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IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 2 and 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,
Appellants/Plaintiffs,

v.

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

BRIEF FOR APPELLEES

Appeal from the June 14, 2017 Order of the Commonwealth Court of Pennsylvania at Nos. 2077 and 2078 C.D. 2016, Affirming the December 19, 2016 Orders of the Philadelphia County Court of Common Pleas, Civil Division, No. 2016-01452

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

PENNSYLVANIA STATUTES

CITY ORDINANCES

OTHER AUTHORITIES

I. INTRODUCTION

The Philadelphia Beverage Tax ("PBT")[1] is a lawful exercise of the power the General Assembly granted to the City of Philadelphia to wrestle with its own tax base and local politics in order to solve its own problems and meet its own needs. The PBT taxes non-retail distribution transactions of sweetened beverages ("SBs").[2] Pennsylvania has the power to tax or license those transactions, but does not do so. The Sterling Act[3] "confer[s] upon [the City] the power to [tax] any and all subjects of taxation which the Commonwealth has power to tax but which it does not . . . tax or license." 53 P.S. § 15971(a). Accordingly, Plaintiffs' argument that the Sterling Act prohibits the PBT as duplicative of the Pennsylvania Sales Tax[4] is without merit.

Both the *en banc* panel of the Commonwealth Court and the Court of Common Pleas, Philadelphia County, Honorable Gary S. Glazer ("Trial Court"),

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[1] Philadelphia Bill No. 160176 (approved June 20, 2016), Phila. Code Chapter 19-4100, commonly referred to as the "Philadelphia Beverage Tax." (R.307a.)

[2] "SBs" refers to the type of beverages described at Sections 19-4101(3)(a), (b) of the PBT.

[3] 1932 [Ex. Sess.], Aug. 5, P.L. 45, § 1, *as amended*, 53 P.S. § 15971, commonly referred to as the "Sterling Act."

[4] 1971, March 4, P.L. 6, No. 2, art. II, *as amended*, 72 P.S. § 7201 *et seq.*

applied longstanding precedent in straightforward fashion, compared the incidence of the PBT to the incidence of the Pennsylvania Sales Tax, and properly rejected Plaintiffs' claim of duplication. This Court should now affirm.

II. COUNTER-STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

"When an appellate court rules on whether preliminary objections in the nature of a demurrer were properly sustained, the standard of review is *de novo* and the scope of review is plenary." *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 101 (Pa. 2008). Preliminary objections admit only well-pleaded facts, but not "conclusions of law nor inferences unwarranted by the admitted facts nor argumentative allegations nor expressions of opinion." *Hyam v. Upper Montgomery Joint Auth.*, 160 A.2d 539, 541 (Pa. 1960).

III. COUNTER-STATEMENT OF THE CASE

A. Chronological Statement of Facts

1. The Philadelphia Beverage Tax

a) City Council Passes the PBT

The imposition of a beverage tax in Philadelphia was, and still is, a hotly contested political issue. Before 2016, the beverage industry successfully defeated two prior attempts to pass beverage tax legislation in Philadelphia. (R.291a; R.305a; R.796a-97a.) However, City Council's third effort was a success. On June 16, 2016, City Council passed the PBT by a 13-4 vote.

(R.314a.) On June 20, 2016, the Honorable James Kenney, Mayor of the City of Philadelphia, signed the PBT into law. (R.291a; R.314a.)

The legislative debate over the PBT was public and extensive. City Council heard testimony from approximately 67 individuals during at least 11 different days, in committees and as a whole, and considered the submission of documents and written questions and answers to City officials. (R.291a-92a; R.737a-55a; R.756a-919a.) The testimony covered how the PBT operates, how it would be implemented, the purposes for which revenues generated by the PBT would be used (*e.g.*, funding thousands of pre-kindergarten seats, community schools, restoration of parks and recreational facilities, etc.), and the perspectives of numerous proponents and opponents of the tax as to its impacts on schools, jobs, public health, parks, recreational facilities, City finances, and the economy generally. (R.736a-919a.)

City Council heard from numerous City government officials, including Mayor Kenney's Chief of Staff Jane Slusser, Finance Director Rob Dubow, Chief Education Officer Otis Hackney, Budget Director Anna Adams, Chief Administrative Officer Rebecca Rhynhart, Pre-Kindergarten Director Anne Gemmell, Revenue Commissioner Frank Breslin, First Deputy Revenue Commissioner Marisa Waxman, City Controller Alan Butkovitz, Behavioral

Health and Intellectual Disability Services Commissioner Arthur Evans, Health Commissioner Thomas Farley, and City Solicitor Sozi Tulante. (R.291a-292a.)

The beverage and food merchant industries put forth testimony from 25 individuals. (R.292a.)

City Council also heard from 30 other citizens representing either themselves or interested organizations, such as: Minister Rodney Muhammed, President of the Philadelphia Chapter of the NAACP (R.842a-843a), Steve Wray, Executive Director, Economy League of Greater Philadelphia (R.852a-854a), Donna Cooper, Executive Director, Public Citizens for Children and Youth (R.905a-908a), and Jamie Gauthier of Sustainable Business Network of Philadelphia (R.916a-919a).

Further, there were extensive lobbying and campaign efforts directed at Council, as the beverage industry reportedly spent $10.6 million specifically to defeat passage of the PBT. (R.292a.)

b) The PBT's Operation

To be applicable, the PBT requires a transaction in which a dealer has "acquired" an SB from a distributor. Phila. Code § 19-4102(1). A "dealer" is "[a]ny person engaged in the business of selling [an SB] for retail sale within the City." *Id.* § 19-4101(1). A "distributor" is "[a]ny person who supplies [an SB] to a dealer." *Id.* § 19-4101(2). An SB is any non-alcoholic beverage with sugar-

based or artificial sweeteners, *id.* § 19-4101(3)(a), or any syrup or concentrate intended to be used to make a non-alcoholic beverage with sugar-based or artificial sweeteners, *id.* § 19-4101(3)(b), but excluding certain beverages such as baby formula and medical foods, and syrups and concentrates sold directly to a consumer or added to a beverage directly by a consumer, *id.* § 19-4101(3)(c).

Dealers seeking to sell acquired SBs in Philadelphia must either obtain those SBs from a registered distributor or register and assume the obligations of a registered distributor under the ordinance. *Id.* §§ 19-4102(1), 4107(2). Dealers may not hold out for retail sale in Philadelphia any SBs they acquired from distributors if the registration, notice, and other provisions of the ordinance have not been followed. *Id.* § 19-4102(1).

Tax liability attaches upon "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," when the supply, acquisition, delivery or transport is for the purpose of the dealer "holding out for retail sale within the City the [SB] or any beverage produced therefrom." *Id.* § 19-4103(1). Thus, by its terms, the PBT only taxes distribution-level transactions that happen independent of any subsequent retail transaction, although whether any retail sale actually occurs is irrelevant to PBT liability. *Id.*

The PBT's rate is $0.015 per fluid ounce of SB. *Id.* § 19-4103(2)(a). For syrups and concentrates, the rate is $0.015 per fluid ounce of beverage that the manufacturer's specifications state should be made from the amount of syrup or concentrate distributed. *Id.* § 19-4103(2)(b). The Department of Revenue may issue regulations modifying the rate on particular syrups and other concentrates, should there be a determination that the rate provided by following the manufacturer's instructions is "unfair or unreasonable." *Id.*

Distributors pay the tax in most instances. Dealers must notify distributors of their status as a dealer under the Ordinance. *Id.* §§ 19-4102(1)(b), 4104(1). Registered distributors must confirm this notification, confirm that they are registered distributors, and identify the amount of tax owing from a transaction in the receipt issued to the dealer. *Id.* §§ 19-4102(1)(b), 4104(2). Thereafter, registered distributors must report to the City certain information on a periodic basis regarding transactions to dealers and pay the tax owing. *Id.* § 19-4106.

A dealer may choose to register and assume the obligations of a registered distributor, which, among other things, enables the dealer to sell SBs in Philadelphia that the dealer acquired from non-registered distributors. *Id.* § 19-4107(2).

Any aggrieved taxpayer may challenge the application of the PBT to a particular transaction through ordinary administrative procedures seeking review

of liability or refunds of payments. *Id.* §§ 19-1702, 1703, *available at* https://goo.gl/AmDw6C (last accessed Apr. 12, 2018).

The City's current regulations regarding the PBT appear at Appendix E to the Plaintiffs' Brief ("PBT Regulations"). The PBT's first remittance and reporting deadline was February 20, 2017. (R.293a.)

c) Some of the Programs Funded by the PBT

Revenues generated by the PBT will enable the City to fund multiple major initiatives designed to aid its most vulnerable populations, including the creation of thousands of seats for 3- to 4-year-old children through Expanded Pre-K and the establishment and expansion of community schools. (R.692a; R.756a-61a; R.770a-71a; R.913a.) The PBT also will enable the City to embark on the Rebuild program to provide desperately needed infrastructure improvements to City recreation centers, playgrounds, libraries, and parks. (R.756a-61a.)

2. The Pennsylvania Sales Tax

The Pennsylvania Sales Tax levies a 6% tax on "each separate sale at retail of tangible personal property or services . . . within this Commonwealth." 72 P.S. § 7202(a).

In its definitional section, the statute defines a "sale at retail" as "[a]ny transfer, for a consideration, of the ownership, custody or possession of tangible personal property, including the grant of a license to use or consume whether such

transfer be absolute or conditional and by whatsoever means the same shall have been effected." *Id.* § 7201(k)(1). The definition of "sale at retail" makes clear that it does not include "any transfer of tangible personal property or rendition of services for the purpose of resale." *Id.* § 7201(k)(8).

"[P]urchaser[s]" of the "sale at retail" pay the tax, and "vendors" collect and remit it on behalf of the State. *Id.* § 7202(a) ("tax shall be collected by the vendor . . . from the purchaser").

3. Plaintiffs' Complaint

On September 14, 2016, Plaintiffs filed their Complaint, seeking declaratory and injunctive relief to invalidate the PBT. (R.23a.) The Complaint asserted seven counts, only the first of which is before the Court.

Count I claims that the Sterling Act expressly preempts the PBT as duplicative of the Pennsylvania Sales Tax; Count II claimed that the PBT, if not duplicative of the Pennsylvania Sales Tax, was impliedly preempted for supposedly conflicting with the purpose of the Pennsylvania Sales Tax; Count III claimed that the PBT violated the State's exclusion from the Pennsylvania Sales Tax of purchases made pursuant to the Federal Supplemental Nutrition Assistance Program; and Counts IV through VII claimed that the PBT violated the Pennsylvania Constitution's Uniformity Clause.

4. Plaintiffs' Application for King's Bench Jurisdiction

On September 14, 2016, the same day Plaintiffs filed their Complaint, Plaintiffs petitioned this Court to assume jurisdiction and issue an expedited declaration that the PBT was invalid. *See* Plfs. Pet. (148 EM 2016). The City did not oppose Plaintiffs' request for King's Bench Jurisdiction, although the City did oppose the schedule proposed by Plaintiffs. *See* City Ans. (148 EM 2016). By order dated November 2, 2016, this Court denied Plaintiffs' application and declined jurisdiction. *See* Order (148 EM 2016).

5. The Trial Court's Orders

On December 19, 2016, the Trial Court sustained the City's preliminary objections, dismissed all claims, and denied Plaintiffs' petition to specially enjoin enforcement of the PBT. Responsive memoranda and evidence to the petition were not yet due at the time the Trial Court dismissed Plaintiffs' action, *see* Pa.R.C.P. No. 208.1; Phila. Civ. R. 208.3, but, elsewhere in the record, the City submitted the Declaration of Marisa Waxman, First Deputy Commissioner of the Philadelphia Department of Revenue, Declaration of Thomas Farley, Philadelphia Health Commissioner, Declaration and Expert Report of Michael K. Wohlgenant, Ph.D., and Excerpts from Testimony Before City Council. (R.664a-919a.)

6. Plaintiffs' Appeal and the City's Application for King's Bench Jurisdiction

On December 23, 2016, Plaintiffs filed a Notice of Appeal to the Commonwealth Court from the Trial Court's Orders. (R.948a, 954a.) Because awaiting resolution of Plaintiffs' appeal would delay the City's ability to secure bonds for funding for substantial portions of Rebuild and other programs, the City filed its own application with this Court seeking King's Bench jurisdiction. *See* City Pet. (2 EM 2017). On February 13, 2017, the Court denied the City's application, and, once again, declined jurisdiction. *See* Order (2 EM 2017).

7. The Commonwealth Court's Opinion and Order

On June 14, 2017, after briefing and oral argument, an *en banc* panel of the Commonwealth Court affirmed the Trial Court's orders in a 5-2 majority opinion authored by the Honorable Michael H. Wojcik. *See* Pls. Br., App. A ("Cmwlth Ct. Op.").

The Commonwealth Court reviewed the plain, unambiguous text of the PBT and concluded that 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." *Id.* at 19. The Commonwealth Court reasoned that there was no duplication under the Sterling Act because "[t]he 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." *Id.* at 17.

The Honorable Anne E. Covey authored a dissenting opinion, in which the Honorable Renee Cohn Jubelirer joined. *See id.*, App. B.[5]

8. This Court's Limited Grant of Allocatur

On January 30, 2018, this Court granted in part Plaintiffs' Petition for Allowance of Appeal on the limited issue of whether the PBT "violate[s] the Sterling Act, 53 P.S. § 15971, which prohibits Philadelphia from imposing a tax on a transaction or subject that the Commonwealth already taxes[.]" *See* Order, Nos. 321 and 322 EAL 2017 (Jan. 30, 2018).

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[5] Judge Covey's dissenting opinion relied upon "Example 11," Pls. Br., App. B, at AEC-6, a hypothetical appearing at the end of the City's regulations in effect at that time. Although the Commonwealth Court correctly rejected Judge Covey's reading of the example, *see* Cmwlth Ct. Op. at 17-18, the City thereafter amended the regulations to revise Example 11 because it apparently created more confusion than it clarified. Plaintiffs do not rely upon former Example 11.

IV. SUMMARY OF ARGUMENT

Plaintiffs' attack on the PBT and the City's predecessor efforts to tax sweetened beverages has been long and relentless – in the political forum, in the media, and in the courts. The Trial Court and *en banc* panel of the Commonwealth Court laid bare the deficiencies in Plaintiffs' legal challenges, and properly dismissed Plaintiffs' seven-count Complaint.

The only question now standing before this Court is whether the PBT duplicates the Pennsylvania Sales Tax and taxes what "the Commonwealth already taxes" in violation of the Sterling Act. That question of law may be put to rest in this simple fashion:

The PBT taxes non-retail distribution transactions of SBs, no matter how much Plaintiffs try to redefine the PBT's tax incidence as being on retail sales. The State has the power to tax those same distribution transactions, but it does not do so. Therefore, the PBT is a proper exercise of the City's authority to tax pursuant to the Sterling Act, which "confer[s] upon [the City] the power to [tax] any and all subjects of taxation which the Commonwealth has power to tax but which it does not . . . tax or license . . . ." 53 P.S. § 15971(a).

In an effort to avoid this straightforward conclusion, Plaintiffs invite this Court to overturn longstanding tax jurisprudence in numerous ways. The Court should decline the invitation: contrary to Plaintiffs' Brief, a tax's incidence

is not determined by the post-tax reactions of private economic actors to the tax; double taxation does not exist merely because two taxes' respective subjects relate to a common physical object despite not actually being duplicative; and the single-Justice opinion in *United Tavern Owners v. School District of Philadelphia*, 272 A.2d 868 (Pa. 1971), does not stand for the proposition Plaintiffs claim, never had any precedential weight to begin with, and was specifically reviewed and supplanted by subsequent opinions of this Court. The Court also should reject Plaintiffs' request that it sit as a super-legislature to determine the wisdom and economic policy of Philadelphia's PBT. Regardless of how incorrect Plaintiffs' political arguments may be, such political issues are the purview of the State and local governments, not matters for this Court.

The Commonwealth Court and Trial Court faithfully applied this Court's precedent and correctly upheld the PBT under the Sterling Act. This Court should affirm.

V. ARGUMENT

A. The Sterling Act Expressly Authorizes the PBT.

The General Assembly enacted the Sterling Act in 1932 during an extraordinary session at the height of the Great Depression. 53 P.S. § 15971. Governor Gifford Pinchot called the session for the express purpose, among other reasons, of "increas[ing] the taxing power of political subdivisions of the state," 1932 Pa. Legis. J. 2 (June 27, 1932), including "enabl[ing] Philadelphia and other political subdivisions to raise additional revenue for relief purposes by means of additional taxing power." *Id.* at 65. Senator Samuel W. Salus hailed the Sterling Act as "the salvation of Philadelphia," enabling the City to "be able to take care of our poor." *Id.* at 665-66.

Specifically, the Sterling Act provides:

> [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).

Leaving no doubt of its intent, the General Assembly expressly stated that the Sterling Act authorizes the City to tax anything within Philadelphia that the State could but does not tax: "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 [or hereafter] tax or license . . . ." *Id.* (emphasis added); *see Blauner's v. City of Philadelphia*, 198 A. 889, 891 (Pa. 1938) ("Under the Sterling Act . . . the city has broad powers to levy taxes for revenue purposes."); *see also Nat'l Biscuit Co. v. City of Philadelphia*, 98 A.2d 182, 185 (Pa. 1953) (describing the Sterling Act as vesting an "enormously broad and sweeping power of taxation").

When a tax is challenged as impermissibly duplicative of another, courts compare the "operation or incidence" of the respective taxes. *Commonwealth v. Nat'l Biscuit Co.*, 136 A.2d 821, 825-26 (Pa. 1957). "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." *Id.* at 826.

Contrary to the core of Plaintiffs' position, duplication is shown through actual sameness – not mere relatedness. As the Commonwealth Court below explained, taxes do not duplicate each other when they tax different

activities or transactions, even if the two taxes relate to a common physical object or material. *See* Cmwlth Ct. Op. at 19-23.

In *John Wanamaker, Philadelphia v. Sch. Dist. of Philadelphia*, 274 A.2d 524 (Pa. 1971), this Court considered whether a tax on the use and occupancy of real estate was tantamount to a property tax on that real estate. The Court painstakingly considered the "precise inciden[ce]" of each type of tax rather than merely resting on the surface similarity that both the use and occupancy tax and property tax related to the same real estate. *Id.* at 527. The Court observed that a use and occupancy tax taxes "[a]ctive use" of a piece of property – that is, "the voluntary election by the owner to use the property in a certain way; and it is measured by the extent to which this election is enjoyed." *Id.* at 529. On the other hand, a property tax taxes the "mere fact of ownership," regardless of whether or by whom that property is used. *Id.* at 527.

The *Wanamaker* court recognized that, although both taxes concern real estate, they each address a distinct aspect of property. It cannot "be fairly said that Active use is consciously calculated into the ad valorem property tax when, for example, the measure of the property tax of a building suitable to use as a department store but which is empty and not so used, is the same as that of the thriving Wanamaker's, namely, the fair market value[.]" *Id.* at 526. As a result,

the Court concluded that the "use and ownership of property are distinct and separate." *Id.* at 526.

Indeed, if the incidence of the use and occupancy tax had been the real estate itself, the tax would have been invalid under longstanding Uniformity Clause principles, as a differential tax on commercial and industrial real estate but not on residential real estate. It is only because this Court recognized that the tax on the use and occupancy of real estate had a different incidence from a tax on the real estate itself that the Court upheld the tax.

Similarly, in *Appeal of Certain Taxpayers of Dunkard Township, Greene County*, 60 A.2d 39 (Pa. 1948), this Court held that a tax on the activity of mining coal was not "double taxation" on top of a property tax that had already been assessed upon the coal, despite the same physical object, coal, being at the heart of both taxes. "The tax on the coal in place is a property tax; the tax imposed by the resolution under consideration is an excise tax on the privilege or occupation of strip mining coal." *Id.* at 41. By way of another example, in *Blauner's*, this Court distinguished a sales tax from a net income tax by noting that "[t]he former is an excise tax on sales and services; the latter is a property tax upon income from any source." 198 A. at 891; *see also, e.g., Plymouth Lanes, Inc. v. Sch. Dist. of Plymouth Twp.*, 202 A.2d 811, 813 (Pa. 1964) (distinguishing between a privilege tax on the activity of bowling and a property tax on bowling

equipment); *Blair Candy Co., Inc. v. Altoona Area Sch. Dist.*, 613 A.2d 159, 161 (Pa. Cmwlth. 1992) (explaining the differences among a local mercantile tax of $0.0155 per cigarette, a State tax on cigarettes, and the State sales tax); *Paul L. Smith, Inc. v. S. York Cty. Sch. Dist.*, 403 A.2d 1034, 1037 (Pa. Cmwlth. 1979) ("[T]he instant tax is a tax on an owner's privilege of using his realty as a location for his residence" and not a property tax); *Man, Levy & Nogi, Inc. v. Sch. Dist. of Scranton*, 375 A.2d 832, 834 (Pa. Cmwlth. 1977) (*en banc*) (privilege tax did not duplicate a State privilege tax even though both taxes affected the insurance business).

Murray v. City of Philadelphia, 71 A.2d 280 (Pa. 1950) (cited four times in Plaintiffs' Brief), does not state otherwise. *Murray* invalidated local income taxes, particularly on dividends to stockholders of a corporation that already had paid a State capital stock tax on that income. *Id.* at 284-86. All parties agreed that the State "tax on the capital stock is a tax on the property of the corporation." *Id.* at 285. The Court then found that, because "a tax on income [produced by a property] is a tax on the property producing the income," the tax on a dividend must be a tax on the property producing the dividend. *Id.* Thus, because the State capital stock tax already taxed the property producing the dividend, the Court concluded that the local tax dividend tax constituted a duplicative tax. *Id.* at 286. In addition, both taxes were measured by net income.

Id. at 285; *see also Man, Levy, & Nogi, Inc.*, 375 A.2d at 834 (finding that *Murray*, as a case concerning property taxes, is distinguishable from State and local taxes applying to two different business privileges). Thus, in this Court's analysis in *Murray*, the State and local taxes applied to the *same* subject (*i.e.*, the property itself) with the *same* measures (*i.e.*, income) – not merely similar or related subjects. *Murray* did not concern the taxing of separate transactions with different measures, as is the case for the PBT and the Pennsylvania Sales Tax.

1. The PBT Does Not Duplicate the Pennsylvania Sales Tax.

The Commonwealth Court correctly found that the incidences of the PBT and the Pennsylvania Sales Tax are not duplicative as a matter of law. Cmwlth. Ct. Op. at 16-19. Their "subjects" are different. Their "measures" or "yardsticks" are different. Further reinforcing their non-duplication, even their payers are different.

Different Subjects. The PBT's "subject" is "the supply . . . to a dealer; acquisition . . . by a dealer; the delivery to a dealer in the City . . . ; and the transport . . . into the City by a dealer," made with the purpose of the dealer "holding [the SB] out for retail sale" in Philadelphia. Phila. Code § 19-4103(1). In shorthand form, the "subject" is "the non-retail distribution of [SBs]." Cmwlth. Ct. Op. at 17. Meanwhile, the Pennsylvania Sales Tax's "subject" is "each separate sale at retail of tangible personal property or services." 72 P.S. § 7202(a); *see also*

Cmwlth. Ct. Op. at 17 (describing the subject as "the retail sale of the sugar-sweetened beverage to the ultimate purchaser").[6] PBT liability is unconcerned with whether a retail sale actually occurs.

Distribution transactions are an economic event separate from retail transactions, and Plaintiffs have never challenged this obvious point. Indeed, it is the very reason that some of Plaintiffs' businesses exist. (*See, e.g.*, R.35a, Complaint ¶¶ 34, 35 (describing distributors' business), R.36a, Complaint ¶¶ 37, 38 (distinguishing between distributors and retailers as members of the Plaintiff associations).) Thus, distribution transactions, a subject of taxation distinct from retail transactions, are well within the City's taxing authority. *See, e.g.*, *Appeal of Borough of Aliquippa*, 175 A.2d 856, 863 (Pa. 1961) ("Retailers and wholesalers have been taxed differently without offending the Constitution."); *Mandl v. Commonwealth*, 637 A.2d 703, 706 (Pa. Cmwlth. 1994) ("The difference between a wholesale dealer and a retail vendor has been recognized as a genuine distinction

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[6] The Amicus Curiae Brief of the National Federation of Independent Business Small Business Legal Center, *et al.* ("NFIB Amicus Brief"), while disagreeing with the wisdom of the Commonwealth Court's decision, recognizes that the PBT is "not . . . imposed at the same transaction level" as the Pennsylvania Sales Tax. (*Id.* at 8.)

acknowledged in the business world and found to be a nonarbitrary and reasonable classification for purposes of taxation."), *aff'd mem.*, 652 A.2d 297 (Pa. 1995).[7]

Different Measures. The PBT's "measure" or "yardstick" is the volume of fluid ounces of SBs distributed between distributor and dealer. Phila. Code § 19-4103(2)(a). The Pennsylvania Sales Tax's "measure" or "yardstick" is the "purchase price" of a retail sale from a retailer to a consumer. 72 P.S. § 7202(a). The amount of PBT owing varies only by volume, regardless of price; the amount of Pennsylvania Sales Tax owing varies only by price, regardless of volume. *See also infra* Part V.A.2.e (correcting Plaintiffs' misconstruction of the PBT's operation respecting distributions of syrups and concentrates).

Different Payers. Plaintiffs also attempt to blur the differences between the payers of the PBT and the payers of the Pennsylvania Sales Tax, *see, e.g.*, Pls. Br. at 21 (section titled "Identity of the Taxpayer"), but they cannot change the legislative realities. The payer of the PBT is the distributor, or in

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[7] At times, Plaintiffs concede that the PBT and Pennsylvania Sales Tax tax two separate transactions; they just argue that the distinction does not matter. (*See, e.g.*, R.430a; *see also* Pls. Br. at 17 n.3, 20-27 (arguing duplication of the taxes' subjects even if the transactions taxed are different).) In their Petition for Allowance of Appeal, Plaintiffs argued that the "subject" of the PBT was the "physical object" of the SB taxed. Pls. Pet. Allow. Appeal at 1. Plaintiffs now argue that the "subject" of the PBT is the generalized activity of "selling soft drinks." Pls. Br. at 13, 20. A faithful adherence to tax incidence law rejects each of Plaintiffs' characterizations.

certain circumstances, a dealer who voluntarily acts to assume the payment and reporting obligations of the distributor. Phila. Code §§ 19-4107(2), 19-4105(2). There is no circumstance in which the end-consumer pays the PBT or has liability for it. Cmwlth Ct. Op. at 16-17 ("[T]here is no provision in the [PBT] that ever shifts liability . . . to the ultimate purchaser at retail."). In contrast, the payer of the Pennsylvania Sales Tax is the purchaser of the "sale at retail." 72 P.S. § 7202(a).

Plaintiffs imply that the retailer pays the Pennsylvania Sales Tax because the retailer is the one who typically "remits payment" to the State. Pls. Br. at 21-22. This is both wrong as a matter of law and irrelevant. A retailer *collects* sales tax from a consumer, *i.e.*, "purchaser," and remits those collections to the State, but the consumer pays the Pennsylvania Sales Tax. 72 P.S. § 7202(a).

The above straightforward analysis of the different incidences of the PBT and the Pennsylvania Sales Tax is dispositive of Plaintiffs' claim of duplication under the Sterling Act.

2. Plaintiffs Misconstrue the PBT's Incidence to Argue Supposed Duplication.

To argue supposed duplication, Plaintiffs redefine the PBT and elide the governing law. Plaintiffs' efforts fail.

a) Post-Tax Economic Reactions Do Not Convert the PBT Into a Tax on Retail Transactions.

A key to Plaintiffs' theory of duplication is their argument that "Philadelphia consumers . . . bear the ultimate cost of the Commonwealth's sales tax and the City's Tax alike." Pls. Br. at 21-22; *see also id.* at 13 ("[T]he brunt of the Tax is ultimately borne by Philadelphia retail consumers."). Although Plaintiffs' characterizations of the actual causes of post-tax economic reactions to the PBT are inaccurate, tax law is clear that they also are irrelevant.[8] The incidence of a tax concerns "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" tax. Cmwlth. Ct. Op. at 16.

The root of Plaintiffs' argument appears to be a misunderstanding of the oft-repeated pronouncement from *Commonwealth v. Eastern Motor Express, Inc.*, 157 A.2d 79 (Pa. 1959), that, "while it is true that what a tax or an Act is

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[8] The City does not concede Plaintiffs' irrelevant averments regarding whether and how much of the cost of compliance with the PBT distributors will pass on to their dealers, and whether and how much of any increased acquisition costs dealers will pass on to their consumers. (*See, e.g.*, R.664a-735a (various contrary evidence).) In addition, if courts were to analyze *what* would be passed on through post-tax economic events, courts also would need to analyze *why*, such as why a distributor did not reduce its costs instead of raising prices (*e.g.*, reduce executive compensation or advertising costs), and whether any large-scale (*e.g.*, raw material prices) or small-scale (*e.g.*, a business's rent) market forces dictated a different retail price adjustment.

called by the Legislature, is entitled to weight and is prima facie what it is, it is well settled that in the last analysis the nature of the tax depends not upon its label, but upon its incidence, *i.e.*, its practical operation and effect." *Id.* at 88-89 (citing numerous United States and Pennsylvania Supreme Court cases); *see* Pls. Br at 19 (citing *Shelly Funeral Home, Inc. v. Warrington Twp.*, 57 A.3d 1136, 1141 (Pa. 2012), which itself relies upon *Eastern Motor Express* and United States Supreme Court precedent for the similarly stated proposition that "irrespective of how taxes are described, reviewing courts assess their validity based on how they operate in practice"). The proposition means that courts must review the substantive text of taxes, instead of merely accepting labels or titles of taxes at face value. But *Eastern Motor Express*, *Shelly Funeral* and numerous other cases stating this same basic proposition still determine the incidence of any tax at issue by reference to the substantive text of the statute and not post-tax economic events. *Eastern Motor Express*, 157 A.2d at 88-89 (determining incidence by "analyz[ing] the broad language of the Corporation Income Tax Law of 1951 and the formulae which it applies to corporations engaged exclusively in interstate commerce"); *Shelly Funeral*, 57 A.3d at 1141.

This Court and the United States Supreme Court[9] have repeatedly confirmed that the legal incidence of a tax, not any supposed post-tax economic reactions, controls. *See 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 [the property], making it a true excise tax.") (emphases added); *Fish v. Twp. of Lower Merion*, 128 A.3d 764, 765 (Pa. 2015) (an enabling act's prohibition of local taxes on leases did not prohibit the township from applying a privilege tax to businesses whose sole income consisted of payments from leases, despite plaintiff taxpayers being economically impacted in the same manner as if their leases were taxed directly).

Gurley v. Rhoden, 421 U.S. 200 (1975), is on point. The Court determined that neither the incidence of a federal tax on gasoline sold (which was levied on the statutory "producer" of the gasoline) nor the incidence of a state tax on gasoline distributed into Mississippi fell on the retail purchaser-consumer. *Id.* at 207-08. The fact that the gas station owner passed on the economic burdens of the taxes within the retail price of gasoline (*i.e.*, raised retail prices in response to the federal tax) was irrelevant. *Id.* at 204. The Court concluded that Mississippi's

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[9] The Complaint purports to follow United States Supreme Court precedent to determine the PBT's incidence (R.57a), but misconstrues that precedent.

sales tax properly applied against the entire retail price paid by the consumer without offending the prohibition of state taxation on federal monies because the store's cost of complying with the federal tax was merely rolled into the purchase price and not formally collected from the consumer. *Id.* at 207.

The *Gurley* Court expressly rejected multiple arguments Plaintiffs raise here. The Court held that who effectively bore a tax's "economic burden" – or "brunt" as Plaintiffs put it – was irrelevant to determining the incidence of a tax. *Id.* at 204 ("[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 . . . ."). The Court also held that political statements regarding the intent that the "economic burden of the tax" would be passed on to the purchaser-consumer were irrelevant. *Id.* at 207. Rather, the legal incidence of the taxes, as set out in the text of their respective statutes, controlled.[10]

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[10] Plaintiffs' previous attempt to distinguish *Gurley* exposed fundamental flaws in their argument. Pls. Br., Cmwlth. Ct., at 18 n.3. It is correct, as Plaintiffs had pointed out, that the federal tax in *Gurley* had no formal provision to shift legal tax liability all the way down a stream of commerce to the purchaser-consumer. Legal liability only shifted as far down as a gas station owner who assumed the functions of a statutory producer. *Gurley*, 421 U.S. at 205-06. This is just like the PBT. In certain circumstances, a dealer may voluntarily assume a distributor's liability for the PBT (like the gas station owner assuming statutory producer functions and liabilities in *Gurley*), but there is no provision in the PBT

Similarly, in *United States v. New Mexico*, 455 U.S. 720 (1982), the United States Supreme Court rejected the federal government's argument that its immunity from state taxation meant a state tax could not be assessed upon the federal government's contractor, who would pass on the economic burdens of the tax in contractor's prices to the federal government. In reasoning directly applicable here, the Court held that the passing on of costs does not equate to a shift in liability for the tax:

> [I]mmunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy. . . . [It is] constitutionally irrelevant that the United States reimbursed all the contractor's expenditures, including those going to meet the tax: the Government's right to be free from state taxation does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity.

Id. at 734 (quoting *Alabama v. King & Boozer*, 314 U.S. 1, 9 (1941)) (internal quotation marks omitted). Thus, just because, under Plaintiffs' theory, a customer

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that legally supports shifting liability to a retail consumer. Yet, Plaintiffs' theory of duplication with the Pennsylvania Sales Tax is that the incidence of the PBT falls on retail consumers – not just on distributors or dealers who assume distributors' functions. *Gurley* is not distinguishable; to the contrary, it is dispositive on this point.

may "pay[] the added costs attributable to the" PBT does not mean the customer is paying the PBT itself.

The legal incidence test, which this Court has advanced for decades, is practical, predictable, and maintains the proper divide between the legislature's and the judiciary's respective functions. *See infra* Part V.D (describing how a post-tax economic effects test would impracticably depend upon constantly evolving events and positions and is an infringement upon the province of the legislature). In addition, a post-tax economic reactions test would stymie local powers, giving the Pennsylvania Sales Tax (and other State taxes) absurdly broad preemptive effect. For example, multiple actors in any stream of commerce pay numerous forms of local taxes, and businesses consider the burdens of these taxes when setting their prices for their own customers, just as they do with the myriad other fluctuations impacting pricing considerations (*e.g.*, raw materials, labor costs, etc.). *See, e.g.*, *Gurley*, 421 U.S. at 211 (noting that passing on costs of a tax in a product's price "is no different from other costs . . . incur[red] in bringing [a] product to market") (citation omitted). Distributors, for example, may factor into their pricing the costs of all sorts of taxes that they pay, such as property and business privilege taxes. But, under Plaintiffs' theory, any direct or indirect inclusion of the burdens of paying those taxes within their prices would turn the end-consumer in that stream of commerce into the taxpayer of those upstream

taxes. And if that end-consumer is paying the Pennsylvania Sales Tax on that transaction, according to Plaintiffs, the end-consumer must be paying an impermissible double tax. Thus, the necessary fallout of Plaintiffs' theory is that countless local taxes incurred by businesses upstream (*e.g.*, use and occupancy, privileges, etc.) must be preempted whenever the Pennsylvania Sales Tax is applied at the end of the stream of commerce. Of course, that is not the law, and it never has been.

Similarly, Plaintiffs' argument that the City intended that consumers bear the economic burdens of the PBT is irrelevant and incorrect. Pls. Br. at 20-22. *First*, the government's intent or assumptions regarding the reactions of private actors to a tax are not relevant to determining a tax's incidence. *See, e.g.*, *Blauner's*, 198 A. at 891 (stating that in determining whether the City has authority to "levy [a] tax in the manner and form in which it was imposed . . . [w]e have nothing to do with the wisdom of the tax or with the purpose of its levy"); *Gurley*, 421 U.S. at 206-07 (holding that statements by President Johnson and in the legislative record regarding the intended passing on of a tax's economic burdens downstream were not relevant to determining the tax's legal incidence). *Second*, Plaintiffs' assumptions regarding a unified, clear legislative intent to cause a particular post-tax economic reaction are misplaced. The PBT is a general revenue raising measure, and individual Councilmembers were free to vote for the PBT

because of – or even in spite of – countless policy considerations, such as raising general monies, enabling thousands of pre-K seats, improving community and recreational facilities, and/or the effect of market forces on consumer behavior and health. *Third*, the PBT taxes non-retail distribution transactions, not sales to end-consumers. By causing economic inducements for distributors to reduce their supply of SBs to Philadelphia dealers, the PBT combats the health impacts of the SBs regardless of whether any retail prices increase. (*Cf.* R.440a (Plaintiffs conceding that "[T]he City is entitled to take the view that its residents would be better served abstaining from the range of drinks covered by the [PBT] . . . .). For example, if distributors (and, then, dealers) did not change their prices, but instead absorbed the cost of the tax by reducing other costs (e.g., advertising budgets), there still could be a significant decline in consumption of SBs in the City.

b) Plaintiffs' Declaration that the PBT Taxes the Subject of "Selling Soft Drinks" Falls Flat.

Plaintiffs currently argue that the "subject" of the PBT is the generalized activity of "selling soft drinks." Pls. Br. at 13, 20; *cf. supra* n.7. This effort to redefine the "subject" of the PBT, while ignoring the "precise inciden[ce]" of the PBT, *see Wanamaker*, 274 A.2d at 527, falls flat.

The Pennsylvania Sales Tax applies to retail sales of various goods and services sold in the Commonwealth, including soft drinks. 72 P.S. § 7202(a). The measure of the tax is the price exchanged at a retail sale to a consumer,

regardless of volume exchanged. *Id.* The PBT applies to non-retail, distribution transactions of SBs. Phila. Code § 19-4103(1). The measure of the PBT is the volume of SBs *distributed* between a distributor and dealer, regardless of any sale or price exchanged between them. *Id.* § 19-4103(2)(a).

Although the reality that the PBT and Pennsylvania Sales Tax tax two different transactions is dispositive of Plaintiffs' duplication claim, even Plaintiffs' implicit assumption that the two transactions are mutually dependent upon one another is incorrect. (Pls. Br. at 19 (arguing "a distribution transaction within the City is neither necessary nor sufficient for imposition of the Tax").) PBT liability is incurred independent of whether a retail sale occurs. For example, it does not impact tax liability if an SB that was acquired in a section 4103(1) transaction is never actually sold at retail; the tax is still owed. This is true whether the dealer is unsuccessful in selling its inventory, the SB expires, the SB is destroyed through spillage, or the SB is stolen prior to a retail sale. Judge Covey's summary description of the PBT that "no retail sale in the City equals no tax" (Pls. Br., App. B, at AEC-6) is just not a correct statement of the PBT's operation.

Conversely, the Pennsylvania Sales Tax applies to retail purchases in Philadelphia for which there is no related prior distribution activity taxed by the PBT. For example, if the dealer creates an SB from scratch without a distributor and sells the beverage directly to a consumer, no PBT liability is triggered because

the dealer never "acquired" the SB, *see* Phila. Code § 19-4102(1). Yet, the retail sale to the consumer is subject to the Pennsylvania Sales Tax, assuming the beverage is included in the list of retail sales to which the Pennsylvania Sales Tax applies.[11] Such examples of retail sales in the City where SBs were not acquired from distributors include at least out-of-City manufacturers selling their own beverages in the City at their own stores or vending machines, as well as in-City dealers who make certain lemonades, teas, and other specialty or artisanal beverages at Philadelphia counters without using an acquired syrup or concentrate.

In sum, Plaintiffs' effort to avoid an analysis of the precise incidence of the PBT and redefine its subject as "selling soft drinks" fails.

c) The Phrase "Holding Out For Retail Sale" Does Not Create a Tax on Retail Transactions.

Plaintiffs misapprehend the import of the PBT's requirement that the SB be acquired "for the purpose of the dealer's holding out for retail sale within the City the [SB] or any beverage produced therefrom." Phila. Code § 19-4103(1). Plaintiffs argue that this requirement somehow means that the PBT must apply to retail transactions and not to distribution transactions. *See, e.g.*, Pls. Br. at 20. Plaintiffs have it backwards.

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[11] As Plaintiffs' own comparison of the distributions of SBs taxed by the PBT and the retail sales of beverages taxed by the Pennsylvania Sales Tax shows, there is not a 1:1 overlap of the beverages covered. (R.59a-60a.)

The clause ensures that retail transactions are *not* subject to the PBT. By the PBT's plain structure and operation, in order for a distribution transaction to be taxed, the dealer acquiring the SB must intend to hold out the acquired SB for retail sale in the City.[12] Phila. Code § 19-4103(1). Thus, the PBT-taxed distribution transaction cannot be a retail transaction. Indeed, the occurrence (or not) of a retail sale is irrelevant to PBT liability and, if a retail sale occurs at all, it must occur separately from the taxed distribution transaction. For example, whether a retail sale occurs one day or one month after a distribution, or never at all, will not impact liability. *See supra* at 31-32. For sure, the word "retail" appears in the PBT, but this reference does not mean that the PBT taxes retail transactions; it has the opposite effect, helping to define what is and what is not taxed by the PBT. *See, e.g.*, *Provident Mutual Life Ins. Co. v. Tax Review Bd.*, 750 A.2d 942, 946 (Pa. Cmwlth. 2000) (referencing a type of transaction within a tax statute is not the same as actually taxing it). Thus, just as the Pennsylvania Sales Tax references, but does not tax, "transfer[s] . . . for the purpose of resale," 72

[12] Plaintiffs criticize the City for not taxing *every* non-retail distribution transaction of SBs. *See* Pls. Br. at 19 (noting that the PBT does not tax non-retail distributions intended for retail sale outside of the City). However, this does not prove that the City taxes retail transactions; it proves only that the City chose not to tax all non-retail distribution transactions.

P.S. § 7201(k) (definition of "sale at retail"), the PBT references, but does not tax, "retail sale[s]," Phila. Code § 19-4103(1).

In addition, Plaintiffs misstate the ordinance's jurisdictional connection to Philadelphia in order to argue that "[t]he actual lynchpin for the Tax is retail commerce within the City." Pls. Br. at 19. It is not. PBT tax liability does *not* require that a retail sale ever occurs. Regardless of the occurrence of any retail sale, PBT tax liability only requires that one or more of the delivery, supply, acquisition, or transport segments of the distribution involving the acquired SB occur in Philadelphia for the purpose of that SB being held for retail sale in Philadelphia. Phila. Code § 19-4103(1).[13] This is completely proper to establish a jurisdictional basis, and, in any event, it has nothing to do with a duplication claim.[14] For example, in *L.J.W. Realty Corp. v. Philadelphia*, 134 A.2d 878 (Pa.

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[13] The tax is paid by either the distributor that has voluntarily registered, Phila. Code § 19-4102(2), or the dealer who has voluntarily self-registered to assume a distributor's obligations, *id.* § 19-4107(2).

[14] No Plaintiff claims to have paid PBT on a transaction that lacks a nexus to Philadelphia. In fact, the Complaint is a facial challenge to the PBT as a whole, not an as-applied challenge to specific instances of enforcement of the PBT. Specific as-applied challenges to enforcement must be raised first in administrative proceedings, which Plaintiffs have not done. *Lehman v. Pennsylvania State Police*, 839 A.2d 265, 275-76 (Pa. 2003) ("[C]laims challenging a statute's application to the facts of a particular case must be raised before the agency or are waived."); *All Purpose Vending, Inc. v. City of Philadelphia*, 561 A.2d 1309, 1312 (Pa. Cmwlth. 1989) (*en banc*) (holding that the court lacked jurisdiction to determine an as-applied constitutional challenge to a City tax, due to failure to exhaust administrative remedies). Moreover, the remedy for a successful as-applied

1957), this Court found the City's realty transfer tax properly applied to a transaction, despite the transfer of ownership occurring outside of Philadelphia, because the tax also was triggered by the act of recording the deed in Philadelphia. *See also Equitable Life Assur. Soc. v. Murphy*, 621 A.2d 1078, 1091-92 (Pa. Cmwlth. 1993) (upholding realty transfer tax on out-of-City stock transfers affecting real estate within the City). Thus, similar to *L.J.W. Realty Corp.*, the PBT requires that some portion of the distribution (*i.e.*, delivering, supplying, acquiring, or transporting) occur in Philadelphia for tax liability to be triggered, even if other aspects of the distribution occur outside of Philadelphia.[15]

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challenge is a declaration that the City could not impose the tax in that particular circumstance, not that the City cannot impose the tax at all.

[15] *City Stores Co. v. City of Philadelphia*, 103 A.2d 664, 667 (Pa. 1954), and *In re N. Am. Rayon Corp.*, 119 A.2d 205, 208-09 (Pa. 1956) (cited in Pls. Br. at 17), do not support Plaintiffs' notion that the PBT does not tax distributions. In both cases, the realty transfer tax ordinance, as then drafted and applied, did not require any act regarding the transfer of real property to be conducted in Philadelphia for tax liability to attach. Thus, the Court upheld as-applied challenges to the tax to the extent it was applied to transfers occurring completely outside of Philadelphia. However, as this Court recognized in *L.J.W. Realty Corp.*, 134 A.2d at 881-82, the City cured the deficiency by amending the realty transfer tax ordinance's language to tax the recordation of the deed in Philadelphia regardless of where contracts were signed or money was exchanged during the transfer. This amendment thus enabled the City to properly tax the same transfers that previously were found non-taxable under the predecessor realty transfer tax ordinances in *City Stores* and *In re N. Am. Rayon Corp.* *See Equitable Life Assur. Soc.*, 621 A.2d at 1091-92 (explaining history of challenges to the realty transfer tax).

d) Taxing the Transport Segment of a Distribution Transaction Is Not a Tax on Retail Sales.

Plaintiffs concede that three of the four possible triggers of PBT liability – "delivering," "acquiring," and "supplying" – are, indeed, distribution transactions distinct from retail transactions. However, Plaintiffs then inaccurately opine that the fourth trigger – "transport . . . into the City by a dealer" – is not a "distribution transaction" and, thus, must somehow be a retail transaction. Pls. Br. at 18-19; *see also id.* at 9-10. Again, Plaintiffs' attempt to redefine the PBT fails.

As an initial matter, it is unclear what Plaintiffs mean by stating that the PBT would apply if retailers transported SBs "into the City on their own, without going through a distributor." Pls. Br. at 9-10. A distributor-dealer transaction is a necessary condition to trigger PBT liability. The PBT only pertains to transactions involving SBs if they are "acquired" by the dealer. *See* Phila. Code § 19-4102(1) (only prohibiting sales for non-compliance with the PBT if the SB had been "acquired" by the dealer); *see also* Phila. Code § 19-4104 (prohibiting "accept[ance]" of SBs without notice provision compliance, but there is no "accept[ance]" to prohibit when a manufacturer sells its own product); *id.* § 19-4105(1) (requiring tax to be paid by the registered distributor, but there is no registered distributor when a manufacturer sells its own product). Transactions involving SBs that were never "acquired" by the dealer from a distributor fall

outside the scope of the PBT (*e.g.*, dealers who make SBs from scratch and sell at their own stores or vending machines).[16]

In addition, contrary to Plaintiffs' argument, Example 4 of the Regulations does not support a finding of duplication of the Pennsylvania Sales Tax. *See, e.g.*, Pls. Br. at 18-19. Example 4 describes the PBT's applicability to a dealer's acquisition of SBs from a distributor at the dealer's out-of-City warehouse, and the dealer's transport of those acquired SBs from the warehouse to its in-City store. PBT Regulations at 21. PBT tax liability appropriately attaches upon the transport of SBs to the dealer's store in Example 4.

First, as to Plaintiffs' duplication claim, the dealer's transport of the SBs is not a retail sale. The transport triggers PBT liability, but it does not trigger Pennsylvania Sales Tax liability. Conversely, a dealer's later transaction of a retail sale with a consumer will trigger Pennsylvania Sales Tax liability, but it will have no impact on PBT liability.[17] Thus, PBT liability attaches upon the transport of the SBs regardless of any subsequent retail sale.

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[16] Moreover, there is no Plaintiff in this action who claims that the City actually has enforced the PBT in the absence of a dealer-distributor transaction. *See supra* n.14.

[17] Although not germane to Plaintiffs' duplication claim, Plaintiffs misread Question and Answer No. 3 to Example 4 of the PBT Regulations. *See* Pls. Br. at 18-19. This Q&A offers guidance regarding what a registered distributor should do if a dealer notifies a distributor that the dealer is acquiring SBs for the purpose of selling SBs in the City, but the dealer does not specifically

Second, the dealer's transport is just a segment of the distribution transaction. The dealer still acquires the SB from a distributor, but the dealer has now voluntarily taken on the distributor's role of effectuating the efficient distribution of the product to the store. *See, e.g.*, *Gurley*, 421 U.S. at 201-02, 204-05 (discussing similar application of gasoline taxes to gas station owners who function as "producers" by self-importing gasoline from out of state).

Third, even if one considers the dealer's transport of SBs to be wholly separate from the dealer's acquisition of the SBs from the distributor, such a post-acquisition transport still is a taxable transaction under the Sterling Act. The Sterling Act authorizes the City to tax any "transaction" not taxed by the State, and a "transaction" need not have two parties; the simple act of carrying out business by a single party constitutes a "transaction." *See, e.g.*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "transaction" as, *inter alia*, "[t]he act or instance of

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tell the registered distributor what portion of the SBs will be sold in and outside of the City. *See* PBT Regulations at 21. In that situation, a distributor should assume that all of the SBs involved in the transaction are intended for retail sale in Philadelphia. Q&A No. 3 stops its explanation there, but the distributor's section 19-4104(2) receipt would necessarily inform the dealer that the distributor assumed all SBs were to be held out for retail in the City, and the dealer could then correct that assumption, if correction were necessary. Of course, dealers and distributors may avoid this temporary ambiguity altogether by providing clear notices regarding the acquired SBs, as is required and contemplated by the ordinance. Phila. Code § 19-4104(1) & (2); *see also* PBT Regulations, § 403 (further describing information to be exchanged between dealers and distributors).

conducting business or other dealings; esp., the formation, performance, or discharge of a contract," and "[s]omething performed or carried out; a business agreement or exchange").

Fourth, even if the transport were not a "transaction," it still is a perfectly valid "subject" of a tax, and, thus, expressly authorized by the Sterling Act for this reason, too. *See* 53 P.S. § 15971(a) (authorizing Philadelphia to tax "any and all subjects of taxation" not taxed by the State). Indeed, Plaintiffs have never questioned that the dealer's transport following acquisition is a taxable activity; they simply and incorrectly claim duplication with the Pennsylvania Sales Tax.

For each of the above reasons, the application of the PBT to "transport" activities is well within the Sterling Act's authorization. Moreover, the PBT's treatment of "transporting" acquired SBs as part of the distribution transaction makes sense, as it protects in-City distributors and dealers. If out-of-City distributors doing business with Philadelphia dealers could bypass the ordinance merely by having the dealers perform the last leg of distribution (*i.e.*, transport the SBs over City boundaries to the dealer's store), they could gain a competitive advantage over in-City distributors trying to distribute the same SBs to the same Philadelphia dealers. Similarly, an out-of-City distributor could stop sending delivery trucks with SBs into the City, and require acquiring dealers to use

their own trucks to obtain product from the distributor. A taxation scheme splicing distributions in that manner might be a desired outcome for some Plaintiffs (*e.g.*, out-of-City distributors, or wealthier dealers for whom conducting the transport segment is more feasible), while others might view it as creating an uneven playing field (*e.g.*, in-City distributors, or smaller dealers without the means to conduct acquisitions outside of the City). However, the City, in its judgment, decided to treat all distributions of SBs for the purposes of holding them out for retail sale in Philadelphia the same.

e) Plaintiffs Misconstrue the PBT's Application to Distributions of Syrup.

Plaintiffs misstate the PBT's calculation of tax owing on distributions of syrups. Pls. Br. at 10, 22. The PBT is not paid upon "the volume [of syrup] sold to the retail consumer." *Id.* at 22. The PBT is paid upon and measured by the volume of syrup distributed to the dealer, at the rate of $0.015 per fluid ounce of beverage that the manufacturer's specifications states should be made from that distributed amount of syrup or concentrate. Phila. Code § 19-4103(2)(b). Such calculations help ensure equal treatment of distributions of SBs under the PBT, whether they are distributed in syrup form or already bottled at the time of distribution. However, whether a dealer ultimately complies with the manufacturers' specifications regarding the syrup when making a retail sale to a consumer, and how much syrup actually is "sold to the retail consumer" – *e.g.*,

whether a dealer adds too much, too little, or just the right amount of syrup through its fountain machines for a retail sale – are irrelevant to calculating the amount of tax owed.

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The PBT is a proper exercise of the City's authority to tax "any and all subjects of taxation" that the State could but does not tax, and this Court should affirm the Commonwealth Court.

B. Plaintiffs' Misplaced Reliance Upon *United Tavern Owners* Further Underscores Why the PBT is a Rightful Exercise of the City's Taxing Authority Under the Sterling Act.

Part B of the Argument section in Plaintiffs' Brief relies upon *United Tavern Owners v. School District of Philadelphia*, 272 A.2d 868 (Pa. 1971), for the faulty alternative argument that, even if the PBT and Pennsylvania Sales Tax tax two different transactions, they still tax the same subject. The Commonwealth Court correctly rejected Plaintiffs' "misplaced" reliance on *United Tavern Owners*. Cmwlth. Ct. Op. at 21 n.20. *United Tavern Owners* does not stand for the proposition Plaintiffs claim, and it is a single-Justice opinion with no precedential weight that has been superseded by subsequent opinions of this Court. Moreover, Plaintiffs' analysis that a transaction tax has two subjects – both the transaction actually taxed and some extra-level, other subject of the tax – is nonsensical and contrary to law.

1. Justice O'Brien's Opinion Is Not Precedential.

United Tavern Owners invalidated a Philadelphia tax imposed on certain types of retail sales of liquor at taverns, restaurants, hotels, and clubs. Justice O'Brien authored the opinion announcing the judgment of the Court, but no other justice joined his opinion. Two justices concurred in the result only, two justices dissented and expressly rejected Justice O'Brien's analysis, and two did not participate in consideration of the decision. *Id.* at 874.

Plurality opinions, let alone single-Justice opinions, are not binding "precedent." *See, e.g.*, *CRY, Inc. v. Mill Serv., Inc.*, 640 A.2d 372, 376 n.3 (Pa. 1994) ("It is axiomatic that a plurality opinion of this court is without precedential authority, which means that no lower court is bound by its reasoning."); *Pitt Ohio Express v. W.C.A.B. (Wolff)*, 912 A.2d 206, 208 (Pa. 2006) ("Reliance on *General Electric* is problematic, as it was a plurality decision and is not binding precedent.") (citation omitted). Moreover, this Court confirmed *United Tavern Owners*' lack of precedential weight when it criticized the Commonwealth Court for "misplac[ing]" reliance on Justice O'Brien's opinion, and then expressly "re-examine[d]" the legal question of the field preemption of liquor. *See Commonwealth v. Wilsbach Distribs., Inc.,* 519 A.2d 397, 400 (Pa. 1986) (plurality op.); *City of Philadelphia v. Clement & Muller, Inc.*, 715 A.2d 397, 398-99 (Pa.

1998) (reinforcing the central principles of *Wilsbach* while not even acknowledging *United Tavern Owners*).[18]

2. Justice O'Brien's Opinion Concerned an Irrelevant Field Preemption Analysis.

Aside from its lack of precedential weight, Justice O'Brien's substantive analysis is irrelevant to Plaintiffs' claim because he engaged in a *field* preemption analysis, albeit at a time before this Court recognized field preemption as a concept applicable to local taxation.[19]

Justice O'Brien posited that the local tax on sales of liquor at hotels, taverns, and similar locations was preempted because of the total combination of (i) the State's extensive regulation of liquor through the Liquor Code, (ii) two State taxes related to liquor sales (including a unique definition for what constitutes a

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[18] Plaintiffs previously argued that this Court has cited *United Tavern Owners* "approvingly." Pls. Br., Cmwlth. Ct., at 19 n.4 (citing *Hoffman Min. Co. v. Zoning Hearing Bd.*, 32 A.3d 587, 594-95 (Pa. 2011)). But, *Hoffman Mining Company* and other decisions have cited *United Tavern Owners* for basic propositions, including general principles associated with field and conflict preemption. No majority of this Court has ever adopted Justice O'Brien's opinion for any analysis regarding duplicative taxes under the Sterling Act.

[19] A majority of this Court expressly recognized the applicability of field preemption to local taxation for the first time in *City of Pittsburgh v. Allegheny Valley Bank*, 412 A.2d 1366 (Pa. 1980) (finding local taxation of the banking industry precluded by field preemption). Then, in *Wilsbach*, 519 A.2d at 399-402, a plurality of this Court specifically chose to "re-examine" the legal question of *United Tavern Owners*, and unequivocally concluded that the reason local taxes related to liquor are preempted is because of field preemption. *Id.* at 402; *see also Clement & Muller, Inc.*, 715 A.2d at 398-99.

sale of liquor at retail), and (iii) a State-created and mandated distribution system. *See United Tavern Owners*, 272 A.2d. at 871-73.[20] It was as a result of these factors *in toto* that Justice O'Brien found the local tax preempted.

It is true that Justice O'Brien rejected the City's argument that the difference in the timing of the collection of the two taxes rendered the local tax permissible, but Plaintiffs ignore that Justice O'Brien expressly explained that he did so "*only*" because of the totality of the field preemption factors. *United Tavern Owners*, 272 A.2d. at 870 ("*Only when* consideration is given to [(i)] the two [State] taxes which exist on liquor and [(ii)] the specific preemption doctrine enacted as part of the Sterling Act, as well as to [(iii)] the Liquor Code, can the conclusion be reached that the City of Philadelphia is barred from authorizing the imposition of a tax on the retail sales of liquor in hotels, restaurants, taverns or clubs.") (emphasis added); *see also id.* at 873.

In other words, in Justice O'Brien's view, the Sterling Act's grant of authority to tax could not overcome the multiple distinguishing features in the field of liquor evidencing legislative intent to preclude local taxation of liquor sales. *Id.* at 870. Therefore, Plaintiffs' characterization of Justice O'Brien's opinion as

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[20] The State collected its "sales tax" during a State-mandated distribution transaction and the City collected its tax upon liquor sales at restaurants, hotels, and taverns. *Id.* at 873.

concluding that the Sterling Act prohibited taxation of all "distribution-level and retail-level transactions," Pls. Br. at 24, particularly outside of the particular context of the liquor industry, is plainly incorrect.[21]

Plaintiffs have conceded that there is no field preemption applicable to the PBT. (R.439a at n.12.) And rightfully so. Unlike the liquor industry described by Justice O'Brien, there is no pervasive State regulation or monopoly over SBs, no multiple State statutes governing taxation of SBs, and no State-created and mandated distribution system to State stores for SBs. Instead, the PBT taxes a voluntary distribution transaction of SBs, *i.e.*, a separate economic event independent of any retail sale, which is precisely the type of coexistence of State and local taxes that the Sterling Act authorizes. *See* 53 P.S. § 15971(a) (authorizing the City to tax "any and all subjects" not taxed by the State).

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[21] Even Judge Covey's dissenting opinion undermines Plaintiffs' reliance upon *United Tavern Owners* for a Sterling Act duplication analysis. After reviewing Justice O'Brien's opinion, Judge Covey wrote that she would invalidate the PBT on *field* preemption grounds. Pls. Br., App. B, at AEC-8 ("[T]he Commonwealth has preempted the field through the [Pennsylvania] Sales Tax . . . ."). Treating the Pennsylvania Sales Tax as preempting localities from legislating within the field of the entire stream of commerce would create absurd results. Seemingly every local tax may be deemed related to some good or service that further down a stream of commerce is subject to Pennsylvania Sales Tax. In addition, a limitless number of local laws impact sales of items (*e.g.*, time, place and manner restrictions on selling products and services) in a stream of commerce and also seemingly would be preempted by such an expansive field preemption doctrine.

3. Plaintiffs' Additional Miscellaneous Arguments Regarding Justice O'Brien's Opinion Fail.

Plaintiffs shoehorn three additional arguments under the guise of applying Justice O'Brien's opinion. None have anything to do with *United Tavern Owners*, and more importantly, none support Plaintiffs' claim for duplication.

First, Plaintiffs illogically argue that the word "subject" in the Sterling Act severely restricts the City's taxing authority. *See* Pls. Br. at 25. More specifically, Plaintiffs argue that a local transaction tax has both a direct subject of the tax (*i.e.*, the transaction) and some sort of more general, larger "subject" of the tax. The argument is contrary to the plain language of the Sterling Act, would require this Court to overturn decades of tax incidence jurisprudence, and would find virtually every local tax to be preempted.

The Sterling Act uses the word "subject" as a noun in two different ways: (i) in a list of a series of the types of things that may be taxed by the City or State (referencing taxes on "persons, transactions, occupations, privileges, subjects and personal property"), and (ii) to describe that same series of things in totality (authorizing the City to levy "taxes upon any and all subjects of taxation"). 53 P.S. § 15971(a). When used in the first way, in a series, the term "subjects" addresses a category of taxes that is broader than the more specific categories of transaction, occupation, privilege, or personal property taxes listed. When used in the second way, in "subjects of taxation," the term "subjects" refers to each and every type of

tax in the previously listed series of taxes. In other words, a transaction *is* a type of "subject[] of taxation" – as is an occupation, privilege, and personal property. Thus, a particular tax's subject might be a person, transaction, occupation, privilege, or personal property, or it might be something else that does not fit within one of those more specific forms of taxes listed. However, the Sterling Act's relevant inquiry always is what exactly the tax is imposed "on" or "upon" – not what the tax is related to. *Id.*; *cf. Fish*, 128 A.3d at 769 (rejecting argument that the Local Tax Enabling Act's "prohibition on lease taxes . . . encompass[ed] a similar proscription as to privileges 'related to' leases") (citations omitted).

Plaintiffs' Brief cites no case reading the Sterling Act as treating a transaction tax as being "on" or "upon" a subject different from the transaction "on" or "upon" which the tax is levied, or a privilege tax as being "on" or "upon" a subject different from the privilege "on" or "upon" which the tax is levied, or a personal property tax as being "on" or "upon" a subject different from the personal property "on" or "upon" which the tax is levied. Such a proposition would strip the City and all localities of virtually all taxing authority in the name of double taxation. Any local tax's "subject" could be restated with enough generality to find relatedness to a physical object or event that is also related to another tax. *Cf. Com. v. Neiman*, 84 A.3d 603, 612 (Pa. 2013) (one can always take two disparate

matters and describe them as a single subject, "if the point of view be carried back far enough") (citations omitted).

For example, following Plaintiffs' logic would require finding that a tax on the privilege of mining coal is a tax on the subject of the coal itself (despite *Dunkard Township*, 60 A.2d 39), and a tax on use and occupancy on real estate would be a tax on the subject of the real estate itself (despite *Wanamaker*, 274 A.2d 524), and a tax on the privilege of bowling would have the same subject as a tax on the bowling equipment (despite *Plymouth Lanes, Inc.*, 202 A.2d at 813). The decades of precedent to the contrary would be turned upside down. *See supra* at 16-18 (citing additional cases upholding local taxes that co-exist with State taxes despite having mutual relatedness with a common physical object or event); *see also* Cmwlth. Ct. Op. at 19-26. This Court and the United States Supreme Court consistently have rejected a standardless, generalized "subject" test, in favor of a predictable and precise tax incidence analysis.

Second, Plaintiffs' "structure and purpose of the [Pennsylvania Sales Tax]" argument, *see* Pls. Br. at 25-26, is just a recycling of their rejected and abandoned implied preemption claim from Count II of their Complaint. Plaintiffs previously pushed the "alternative, independent" claim that if the PBT was not duplicative under the Sterling Act, then it was "impliedly preempted" by the Pennsylvania Sales Tax. Pls. Br., Cmwlth. Ct., at 25-27; *see also id.* at 3-4

(describing Questions Presented); R.62a (Complaint). However, Plaintiffs neither sought nor were granted permission to appeal that question to this Court, and the question of implied preemption by the Pennsylvania Sales Tax is not before this Court.

In addition, both the Trial Court and the Commonwealth Court correctly rejected Plaintiffs' structure and purpose argument. *See* Tr. Ct. Op. at 8, n.24; Cmwlth Ct. Op. at 23-27. The Pennsylvania Sales Tax's 6% levy only is applied to a "sale at retail," which, by definition does not include separate, pre-retail transactions. 72 P.S. § 7202(a); 72 P.S. § 7201(k) (definitional clause defining "sale at retail" as not including "transfer[s] . . . for the purpose of resale"). In other words, the State could have, but did not, tax non-retail distribution transactions. Since Plaintiffs concede that distribution transactions are *not* taxed by the State, the necessary effect is that the Sterling Act is no bar to the City taxing those transactions. After all, the Sterling Act grants to the City the power to tax what "the Commonwealth has the power to tax but which it does not . . . tax." 53 P.S. § 15971(a).

As the Commonwealth Court explained, just "because a particular transaction is mentioned but not specifically designated as taxable in the [Pennsylvania Sales Tax]" does not mean "the City has no authority to tax the transaction." Cmwlth. Ct. Op. at 25 (quoting *Provident Mutual Life Ins. Co.*, 750

A.2d at 946); *cf. Nutter v. Dougherty*, 938 A.2d 401, 414 (2007) ("[T]he mere fact of legislation in a field is insufficient, without more, to support a finding of preemptive legislative intent as to that field. 'The state is not presumed to have preempted a field merely by legislating in it. The General Assembly must clearly show its intent to preempt a field in which it has legislated.'") (citations omitted).[22]

Third, Plaintiffs' "threat to the General Assembly's taxing authority" argument, Pls. Br. at 26-27, is just another disguised implied preemption argument. While the PBT is neither legally nor factually a "threat" to the General Assembly, the issue is irrelevant to the tax incidence analysis before this Court.[23] The analysis of whether duplication under the Sterling Act exists concerns whether the subjects of the State and City tax are duplicative. Displeased as Plaintiffs may be, the General Assembly chose to grant Philadelphia the authority to tax "any and all

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[22] *Commonwealth v. Wetzel*, 257 A.2d 538 (Pa. 1969), and *Commonwealth v. Lafferty*, 233 A.2d 256 (Pa. 1967), are irrelevant. Both concerned how to apply the Pennsylvania Sales Tax's levy, not any question of co-existence of State and local taxation. Neither holds that the Pennsylvania Sales Tax exempts non-retail transactions from other State and local taxation; they stand only for the unremarkable proposition that the specific sales tax is only applied at retail. *See Wetzel*, 257 A.2d at 539 (holding that state sales tax applied to each of two separate retail transactions); *Lafferty*, 233 A.2d at 259-60.

[23] Moreover, the assumption that the PBT causes a decrease in State sales tax revenue is incorrect, as the impacts of the PBT are at least as likely to produce a net increase in revenue to the State, particularly if, as Plaintiffs insist, retail dealers are increasing their retail prices to offset the increased costs they are incurring. (*See, e.g.*, R.664a-735a.)

subjects of taxation" that the State could tax, but does not. 53 P.S. § 15971(a). If the General Assembly is dissatisfied with the non-duplicative PBT or any other City tax, the General Assembly may take that power of taxation away. *Marson v. City of Philadelphia*, 21 A.2d 228, 230 (Pa. 1941) (holding that if the State "finds itself so crippled [by a local tax], it can take from the City of Philadelphia at any time the authority to tax . . . [because t]he only power that Philadelphia has to impose any tax on its residents is the power the state gives it in the 'Sterling Act'. Repeal this act and the power vanishes and the tax falls.") (rejecting argument that the City could not tax State employees' salaries because the Sterling Act supposedly "failed to specify employees of the State as being subject to the tax").[24]

C. There is No Doubt As to the Proper Construction of the Sterling Act.

Statutory construction principles provide no cover for Plaintiffs' claim. *See* Pls. Br. at 27-28. The general principles cited in Plaintiffs' Brief apply when an ambiguity exists in the relevant enabling statute or the local tax (here, the Sterling Act and PBT, respectively), but ambiguity exists only "when there are at least two reasonable interpretations of the text under review." *City of Philadelphia*

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[24] Indeed, 27 State Representatives (including 17 of the 32 who signed the Brief of Amici Curiae State Senator Anthony Williams, *et al.*) have introduced legislation to preempt beverage taxes. *See* HB 2241 (2018), pr. no. 3290. To date, however, that proposal does not reflect the law applicable to the instant case.

v. City of Philadelphia Tax Review Bd. ex rel. Keystone Health Plan E., Inc., 132 A.3d 946, 952 (Pa. 2015) ("Where ambiguity is found, a court may consider the factors listed in 1 Pa.C.S. § 1921(c) to ascertain legislative intent.") (citation omitted). When, instead, "the language of the statute is clear, that language is dispositive of legislative intent and so vitiates the need for further interpretation." *Lynnebrook & Woodbrook Assocs., L.P. ex rel. Lynnebrook Manor, Inc. v. Borough of Millersville*, 963 A.2d 1261, 1265 (Pa. 2008) (citing 1 Pa.C.S. § 1921(b)) (cited in Pls. Br. at 27-28); *see also Marson*, 21 A.2d at 229 (rejecting argument that the City could not tax State employees' salaries because the Sterling Act supposedly "failed to specify employees of the State as being subject to the tax"); *Keystone Health Plan E.*, 132 A.3d at 954 (affirming Commonwealth Court ruling against taxpayers on the basis that there was no ambiguity in the plain language of the provision at issue).

The question before this Court is whether the PBT taxes what "the Commonwealth already taxes." *See* Order, Nos. 321 and 322 EAL 2017 (Jan. 30, 2018). Both the Sterling Act and this Court's precedent are clear regarding how to determine that question. The Sterling Act only prohibits a City tax as taxing what "the Commonwealth already taxes" if it is "on" the same "subject[] of taxation" as a State tax or fee. *See* 53 P.S. § 15971(a). The General Assembly stated that "intention" unequivocally and without ambiguity. *Id.* In this regard, the Sterling

Act stands in stark contrast to the Local Tax Enabling Act ("LTEA"),[25] which provides more than sixteen exceptions to the grant of taxing authority with various intersecting provisions that sometimes do force the Court to resort to statutory construction principles.

A duplication analysis requires a precise and exacting review of the taxes' respective incidences, and the application of that test here shows that the PBT taxes a different set of activities and by a different measure than does the Pennsylvania Sales Tax. *See supra* Part V.A.1 (comparing the subjects and measures of the PBT and the Pennsylvania Sales Tax). Indeed, half of Plaintiffs' Brief and the brief of some amici supporting Plaintiffs concede exactly that. *See, e.g.*, Pls. Br. at 17 n.3, 20-27 (basing alternative argument on assumption that PBT and Pennsylvania Sales Tax apply to different transactions); NFIB Amicus Brief at 8.

Nor is there any ambiguity in the text of the PBT for the Court to now construe against the City. For example, there is no allegation that the City has applied ambiguous terms of the PBT against a taxpayer without fair notice of the PBT's applicability. If the City did apply the tax to an ambiguous situation, a taxpayer would be free to challenge that application through a properly filed as-

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[25] 1965, Dec. 31, P.L. 1257, § 2, 53 P.S. § 6924.301 *et seq.*

applied challenge, starting with administrative review. But, here, Plaintiffs know what conduct is taxed – the PBT taxes non-retail distribution transactions, not retail sales. Plaintiffs certainly do not like that the PBT taxes distribution transactions. However, their self-proclaimed "doubts" do not constitute the type of "reasonable doubt" that is construed against a taxing authority for the purposes of 1 Pa.C.S. § 1928(b)(3). *See, e.g., Bd. of Comm'rs of Swatara Twp., Dauphin Cty. v. Automatic Bowling Ctr., Inc.*, 214 A.2d 725, 728 n.13 (Pa. 1965) ("The rule that taxing statutes are to be strictly construed against the taxing authority . . . is not here applicable. . . . it is only reasonable doubt which must be resolved in favor of the taxpayer, and our examination of the ordinances reveals no such doubt as to the stated burden of the tax.") (internal citations omitted).

A party's refusal to accept what a statute or ordinance states does not create an ambiguity, and is not a reason to impede Philadelphia's rightful exercise of the power bestowed upon it by the General Assembly. The Commonwealth Court correctly followed the plain language of the Sterling Act and longstanding precedent as the operative legal framework for analyzing whether a local tax impermissibly duplicates a state tax.

D. Plaintiffs' Irrelevant and Misguided Policy Concerns Are Not Properly Before This Court.

As a final salvo, Plaintiffs ask this Court to become a super-legislature on tax policy. *See* Pls. Br. at 29-31. Again, Plaintiffs miss the mark.

Judicial review of taxes is limited to an analysis of legal incidence for good reason. A broader policy analysis of taxes necessarily would depend upon constantly evolving events and positions, and would seemingly let private actors decide at any moment when a tax would be proper or not. As the United States Supreme Court explained:

> [O]ur focus on a tax's legal incidence accommodates the reality that tax administration requires predictability . . . . If we were to make 'economic reality' our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume—a complicated matter dependent on the characteristics of the market for the relevant product. . . . . By contrast, a 'legal incidence' test . . . provides a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority.

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 459-60 (1995) (internal quotation marks and citation omitted). Similarly, the wisdom of a tax and other analyses of industrial economics are policy questions for legislatures, not the courts. *See, e.g., Wanamaker*, 274 A.2d at 529 (Bell, J., concurring) (finding that a use and occupancy tax was proper and constitutional despite believing the tax to be "unfair and unwise").

The General Assembly's intention regarding the "division of taxing authority" under the Sterling Act, Pls. Br. at 29-30, is unmistakable. The power the General Assembly conferred upon Philadelphia to grapple with its own revenue

and taxation issues is as broad as can possibly be, save only for the limitation against duplicating a State tax. Balancing a myriad of political, economic, and other issues, the City made a carefully considered decision to pass the PBT, attempting to address some of the City's most significant needs and problems in the manner the City deemed best. During that same process, City Council weighed the policy arguments raised here by Plaintiffs and their amici and found them lacking. If the General Assembly is dissatisfied with the City's exercise of its powers under the Sterling Act, the General Assembly has the power to curtail the scope of the City's authority to tax. It has the same authority with respect to any other municipality's exercise of authority under its respective enabling statute.

Plaintiffs' sky-is-falling prognostications are not only irrelevant here, but also highly inaccurate. Nearly two years since passage of the PBT, Plaintiffs' ominously predicted State-wide avalanche of local taxes has not occurred. The reasons why are obvious: taxes have political consequences, and therefore just because localities have the power to tax does not mean that localities actually do enact such taxes. All elected officials are aware of this fact – from the legislators who signed the Brief of Amici Curiae State Senator Anthony Williams, *et al.*, to the over 200 legislators who did not sign it, to the local councilmembers and commissioners in taxing jurisdictions throughout the Commonwealth, to the City Council and to the Mayor of Philadelphia.

Plaintiffs surely will continue to avail themselves of political processes to challenge the future of the PBT, including petitioning both City Council and the General Assembly. Of course, in two budget cycles since passage of the PBT, Plaintiffs' political efforts to repeal it or strip the City of its taxing authority have been unsuccessful. However, Plaintiffs' dissatisfaction with the outcome of that process is no basis for a legal claim, and their policy objections have no place in this Court.

VI. CONCLUSION

For the foregoing reasons, the decisions of the Trial Court and Commonwealth Court should be affirmed.

Respectfully submitted,

April 13, 2018

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CERTIFICATE OF COMPLIANCE

I, John S. Stapleton, certify that this Brief for Appellees complies with Pa.R.A.P. 2135(a)(1), because it contains 13,911 words, as counted by the undersigned's Microsoft Word software, excluding the parts exempted by Pa.R.A.P. 2135(b).

/s/ John S. Stapleton
John S. Stapleton

Dated: April 13, 2018

CERTIFICATION OF COMPLIANCE WITH
PUBLIC ACCESS POLICY PURSUANT TO Pa.R.A.P. 127

I, John S. Stapleton, 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. I certify that this filing does not contain confidential information.

/s/ John S. Stapleton
John S. Stapleton

Dated: April 13, 2018

CERTIFICATE OF SERVICE

I, John S. Stapleton, certify that on April 13, 2018, I caused a true and correct copy of the foregoing Brief of Appellees City of Philadelphia and Frank Breslin, In His Official Capacity as Commissioner of the Philadelphia Department of Revenue, to be served on the following counsel for Plaintiffs-Appellants by First Class Mail, which satisfies the requirements of Pa.R.A.P. 121:

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