Fish v. Twp. of *Lower Merion*

Supreme Court of Pennsylvania

September 10, 2015, Argued; December 21, 2015, Decided

No. 29 MAP 2015

Reporter
2015 Pa. LEXIS 2979

GEORGE D. ***FISH***, STEPHEN HRABRICK AND JONATHAN A. BRISKIN, Appellees v. TOWNSHIP OF ***LOWER MERION***, Appellant

Prior History: **[*1]** Appeal from the Order of the Commonwealth Court dated 9/19/14 at No. 1940 CD 2013 affirming in part and reversing in part the order of the Montgomery County Court of Common Pleas, Civil Division, dated 9/23/13 at No. 2012-02530.
Fish v. Twp. of ***Lower Merion***, 100 A.3d 746, 2014 Pa. Commw. LEXIS 460 (Pa. Commw. Ct., 2014)

Core Terms

leases, privilege tax, Township, transactions, taxes, municipal, taxation, privileges, levied, lease transaction, manufacturing, taxing authority, businesses, lease income, activities, rental, sales, privilege of doing business, gross receipts, authorities, residential dwelling, subject of taxation, rent payment, impermissible, registration, cases, label, movie, join

Case Summary

Overview

HOLDINGS: [1]-The Court reversed the order of the lower appellate court and reinstated the trial court's dismissal of the lessors' complaint because the township's business privilege tax was enforceable under the Local Tax Enabling Act, 53 Pa. Stat. Ann. §§ 6924.101-6924.901, relative to businesses which derived their income only from leases; [2]-The Court clarified that privileges and transactions were separate subjects of taxation and there was no language in the township's municipal code prohibiting taxes on privileges, acts, or transactions related to leases; [3]-Ultimately, the Court held that the township's business privilege tax could apply to a business receiving gross receipts from the business of leasing real estate.

Outcome

Order reversed; case remanded for reinstatement of the trial court order dismissing the complaint.

LexisNexis® Headnotes

Tax Law > State & Local Taxes > Franchise Taxes > Imposition of Tax

Business & Corporate Law > ... > Corporate Finance > Franchise Tax > Excise Taxes

Governments > Local Governments > Finance

HN1 ***Lower Merion*** Twp., Pa., Mun. Code art. IV, §§ 138-40 and 138-42 (1976), requires every person, defined generally as an individual or a for-profit business entity, engaging in a business, trade, occupation, or profession in the township to pay an annual business privilege tax calculated as a percentage of gross receipts. See Each such person must also purchase and display a business registration certificate and file an annual tax return. ***Lower Merion*** Twp., Pa., Mun. Code art. IV, §§ 138-41, 138-45, and 138-46.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN2 An issue of statutory interpretation is a question of law over which the appellate court's review is plenary and de novo.

Governments > Legislation > Interpretation

HN3 1 Pa.C.S. § 1902 provides that, in statutory text, the singular includes the plural and vice versa.

Governments > Legislation > Interpretation

Governments > State & Territorial Governments > Legislatures

Evidence > Inferences & Presumptions > Presumptions > Effects

HN4 A court cannot assume that the legislature intended any words to be mere surplusage. *1 Pa.C.S. § 1922(2)* provides that courts should presume the Pennsylvania General Assembly intends the entire statute to be effective and certain.

Business & Corporate Law > ... > Corporate Finance > Franchise Tax > Excise Taxes

Tax Law > State & Local Taxes > Franchise Taxes > Imposition of Tax

HN5 Dale's reasoning is consistent with a line of cases distinguishing business privilege taxes, or mercantile license taxes, which are similar in nature, from taxes on transactions or sales. In Gilberti, for example, the Pennsylvania Supreme Court has emphasized that the Local Tax Enabling Act, 53 Pa. Stat. Ann. §§ 6924.101-6924.901, lists transactions and privileges as two distinct subjects of taxation, and hence, a business privilege tax could be applied to transactions occurring outside the city limits so long as those transactions were attributable to an office in the city, whereas a transaction tax on such extraterritorial transactions would have been impermissible. In light of this precedent, it is established law in Pennsylvania that business privileges and transactions are separate and distinct subjects of taxation. That is not to say that a business privilege tax applicable only to leasing businesses would be permissible under subsection (f)(1). In that sense, the Supreme Court reaffirms Lynnebrook's observation that subsection (f)(1) constitutes a tax exception to be broadly construed in favor of the taxpayer, as well as its ultimate holding that a tax directed specifically to lease transactions constitutes a prohibited tax on leases.

Tax Law > State & Local Taxes > Franchise Taxes > Imposition of Tax

Business & Corporate Law > ... > Corporate Finance > Franchise Tax > Excise Taxes

HN6 A tax on the privilege of employing property is, from a practical standpoint, the same in effect as a tax upon the property itself. The Pennsylvania Supreme Court also agrees, in the abstract at least, with the Commonwealth Court's suggestion that there is no substantive difference between a tax upon the total of all rent payments and a tax on each individual rent payment.

Tax Law > State & Local Taxes > Administration & Procedure > Judicial Review

HN7 Reviewing courts consider a tax's practical operation, and not merely its label.

Business & Corporate Law > ... > Corporate Finance > Franchise Tax > Excise Taxes

Tax Law > State & Local Taxes > Franchise Taxes > Imposition of Tax

HN8 The Pennsylvania Supreme Court acknowledges that the precedent on which it currently relies, including Dale, is in tension with other decisions which may be read to suggest that application of a generalized business privilege tax would be impermissible relative to a taxpayer whose revenues are derived exclusively from untaxable transactions. One notable example is *Cheltenham Cinema, 548 Pa. at 389-90, 697 A.2d at 261*, decided two years before Dale, in which the Court suggested in dicta that if the taxpayer had obtained its income solely from movie tickets, it would have escaped liability under the township's business privilege tax due to the ban in the Local Tax Enabling Act, 53 Pa. Stat. Ann. §§ 6924.101-6924.901, on taxing movie admission sales. To the extent such dicta conflicts with Dale and its present holding, it is disapproved.

Judges: SAYLOR, C.J., EAKIN, BAER, TODD, STEVENS, JJ. MR. CHIEF JUSTICE SAYLOR. Mr. Justice Baer and Madame Justice Todd join this opinion. Mr. Justice Baer files a concurring opinion. Mr. Justice Eakin files a dissenting opinion in which Mr. Justice Stevens joins.

Opinion by: SAYLOR

Opinion

MR. CHIEF JUSTICE SAYLOR

In this appeal by allowance, we address whether the Local Tax Enabling Act's prohibition on taxing leases precludes a municipality from applying its business privilege tax to businesses whose sole income consists of rent payments on leased real property.

Appellant ***Lower Merion*** Township is a township of the first class. Article IV of its municipal code ***HN1*** requires every person — defined generally as an individual or a for-profit business entity — engaging in a business, trade, occupation, or profession in the Township to pay

an annual business privilege tax calculated as a percentage of gross receipts. *See* ***Lower Merion*** Twp., Pa., Mun. Code art. IV, §§138-40, 138-42 (1976). Each such person must also **[*2]** purchase and display a business registration certificate and file an annual tax return. *See id.* §§138-41, 138-45, 138-46.

Appellees ***Fish***, Hrabrick, and Briskin ("Lessors") each own one or more parcels of real estate in the Township that they rent to tenants pursuant to lease agreements. The Township notified Lessors that, for every such parcel, they were obligated to purchase a separate business registration certificate and pay the business privilege tax based on all rental proceeds. In this regard, the Township adopted the position that: (a) the leasing of real property constitutes a business, trade, occupation, or profession for purposes of Article IV of its code; and (b) each parcel was a discrete business location subject to registration, tax-return, and tax-payment requirements.

Lessors filed a complaint in the county court, naming the Township as defendant and seeking a declaratory judgment stating that, pursuant to the Local Tax Enabling Act (the "LTEA"),[1] the Township's business privilege tax could not be applied to rental proceeds from leases and lease transactions. Lessors did not challenge the validity of Article IV generally, as the LTEA authorizes the taxing authorities of various political **[*3]** subdivisions, including first-class townships, to "levy, assess and collect . . . taxes . . . on persons, transactions, occupations, privileges, subjects and personal property" within the subdivision's jurisdictional limits. *53 P.S. §6924.301.1(a)*. Rather, they observed that the LTEA's general grant of power in this regard is subject to an exception stating that such local authorities lack the ability to "levy, assess, or collect . . . any tax on . . . leases or lease transactions[.]" *Id. §6924.301.1(f)(1)*. Lessors argued their real-property rental activities fall within the scope of this exception.[2]

The parties eventually filed cross-motions for judgment on the pleadings. The court granted the Township's motion, denied Lessors' motion, and dismissed the complaint. The **[*4]** court issued an opinion explaining that it viewed the challenged tax as a gross-receipts tax and not a transactional tax such as the one disapproved in *Lynnebrook & Woodbrook Associates, L.P. v. Borough of Millersville, 600 Pa. 108, 963 A.2d 1261 (2008)* (holding that an ordinance imposing a flat $30.00 tax on the consummation of residential leases was prohibited by the LTEA). *See* ***Fish*** v. Twp. of ***Lower Merion***, *No. 2012-02530, 2013 Pa. Dist. & Cnty. Dec. LEXIS 619, slip op. at 3-4 (C.P. Montgomery Dec. 26, 2013)*.

A divided *en banc* panel of the Commonwealth Court reversed in relevant part. As pertains to the issue involved in this appeal, the court initially stated that *Section 301.1(f)(1)* of the LTEA, *53 P.S. §6924.301.1(f)(1)*, does not reflect a tax exemption, but carves out an exclusion or exception from the Township's taxing authority, meaning that any doubt about its reach should be resolved in the taxpayer's favor. *See* ***Fish*** v. Twp. of ***Lower Merion***, *100 A.3d 746, 750 (Pa. Cmwlth. 2014)* (*en banc*) (citing *Lynnebrook, 600 Pa. at 117, 963 A.2d at 1266* (indicating that the statutory language in *Section 301.1(f)(1)* "should be construed as a tax exception — not a tax exemption — and thus construed against the taxing authority")). Applying this precept, and observing that the exception bars "any" tax on leases or lease transactions, the court concluded:

> Regardless of title, there is no material difference between a tax scheme that imposes a 1.5 mill tax upon the receipt of each rent payment (arguably a transactional tax), and a scheme that imposes a 1.5 **[*5]** mill tax payment annually based on all rent receipts (characterized by the Township as a business privilege tax). The only differences are title and timing. . . . Because the Township's [business privilege tax] would tax Lessors' lease revenue at a rate of 1.5 mills, it is a tax on leases or lease transactions and, thus, prohibited under the [Pennsylvania] Supreme Court's interpretation of *Section 301.1(f)(1)* of the LTEA in *Lynnebrook*.

Id. at 751 (footnote omitted).

President Judge Pellegrini authored a dissenting opinion, joined by Judge Leadbetter. The dissent distinguished *Lynnebrook* on the grounds that the tax in

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[1] Act of Dec. 31, 1965, P.L. 1257 (as amended 53 P.S. §§6924.101-6924.901).

[2] Lessors also requested a declaration that Article IV's business-registration mandate cannot be applied to their rental activities, or, in the alternative, that the Township cannot require a separate registration fee for each property. These requests were denied, and the Commonwealth Court affirmed the denial. As the Township is the Appellant, no issue involving business registration is presently before the Court.

that matter was a flat tax expressly levied on lease transactions. The dissent indicated that the present tax, as it applies to Lessors, is imposed on the privilege of leasing property and not on leases or lease transactions themselves. In the dissent's view, the majority should have accorded this distinction controlling significance, as Pennsylvania courts have viewed privileges and transactions as distinct subjects of taxation, *see, e.g.,* Gilberti v. City of Pittsburgh, 511 Pa. 100, 106, 511 A.2d 1321, 1324 (1986), and the LTEA authorizes the Township to tax privileges. In support of its position, the dissent highlighted School District of Scranton v. Dale & Dale Design & Development, Inc., 559 Pa. 398, 741 A.2d 186 (1999), in which this Court upheld the application of a business privilege tax to a **[*6]** contractor that built residences notwithstanding that the LTEA prohibited localities from taxing the construction of, or improvements to, residential dwellings. *See* ***Fish***, 100 A.3d at 753-54 (Pellegrini, P.J., dissenting).

We allowed further review to consider whether the Commonwealth Court erred in holding that the Township's "business privilege tax could not apply to a business receiving gross receipts from the business of leasing real estate[.]" ***Fish*** v. Twp. of ***Lower Merion***, __Pa. __, 112 A.3d 1209 (2015) (*per curiam*).

The Township's position largely echoes that of the Commonwealth Court dissent. It argues that: *Lynnebrook* is distinguishable as the tax there was levied directly on leases or lease transactions, and not on a privilege; this Court clarified in *Gilberti* that privileges and transactions are distinct subjects of taxation; and *Dale* should control the outcome here. The Township also maintains that the Commonwealth Court erred by failing to consider early decisions in which a city sales tax was held not to impermissibly duplicate a state-imposed mercantile tax, although the mercantile tax was calculated based on the taxpayer's business volume. *See, e.g.,* Blauner's, Inc. v. City of Phila., 330 Pa. 342, 346, 198 A. 889, 892 (1938) ("The city tax is a levy on sales, the state tax is a levy imposed for the privilege of conducting a particular **[*7]** kind of business, albeit the amount of the tax is measured by gross sales."). Finally, the Township contends that the Legislature understands "the distinction between a tax on something and a tax on privileges or uses related to that thing," Brief for Appellant at 13, as illustrated by the LTEA's manufacturing exception pursuant to which political subdivisions are precluded from imposing taxes on manufactured goods "or on any privilege, act or transaction related to the business of manufacturing." 53 P.S. §6924.301.1(f)(4). Since this same "privilege" prohibition does not appear in subsection (f)(1), the Township suggests that this Court should not read such provision as barring application of a general business privilege tax to a business whose revenue consists of rental income.[3]

Several municipalities have submitted *amicus* briefs supporting the Township's position. Their arguments are generally duplicative of those advanced by the Township, albeit they focus primarily on the distinction between taxing transactions and taxing privileges — or, alternatively, between direct and indirect taxation of lease income. They assert this Court's case precedent clarifies that the LTEA permits indirect taxation, via a business privilege tax, of otherwise untaxable transactions or activities.

Lessors argue, first, that subsection 301.1(f)(1) should be read to expressly bar the tax in issue. They highlight *Lynnebrook*'s explanation that subsection (f)(1) represents an "unqualified prohibition on the taxation of leases." Brief for Appellees at 3 (quoting Lynnebrook, 600 Pa. at 119, 963 A.2d at 1267). Quoting dictionary **[*9]** definitions of "lease," Lessors submit that consideration is an essential and elemental component of a lease. Thus, they forward that a tax measured by such consideration is, in fact, a tax on leases. Lessors argue, moreover, that this premise is supported by *Lynnebrook* insofar as it held that a flat tax on lease *transactions* was disallowed by the pre-2008 version of the statute, which only facially precluded taxes on "leases." *See supra* note 3. In further support of a broad reading of (f)(1), Lessors observe that subsection 301.1(f) contains numerous subsections, most of which

[3] Separately, the Township notes that the Commonwealth Court repeatedly referenced the LTEA's prohibition on municipalities taxing "leases or lease transactions." *See, e.g.,* ***Fish***, 100 A.3d at 751. The Township observes that a legislative change from "leases" to "leases or lease transactions" was effectuated by the Act of October 15, 2008, P.L. 1615, No. 130 ("Act 130"), which, notably, specified that the revision did not apply to municipalities taxing such transactions before **[*8]** July 1, 2008. *See* Act 130, §4. The Township finds such limitation relevant because: at most, the tax challenged here is imposed on revenues derived from lease transactions, and not the mere existence of a lease; and the Township's tax was enacted before July 1, 2008. In light of our disposition below, any perceived difference between "leases" and "leases or lease transactions" as the subject of a tax is of no present significance.

proscribe taxation relative to certain subjects using the term "a tax" rather than "any tax." *See, e.g.*, 53 P.S. §6924.301.1(f)(7) (precluding "a tax" on memberships in nonprofit organizations). Because the phrase "any tax" is used for (f)(1)'s lease-tax prohibition, Lessors reason that the Legislature must have intended an especially broad interpretation of that constraint. Relatedly, they argue that the "any tax" phraseology refers back to the types of taxes enumerated in the general grant of powers in subsection (a)(1), including privilege taxes. Lessors conclude that the phrase "any tax," as employed in (f)(1), must therefore be understood to subsume **[*10]** business privilege taxes insofar as they are levied — directly or indirectly — on lease income.

Alternatively, Lessors maintain the tax challenged here is a business privilege tax in name only, at least as applied to their leasing activities. They cite to cases suggesting that the true measure of a tax is not its name but how it operates in practice. *See, e.g.*, *Shelly Funeral Home, Inc. v. Warrington Twp.*, 618 Pa. 469, 477, 57 A.3d 1136, 1141 (2012) (explaining that, "irrespective of how taxes are described, reviewing courts assess their validity based on how they operate in practice"); *Commonwealth v. E. Motor Express, Inc., 398 Pa. 279, 297, 157 A.2d 79, 89 (1959)* ("[I]n the last analysis the nature of the tax depends not upon its label, but upon its incidence, i.e., its practical operation and effect."). Lessors state that, in practice, Article IV operates to tax the income from leases as demonstrated by the Township's decision to consider each rental property a separate place of business. They contend that, while there have been cases in which a business privilege tax was upheld although it captured income from activities excepted from taxation, in virtually all such matters the tax was levied upon monies derived from multiple sources, so that the reviewing court found that it was not a tax upon the excepted activity. *See, e.g.*, *Cheltenham Twp. v. Cheltenham Cinema, Inc., 548 Pa. 385, 697 A.2d 258 (1997)* (upholding a business **[*11]** privilege tax as applied to the gross receipts of a movie theater, notwithstanding that the taxing authority was barred from taxing the sale of movie tickets, where the theater earned its gross receipts from ticket and concession sales). They observe, again, that the present tax as applied to them is distinguishable in that it is only levied upon lease income.

The underlying facts are not in dispute. The issue in this appeal, as noted, is whether the exception appearing at Section 301.1(f)(1) of the LTEA, 53 P.S. §6924.301.1(f)(1), bars application of the Township's general business privilege tax to persons or businesses whose sole income consists of rental payments. More particularly, the question is whether the prohibition of "any tax on . . . leases" precludes such application. ***HN2*** This is an issue of statutory interpretation. As such, it is a question of law over which our review is plenary and *de novo*. *See, e.g.*, *In re D.L.H., 606 Pa. 550, 563, 2 A.3d 505, 513 (2010)*.

Initially, we reject Lessors' assertion that the phrase "any tax" as it appears in *subsection 301.1(f)(1)* is broader in scope than "a tax" as used elsewhere in *subsection 301.1(f)*. Although "any" and "a" are different words, there is no difference in substance between statutory language barring "any tax" on a subject and language **[*12]** barring "a tax" on that subject. *Cf.* *1 Pa.C.S. §1902* ***HN3*** (providing that, in statutory text, the singular includes the plural and *vice versa*). Nor are we persuaded by the suggestion that, to the degree "any tax" may refer back to the enumerated types of taxes that municipalities are otherwise authorized to enact, its use evidences a particularized legislative design to preclude application of a generalized business privilege tax to leasing activities. There is no textual support for this position and Lessors do not reference any decision in which such an interpretation has been endorsed. Moreover, such a reading would be in substantial tension with *Fischer v. City of Pittsburgh, 383 Pa. 138, 118 A.2d 157 (1955)*, discussed below.

The Township's textual argument is more compelling. As noted, the Township highlights that, in the manufacturing exception, the legislative body not only precluded municipal taxes on the manufacturing of goods, it also prohibited taxes "on any *privilege, act or transaction related to*" the manufacturing of such goods. *53 P.S. §6924.301.1(f)(4)* (emphasis added). The emphasized language would be superfluous if the legislative prohibition of "a tax on" manufactured goods had been intended, without more, to prohibit taxes on a business privilege "related to" the making **[*13]** of the goods. *See generally* *Commonwealth v. Ostrosky, 589 Pa. 437, 450, 909 A.2d 1224, 1232 (2006)* (citing *Holland v. Marcy, 584 Pa. 195, 206, 883 A.2d 449, 456 (2005)* (plurality) ***HN4*** ("[W]e cannot assume that the legislature intended any words to be mere surplusage.")); *1 Pa.C.S. §1922(2)* (providing that courts should presume the General Assembly intends the entire statute to be effective and certain). That being the case, we do not read *subsection (f)(1)*'s prohibition on lease taxes as encompassing a similar proscription as to privileges "related to" leases.

Additionally, the legislative decision to bar taxes on privileges, acts, or transactions relating to manufactured goods proved crucial in *Fischer*, where the Court stated that, absent such language, Pittsburgh's earned-income tax would have been enforceable as against the owners of a manufacturing concern in the city. Reasoning, however, that selling manufactured products is a privilege, act, or transaction associated with manufacturing, the Court disallowed such enforcement. *See* Fischer, 383 Pa. at 142-44, 118 A.2d at 159-60.[4] Conversely, in *Dale*, the Court dealt with circumstances directly analogous to those of the present case inasmuch as the exception at issue — a ban on municipal taxes on the construction of, or improvements to, residential dwellings, *see* 53 P.S. §6924.301.1(f)(11) — did not contain the expansive language of the manufacturing exception. A construction **[*14]** contractor involved solely in erecting residential dwellings questioned whether the city's business privilege tax could be enforced against it. This Court held that the tax could be enforced against the contractor, explaining that it was a tax on the privilege of doing business within the city, and not a tax upon the construction of residential dwellings as such. *See* Dale, 559 Pa. at 403, 741 A.2d at 189 (quoting Middletown Twp. v. Alverno Valley Farms, 105 Pa. Cmwlth. 311, 315, 524 A.2d 1039, 1041 (1987)).

HN5 *Dale*'s reasoning is consistent with a line of cases distinguishing business privilege taxes (or mercantile license taxes, which are similar in nature) from taxes on transactions or sales. In *Gilberti*, for example, this Court emphasized that the LTEA lists transactions and privileges as two distinct subjects of taxation, and hence, a business privilege tax could be applied to transactions occurring outside the city limits so long as those transactions were attributable to an office in the city — whereas a *transaction* tax on such extraterritorial transactions would have been impermissible. *See* Gilberti, 511 Pa. at 106, 511 A.2d at 1324; *see also* F.J. Busse Co. v. City of Pittsburgh, 443 Pa. 349, 279 A.2d 14 (1971) (holding that a business privilege tax **[*15]** levied on gross income, including income derived from the use of tangible property, did not duplicate a state tax on use of the same property, since the two taxes were levied upon different subjects); Blauner's, Inc., 330 Pa. at 346, 198 A. at 892 (indicating that a city sales tax did not duplicate a state mercantile license tax since the city taxed sales whereas the state taxed the privilege of conducting business, notwithstanding that both taxes were measured by gross sales).

In light of this precedent, it is established law in Pennsylvania that business privileges and transactions are separate and distinct subjects of taxation. Additionally, the privilege tax here mirrors the Pittsburgh ordinance at issue in Gilberti, in that it is levied upon the privilege of doing business in the Township and, with certain exceptions not presently relevant, it is calculated based on gross receipts from transactions occurring anywhere — so long as they can be attributed to the Township.

This is not to say that a business privilege tax applicable *only* to leasing businesses would be permissible under subsection (f)(1). In this sense, we reaffirm Lynnebrook's observation that subsection (f)(1) constitutes a tax exception to be broadly construed in favor of the taxpayer, as well **[*16]** as its ultimate holding that a tax directed specifically to lease transactions constitutes a prohibited tax on leases. *Cf.* In re Sch. Dist. of Hampton Twp., 362 Pa. 395, 397, 67 A.2d 376, 377 (1949) ***HN6*** ("[A] tax on the privilege of employing property is, from a practical standpoint, the same in effect as a tax upon the property itself[.]"). We also agree, in the abstract at least, with the Commonwealth Court's suggestion that there is no substantive difference between a tax upon the total of all rent payments and a tax on each individual rent payment. *See* ***Fish***, 100 A.3d at 751. This is consistent with cases highlighted by Lessors, such as *Shelly Funeral Home*, which reiterate a longstanding precept that ***HN7*** reviewing courts consider a tax's practical operation, and not merely its label. *See* Pittsburgh Rys. Co. v. City of Pittsburgh, 211 Pa. 479, 488, 60 A. 1077, 1081 (1905); *see also* Allfirst Bank v. Commonwealth, 593 Pa. 631, 643 n.10, 933 A.2d 75, 82 n.10 (2007) (citing cases).

The difficulty here is in the way the Commonwealth Court applied the principle. The court overlooked that, unlike the tax invalidated in *Lynnebrook*, the Township's tax is not targeted to leases. It is, rather, a general business privilege tax which encompasses all for-profit businesses that offer services to the public within the Township's borders. *See* ***LOWER MERION*** TWP., PA., MUN. CODE art. IV, §138-40 (1976). The question is whether businesses which derive their income only from **[*17]** leases must be excluded from the tax's

[4] *Fischer* involved the manufacturing exception in the LTEA's predecessor statute. That exception was, for present purposes, substantively identical to the one in the LTEA.

reach. Based on the precedent discussed above, clarifying that privileges and transactions are separate subjects of taxation, as well as the absence of any language in *subsection 301.1(f)(1)* prohibiting taxes on privileges, acts, or transactions related to leases, we conclude that the Township's tax is enforceable relative to such businesses.

HN8 We acknowledge that the precedent on which we currently rely, including *Dale*, is in tension with other decisions which may be read to suggest that application of a generalized business privilege tax would be impermissible relative to a taxpayer whose revenues are derived exclusively from untaxable transactions. One notable example is *Cheltenham Cinema* — decided two years before *Dale* — in which the Court suggested in *dicta* that if the taxpayer had obtained its income solely from movie tickets, it would have escaped liability under the township's business privilege tax due to the LTEA's ban on taxing movie admission sales. *See Cheltenham Cinema, 548 Pa. at 389-90, 697 A.2d at 261*; *see also Busse, 443 Pa. at 355, 279 A.2d at 17* (containing analogous *dicta* relating to a prohibition on municipal taxation of tangible property). To the extent such *dicta* conflicts with *Dale* and our present holding, it **[*18]** is disapproved.

The order of the Commonwealth Court is reversed and the matter is remanded for reinstatement of the common pleas court's order dismissing the complaint.

Mr. Justice Baer and Madame Justice Todd join this opinion.

Mr. Justice Baer files a concurring opinion.

Mr. Justice Eakin files a dissenting opinion in which Mr. Justice Stevens joins.

Concur by: BAER

Concur

CONCURRING OPINION

MR. JUSTICE BAER

I join the majority opinion to the extent it holds that taxing the privilege of doing business as a landlord is not the same as taxing leases. We have consistently held that a business privilege tax is distinct from a transactional tax. See, e.g., *Gilberti v. City of Pittsburgh, 511 Pa. 100, 511 A.2d 1321 (Pa. 1986)* (holding that levying a tax on the privilege of doing business is not the same as taxing the individual transactions of that business). However, that does not mean that a taxing authority may cloak a prohibited transactional tax merely by designating it a business privilege tax. See *Shelly Funeral Home, Inc. v. Warrington Twp., 618 Pa. 469, 57 A.3d 1136, 1141 (Pa. 2012)* (providing that the substance of a tax should dictate the validity of the tax). Moreover, the fact that a taxing authority applies its business privilege tax to all businesses equally should not allow a taxing authority to impose an otherwise impermissible tax.

A business privilege **[*19]** tax must be distinguishable from a prohibited transactional tax for it to be valid. See *School District of Scranton v. Dale & Dale Design & Development, Inc., 559 Pa. 398, 741 A.2d 186 (Pa. 1999)* (finding that taxing a residential contractor's privilege of conducting business within the city, determined by the gross receipts of his business, is not a tax upon the construction of a residential dwelling); *Cheltenham Twp. v. Cheltenham Cinema, Inc., 548 Pa. 385, 697 A.2d 258, 261 (Pa. 1997)* (finding that a business privilege tax on a movie theater was permitted despite a prohibition on a transactional tax on "admissions to motion picture theaters" because the business privilege tax did not tax "the identical subject matter" nor was it "measured by the same base" as the prohibited transactional tax).

The statute here prohibits "any tax . . . on leases or lease transactions." *53 P.S. § 6924.301.1(f)*. A lease is a contract. The prohibition does not purport to cover rental income or revenue derived from leases. It merely prohibits a direct tax on leases, as we found in *Lynnebrook & Woodbrook Associates, L.P. v. Borough of Millersville, 600 Pa. 108, 963 A.2d 1261 (Pa. 2008)*. The tax at issue is not a tax on leases. It is a tax on the privilege of doing business within the township. As I view the privilege of doing business as a landlord to be distinct from a tax on a lease, I agree that the tax at issue is not prohibited.

Dissent by: EAKIN

Dissent

DISSENTING OPINION

MR. JUSTICE EAKIN

I agree with the Majority that a tax on a privilege **[*20]** and a tax on a transaction are categorically distinct in our Commonwealth. However, where the amount of a privilege tax is a fixed percentage of transactional income, it becomes a titular distinction with no actual difference. Where the tax on the "privilege" is determined to the penny by the amount of non-taxable income, one is not paying tax on a privilege at all — one is paying tax on lease income, which defeats the statutory prohibition.

The Majority's interpretation of the Local Tax Enabling Act (LTEA), *53 P.S. § 6924.301.1*, allowing the taxing body to exempt its tax from the prohibition of the statute, conflicts with our analysis in *Lynnebrook & Woodbrook Assocs., L.P. v. Borough of Millersville, 600 Pa. 108, 963 A.2d 1261 (Pa. 2008)*. In *Lynnebrook*, we unanimously found the provision to be "an unqualified prohibition on the taxation of leases." *Id. at 1267* (citation omitted). Apparently the "unqualified prohibition" is not so unqualified that it cannot be avoided simply by retitling it, vitiating the plain language of the LTEA's prohibition. A tax is to be analyzed by its practical operation and effect, not merely by its label. *Commonwealth v. E. Motor Express, Inc., 398 Pa. 279, 157 A.2d 79, 89 (Pa. 1959)*. Stated another way, substance trumps labelling in the realm of tax law; what counts is what you do, not what you call it. What this municipal tax does, as applied to Appellees, is **[*21]** to impose a tax based solely on income from leases.[1]

The LTEA, *53 P.S. § 6924.301.1(a)*, grants municipalities the authority to tax "persons, transactions, occupations, privileges, subjects and personal property" within their respective jurisdictions; where it is unclear whether the legislature intended to permit municipal taxation of some privilege, act, or *res*, we must err on the side of strict interpretation against the government and exclude the subject from taxation until such time as the legislature issues a clear grant of authority. *Marson v. City of Philadelphia, 342 Pa. 369, 21 A.2d 228, 230-31 (Pa. 1941)*. Likewise, in *Lynnebrook*, we concluded *§ 6924.301.1(f)(1)* was an exception to such authority, as opposed to an exemption; therefore, the provision must be strictly construed in favor of **[*22]** the taxpayer and against the taxing authority. *Lynnebrook, 963 A.2d at 1267*; *1 Pa.C.S. § 1928(b)(5)*.

The Majority opines that legislative language barring taxation of "privileges, acts, or transactions," stated elsewhere in the statute, serves as contextual indicia that the legislature intended taxation on the privilege of leasing to be permissible. Majority Slip Op., at 9. Under the maxim *expressio unius est exclusio alterius*,[2] this reasoning is not without its allure, but appears contrary to our precedent. Specifically, in *Lynnebrook*, we determined that the exception provision was enacted by the legislature to remedy the "mischief" caused when "overweening municipal authorities impos[e] taxes beyond the LTEA's authorization." *Lynnebrook, 963 A.2d at 1267*. To overween is to regard one's own thinking too highly — as in trying to think of a way to elude a clear statutory prohibition by titling a tax on income as a tax on the privilege of earning that income.

Is there a difference between taxing income and taxing the *privilege* of income? In theory, they are distinguishable, as my colleagues aptly point out, but in practice, both involve exactly the same thing — paying the municipality a percentage of the profit **[*23]** from the lease. The only difference is title and timing, and if taxing authorities can avoid unambiguous legislative prohibitions simply by renaming the tax and rescheduling its collection, what is the purpose of the exception in the first place? Is this really construing the statute in favor of the taxpayer, who must now reflect, "There's a statute that says my overweening municipality can't tax my lease income, but I'm writing them a check to pay a 'privilege' tax based entirely on the same exact income they can't tax? What kind of double talk is this?" If a landlord makes another dollar on a lease, they have to pay more tax — what increased, their privilege or their lease income?

If the privilege tax were a fixed amount, or scaled to some factor or category of income that is not excepted from taxation, the distinction between transaction and privilege would be defensible. However, the amount of the privilege tax here is precisely dependent on the amount of income from leases and nothing else at all. If

[1] Where a business's overall income was derived from multiple activities, only one of which was proscribed by the LTEA, this Court has held the proscribed income stream may be subsumed by the business's overall revenue, and taxed indirectly. *Cheltenham Twp. v. Cheltenham Cinema, Inc.*, 548 Pa. 385, 697 A.2d 258, 262 (Pa. 1997). However, even where we did so, we expressly recognized, albeit in *dictum*, that the LTEA would prohibit applying that same tax to a business whose income stream was *wholly* derived from an activity excepted from taxation. *Id.* at 261. That is precisely the situation presented here.

[2] Expression of one thing is the implied exclusion of another thing.

we are to interpret in favor of the taxpayer, can we not see through the charade? When a tax by whatever name is manifestly a *de facto* tax on matters which the state does not allow **[*24]** a municipality to tax, let the scales fall from our eyes.

The Majority's holding allows municipalities to rely on semantic distinctions to reframe *ultra vires* taxation, circumventing express legislative prohibitions and validating otherwise impermissible levies. Plainly put, after its holding here, the nominal reaffirmation that *Lynnebrook* is good law, to the extent that taxes levied directly on leases are still prohibited, is meaningless. The framework for collecting the prohibited tax by calling it something else is established.[3] By engineering its lease tax in the guise of a privilege tax, indirectly collecting the same revenue it could not collect directly, the municipality may frustrate the legislature's intention that lease income should be spared from local taxation.

The Bard once mused: "What's in a name? That which we call a rose by any other name would smell as sweet." William Shakespeare, *Romeo and Juliet*, Act II, Scene II. In the realm of tax law, the aphorism holds true, though the odor may be less honeyed. Irrespective of labels, taxation of lease income under the LTEA is prohibited; that tax smells the same, whether levied directly, as in *Lynnebrook*, or repackaged as an indirect privilege tax, as here. For whatever reason, municipal taxation on leases was barred, specifically, unequivocally, and clearly by the legislature; **[*26]** such is established by the plain language of the LTEA, and we should not place our imprimatur on municipal action that circumvents such an obvious legislative prohibition.

You cannot turn a duck into a goose by putting a sign that says "goose" around its neck — it's still a duck.

Mr. Justice Stevens joins this dissenting opinion.

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[3] The Majority states a contrary holding would render the legislature's use of the phrase "privileges, acts, or transactions" mere surplusage. Majority Slip Op., at 8. However, it neglects to give the same treatment to the legislature's choice of the term, "any" tax, although the legislature uses the distinct term, "a" tax, in other provisions of the LTEA. The Majority takes the position that there is no practical difference **[*25]** between "a" tax and "any" tax, comparing this distinction to the difference between singular and plural terms, which are used interchangeably in statutory text. *Id.* However, the plural of "a tax" is "taxes," not "any tax." Under the rules of statutory construction, we are obliged to give effect to all terms and provisions in a statute, wherever possible. 1 Pa.C.S. § 1921(a). The Majority properly notes that we may not assume the legislature intended any words to be surplusage, and thus to give effect to all terms and provisions in the statute, we must interpret "a tax" to mean a specific tax, and "any tax" to mean a tax of whatever kind.