[J-28-2016][M.O. – Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MOUNT AIRY #1, LLC,	:	No. 34 EM 2015
	:	
Petitioner	:	
v.	:	
	:	
	:	ARGUED: March 8, 2016
PENNSYLVANIA DEPARTMENT OF REVENUE AND EILEEN MCNULTY, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF REVENUE,	:	
	:	
Respondents	:	

CONCURRING AND DISSENTING OPINION

CHIEF JUSTICE SAYLOR **FILED: September 28, 2016**

I agree with the majority that relief is presently unavailable under Section 1983 of the Federal Civil Rights Act of 1871. However, I dissent from its conclusion that the Local Share Tax ("LST") on Gross Terminal Revenue ("GTR") is unconstitutional on its face. In my view, factual development is needed to determine its validity.

Initially, and as the majority recognizes, this Court has a duty to uphold legislative enactments if it is reasonably possible to do so. *See* Majority Opinion, *slip op.* at 5; *Triumph Hosiery Mills, Inc. v. Commonwealth*, 469 Pa. 92, 96, 364 A.2d 919, 921 (1976). Also, when assessing the validity of tax legislation, the nomenclature employed by the General Assembly is not necessarily dispositive, as our analysis considers how the tax operates in practice. *See Shelly Funeral Home, Inc. v. Warrington Twp.*, 618 Pa. 469, 477, 57 A.3d 1136, 1141 (2012).

Here, the municipal portion of the LST (the "municipal LST") for non-Philadelphia casinos is stated as "2% of the gross terminal revenue or $10,000,000 annually, whichever is greater." 4 Pa.C.S. §1403(c). This formulation has the effect of classifying licensees according to whether their GTR is below or above $500 million. *Accord* Brief for Petitioner at 25. Even setting aside the two-percent levy for licensees earning over $500 million, casinos earning less than $500 million pay different effective rates in view of the defined-sum tax of $10 million, a scheme which Petitioners argue "is tantamount to a classification of taxpayers . . . based on . . . their GTR." *Id.* at 21; *see* Majority Opinion, *slip op.* at 3 n.3 (providing a mathematical example to illustrate the point).

Although a difference in effective tax rates as between taxpayers, and the *de facto* classifications which ensue, may warrant close scrutiny, the circumstance does not always render a tax non-uniform, as at least modest defined-sum taxes such as occupation privilege taxes and per capita taxes have been upheld. *See, e.g.*, *Gaugler v. City of Allentown*, 410 Pa. 315, 189 A.2d 264 (1963); *Appeal of Certain Taxpayers of Dunkard Twp.*, 359 Pa. 605, 60 A.2d 39 (1948). The unusual aspect of the present levy is its hybrid nature, since it imposes a floor but no ceiling.[1] A hybrid tax formula such as the present one has never been evaluated for compliance with Pennsylvania's Uniformity Clause; as such, this litigation raises an issue of first impression. Particularly inasmuch as the General Assembly retains "broad authority and wide discretion in matters of taxation," *Clifton v. Allegheny Cnty.*, 600 Pa. 662, 685, 969 A.2d 1197, 1211 (2009) (citation omitted), I believe it incumbent upon this Court to consider whether the circumstances of this case, and its connection to the unique area of gaming, could

[1] Tax statutes imposing a mandatory minimum but no maximum are not unheard of, albeit they often involve smaller mandatory minimums. *See, e.g.*, *City of Portland v. Cook*, 12 P.3d 70 (Or. Ct. App. 2000) (involving a business license tax of 2.2 percent of adjusted net income, subject to a $100 minimum).

potentially render a floor-but-no-ceiling tax constitutionally justifiable. In doing so, we should bear in mind the established precept that tax legislation is presumed valid and the person challenging it has the burden of proving otherwise. *See Leventhal v. City of Phila.*, 518 Pa. 233, 239, 542 A.2d 1328, 1331 (1988); *see also Clifton*, 600 Pa. at 686, 969 A.2d at 1211 (recognizing that "a tax enactment will not be invalidated unless it clearly, palpably, and plainly violates the Constitution" (internal quotation marks and citation omitted)).

The majority proceeds by analogy to tax cases primarily involving inheritance or personal income taxes. I view such decisions as having limited relevance in the present context. First, the taxes involved in those disputes were materially different from the tax currently in issue in that they did not subsume the present hybrid-type formulation.[2]

Just as important, while most citizens earn income and many hope to provide or receive an inheritance, no individual needs to acquire a gaming license and operate a casino. *Cf. Amidon v. Kane*, 444 Pa. 38, 56, 279 A.2d 53, 63 (1971) (explaining that "[n]atural persons . . . cannot be likened to profit-maximizing entities" for purposes of determining whether a statute's method of computing taxable income comports with the Uniformity Clause). Whether or not this latter distinction alone affects the uniformity calculus, it is worth noting that the gaming arena is *sui generis* in that the

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[2] The majority also relies in part on *Cope's Estate*, 191 Pa. 1, 43 A. 79 (1899), which held that exempting the first $5,000 of an estate from Pennsylvania's inheritance tax worked a uniformity violation. *See id.* at 22, 43 A. at 81; *see also Saulsbury v. Bethlehem Steel Co.*, 413 Pa. 316, 320, 196 A.2d 664, 666 (1964) (holding that an occupational privilege tax levied upon individuals working in the city and earning over $600 annually was non-uniform because persons earning less than that amount were exempted from liability).

The tax statute challenged here is different in that no license holder is exempt from tax liability and no portion of the GTR is exempted from the municipal LST.

Commonwealth provides a limited number of licenses and guarantees geographic monopoly status to some licensees and near-monopoly status to others, *see* 4 Pa.C.S. §§1304(b), 1307, thus alleviating the effects of free-market forces and ensuring that there is often only one taxpayer per municipality.

Further, casinos by nature attract many customers even when their GTR is less than $500 million. As a result, a single casino is likely to generate significant local effects such as increased vehicular traffic, the presence of a large number of patrons, and the concomitant potential for substantial consumption of municipal resources such as fire and police services. *See Shelly Funeral Home*, 618 Pa. at 476, 57 A.3d at 1140 (observing that "businesses with high gross receipts tend to be larger and more likely than small ones to consume municipal resources"); *cf. Leonard v. Thornburgh*, 507 Pa. 317, 322, 489 A.2d 1349, 1352 (1985) (describing differences in usage of municipal services as a "significant" factor for tax classification purposes).

As well, gaming can have negative social effects such as gambling addiction leading to emotional and behavioral problems – as reflected by the Gaming Act's creation within the Health Department of the Compulsive and Problem Gambling Treatment Fund. *See* 4 Pa.C.S. §1509; *id.* §1408 (providing for the transfer of monies into the fund). It seems reasonable to suppose that the hosting municipality is likely to feel these effects most keenly and, moreover, that even a low-GTR casino will impose costs upon such a locality. Therefore, the Legislature may have wished to guarantee a minimum level of indemnification to host municipalities while also ensuring that if a casino exceeded an extremely high threshold, it would pay even more as a

consequence of the extra traffic and patronage needed to reach that level of gross revenues.[3]

Finally, and as suggested, the government-imposed monopolistic facet of Pennsylvania's gaming industry means that within the boundaries of the hosting municipality each casino usually has no similarly-situated "neighbor" with whom it can compare tax burdens. *See Del., Lackawanna & W. R. Co.'s Tax Assessment*, 224 Pa. 240, 243, 73 A. 429, 430 (1909) ("While every tax is a burden, it is more cheerfully borne when the citizen feels that he is only required to bear his proportionate share of that burden measured by the value of his property to that of his neighbor.")

Overall, then, a taxing scheme whereby a slot-machine licensee must pay a percentage of its profits subject to a mandatory minimum does not seem untoward, and I am reluctant to conclude at the present juncture that the non-Philadelphia municipal LST is facially invalid solely on the basis that it imposes different effective tax rates upon different casinos depending on their GTR levels. Notably, in this respect, classifications appearing in tax statutes are permissible so long as they are reasonable and non-arbitrary, *see Leonard*, 507 Pa. at 321, 489 A.2d at 1352, and the government has not yet had a chance to demonstrate reasonableness via evidentiary development.

In view of the foregoing, and recognizing that this litigation has not progressed beyond the pleading stage – meaning there is no evidentiary record – I would overrule Respondents' preliminary objections and appoint a special master to hear evidence and

[3] Respondents forward an argument along these lines, observing that the Legislature's objectives in enacting the Gaming Act included the provision of a significant source of new revenue for items such as economic development and property and wage tax relief. *See* Brief for Respondents at 17 (quoting 4 Pa.C.S. §1102(3)). Respondents continue that the $10 million minimum "ensures the Commonwealth can rely upon receiving, at a minimum, this revenue to fund its specified goals" and "guarantees revenue to fund the expenses that municipalities face in developing and maintaining their infrastructure when licensed entities are operated in their communities." *Id.* at 17-18.

make findings, in the first instance, on whether there is a rational basis for the classifications inherent in the municipal LST. *See* 4 Pa.C.S. §1904 (authorizing this Court to "take such action as it deems appropriate . . . to find facts").[4] I therefore respectfully dissent from the majority's holding that the municipal LST for non-Philadelphia casinos is facially unconstitutional.

I am also not convinced that the difference in levies imposed on Philadelphia and non-Philadelphia casinos is impermissible. Philadelphia is qualitatively different from other municipalities in multiple respects. First, and as the majority observes, it is unique in that the city and county are coterminous. *See* Majority Opinion, *slip op.* at 2. Thus, the Legislature could reasonably have believed it was unnecessary to guarantee a mandatory minimum solely to the municipality as long as the county and municipal LST components were combined into a single, four-percent levy. Second, Philadelphia is the only municipality that the Gaming Act allows to host multiple Category 2 licensees, *see* 4 Pa.C.S. §§1304(b)(1), 1307, with the consequence that Philadelphia licensees must contend with greater competition in their immediate geographic area – a reasonable basis (in my view) for distinct tax treatment. Third, and as Respondents argue, Philadelphia casinos are subject to other substantial business taxes. Accordingly, if it can be shown that the classification was designed to roughly equalize the tax burden imposed on Philadelphia and non-Philadelphia licensees, such a

[4] Although the challenger bears the initial burden to prove invalidity, once differential treatment has been shown the burden shifts to the taxing authority to demonstrate that the tax is nonetheless uniform. *Accord Geja's Cafe v. Metro. Pier & Exposition Auth.*, 606 N.E.2d 1212, 1216 (Ill. 1992) (explaining that, upon a good-faith uniformity challenge, the taxing authority must justify its classifications, whereupon the burden shifts to the plaintiff to demonstrate that the explanation is insufficient or unsupported by the facts). *See generally 500 James Hance Court v. Pa. Prevailing Wage Appeals Bd.*, 613 Pa. 238, 272-73, 33 A.3d 555, 575-76 (2011).

showing would, in my view, demonstrate a legitimate basis for the challenged classification.

Again, however, there is no factual record before this Court, and hence, we have no comparative data concerning how taxes extrinsic to the Gaming Act levied on Philadelphia gaming facilities compare to those imposed on non-Philadelphia casinos. That being the case, I would require a special master to make findings in the first instance predicated upon evidentiary development on the subject – with Respondents, again, ultimately bearing the burden of proof. *See supra* note 4.