IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

VERIZON PENNSYLVANIA, INC.,	: Nos. 70 & 74 MAP 2013
Appellant/Cross Appellee	: Appeal from the Order of the Commonwealth Court at No. 266 FR 2008 dated 8/23/13, exited 8/26/13, granting the exceptions and entering judgment of the 7/5/13 opinion that affirmed in part and reversed in part the decision of the Board of Finance and Revenue dated 2/26/08 at No. 0625383
v.	:
COMMONWEALTH OF PENNSYLVANIA,	:
Appellee/Cross Appellant	: ARGUED: March 10, 2015

CONCURRING AND DISSENTING OPINION

MR. CHIEF JUSTICE SAYLOR **DECIDED: November 18, 2015**

I would affirm the judgment of the Commonwealth Court.

The Tax Reform Code of 1971 (“Code”), by its terms, imposes a tax upon gross receipts from “telephone messages transmitted.” 72 P.S. §8101(a)(2). Initially, I agree that directory assistance charges are taxable pursuant to this description, as the information concerning the number sought is transmitted by telephone to the requester. As well, any receipts from the follow-on “ConnectReQuest” service pertain to an essential component of a transmitted message since the customer is only charged if a connection is made. *See* Majority Opinion, *slip op.* at 29-31; *see also Verizon Pa., Inc. v. Commonwealth*, Stipulation of Facts I, ¶31 (Pa. Cmwlth. Nov. 21, 2012) (“Stipulation I”) (explaining that the customer is only charged for the follow-on service if a successful connection to the requested number is completed).

Applicability of the tax to charges for the leasing of private lines presents a substantially different question, in my view, because such leasing does not in itself entail the transmission of any messages. Thus, if we were writing on a clean slate, I would conclude that charges for these dedicated lines do not constitute gross receipts for "telephone messages transmitted," particularly in view of the principle that statutes imposing taxes are to be strictly construed with doubts about their reach resolved in favor of the taxpayer. *See* 1 Pa.C.S. §1928(b)(3).[1]

As the majority observes, however: in *Commonwealth v. Bell Telephone Company of Pennsylvania*, 348 Pa. 161, 34 A.2d 531 (1943) ("Bell III"), this Court interpreted the predecessor statute to implicate charges for "any device or apparatus which renders the transmission [of phone messages] more effective," *id.* at 165, 34 A.2d at 533, as well as "facilities making telephone communication more satisfactory," *id.* at 166, 34 A.2d at 533; and the Legislature has effectively directed us to presume it intends such interpretation to apply to the Code, which represents a reenactment of the prior statute undertaken without any change to the relevant language. *See* 1 Pa.C.S. §1922(4); Majority Opinion, *slip op.* at 21-22 (citing cases). *See generally Bell III*, 348 Pa. at 162, 34 A.2d at 532 (reciting the relevant language of the predecessor statute). With that said, I note as an aside that the *Bell III* Court's fidelity to the principle of strict

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[1] I disagree with the majority's assertion that this principle has no application to the present case. *See* Majority Opinion, *slip op.* at 21 n.16. Telecommunications technology, by its nature, changes and evolves over time, with the result that new services and technologies regularly emerge. As this case illustrates, questions will inevitably arise concerning whether the tax – by its plain terms or via an interpretative overlay – applies in new circumstances. Although the majority references a footnote in *Dechert LLP v. Commonwealth*, 606 Pa. 334, 998 A.2d 575 (2010), the footnote relates that the rule of strict construction does not require the strictest possible interpretation, and that it is applicable when the statutory text is uncertain. *See id.* at 348 n.8, 998 A.2d at 584 n.8. While these concepts seem uncontroversial as far as they go, I fail to see how they preclude application of Section 1928(b)(3) in the present case.

construction may be questioned.[2] In my reading, the decision appears to have employed a particularly broad interpretation of the term "telephone messages transmitted." Be that as it may, the decision has not been overruled, and in the 72 years since it was decided the General Assembly has not seen fit to clarify the intended scope of the tax – notwithstanding that body's role as the branch of government primarily concerned with shaping public policy and its superior ability to assess the implications of the major changes that have occurred in the telecommunication industry. *See generally* Brief for Appellant at 33-37 (discussing public policy implications inherent in the way a telecommunications tax is devised). I find this state of affairs an unhappy one and would welcome a decision by the legislative branch to enter the field and provide guidance; in the interim, however, I am constrained to concur with the majority's position that the judicial gloss set down in *Bell III* applies here. With that said, we should, at a minimum, construe *Bell III* strictly by not extending its rationale to items that are even less connected with actual "telephone messages transmitted" than those at issue in *Bell III*.

Given the above, I agree that the leasing of private, dedicated lines is sufficiently similar to the leasing of auxiliary lines at issue in *Bell III* (which were found to be taxable) so that the company's decision to charge customers via periodic lease payments rather than on a per-message basis is insufficient to remove them from the scope of the tax. *See Bell III*, 348 Pa. at 166, 34 A.2d at 533. As noted, however, I believe this result is based on a questionable reading of the term "messages transmitted," but one that is presently binding.

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[2] The principle was in force at the time of the *Bell III* decision. *See, e.g.*, *In re Girard Trust Co.*, 343 Pa. 434, 435, 23 A.2d 454, 455 (1942); *Appeal of Wellsboro Hotel Co.*, 336 Pa. 171, 175, 7 A.2d 334, 335 (1939) (observing that the strict-construction rule for tax statutes was codified in the Statutory Construction Act of 1937).

Finally, I depart from the majority's analysis with regard to non-recurring charges for telephone line installations, moves, and repairs. These actions do not involve the actual transmission of messages, nor do such services constitute "devices," "apparatuses," or "facilities," so as to bring them within the description endorsed by *Bell III*. The majority justifies application of the tax to such charges by observing that, absent the services involved, no messages would be transmitted at all. The majority suggests it follows that the services make the transmission of messages "*more* effective" or "*more* satisfactory" in the manner envisioned by the Court in *Bell III*. Majority Opinion, *slip op.* at 34 (emphasis added). I find this reasoning untenable.

Notably, *Bell III* did not address one-time services designed to establish, repair, or move a component of the telephone network. The charges in *Bell III* were all for the *use* of various types of equipment involved in message transmission. To my mind, the majority's conclusion with regard to these nonrecurring charges represents a significant broadening of the scope of taxable items as compared to *Bell III*. Such broadening is not supportable by reference to the statutory text and it entails a misuse of the terminology employed in the *Bell III* decision. Moreover, it runs directly contrary to the principle of strict construction relative to tax statutes. Accordingly, I respectfully dissent from this latter portion of the majority's holding.