IN THE

Supreme Court of Pennsylvania

Nos. 20 and 21 EAP 2022

DIANE ZILKA

Appellant

v.

TAX REVIEW BOARD CITY OF PHILADELPHIA

Appellee

BRIEF OF *AMICUS CURIAE* AMERICAN COLLEGE OF TAX COUNSEL IN SUPPORT OF APPELLANT

On Appeal from the Order of the Commonwealth Court entered at Nos. 1063 C.D. 2019 and 1064 C.D. 2019 on January 7, 2022, *affirming* the decision of the Philadelphia Court of Common Pleas entered at Docket Nos. 2018-02438 and 2018-02439 dated June 26, 2019, with opinion issued August 28, 2019

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STATEMENT OF THE CASE

These undisputed facts are taken from the parties' briefing before the Commonwealth Court and from the Commonwealth Court opinion.

During 2013-2016, the tax years at issue before the Court, Appellant, Ms. Diane Zilka ("Appellant"), resided in Philadelphia, Pennsylvania ("Philadelphia") and worked in Wilmington, Delaware. During the years at issue, Appellant paid income taxes on the same income to two states and two local jurisdictions: Pennsylvania, Delaware, Wilmington and Philadelphia. She claimed the available credit for income taxes paid to Delaware against her Pennsylvania income taxes, which offset the full amount of her Pennsylvania state tax liability. Originally, she did not claim the "excess" Delaware state income tax credits against the local taxes she paid to Philadelphia. This resulted in some of her income being taxed twice which would not have happened had she only worked in Pennsylvania.

On April 9, 2017, Appellant filed a refund petition with the Philadelphia Department of Revenue seeking a refund of $29,497.00 of the Philadelphia City Wage Tax, Phila. Code §19-1500, *et seq.* (the "Wage Tax") for the tax years at issue. In the refund petition, Appellant claimed a credit against the Wage Tax for the income taxes paid to Wilmington and the income taxes paid to Delaware that weren't previously applied against her Pennsylvania liability. The Philadelphia Department of Revenue allowed Appellant a credit for income taxes paid to

Wilmington; however, it denied Appellant a credit for income taxes paid to Delaware that exceeded her Pennsylvania state tax credit. The decision was upheld by the City of Philadelphia Tax Review Board, the Philadelphia Court of Common Pleas, and the Commonwealth Court.

There is no dispute that Appellant is paying more tax due to her interstate working arrangement versus a Philadelphia resident who works entirely intrastate. The issue addressed herein is whether this is permissible under the Commerce Clause of the Constitution of the United States ("Commerce Clause").

STATEMENT OF INTEREST

The American College of Tax Counsel is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions in the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College.

This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.[1]

Pursuant to Pa.R.A.P. 531, the College submits this brief to assist this Court in its analysis of the tax issues presented in the instant case. The College places great importance on the protections afforded by the Commerce Clause of the Constitution of the United States and having those protections applied in a sound and consistent way pursuant to long-standing case law of the Supreme Court of the United States.

No other person or entity, other than *amicus curiae* members or its counsel, paid in whole or in part for the preparation of this brief, nor did any other person or entity author this brief, in whole or in part.

[1] Larry Campagna, Vice President of the College, abstained from the decision of the Board of Regents to prepare and file this brief and did not participate in the preparation or review of this brief.

ARGUMENT

I. The failure of the City of Philadelphia to grant a credit against Appellant's Wage Tax liability for taxes paid on that income to the State of Delaware and its subdivisions violates the Commerce Clause of the United States Constitution.

The United States Constitution imposes "an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority,* 550 U.S. 330, 338 (2007). This restraint stems from the Commerce Clause, which grants Congress the sole power "[t]o regulate Commerce with foreign Nations, and among the several States. . . ." U.S. Const. art. I, §8, cl. 3. Accordingly, although the United States Supreme Court has made clear that states have complete control of their taxing power over *intrastate* commerce, when *interstate* commerce is involved, the Commerce Clause (sometimes specifically referred to as the dormant Commerce Clause) limits a state's ability to tax. *Associated Industries of Missouri v. Lohman,* 511 U.S. 641 (1994).

The Supreme Court has long held that under the Commerce Clause "interstate business…shall not be burdened with cumulative exactions which are not similarly laid on local business." *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 258 (1938). The Supreme Court consistently has recognized the harm that multiple state taxes could inflict on interstate commerce, plainly holding that a state "may not tax a transaction or incident more heavily when it crosses

state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty,* 467 U.S. 638, 642 (1984). The restrictions on taxation of interstate commerce imposed by the Commerce Clause follow from the framers' "conviction that in order to succeed the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma,* 441 U.S. 322, 325-26 (1979).

By denying Appellant the full credit for Delaware state tax paid, she is subject to a higher tax burden than she would have been if she were a Philadelphia resident working wholly in Pennsylvania. This is an impermissible burden on her participation in interstate commerce.

A. State taxes and local taxes must be viewed collectively when applying the limitations on state taxation contained in the Commerce Clause.

In *Comptroller of Maryland v. Wynne,* 575 U.S. 542 (2015), the United States Supreme Court faced the same issue arising in this case. In *Wynne,* the Supreme Court held that the Commerce Clause requires that credits for taxes paid to other states must be permitted to offset a local tax paid in a taxpayer's state of residence on the same income. *Wynne,* 575 U.S. at 564.

Wynne involved the Maryland state personal income tax and a county-level tax upon income. A married couple residing in Maryland received pass-through

income from an "S" Corporation, which filed income tax returns and paid income taxes in 39 states. Maryland law allowed the couple a credit against their state income tax for those taxes paid to the other states, but did not permit an unused state income tax credit against the Maryland county-level income tax. The Supreme Court struck down the denial of the excess state income tax credit against the county-level income tax, holding that the two taxes must be viewed as part of the same combined state tax system.

The Supreme Court explained:

> In order to apply the [relevant test under the Commerce Clause], **we must evaluate the Maryland income tax scheme as a whole**…[f]or Commerce Clause purposes, it is immaterial that Maryland assigns different labels (i.e., "county tax" and "special nonresident tax") to these taxes. In applying the dormant Commerce Clause**, they must be considered as one**.

Wynne, 575 U.S. at 565 n. 8 (emphasis added).

Thus, the central holding in *Wynne* is that a credit must be given to offset a local tax in the taxpayer's state of residence, for a state tax paid to a different state. Otherwise, a state could avoid providing full credits to its residents for taxes paid to other states on income earned in the other states by simply authorizing its subdivisions to impose a portion of the tax and label that portion of the total tax as "local." The tax burden imposed by states and their political subdivisions is singular, and it is this collective burden that must be considered when evaluating constitutionality under the Commerce Clause. *See also, Assoc. Ind. Of Missouri v.*

Lohman, supra (when analyzing the impact on interstate commerce posed by a state's sales and use tax structure, involving both state taxes and local taxes, the Court held that, to the extent that "out-of-state goods brought into [] a jurisdiction are subjected to a higher levy than are goods sold locally," the state's overall tax structure impermissibly discriminates against interstate commerce).

B. The Commonwealth Court erred in failing to follow *Wynne*.

Although the Supreme Court in *Wynne* emphasized that taxes upon income at the state level and the local level must be viewed together for Commerce Clause purposes, the Commonwealth Court did not adhere to that rule. Instead, the Commonwealth Court erroneously regarded the local tax as separate from the state tax when analyzing the burden upon interstate commerce. Therefore, it incorrectly reached the conclusion that there was no Commerce Clause violation.

Specifically, the Commonwealth Court concluded that the tax imposed at the county level in *Wynne* was really a "state" tax and not a "county" tax because it was collected by the Maryland State Comptroller of the Treasury. Commonwealth Court Opinion at 10-11. As a result, the Commonwealth Court failed to view the combined state tax and local tax as a part of a single state tax structure and the tax burden imposed by that collective and singular structure was the relevant burden to be analyzed under the Commerce Clause.

1. There is no distinction between the local tax in *Wynne* and the Philadelphia tax in this case for Commerce Clause purposes.

The Philadelphia tax in this case cannot be treated differently from the local tax at issue in *Wynne*. Nothing in *Wynne* supports distinguishing between taxes labelled as state taxes and those labelled as local taxes for purposes of the limitations contained in the Commerce Clause. To the contrary, for Commerce Clause purposes, under the reasoning and plain language of *Wynne,* such "labels" are neither dispositive nor relevant. The Supreme Court in *Wynne* provided an example that included both state level and local level taxes, and required that both taxes, whether imposed by the state or its subdivisions, be included when determining the burden upon interstate commerce.

In general, municipalities and local governments are nothing more than creatures of the state. Municipalities are not sovereign and have no powers apart from those that are granted by the state of which they are political subdivisions. Indeed, the Commonwealth of Pennsylvania dictates to Philadelphia what is permissible in the areas of legislation and taxation, just like the State of Maryland did with respect to the county-level tax in *Wynne*. That is, Philadelphia's power to tax arises solely from the General Assembly of the Commonwealth of Pennsylvania. As this Court observed on the state-municipality distinction in Pennsylvania law:

> Neither municipalities or school districts are sovereigns; they have no original or fundamental power of legislation or taxation. They have the right and power to enact only those legislative and tax ordinances or resolutions which are authorized by an Act of the legislature; and if such ordinance or resolution is unauthorized or conflicts with the enabling statute or with some its provisions it is in that respect or to that extent void.

Appeal of School District of City of Allentown, 87 A.2d 480, 484 (Pa. 1952) (citations omitted).

Moreover, that Philadelphia's power to tax derives from the original taxing jurisdiction of Pennsylvania has been well-settled by this Court:

> The power of taxation, in all forms and of whatever nature lies solely in the General Assembly of the Commonwealth acting under the aegis of our Constitution. Absent a grant or a delegation of the power to tax from the General Assembly, no municipality, including Philadelphia, a city of the first class, has any power or authority to levy, assess or collect taxes.

Mastrangelo v. Buckley, 250 A.2d 447, 452-453 (Pa. 1969). Unless expressly authorized by the General Assembly, Philadelphia has no power to tax. In this case, the General Assembly has authorized Philadelphia to levy the Wage Tax. *See* The Sterling Act, Act of August 5, 1932, P.L. 45, 53 P.S. §15971.

Thus, the local tax at issue here is, fundamentally, a state tax. If the Commonwealth Court's distinction is upheld, it would wrongfully permit Pennsylvania to make an end-run around the federal constitutional prohibition against taxing commercial activity between states more heavily than intrastate commerce.

2. The Commonwealth Court erred in excusing the Commerce Clause violation simply because the Delaware state rate was higher than the Pennsylvania state rate.

The Commonwealth Court also incorrectly excused the Commerce Clause violation on the grounds that the violation was caused by the higher tax rates in Delaware. Commonwealth Court Opinion at 8. This view is premised on isolating the local tax imposition from the entire state tax scheme. The Supreme Court in *Wynne* expressly rejected that premise. Indeed, in this case it is not Delaware's responsibility to provide a credit, but rather Pennsylvania and Philadelphia, who are imposing a tax upon income earned elsewhere by their residents.

The numerical example below illustrates how a Philadelphia resident who works entirely in Wilmington, Delaware is taxed more heavily than a Philadelphia resident working entirely within Philadelphia. For purposes of the example, average tax rates are used for tax year 2014:

Income Tax Impact on a Philadelphia Resident
Taxable Income of $100

	Working in Philadelphia	**Working in Wilmington, DE**
Philadelphia Rate	3.922%	3.922%
Philadelphia Tax	**$3.92**	**$3.92**
Pennsylvania Rate	3.07%	3.07%
Pennsylvania Tax	**$3.07**	**$3.07**
Wilmington Rate	N/A	1.25%
Wilmington Tax	**N/A**	**$1.25**
Delaware Rate	N/A	5.00%
Delaware Tax	**N/A**	**$5.00**
TOTAL TAX PRIOR TO CREDITS	**$6.99**	**$13.24**
Less State Credit	N/A	*($3.07)*
Less Local Credit	N/A	*(1.25)*
TOTAL TAX AFTER CREDITS	**$6.99**	**$8.92**

As the chart shows, the interstate activity is taxed nearly 2 percentage points higher than intrastate activity, resulting in nearly an extra $2 of tax on every $100 of taxable income earned outside of Pennsylvania. Thus, in violation of the Commerce Clause, Pennsylvania's taxing scheme imposes a higher burden on individuals who choose to work across state lines.

In contrast, if a credit for the Delaware taxes were allowed, the local credit would be the sum of the Wilmington tax paid ($1.25) and the excess of the Delaware taxes paid that were not used to offset the Pennsylvania state income tax ($5.00-3.07= $1.93). Thus, the total Pennsylvania tax after credit would be $6.99, the same tax liability as for a Pennsylvania resident with the same income who worked solely in Philadelphia. Absent a full credit for both taxes imposed by the state and its subdivisions, that scheme fails the internal consistency test of the Commerce Clause.

C. Courts of other states have concluded contrary to the reasoning of the Commonwealth Court.

Other state courts have understood the necessity of viewing the total state and local tax burden as one for purposes of the Commerce Clause. For example, after *Wynne* was decided, the West Virginia Supreme Court conducted a Commerce Clause analysis in *Matkovich v. CSX Transportation Inc.,* 793 S.E.2d 888 (W.Va. 2017). In *Matkovich,* the court reviewed whether a taxpayer was entitled to in-state sales tax credit for sales taxes paid to localities in other states. In holding that such a credit was required for sales taxes paid to the other states and their subdivisions, the court observed, "Any other construction of the statute would invariably violate the Commerce Clause's prohibition on subjecting interstate transactions to a greater tax burden than imposed strictly on intrastate

dealings." *Matkovich,* 793 S.E.2d at 897. The court based its decision on the "total tax burden," citing *Wynne* with approval. *Id.* at 896 (citation omitted).

Even prior to *Wynne*, other state courts recognized the importance of viewing the state tax and local tax burden as one. For example, in *General Motors Corp. v. City and County of Denver,* 990 P.2d 59 (Colo. 1999), the Colorado Supreme Court considered a city and county tax that allowed credits for taxes paid to other states' municipalities, but not credits for taxes paid to other states. The court reasoned: "Internal consistency requires that states impose identical taxes when viewed in the aggregate—a collection of the state and sub-state taxing jurisdictions. In other words, the interstate taxpayers should never pay more sales or use tax than the intrastate taxpayer." *General Motors Corp.,* 990 P.2d at 69; *see also Arizona Department of Revenue v. Arizona Public Service Co.,* 934 P.2d 796 (Ariz. Ct. App. 1997) (holding that Arizona sales tax credit must be granted for a New Mexico county's gross receipts tax paid).

D. The Commonwealth Court's holding has been criticized by commentators.

The Commonwealth Court's improper approach in this case has caught the attention of national state and local tax commentators and practitioners. For example, after the Commonwealth Court's decision, Walter Hellerstein,[2] a well-

[2] Walter Hellerstein is the Distinguished Research Professor Emeritus and the Francis Shackelford Professor of Taxation Law Emeritus at the University of Georgia Law School. He is also the co-author of the treatise *State Taxation* (3d ed. 1988), WESTLAW WGL-STATE.

respected legal scholar on state and local taxes whose treatise has been cited and relied upon by the Supreme Court of the United States on multiple occasions,[3] addressed what he views as the Commonwealth Court's incorrect holding. He specifically explained why the total state tax burden, including both state taxes and local taxes, must be viewed together as the relevant burden on interstate commerce under the Commerce Clause. *See* Walter Hellerstein, "Are State and Local Taxes Constitutionally Distinguishable" (Revised), State Tax Notes Vol. 103, p. 743, February 14, 2022 (a true and correct copy of the article is appended to this brief as Appendix A). Professor Hellerstein notes that "in addressing federal constitutional restraints on state and local taxation affecting cross-border economic activity, one should evaluate the tax at the state level and in light of the state tax structure as a whole." *Id.* at 744. Finally, Hellerstein states that "[t]he taxpayer's constitutional right to a tax credit against Pennsylvania state and local taxes for payment of Delaware's state and local taxes *should be evaluated collectively at the state level and should not be subdivided into separate analyses of the state and local taxes in question.*" *Id.* at 754. (emphasis added).

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[3] *S. Dakota v. Wayfair, Inc*., 138 S. Ct. 2080, 2092 (2018); *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 561 (2015); *MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dep't of Revenue*, 553 U.S. 16, 25, 27, 29, 31 (2008); *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 321–23 (1998); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc*., 514 U.S. 175, 180, 194 (1995); *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 304 n. 1, 305 n. 4, 306 (1994); *Container Corp. of Am. v. Franchise Tax Bd*., 463 U.S. 159, 178 n. 17, 199 (1983).

CONCLUSION

In light of well-established Supreme Court of the United States precedent on the Commerce Clause and for the reasons set forth in this brief, this Court should find that failure of Philadelphia to allow Appellant a credit for income tax paid to Delaware against her Wage Tax liability violates the Commerce Clause of the Constitution of the United States. Accordingly, this Court should reverse the decision of the Commonwealth Court.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I hereby certify that this brief contains 4000 words, as determined by the word-count feature of Microsoft Word, the word-processing software program used to prepare this brief.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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I hereby certify that I caused a true and correct copies of the foregoing *Brief of Amicus Curiae American College of Tax Counsel* to be served upon the persons indicted below by PACFile, which satisfies the service requirements of Pa.R.A.P. 121:

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