce a different beverage that might not have been subject to the SBT is irrelevant.

Example 9

Company W is a major restaurant with many locations in Philadelphia. W is a Registered Dealer and acquired the following SBs from various Distributors:

a) 20 quarts of syrup that contains sugar-based sweetener as an ingredient and each quart of which produces, according to the manufacturer's specification, 30 quarts of SB. W doesn't follow the manufacturer's specification and intends to produce 40 quarts of SB out of each quart of syrup.
b) 10 quarts of concentrate that contains as an ingredient sugar substitute. According to the manufacturer's specification, each quart of concentrate produces 200 quarts of SB. Again, W doesn't follow the manufacturer's specification and intends to produce 300 quarts SB out of each quart of concentrate.

Question:

1. As a Registered Dealer, W is liable to the City for payment of the SBT, and W calculates the SBT due based on the amount of SB it intends to produce out of the syrups and concentrates it acquired as follows:

Amount of SBT due on the syrup

Number of quarts of syrup acquired:		20
Number of ounces per quart		32
Amount of syrup acquired in ounces (20*32)		640
Ounces of SB W intends to produce (640*40)	25,600	

SBT due (25,600*$0.015) = <u>$384.00</u>

Amount of SBT due on the concentrate

Number of quarts of concentrate acquired:		10
Number of ounces per quart		32
Amount of concentrate acquired in ounces (10*32)		320
Total number of ounces of SB W intends to produce (320*300)		96,000

SBT due on (96,000*$0.015) = <u>$1,440.00</u>

Total SBT due $192.00 + $1,440.00 = <u>$1,632.00</u>

Is $912.00 the correct SBT W is liable to pay to the City? Why?

2. If the above amount is not the correct SBT, what is the correct amount?

Answer:

1. $912.00 is not the correct SBT. As a Registered Dealer, W has elected to pay the SBT on the SB it acquires. W must calculate the SBT using the same formula as a Registered Distributor. The election to be a Registered Dealer doesn't come with a special privilege to pay less SBT than a Registered Distributor would pay on the same transaction.

2. The correct amount of SBT that Company W is liable to pay to the City should be calculated based on the manufacturer's specification of the number of ounces of SB that could be produced. Thus, the correct amount is:

Amount of SBT due on the syrup

Number of quarts of syrup acquired:	20
Number of ounces per quart	32
Amount of syrup acquired in ounces (20*32)	640
Ounces of SB to be produced per manuf. specification (640*30)	19,200

SBT due (19,200*$0.015) = $288.00

Amount of SBT due on the concentrate

Number of quarts of concentrate acquired:	10
Number of ounces per quart	32
Amount of concentrate acquired in ounces (10*32)	320
Ounces of SB to be produced per manuf. Specification (320*200)	64,000

SBT due on (64,000*$0.015) = $960.00

Total SBT due $288.00 + $960.00 = $1,248.00

Example 10

ABEX is a Dealer with ten (10) retail stores, two (2) of which are located within Philadelphia. ABEX is not a Registered Dealer. On April 2, 2017, ABEX acquired 100 cases of SB from a Registered Distributor. The Registered Distributor delivers the SBs to ABEX's only storage facility, which is located in Philadelphia. ABEX intends to sell 30 of the 100 cases of SB in its two Philadelphia stores. The remaining 70 cases will be taken by ABEX to its other stores located outside Philadelphia for retail sale. Upon purchase of the SBs, ABEX properly notified the Distributor of this fact and received from the Distributor confirmation notification and receipts detailing the amount of SB that ABEX intends to sell with Philadelphia and the amount of SBT it would pay on this transaction. The Distributor filed the required return and paid the SBT before the due date, which is May 20, 2017, on the 30 cases of the SB it transferred to ABEX storage facility for sale in Philadelphia. However, due to a special event that took place in the last week of May, ABEX ended up selling at its Philadelphia locations 50 cases, rather than 30 cases, of the SB purchased from the Distributor in that transaction.

Question:

Are the 20 additional cases of SB sold by ABEX in its Philadelphia store subject to the SBT? If so, who is liable for the payment of the tax?

Answer:

Yes, the 20 additional cases of SB sold by ABEX in its Philadelphia store is subject to the SBT. **The correct solution for the underpayment is for ABEX to adjust its future order for that particular SB to overstate its anticipated Philadelphia store needs by 20 cases and therefore correct its inventory balance between Philadelphia and non-Philadelphia cases.**

If ABEX fails to make that adjustment within the next two orders for that SB, ABEX would be in violation of the SBT law and, in addition to the fines and costs specified under Section 702 of this regulation, ABEX would be liable for the payment of the tax. In the extraordinary situation where ABEX will not be placing any future Philadelphia orders for that SB (either because it will cease to carry that SB or because it no longer will have a Philadelphia location), ABEX should contact the Department directly to arrange payment of the additional tax due.

Example 11[1]

Same fact pattern as Example 10 above, except that the special event took place near one of the ABEX's stores located outside Philadelphia and ABEX had to transfer to this store half the inventory intended for sale in the two Philadelphia stores. Thus, instead of the 30 cases of SB ABEX notified the Distributor that it would sell in its two Philadelphia stores, for which the Distributor properly paid the SBT, ABEX only sold in the two Philadelphia stores 15 cases of the SB it acquired from the Distributor in the April 2, 2017 transaction.

Question:

Would the Distributor receive refund or a credit from the Department of the SBT paid on the 15 cases of SB that were not sold in the Philadelphia Stores by ABEX?

Answer:

No, a refund or credit is not available from the Department in this situation.

[1] Example 11 has been amended by regulation submitted to the Department of Records on June 30, 2017 (effective July 31, 2017).

Example 12

TBS is a Dealer located in Philadelphia that purchased online from an internet retailer a concentrate intended to produce SB. The internet retailer does not have any location in Philadelphia and, for the purpose of SBT, it is neither a Registered Distributor nor a Registered Dealer. TBS used a quarter of the concentrate it purchased from the internet retailer to prepare SB for a charitable event that takes place within Philadelphia and donated the SB free of charge to the charity that organizes the event. TBS used another quarter of the concentrate it purchased from the internet retailer to prepare SB and to sell it at cost to the same charity for the same event. In each case, the charity intends to provide the SB to patrons of the event at no charge. The remaining one-half of the concentrate was used to prepare SB for retail sale in Philadelphia at a regular price.

Question:

1. Is the on-line seller liable for the payment of any SBT to Philadelphia on its supply of the concentrate to TBS?
2. Is TBS liable for the payment of any SBT to Philadelphia on its purchase?
3. If TBS is liable for the payment of any SBT, what portion is subject to the tax?
4. If TBS, used the SB itself or for free samples instead of donating it to charity, would it be liable for the payment of any SBT?

Answer:

1. The online seller is not liable for the payment of any SBT to Philadelphia, because it is neither a Registered Distributor nor a Registered Dealer.
2. TBS is liable for the payment of SBT to Philadelphia on the acquisition of SB concentrate. Because the online seller is not a Registered Distributor or Dealer, for TBS to be able to sell its purchase of concentrate, TBS has to be either a Registered Dealer or Special Dealer pursuant to Section 302 of these Regulations and to assume the responsibility of payment of the SBT to the City.
3. The quarter of the concentrate that TBS purchases from the internet retailer to prepare SB for donation to charity free of charge is not subject to SBT. The portion of the concentrate TBS uses to prepare SB for sale to the charity at cost and the portion it uses to prepare SB for retail sale at a regular price are both subject to the SBT. The fact that the portion of the SB is sold at a substantial discount (in this case at cost), even if it is sold to a charity, is irrelevant for the purpose of SBT as long as the SB is sold at retail.
4. No, products not transferred for retail sale are not subject to the tax.

Example 13

On January 20, 2017, Distributor A sold and delivered 100 cases of SB to Dealer B, which is also a Distributor. For the purpose of this tax, both A and B are Registered Distributors. B intends within three (3) months a) to sell at retail within Philadelphia 35 cases of the SB it purchased from A, b) to distribute/sell to Dealers within Philadelphia 25 cases of the SB it purchased from A and c) to distribute/sell the remaining 40 cases to Dealers/retailers located outside Philadelphia. B distributes all 100 cases of the SB to Dealers within Philadelphia in February, 2017.

Question:

1. Is Distributor A liable for the payment of any SBT on this transaction?
2. Is Dealer/Distributor B liable for payment of any SBT on this transaction?
3. If there is any SBT due, what is the due date for the payment of the tax?

Answer:

1. As a Registered Distributor, Distributor A may be liable for the payment of SBT on the 35 cases of the SB it sold to B. For Distributor A to be liable, B has to properly notify A that it intends to sell 35 cases of its purchase from A at retail within Philadelphia and B has to receive from A, pursuant to Section 403 of these Regulations, confirmation of notification and receipts detailing the transaction and the amount of SBT due. The fact that B is a Dealer that is also registered as a Distributor for the purpose this tax does not make it automatically responsible for the payment of the tax on the transaction. B will be responsible for the payment of the tax if, for whatever reason, it opts not to notify Distributor A about its intent to sell the 35 cases of its purchase at retail in Philadelphia.
2. Dealer/Distributor B is liable for the payment of SBT on the 25 cases of the SB it distributes to other Dealers/retailers within Philadelphia, assuming it gets notification from those Dealers that they are Dealers and that they intend to sell the product at retail in Philadelphia. The remaining 40 cases of SB that B distributes to retailers outside Philadelphia is not subject to the tax.
3. The due date for the payment of SBT is the 20th day of the month following the calendar month when the transaction takes place. Distributor A sold the SB to B in the month of January, 2017, and as such, the due for the payment of the SBT by Distributor A is February 20, 2017; Dealer/Distributor B sold the SB to other Dealers in Philadelphia in the month of February, 2017 and, as such, the due date for payment of the SBT by Dealer/Distributor B is March 20, 2017.

APPENDIX "F"

Act of August 5, 1932, P.L. 45, *as amended*, 53 P.S. § 15971

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 53 P.S. Municipal and Quasi-Municipal Corporations
Part II. Cities of the First Class
Chapter 43. Taxation
Article II. Subjects of Taxation (Refs & Annos)

53 P.S. § 15971

§ 15971. Persons, transactions, occupations, privileges, subjects, personalty; state employee compensation deduction; remission

Currentness

(a) From and after the effective date of this act, the council of any city of the first class shall have the authority by ordinance, for general revenue purposes, to levy, assess and collect, or provide for the levying, assessment and collection of, such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city of the first class, as it shall determine, except that such council shall not have authority to levy, assess and collect, or provide for the levying, assessment and collection of, any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee. If, subsequent to the passage of any ordinance under the authority of this act, the General Assembly shall impose a tax or license fee on any privilege, transaction, subject or occupation, or on personal property, taxed by any city of the first class hereunder, the act of Assembly imposing the State tax thereon shall automatically vacate the city ordinance passed under the authority of this act as to all taxes accruing subsequent to the effective date of the act imposing the State tax or license fee. It is the intention of this section to confer upon cities of the first class the power to levy, assess and collect taxes upon any and all subjects of taxation which the Commonwealth has power to tax but which it does not now tax or license, subject only to the foregoing provisions that any tax upon a subject which the Commonwealth may hereafter tax or license shall automatically terminate upon the effective date of the State act imposing the new tax or license fee.

(b) It shall be the duty of the State Treasurer or other appropriate State official at the time of payment of the salary, wage or other compensation to any officer or employe of the Commonwealth of Pennsylvania, with the exception of elected officials, domiciled or rendering services within any first class city, to deduct any tax imposed by such city on the salary, wage or other compensation paid by the Commonwealth to any officer or employe thereof.

(c) The State Treasurer or other appropriate State official shall on or before the last day of April, July, October and January of each year, beginning with October, 1961, make a return on a form furnished by or obtainable from the revenue commissioner of such city and remit to the revenue commissioner the amount of tax so deducted for the three month period ending on the last day of the month preceding.

Credits

1932 [Ex.Sess.], Aug. 5, P.L. 45, § 1. Amended 1961, July 26, P.L. 904, § 1.

Notes of Decisions (154)

53 P.S. § 15971, PA ST 53 P.S. § 15971
Current through 2017 Regular Session Act 6

APPENDIX "G"

Excerpts from Act of March 4, 1971, P.L. 6, as amended, 72 P.S. §§ 7201-02
(imposing the Sales and Use Tax)

72 P.S. § 7201

§ 7201. Definitions
Effective: August 1, 2016 to June 30, 2017

The following words, terms and phrases when used in this Article II shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) "Soft drinks." All nonalcoholic beverages, whether carbonated or not, such as soda water, ginger ale, coca cola, lime cola, pepsi cola, Dr. Pepper, fruit juice when plain or carbonated water, flavoring or syrup is added, carbonated water, orangeade, lemonade, root beer or any and all preparations, commonly referred to as "soft drinks," of whatsoever kind, and are further described as including any and all beverages, commonly referred to as "soft drinks," which are made with or without the use of any syrup. The term "soft drinks" shall not include natural fruit or vegetable juices or their concentrates, or non-carbonated fruit juice drinks containing not less than twenty-five per cent by volume of natural fruit juices or of fruit juice which has been reconstituted to its original state, or natural concentrated fruit or vegetable juices reconstituted to their original state, whether any of the foregoing natural juices are frozen or unfrozen, sweetened or unsweetened, seasoned with salt or spice or unseasoned, nor shall the term "soft drinks" include coffee, coffee substitutes, tea, cocoa, natural fluid milk or non-carbonated drinks made from milk derivatives.

(k) "Sale at retail."

(8) Any retention of possession, custody or a license to use or consume tangible personal property or any further obtaining of services described in subclauses (2), (3) and (4) of this clause pursuant to a rental or service contract or other arrangement (other than as security).

(m) "Tangible personal property."

(1) Corporeal personal property including, but not limited to, goods, wares, merchandise, steam and natural and manufactured and bottled gas for non-residential use, electricity for non-residential use, prepaid telecommunications, premium cable or premium video programming

service, spirituous or vinous liquor and malt or brewed beverages and soft drinks, interstate telecommunications service originating or terminating in the Commonwealth and charged to a service address in this Commonwealth, intrastate telecommunications service with the exception of (i) subscriber line charges and basic local telephone service for residential use and (ii) charges for telephone calls paid for by inserting money into a telephone accepting direct deposits of money to operate, provided further, the service address of any intrastate telecommunications service is deemed to be within this Commonwealth or within a political subdivision, regardless of how or where billed or paid. In the case of any such interstate or intrastate telecommunications service, any charge paid through a credit or payment mechanism which does not relate to a service address, such as a bank, travel, credit or debit card, but not including prepaid telecommunications, is deemed attributable to the address of origination of the telecommunications service.

72 P.S. § 7202

§ 7202. Imposition of tax
Effective: July 1, 2002

(a) There is hereby imposed upon each separate sale at retail of tangible personal property or services, as defined herein, within this Commonwealth a tax of six per cent of the purchase price, which tax shall be collected by the vendor from the purchaser, and shall be paid over to the Commonwealth as herein provided.