

[J-70A-D-2013][M.O. – Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ERNEST & BEVERLY WIRTH, : No. 82 MAP 2012
: :
Appellants : Appeal from the Order of the
: Commonwealth Court entered August 16,
: 2012 at 424 FR 2008, overruling the
v. : exceptions to the January 3, 2012 order
: and affirming in part the Board of Finance
: and Revenue Order dated September 19,
COMMONWEALTH OF PENNSYLVANIA, : 2008 at 0619432 and vacating and
: remanding the amount of tax to the Board
Appellee : for recalculation.
: :
: SUBMITTED: August 19, 2013

JOHN K. HOUSSELS, JR., : No. 83 MAP 2012
: :
Appellant : Appeal from the Order of the
: Commonwealth Court entered August 16,
: 2012 at 757 FR 2008, overruling the
v. : exceptions to the January 3, 2012 order
: and affirming in part the Board of Finance
: and Revenue Order dated April 25, 2008
COMMONWEALTH OF PENNSYLVANIA, : at 0712902 and vacating and remanding
: the amount of tax to the Board for
Appellee : recalculation.
: :
: SUBMITTED: August 19, 2013

THOMAS SHAKER, : No. 84 MAP 2012
: :
Appellant : Appeal from the Order of the
: Commonwealth Court entered August 16,
: 2012 at 932 FR 2008, overruling the
v. : exceptions to the January 3, 2012 order
: and affirming in part the Board of Finance
: and Revenue Order dated December 19,
COMMONWEALTH OF PENNSYLVANIA, : 2008 at 0813407 and vacating and
: remanding the amount of tax to the Board

	Appellee	:	for recalculation.
		:	
		:	SUBMITTED: August 19, 2013
ROBERT J. MARSHALL, JR.		:	No. 85 MAP 2012
		:	
	Appellant	:	Appeal from the Order of the
		:	Commonwealth Court entered August 16,
		:	2012 at 933 FR 2008, overruling the
v.		:	exceptions to the January 3, 2012 order
		:	and affirming in part the Board of Finance
		:	and Revenue Order dated December 19,
COMMONWEALTH OF PENNSYLVANIA,		:	2008 at 0811195 and vacating and
		:	remanding the amount of tax to the Board
	Appellee	:	for recalculation.
		:	
		:	SUBMITTED: August 19, 2013

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE

DECIDED: June 17, 2014

I join the Majority Opinion with the exception of Part III(A), which is the section of the decision prompting Mr. Justice Saylor’s Dissenting Opinion. On that distinct issue, I agree with much of Mr. Justice Saylor’s dissent, albeit I ultimately concur in the result reached by the Majority.

Most significantly for present purposes, I agree with Justice Saylor’s disagreement with the Court’s holding that the question of whether the tax event at issue (the foreclosure upon a nonrecourse loan) results in an “amount realized” or “[n]et gains or income from the disposition of property” under 72 P.S. § 7303(a)(3) is resolvable as a matter of “plain language” statutory interpretation. There is no express language in the statute or implementing regulation that explicitly covers the type of

“gain” involved here;¹ and, moreover, the Court’s approval of the importation of a non-plain-language approach from a federal taxing regime involving different statutory language, as reflected in Commissioner of Internal Revenue v. Tufts, 461 U.S. 300 (1983), obviously betrays that there is more at work than what the statute plainly states. Thus, I cannot join in the Majority’s assertion that “the Tufts rule is encompassed within the plain meaning of ‘disposition of real property’ as contemplated by Section 7303(a)(3) and [Section § 103.13].” Majority Slip. Op. at 27-28. Justice Saylor has ably laid out the countervailing complexity in his dissent, adding necessary context.

For my part, resolving the case as a matter of statutory construction, and having considered the competing concerns articulated in equally able fashion by Justice Saylor – encompassing, *inter alia*, separation of powers, considerations of policy with questions involving tax matters, the failure of the General Assembly to directly visit this particular issue, and the possible collateral consequences of our decision – in this close case offering no easy solution, I believe affirmance is less disruptive. The effect may be the same – *i.e.*, approval of an approach aligned with Tufts, despite that decision’s flaws

¹ Notably, the Commonwealth appears to concede that the regulation, 61 Pa. Code §103.13, is ambiguous, as it argues:

In sum, § 103.13(a) is not as black-and-white as the Investors would have this Court believe. To be sure, income or gain may well be recognized if the disposition of property results in someone receiving “cash or other property,” but that does not mean there cannot possibly be income or gain unless the taxpayer in fact receives “cash or other property.”

Brief of Appellee at 38. The regulation, entitled “Net gains or income from disposition of property,” reads: “A gain on the disposition of property is recognized in the taxable year in which the amount realized from **the conversion of the property into cash or other property** exceeds the adjusted basis of the property.” 61 Pa. Code §103.13 (emphasis supplied).

– but I believe it is important to candidly recognize the necessary complexity, as Justice Saylor does. Finally, I join in Justice Saylor’s modest call to the General Assembly to address the issue and provide clearer guidance.

Mr. Justice Stevens joins this concurring opinion.