IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Shelly Funeral Home, Inc., Carroll Engineering Corp., Richard B. Sherker, individually and t/a S&H Landscaping Contractors, Lankford Landscaping, LLC, Bugajewski Facility Services, LLC, Valts Roofing Company, Inc., Hellers Seafood Market, Inc., Hill's Cleaners and Dyers, Inc. d/b/a Hill's Cleaners, Judel Corporation d/b/a Jem Jewelers, Win Far, Inc. trading as Villa Barolo Ristorante & Wine Bar, F.E. Buehler & Son, Inc., Dirshtik, Inc., t/a Thirsty's Beer, Tech Environments, Inc., O.P. Schuman & Sons, Inc., Earthborne, Inc., Limbach Company, LLC, and Bostock Company, Inc., Polysciences, Inc., The Pansy Shop, Inc., Land-Tech Enterprises, Inc., Bahavi Motel, LLC d/b/a Hampton Inn, Lentzcaping, Inc., Langan Engineering and Environmental Services, Inc., Continental Property Mgmt, Inc., The Lingo Group, Inc., Dentrust Dental International, Inc. and Harris and Harris, PC,	:	No. 769 C.D. 2009
Appellants	:	Argued: November 10, 2009
v.	:	
Warrington Township and Warrington Township Board of Supervisors	:	

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE QUIGLEY FILED: December 31, 2009

Appellants, who are twenty-seven businesses in Warrington Township (Township), appeal from the April 20, 2009 order of the Court of Common Pleas of Bucks County (trial court) upholding the validity of a tax ordinance (Ordinance) enacted by the Warrington Township Board of Supervisors (Board). The questions raised are whether the Ordinance violates Section 533 of the Local Tax Reform Act (Act)[1]; whether it violates the uniformity clause contained in Article VIII, Section 1 of the Pennsylvania Constitution (Uniformity Clause); and whether the Ordinance, which was enacted in 2009, improperly taxes revenue generated in 2008. We affirm.

The Ordinance imposes an annual mercantile and business privilege tax (business privilege tax) of $2,600.00 on all businesses in the Township, but it exempts businesses with gross receipts of one million dollars or less (Tax). Appellants petitioned the trial court for a declaratory judgment as to the Tax's legality. At a hearing before the trial court, the parties agreed that the case could be decided on the briefs and the notes of testimony of the public hearings before the Board (Transcript). The Transcript evidences that: (1) the purpose of the Tax was to generate revenue to close a budget shortfall; and (2) in considering the nature of the Tax, the Board took into account the number of businesses that would be subject to the Tax, the flat amount that each would have to pay to generate the revenue needed to cover the shortfall, the number of businesses that would be exempt from the Tax at different levels of gross receipts and the fact that businesses that generate more than one million dollars in gross receipts tend to be larger and require more municipal resources.

[1] Act of December 13, 1988, P.L. 1121, 72 P.S. § 4750.533.

The trial court upheld the validity of the Tax. It concluded that the Tax did not violate Section 533 of the Act, which forbids a business privilege tax on "gross receipts or part thereof," because this court has held that the Act does not prohibit a *flat tax*, *see Smith and McMaster, P.C. v. Newtown Borough*, 669 A.2d 452 (Pa. Cmwlth. 1995), and because the Ordinance imposed a flat tax, albeit with an exemption for businesses with gross receipts of one million dollars or less, not a tax on "gross receipts or part thereof."

The trial court further determined that, although the Ordinance created two classes of taxpayers, those with gross receipts of one million dollars or less and those with more than one million dollars, it did not violate the Uniformity Clause because the different treatment of the two classes was based on the ability to produce revenue, a distinction that our Supreme Court has upheld. *Aldine Apartments, Inc. v. Commonwealth*, 493 Pa. 480, 426 A.2d 1118 (1981).

The trial court also rejected Appellants' claim that the Ordinance taxes revenue generated in the year 2008, i.e., that it taxes money received in the year before the Tax was enacted. The court reasoned that the Ordinance was not taxing revenue generated in 2008 but, rather, was imposing a flat tax in 2009 on businesses that had gross receipts above one million dollars in 2008.

Appellants now appeal to this court.[2] We discuss the issues raised *seriatim*.

A. Section 533 of the Local Tax Reform Act

[2] We review an action for a declaratory judgment to determine whether the trial court's findings are supported by substantial evidence, whether an error of law was committed, or whether the trial court abused its discretion. *Conley Motor Inns, Inc. v. Township of Penn*, 728 A.2d 1012 (Pa. Cmwlth.), *appeal denied*, 560 Pa. 731, 745 A.2d 1225 (1999).

Appellants acknowledge that the Tax would be lawful if it were a flat tax applicable to all businesses in the Township, but contend it is not such a tax. (Brief at p. 14.) They argue that *Smith and McMaster*'s holding that a flat tax does not violate Section 533 was based on the fact that it was imposed on all businesses in the municipality and was not dependent on, or calculated with respect to, their gross receipts, while, here, the Tax is dependent on, or calculated with respect to, gross receipts because it exempts businesses with gross receipts below one million dollars. They reason that, while the Tax is a flat tax for all businesses with gross receipts over one million dollars, it does not apply to businesses with gross receipts below that amount, and, therefore, it is a tax on "gross receipts *or part thereof*," namely the part of gross receipts over one million dollars.

This analysis conflates the Uniformity Clause issue of the legality of the Ordinance's imposition of the Tax on some, but not all, businesses in the Township with the Section 533 issue of whether the Ordinance taxes part of gross receipts or, instead, is a flat tax. As to the latter question, "flat," as used in the phrase "flat tax," means fixed, or without variation. Webster's Third New International Dictionary 866 (2002). The Tax at issue here is without variation and is fixed at $2,600.00 on all businesses with gross receipts of more than one million dollars. As such, it plainly is a flat tax. Indeed, in *Smith and McMaster*, the tax at issue was a non-varying $100.00, exempting non-profit entities. The parties and the court there all recognized that tax to be a flat tax. Here, too, the parties and the trial court all agree that the Tax in this case is a flat tax. (Brief at pp. 14, 17.)

Aside from its misplaced injection of the Uniformity Clause question, the flaw in Appellants' analysis comes down to its argument that the Tax violates Section 533 because "it only taxes that part of gross receipts that is over One

Million Dollars." (Brief at p. 16.) As the Ordinance makes clear on its face, however, it does not tax *any part* of gross receipts. Rather, the Tax is a flat tax of $2,600.00. Appellants' argument is essentially the same as the one that taxpayers made in *Smith and McMaster, viz.*, that a flat-rate tax can constitute a tax on an entity's gross receipts or part thereof. This court rejected that argument: "The General Assembly expressly mentioned a prohibition on taxes *on* gross receipts or part thereof, but did not mention that any other taxes would be prohibited by section 533(a) of the Local Tax Reform Act. Accordingly, we will not adopt appellants' interpretation of section 533(a)." *Smith and McMaster*, 669 A.2d at 456 (emphasis in original). We similarly do not accept Appellants' interpretation.

B. The Uniformity Clause of the Pennsylvania Constitution

Appellants acknowledge that the Uniformity Clause, which mandates that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax," requires that there be a reasonable distinction and difference between the classes of taxpayers sufficient to justify different tax treatment, *Allegheny County v. Monzo*, 509 Pa. 26, 500 A.2d 1096 (1985), and that the ability to produce revenue is one such reasonable distinction, *Aldine Apartments, Inc.* (Brief at 18-19.) They further acknowledge that the burden is on the taxpayer to show that the tax clearly, palpably and plainly violates the Constitution by demonstrating that a tax classification is unreasonable, *Leonard v. Thornburgh*, 507 Pa. 317, 489 A.2d 1349 (1985), and that the burden is a heavy one because the tax is presumed constitutional, *D/K Beauty Supply, Inc. v. North Huntingdon Township*, 446 A.2d 986 (Pa. Cmwlth. 1982). (*Id.* at 18.) They argue, however, that a classification under which businesses that have gross

receipts in any year of as much as one million dollars pay no tax while businesses that have gross receipts of one additional dollar pay $2,600 is not reasonable. We disagree.

The Board hearings reflect that the purpose of the Tax was to generate sufficient revenue to close a budget shortfall and that, in creating the two classifications of taxpayers contained in the Ordinance, the Board took into account the ability to produce revenue and the fact that businesses that generate more than one million dollars in gross receipts tend to be larger and require more municipal resources. These are reasonable distinctions and differences between the classes of taxpayers sufficient to justify different tax treatment.[3] Considering that the Uniformity Clause does not require perfect uniformity in taxation and that any doubts as to the constitutionality of a statute are to be resolved in favor of upholding the statute, *Parsowith v. Department of Revenue*, 555 Pa. 200, 723 A.2d 659 (1999), we believe that Appellants have failed to satisfy their burden to show that the tax clearly, palpably and plainly violates the Constitution by demonstrating that the tax classification set forth in the Ordinance is unreasonable. *Leonard*.

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[3] In *Commonwealth v. Life Assurance Company of Pennsylvania*, 419 Pa. 370, 377-378 n.11, 214 A.2d 209, 215 n.11 (1965), our Supreme Court stated:

> [W]here the state seeks to raise revenue, it need not justify any distinction drawn between the taxed and non-taxed with respect to the raising of revenue so long as some other reasonable basis for treating the various classes differently exists. Where such distinction exists, the wisdom of the legislative policy of taxing one class and not another is not a matter for the courts. 'Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and an earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.'

C. Whether the Ordinance taxes revenue generated in 2008

Appellants contend that although the Ordinance was enacted in 2009, it taxes gross receipts received in 2008, and doing so is illegal. Assuming *arguendo* that doing so would be illegal, the argument nonetheless is without merit since, as discussed in section "A," the Ordinance imposes a flat tax for the privilege of doing business in 2009; it does not tax gross receipts received in 2008, or in any other year.

Accordingly, we affirm the trial court's order upholding the validity of the Ordinance.

KEITH B. QUIGLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Shelly Funeral Home, Inc., Carroll Engineering Corp., Richard B. Sherker, individually and t/a S&H Landscaping Contractors, Lankford Landscaping, LLC, Bugajewski Facility Services, LLC, Valts Roofing Company, Inc., Hellers Seafood Market, Inc., Hill's Cleaners and Dyers, Inc. d/b/a Hill's Cleaners, Judel Corporation d/b/a Jem Jewelers, Win Far, Inc. trading as Villa Barolo Ristorante & Wine Bar, F.E. Buehler & Son, Inc., Dirshtik, Inc., t/a Thirsty's Beer, Tech Environments, Inc., O.P. Schuman & Sons, Inc., Earthborne, Inc., Limbach Company, LLC, and Bostock Company, Inc., Polysciences, Inc., The Pansy Shop, Inc., Land-Tech Enterprises, Inc., Bahavi Motel, LLC d/b/a Hampton Inn, Lentzcaping, Inc., Langan Engineering and Environmental Services, Inc., Continental Property Mgmt, Inc., The Lingo Group, Inc., Dentrust Dental International, Inc. and Harris and Harris, PC,	:	
Appellants	:	
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v.	:	
	:	
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O R D E R

AND NOW, this 31st day of December, 2009, the April 20, 2009 order of the Court of Common Pleas of Bucks County hereby is affirmed.

KEITH B. QUIGLEY, Senior Judge