[J-66-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

V.L. RENDINA, INC.,	:	No. 130 MAP 2005
	:	
Appellee	:	
	:	Appeal from the Order of the
	:	Commonwealth Court entered on October
v.	:	7, 2004 at No. 46 CD 2004 which reversed
	:	the Order of the Court of Common Pleas
	:	of Dauphin County, Civil Division, entered
THE CITY OF HARRISBURG AND THE	:	on December 10, 2003 at No. 2003 CV
HARRISBURG SCHOOL DISTRICT,	:	3148 MP.
	:	
Appellants	:	
		ARGUED: May 8, 2006

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: December 27, 2007**

Although I agree with the Majority that Harrisburg's imposition of its Business Privilege and Mercantile tax in this case was proper under the Local Tax Enabling Act (LTEA), Act of Dec. 31, 1965, Pub. L. 1257, § 2, as amended, 53 P.S. §§ 6901, *et seq*., and therefore should be sustained, I disagree with the Majority's characterization of the tax in question. I cannot join the Majority's identification of the Harrisburg tax, as applied to Appellee V. L. Rendina, Inc., as a "business privilege tax" levied on the privilege of doing business in the City of Harrisburg rather than a "transaction tax" calculated based upon a transaction conducted in the taxing jurisdiction -- in this case, the construction of the Keystone Office Building. Maj. Slip Op. at 11 ("[I]t does not follow that gross receipts stemming from transactions occurring within a city cannot be subject to tax liability pursuant to the city's business privilege tax, simply because they are transactions." (emphasis

added)). Nor do I think it prudent to so identify the tax when it unnecessarily casts doubt on our prior decisions, which is precisely the effect of the Majority Opinion.

Notwithstanding the parties' and the lower courts' efforts to analyze this case based upon our opinion in Gilberti v. City of Pittsburgh, 511 A.2d 1321 (Pa. 1986), the Majority approaches abrogating an important aspect of that decision, and in that regard I differ with the Majority Opinion. The Majority is certainly correct that the question in Gilberti concerned a taxing jurisdiction's authority to assess taxes on extra-jurisdictional business activity, where it was attributable to a "base of operations" located within the jurisdiction. The Majority is too hasty, however, to cast aside aspects of that ruling with broader implications, especially given that we lack the customary adversarial briefing for and against such a decision.[1] In particular, this Court in Gilberti spoke of and acted upon the need to distinguish the different forms of taxation authorized by the LTEA.[2] Focusing on the operation of the tax, rather than how the taxing jurisdiction styled it, the Court found the levy in question unsustainable as a transaction tax but deemed it a permissible exercise of the authority bestowed by the LTEA to tax receipts attributable to an exercise of the privilege of maintaining a "base of operations" within the taxing jurisdiction.

In support of this analysis, and as a necessary aspect of the holding that should bind this Court under the principle of *stare decisis*, we emphasized that "[t]he privilege of engaging in business within the City, which the [LTEA] establishes as a subject that may be

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[1] Notably, neither the parties nor the courts below have ever analyzed this case as other than a Gilberti case with the sole relevant legal question pertaining to whether a job site trailer set up only to support construction activities amounts to a "base of operations" pursuant to that case.

[2] The LTEA authorized jurisdictions such as Harrisburg to, "in their discretion, by ordinance or resolution, for general revenue purposes, levy, assess and collect or provide for the levying, assessment and collection of such taxes as they shall determine on persons, transactions, occupations, privileges, subjects and personal property within the limits of such political subdivisions . . . ." 53 Pa.C.S. § 6902 (emphasis added).

taxed, must be regarded as being separate and apart from 'transactions' within the City that may be taxed." Gilberti, 511 A.2d at 1324 (emphasis added).[3] Linking a taxing jurisdiction's authority to levy a business privilege tax to the maintenance of a "base of operations" within the jurisdiction, this Court deemed the privilege of doing business in a jurisdiction to require more than merely selling a good or service in that jurisdiction. Indeed, were that all the privilege required, a business privilege tax would be indistinguishable from a transaction tax. To so conflate the two, the Court concluded, would be unsound in light of the General Assembly's choice of language in enabling local jurisdictions to assess distinct categories of taxation.[4] In so doing, the Court emphasized the LTEA's language restricting

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[3] Despite the Majority's effort to characterize its treatment of Gilberti as distinguishing, rather than abrogating that case, the Majority's rejection of this distinction as so much "judicial use of abstract nomenclature," Maj. Slip Op. at 10, casts the validity of Gilberti's preservation of the distinction between the various taxes permitted by the LTEA into serious doubt without so much as a whisper from any party suggesting that such is necessary or advisable.

[4] It is no response to this point to cite this Court's characterization of the LTEA as largely mimicking its predecessor Sterling Act's reputation as the "Tax Anything Act" of 1947. Maj. Slip Op. at 11 (citing Gilberti, 511 A.2d at 1323 n.1), and to do so, itself, privileges this Court's "abstractions" over the statute's plain language. I do not dispute that the legislature's intent was to provide very broad taxing authority to local jurisdictions, nor do I question Harrisburg's authority under the LTEA to enact a transaction or business privilege tax. The danger lies not in overtaxation itself, but rather in so muddying the waters that a locality can recharacterize its scheme of taxation at will to generate more revenue, in violation of the fair expectations of parties doing business in that jurisdiction. Were Harrisburg to set up a tax plainly framed on the business privilege as bindingly characterized in our caselaw, see Gilberti, *supra*, it would be inequitable to permit it, based on the LTEA alone, to modify the character of its tax in practice to capture receipts not fairly identifiable as arising from the privilege of doing business in the jurisdiction.

This cautionary note is especially important in light of the General Assembly's post-Gilberti enactment of the Local Tax Reform Act of Dec. 13, 1988, Pub. L. 1121, No. 145, § 101, as amended, 72 P.S. 4750.101, *et seq.*, which purported to bar local taxing jurisdictions from imposing business privilege taxation schemes not already extant as of (continued…)

the imposition of any of the enumerated taxes to activity occurring "within the limits of such political subdivisions." Id. at 1323 (quoting 53 P.S. § 6902). As a corollary to this restriction, which the Court properly construed strictly in favor of the putative taxpayer, see Fischer v. Pittsburgh, 118 A.2d 157, 158-59 (Pa. 1955), it held that the imposition of a business privilege tax, as such, necessarily requires the maintenance of a "base of operations" within the jurisdiction. Id. at 1324-26. This analysis seems to me consistent with the language of the LTEA. See 1 Pa.C.S. § 1921 (requiring us, where possible, to construe statutes to give effect to all of their provisions, and denying us the prerogative to disregard the letter of the law in pursuit of its spirit).

Thus, to the extent Harrisburg's tax operates as a business privilege tax, regardless of the nomenclature its ordinance employs, its authority to assess that tax depends on a taxpayer's meaningful business presence within the taxing jurisdiction, one that exceeds that necessary to support the imposition of local taxes on mere transactions occurring within the jurisdiction. The Majority disagrees, and in so doing undermines material aspects of the Gilberti analysis. See Maj. Slip Op. at 8 (rejecting the "base of operations" terminology as a "construct" not rooted in the LTEA), 10 (calling for this Court to disregard its prior "use of abstract nomenclature" in favor of Harrisburg's interpretation of its own taxing ordinance). For all the reasons enumerated by the Commonwealth Court, see V. L. Rendina, Inc., v. City of Harrisburg, 859 A.2d 888, 892 (Pa. Cmwlth. 2004), I simply cannot agree that the maintenance of a job site trailer, which the parties have stipulated served no greater business purpose than supporting the construction project in question, is

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that act's effective date. See 72 P.S. § 4750.533. If we are unwilling to recognize a meaningful analytic boundary between transaction, business privilege, and other taxes authorized by the LTEA, then we leave municipalities free to recharacterize their tax ordinances at will to avoid any legislative prohibition on new taxes, a result inconsistent with legislative intent.

tantamount to maintaining a "base of operations" in Harrisburg sufficient to support the imposition of a tax on the privilege of doing business in that jurisdiction. Accordingly, were Harrisburg's tax strictly structured as a tax upon the privilege of doing business in that jurisdiction, as understood in Gilberti, I would agree with the Commonwealth Court and with Appellee that the levy before us could not be sustained.

This analysis, however, does not end the inquiry. As in Gilberti, I believe that we must also consider whether the tax in question, by whatever name, is sustainable as a duly enacted instance of one of the other forms of taxation authorized by the LTEA. The LTEA, of course, did not restrict Harrisburg to imposing any one form of taxation at a time, or preclude it from creating a hybrid tax designed to reach multiple forms of business activity. Although the Harrisburg ordinance uses the words "business privilege" it does so as part of a compound title identifying the tax provision in question as a "Business Privilege and Mercantile Tax." See THE AMERICAN HERITAGE COLLEGE DICTIONARY 868 (4th ed.)(defining "mercantile" as "[o]f or relating to merchants or trade"). In so entitling its taxing provision, and in light of the local tax provisions highlighted by the Majority, I find it clear that Harrisburg intended to create a tax that established simultaneous but distinct levies on both the privilege of doing business in its jurisdiction as well as on any transactions completed within the jurisdiction, without regard to where the parties to those transactions conduct business generally or are "based." This intent is manifest not only in the title of the tax, but also in the taxing ordinance's broad definition of "business," and its provision of examples that embody aspects of both business privilege and transaction taxation. See Maj. Slip Op. at 2-3 & n.5. Nothing in the LTEA restricted Harrisburg from so fashioning its local tax, and I find nothing problematic with concluding that it did so and deeming it proper.

In summary, to characterize the tax in question, as does the Majority, as a "business privilege tax," Maj. Slip. Op. at 11, strikes me as neither reflective of the tax's operation nor respectful of our decision in Gilberti and that case's progeny. See, e.g., Northwood Constr.

Co. v. Township of Upper Moreland, 856 A.2d 789 (Pa. 2004); Township of Lower Merion v. QED, Inc., 738 A.2d 1066 (Pa. Cmwlth. 1999); Airpark Int'l v. Interboro Sch. Dist., 677 A.2d 388 (Pa. Cmwlth. 1996); G.A. & F.C. Wagman, Inc., v. Manchester Township, 535 A.2d 702 (Pa. Cmwlth. 1988). Instead, I would identify this tax as one that embodies aspects of both business privilege taxation and transaction taxation, one that has been clearly so structured since its enactment, and one that operates, and properly, as a transaction tax with regard to Appellee under the circumstances of this case. In so ruling, I would avoid the temptation to cast into doubt the validity of our decision in Gilberti, which I believe properly swept more broadly in addressing the nature of business privilege taxation than the Majority credits, and should be preserved as a viable analytic tool in assessing the validity of other business privilege tax provisions that come before the courts in the future. Accordingly, I concur in the result, but respectfully decline to join the Majority's analysis.