IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

LORA JEAN WILLIAMS, ET. AL.,	:	September Term 2016
Plaintiffs,	:	
v.	:	No. 1452
CITY OF PHILADELPHIA, ET. AL.,	:	
Defendants.	:	Commerce Program
	:	
	:	Control Number 16100940

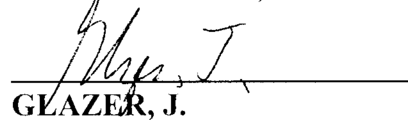
ORDER

AND NOW, this 19d day of December 2016, upon consideration of Defendants' preliminary objections to Plaintiffs' complaint, Plaintiffs' response in opposition and Defendants' reply, it is hereby

ORDERED

that the preliminary objections are **SUSTAINED** and the complaint is dismissed in its entirety.

BY THE COURT,



GLAZER, J.

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OPINION

GLAZER, J. **December 19, 2016**

This is an action seeking declaratory and injunctive relief to invalidate the Philadelphia Beverage Tax ("PBT"). Plaintiffs, Lora Jean Williams, Gregory J. Smith, CVP Management, Inc. d/b/a or t/a City View Pizza, John's Roast Pork, Inc. f/k/a John's Roast Pork, Metro Beverage of Philadelphia, Inc. d/b/a or t/a Metro Beverage, Day's Beverage, Inc. d/b/a or t/a Day's Beverages, American Beverage Association, Pennsylvania Beverage Association, Philadelphia Beverage Association, and Pennsylvania Food Merchants Association (collectively "Plaintiffs") are consumers, retailers, distributors and trade associations who allege injury from the PBT when implemented. Defendants are the City of Philadelphia and Frank Breslin, the Commissioner of the Philadelphia Department of Revenue (collectively "Defendants").

The PBT was passed on June 16, 2016, by the Philadelphia City Council by a vote of 13-4 and was signed into law on June 20, 2016, by the Honorable James Kenney, Mayor of the City of Philadelphia. The PBT will become effective January 1, 2017 and will impose a 1.5 cent per fluid ounce tax by distributors to dealers on the transfer of sugar sweetened beverages ("SSBs") as defined by the ordinance to Philadelphia dealers. The first collection deadline is February 20, 2017.

The PBT states that the tax is imposed only when the "supply, acquisition, delivery or transport is for the purpose of the dealer's holding out for retail sale within the City the sugar-sweetened beverage or any beverage produced therefrom." The PBT defines "sugar-sweetened beverage" as "any non-alcoholic beverage that lists as an ingredient: (1) any form of caloric sugar-based sweetener, including, but not limited to, sucrose, glucose or high fructose corn syrup; or (2) any form of artificial sugar substitute, including stevia, aspartame, sucralose, neotame, acesulfame potassium (Ace-K), saccharin, and advantame."[1] The PBT defines "Distributor" as "any person who supplies sugar-sweetened beverage to a dealer."[2] "Dealer" is defined by the PBT as "any person engaged in the business of selling sugar-sweetened beverage for retail sale within the City, including but not limited to restaurants; retail stores; street vendors; owners and operators of vending machines; and distributors who engage in retail sales."[3]

The PBT specifically excludes the following beverages from the definition of "sugar-sweetened beverages": (1) baby formula; (2) "medical food" as it is defined under the Orphan Drug Act; (3) any product more than fifty percent (50%) of which, by volume, is milk; (4) any product more than fifty percent (50%) of which, by volume, is fresh fruit, vegetables or a combination of the two added by someone other than the customer; (5) unsweetened drinks to which a purchaser can add, or can request that a seller add, sugar at the point of sale, and (6) any syrup or other concentrate that the customer combines with other ingredients to create a beverage.[4]

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[1] Complaint ¶ 44.

[2] Complaint ¶ 45.

[3] Complaint ¶ 46.

[4] Complaint ¶ 47.

The PBT will be imposed only once in the chain of supply, delivery, and distribution and is imposed "only when the supply, acquisition, delivery or transport is for the purpose of the dealer's holding out for retail sale within the City the sugar- sweetened beverage or any beverage produced therefrom."[5] Distributors are generally responsible for the payment of the tax to the City. In the event the dealer does not acquire an affected beverage from a registered distributor and the distributor does not pay the tax, then the dealer is responsible for payment of the tax. The tax requires the distributor to provide "a receipt detailing the amount of sugar-sweetened beverage supplied in the transaction and the amount of tax owing on such a transaction" to the dealer to whom the distributor supplies a "sugar-sweetened beverage."

On September 14, 2016, plaintiffs filed this action seeking to invalidate the PBT by asserting three preemption claim challenges and four uniformity clause challenges. On the same day the complaint was filed, plaintiffs also filed an Emergency Application for the Exercise of King's Bench Powers in the Pennsylvania Supreme Court. On November 2, 2016, the Pennsylvania Supreme Court denied the Emergency Application for King's Bench powers. Defendants filed preliminary objections which are now ripe for decision.[6]

DISCUSSION

I. The PBT is expressly authorized by the Sterling Act, is not duplicative of the Pennsylvania Sales and Use Tax and is not preempted.

In count I of the complaint, plaintiffs claim that the Sterling Act expressly preempts the PBT. All municipalities, including the City of Philadelphia, are creations of the Commonwealth and

[5] Complaint ¶ 49.

[6] In addition to the Emergency Application for the Exercise of King's Bench Powers, plaintiffs also filed a petition for injunctive relief as well as a miscellaneous motion to supplement the complaint with a memorandum of law. The petition for injunctive relief and the miscellaneous motion shall be disposed of in separate orders.

have no inherent powers of their own. Rather, "they possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect."[7] Even where the Commonwealth has granted powers to act in a particular field, such powers do not exist if the Commonwealth preempts the field. The preemption doctrine establishes a priority of laws enacted by various levels of government. Under this doctrine, local legislation cannot permit what a Commonwealth statute or regulation prohibit and cannot prohibit what Commonwealth enactments allow. Preemption may be implicit, as when the Commonwealth regulation occupies the entire field or it may be express where the Commonwealth enactment contains language specifically prohibiting local authority over the subject matter.[8] As it pertains to the matter at issue, the question to be addressed is whether the PBT is preempted by the Commonwealth's Sales and Use Tax. In order to resolve this question, the Sterling Act must be considered.

The Sterling Act empowers the City of Philadelphia to levy, assess and collect certain additional taxes for general revenue purposes under certain restrictions.[9] The Act provides as follows:

> "the council of any city of the first or second class shall have the authority by ordinance, for general revenue purposes, to levy, assess and collect, or provide for the levying, assessment and collection of, such taxes on persons, transactions, occupations, privileges, subjects, and personal property, within the limits of such city of the first or second class, as it shall determine, Except that such council shall not have authority to levy, assess and collect, or provide for the levying, assessment and collection of, any tax on a privilege, transaction, subject or occupation or on personal property which is now or may hereafter become subject to a State tax or license fee." [10]

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[7] *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009) quoting *City of Phila. V. Schweiker*, 579 Pa. 591, 605, 858 A.2d 75, 84 (2004).

[8] *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont, supra.*

[9] *Mastrangelo v. Buckley*, 433 Pa. 352, 376, 250 A.2d 447, 459 (1969)

[10] *United Tavern Owners of Philadelphia v. Sch. Dist. of Philadelphia*, 441 Pa. 274, 283–84, 272 A.2d 868, 872 (1971) citing, Act of August 5, 1932, P.L. 45, s 1, 53 P.S. s 15971.

The purpose of the Sterling Act is to prohibit double-taxation where two governmental units, the state and its political subdivision, are seeking revenue from a tax or license fee on the same base. However, merely because a business is taxed on a certain aspect of its operations by the Commonwealth, the Sterling Act does not preclude a tax by a political subdivision on a different aspect of its operations.[11] For example, the court in *National Biscuit Co. v. Philadelphia*[12] held that the payment of a state corporate income tax does not bar the city from imposing a mercantile tax which is based on the gross volume of business. Similarly, the court in *Philadelphia v. Samuels*[13] held that there was no conflict between the state corporate income tax and a parking lot tax based on gross receipts. Although in both cases the court used the labels "property involved" and "excise tax" to distinguish the taxes involved, the distinction does not rest on labels attached to the tax, but rather on the different aspects of the business which are being taxed. The Sterling Act only forbids a political subdivision from imposing a tax on the same aspect of a business that is also taxed by the Commonwealth.

In determining whether a tax duplicates another tax and results in double taxation, the incidence of the two taxes is controlling. The incidence of tax embraces the subject matter thereof and more importantly, the measure of the tax, i.e. the base or yardstick by which the tax is applied. If these elements inherent in every tax are kept in mind, the incidence of the two taxes may or may not be duplicative. [14] Applying this test to the instant matter, this court finds as

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[11] *Prudential Ins. Co. of Am. v. City of Pittsburgh*, 38 Pa. Cmwlth. 15, 17, 391 A.2d 1326, 1330 (1978).

[12] 374 Pa. 604, 98 A.2d 182 (1953).

[13] 338 Pa. 321, 12 A.2d 79 (1940).

[14] *Pocono Downs, Inc. v. Catasauqua Area School Dist.*, 669 A.2d 500 (Cmwlth. Ct. 1996) citing *Com v. National Biscuit Co.*, 390 Pa. 642, 652, 136 A.2d 821, 825-826 (1957), appeal dismissed, 357 U.S. 571, 78 S.Ct. 1383, 2 L.Ed. 2d 1547 (1958).

a matter of law that the PBT is not duplicative of the Commonwealth's Sales and Use Tax and is therefore not preempted. This conclusion is not only supported by the language of the PBT but also by the longstanding legal precedent addressing duplication.

The PBT is a tax on the distribution of SSBs on a per ounce basis and legal liability to pay the tax remains on distributors and, in certain instances, dealers. Conversely, the Commonwealth's Sales and Use Tax imposes a tax on soft drinks as defined in 72 P.S. § 7201(a). The Commonwealth's tax applies to non-alcoholic drinks including Coca-Cola and Pepsi, lemonade, fruit juice, root beer, and Dr. Pepper. The Commonwealth's tax excludes natural fruit and vegetable juices, milk, coffee, and tea. The Commonwealth's Sales and Use Tax is a 6% tax on the "sale at retail of tangible property or services".[15] The Commonwealth's Sales and Use tax is applied to the purchase price of retail sales of personal property and legal liability to pay the tax falls on the consumer.

The PBT does not tax the same "privilege, transaction, subject or occupation or ....personal property" as the Commonwealth's Sales and Use Tax. The respective taxes apply to two different transactions, have two different measures and are paid by different taxpayers. The subject of the PBT is a non-retail, distribution level tax on SSBs. The PBT is only triggered when the SSBs are distributed by the distributor to the dealer, irrespective of whether the dealer sells the product to the consumer. The tax is measured by the volume of fluid ounces of the SSB and is imposed on the distributor. Alternatively, the Commonwealth's Sales and Use Tax is imposed on a sale at the retail level, is measured by the purchase price of the retail sale and is paid by the consumer. Since the incidence of the PBT and the incidence of the Commonwealth's Pennsylvania Sales and Use Tax are not the same, the PBT is not preempted.

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[15] 72 P.S. § 7202(a).

In an attempt to strike down the PBT, plaintiffs argue that the incidence of tax is determined not by its plain meaning and operation but by any post-tax economic consequences experienced in the marketplace. Specifically, plaintiffs argue that the incidence of the tax is the same because the PBT will cause the distributor to pass the economic burden of the tax onto the dealer who will then pass the economic burden to the consumer. While at preliminary objections the court is constrained to accept all well pleaded facts as true as well as all reasonable inferences drawn from those facts, plaintiffs' allegations regarding the economic incidence of the PBT are not relevant to this court's determination of whether the PBT is duplicative of the Commonwealth Sales and Use tax. What is determinative is the how the PBT operates, not what private actors will do in response to the tax to offset the burden of the tax or other post-tax economic transactions.[16] As recognized by the United States Supreme Court in *Gurley v. Rhoden*[17], the economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise. However, the Court found that irrelevant in deciding the statute's constitutionality.

In *Gurley v. Rhoden*,[18] the Supreme Court upheld the fuel tax, finding that the congressional purpose was plainly evident where the statute "place[d] the incidence of tax on the 'producer.'"[19] While the Supreme Court acknowledged that "[t]he ultimate economic burden of the tax rest[ed] upon the purchaser-consumer," it was immaterial because the "legal incidence of

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[16] *Com. v. National Biscuit Co.*, 390 Pa. 642, 136 A.2d 821, 826 (1957).

[17] 421 U.S. 200, 95 S.Ct. 1605, 44 L. Ed. 2d 110 (1975).

[18] Id.

[19] Id. at 421 U.S. at 205.

the tax [was] on the producer."[20] Like the fuel tax in *Gurley*, the ultimate economic burden of the tax may be imposed upon the purchaser-consumer, but the legal incidence is on the distributor.

Blauner's Inc. v. Philadelphia[21] stands for the same proposition. In *Blauner*, the Pennsylvania Supreme Court held that the sales tax and corporate net income tax was not duplicative because the incidence of taxation was "wholly different." The court upheld the validity of the tax because the sales tax was "imposed upon the purchaser or consumer," whereas the net income tax was imposed "on the corporation receiving the income."[22]

The PBT expressly states that the tax is on the distribution of SSBs as opposed to a tax on the SSB property itself.[23] Mere ownership of the SSBs is not enough to trigger the tax. The PBT is triggered once the SSBs are supplied to a dealer by a distributor for retail sale and is not a tax on the same property subject to the Commonwealth's Sales and Use Tax. As such, the PBT is not preempted and the preliminary objection to count I is sustained and the count is dismissed.[24]

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[20] *Id.* at 207 (quoting *Martin Oil Serv., Inc. v. Dep't of Revenue,* 273 N.E.2d 823, 826 (Ill. 1971)); *see also United States v. New Mexico*, 455 U.S. 722, 722 (1982)) (finding that the tax did not violate the United States' immunity from state taxation just because "the tax has an effect on the United States, or because the Federal Government shoulders the entire economic burden of the levy, or because the tax falls on the earnings of a contractor providing services to the Government").

[21] 330 Pa. 342, 198 A. 889 (Pa. 1938)

[22] *Id.*

[23] See Phila. Code § 19-4103(1).

[24] Because the court finds that the PBT was expressly authorized by the Sterling Act and therefore not expressly preempted, conflict preemption does not exist. Accordingly, the preliminary objection to count II is also sustained and the count is dismissed.

II. The PBT is not preempted by SNAP since the tax is not collected on Retail Sales.

In count III of the complaint, plaintiffs claim that the PBT impermissibly conflicts with the Commonwealth's implementation of SNAP because it causes SNAP benefits to be used to pay a sales tax. The Supplemental Nutrition Assistance Program ("SNAP") is a federally funded program whose benefits help supplement an individual's or a family's income to help buy nutritious food. By mandate of the Food Stamp Act of 1977, a state may not receive federal SNAP funds unless it agrees not to impose a sales and use tax on eligible grocery items, including low-calorie and regular soft drinks. [25] Congress amended the Food Stamp Act in 1985 to ensure that states did not circumvent its prohibition on collecting state or local sales taxes on SNAP purchases in order to "put an end to what is, in effect, a transfer of revenues from the federal government to state and local governments at the expense of low income person...Federal dollars provided for food assistance should not be diverted to other purposes."[26] This prohibition however does not apply to the PBT because SNAP recipients, the ultimate consumers, will not pay the PBT, given that the incidence of tax is at the distribution level.

The scope of SNAP is limited to the "purchase [of] food *from retail food* stores."[27] The PBT is not a sales tax on the consumer, but rather a tax on the distributor.[28] As discussed above, the incidence of taxation is assessed by examining the statute's intended taxpayer, and not the economic impact of the tax.[29] Under the plain terms of the PBT, the tax is not collected upon

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[25] Complaint ¶ 12.

[26] Complaint ¶ 13 citing H.R. Rep. 99-271 (1)(1985).

[27] 7 U.S.C.A. § 2013 (a).

[28] Phila. Code § 19-4101(1), (2) (2016) (enacted); See Phila. Code § 19-4103(1) (2016) (enacted).

[29] See, *Gurley v. Rhoden, supra at* 421 U.S. 200, 205 (1975).

"purchases" at "retail" made with food stamps, but only upon non-retail, distributor-level transactions. Since the PBT's incidence of taxation is not on the consumer and the tax is not paid using SNAP benefits, the PBT is not preempted. Accordingly, the preliminary objection to count III is sustained and the count is dismissed.[30]

III. The PBT does not violate the Uniformity Clause of the Pennsylvania Constitution.

Counts IV through VII of plaintiffs' complaint allege that the PBT violates the Uniformity Clause of the Pennsylvania Constitution. Plaintiffs allege that the PBT is not uniform because it falls on four different classes, soft drinks, distributors, retailers and consumers, on an unequal basis. Specifically, plaintiffs allege that the PBT results in an enormous range of tax burdens across the classes subject to the tax because it imposes a flat tax per unit of volume regardless of the market price or wholesale price of the SSB. However, the only classes created by the PBT are distributors and arguably SSBs which are one and the same for purposes of this analysis. The consumer and retailer classes identified by plaintiffs are not classes created by the PBT and are therefore not subject to tax liability under the PBT.

It is clear from the complaint that plaintiffs' uniformity challenge to the PBT is specifically directed to the tax burden to be borne by the respective distributors who supply SSBs to retailers within the City of Philadelphia. According to plaintiffs, the PBT does not operate uniformly since a distributor that sells small quantities of high-cost beverages will owe far less tax than one who distributes large quantities of budget beverages, even if the revenues or profits of the former are higher.

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[30] Based on this ruling, the question of subject matter jurisdiction need not be considered.

The Uniformity Clause of the Pennsylvania Constitution states "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." [31] This clause requires that every tax "operate alike on the classes of things or property subject to it."[32] "While reasonable and practical classifications in tax legislation are justifiable and often permissible, when a method or formula for computing a tax will, in its operation or effect, produce arbitrary, unjust, or unreasonably discriminatory results, the uniformity requirement is violated."[33]

The Uniformity Clause requires that all taxpayers in a given class be treated uniformly, without regard to the amount involved.[34] Here, the distributors are taxed based on volume in similar fashion to fuels and alcoholic beverages. [35] The Uniformity Clause does not require absolute equality and perfect uniformity in taxation, and any doubts as to the constitutionality of the statute are to be resolved in favor of upholding the statute.[36] In evaluating a tax for uniformity purposes, the court's sole purpose is to determine the ordinance's constitutionality. It is the responsibility of the legislature to question whether the tax is equitable and just. [37] "[A] tax

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[31] PA. Const. art. VIII, § 1. "All taxes" includes property taxes and specific taxes.

[32] *Commonwealth v. Overholt & Co.*, 331 Pa. 182, 200 A. 849, 853 (1938).

[33] *Clifton v. Allegheny Cnty.*, 600 Pa. 662, 969 A.2d 1197, 1211 (2009).

[34] *Saulsbury v. Bethlehem Steel Company,* 413 Pa. 316, 196 A.2d 664 (1964).

[35] 75 P.S. § 9004 (fuel taxed by gallon), 74 Pa. C.S. § 6121 (aviation fuel taxed by gallon) and 72 P.S. § 9003 (alcohol taxed by ounces).

[36] *Parsowith v. Com. Dept. of Revenue,* 555 Pa. 200, 723 A.2d 659, 663–64 (1999).

[37] Com. v. Girard Life Ins. Co., 305 Pa. 558, 158 A. 262 (1932).

enactment will not be invalidated unless it clearly, palpably, and plainly violates the Constitution."[38]

Plaintiffs' rely upon *Commonwealth v. Overholt,*[39] to support their position that the PBT violated the Uniformity Clause. In *Overholt*, the court held that a $2 per gallon tax on all alcohol stored within Pennsylvania violated the uniformity clause because it did not take into consideration the value of the liquor involved resulting in the owner of cheaper liquor bearing a greater burden than the owners of expensive liquors.[40] The tax was not invalidated based on unequal tax burdens and profit margins when the tax was applied. Rather, after the plaintiff conceded that the tax at issue was a property tax, the tax was invalidated as non-uniform based on how the property to be taxed was valued.[41] Here, valuation of property is not in issue because the PBT is not a property tax but a specific tax on the privilege of distributing SSBs in the City of Philadelphia. Consequently, the PBT, a tax on distribution, unlike the property tax in *Overholt*, need not be assessed on an *ad valorem* basis.[42]

The PBT's manner and measure of calculating the tax is uniformly applied to distributors. The PBT levies a tax on per fluid ounce of SSBs distributed in the City to dealers at a rate of 1.5

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[38] *Wilson Partners, L.P. v. Commonwealth Bd. of Finance and Revenue,* 558 Pa. 462, 737 A.2d 1215, 1220 (1999) (citations and internal quotation marks omitted).

[39] 331 Pa. 182, 200 A. 849 (Pa. 1938)

[40] *Id.* 331 Pa. at 851.

[41] Plaintiffs also rely upon *Amidon v. Kane*, 444 Pa. 38, 279 A.2d 53 (Pa. 1971) which involves a uniformity challenge to an income tax. *Amidon*, however, is distinguishable since an income tax is a property tax.

[42] Taxes are either specific or *ad valorem*. Specific taxes are a fixed amount by the head or number, or by some standard of weight or measurement and require no assessment other than a listing or classification of the subjects to be taxed. An *ad valorem* tax is a tax of a fixed proportion of the value of the property with respect to which the tax is assessed, and requires the intervention of assessors or appraisers to estimate the value of such property before the amount due from each taxpayer can be determined. *Commonwealth v. Overholt & Co.*, 331 Pa. 182, 200 A. 849, 852 (1938). The PBT is a specific tax based on the "supply, acquisition, delivery or transport" of SSBs for the purpose of the dealer's holding out for retail sale within the City of sugar-sweetened beverage.

cents per ounce. As such, all distributors are subject to the same tax calculation formula and therefore no disparate treatment exists within the distributor class in regard to the formula and rate of tax. The PBT is measured by volume of SSBs distributed which is related to the government's interest in having its residents abstain from the range of drinks covered by the PBT.

The case *sub judice* is more akin to *Wanamaker v. Philadelphia School District et al.*[43] In *Wanamaker*, the Supreme Court addressed the issue of whether a Business Use and Occupancy Tax, calculated based on the assessed value of real estate, the amount of square footage used or occupied and the duration of the occupancy violated the uniformity clause. The taxpayers in *Wanamaker* complained that they would bear very different tax burdens as a percentage of their total real estate value depending on the amount of space used or occupied and the time spent occupying that space. Despite the taxpayers' argument of unequal tax burdens, the court found the tax to be uniform since the Business Use and Occupancy Tax was a privilege tax on the use of real estate and not a property tax. In doing so, the Court explained that while economically the incidence of the tax is on the property itself, its legal incidence is on the privilege of using the real estate, making it a true excise tax.[44] The PBT, like the tax in *Wanamaker*, is not a property tax since the legal incidence of the tax is based on the privilege of distributing SSBs in Philadelphia. Consequently, since the PBT is not a property tax it need not be assessed *ad*

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[43] 441 Pa. 567, 274 A.2d 524 (1971).

[44] *Id.* See also, *Paul L. Smith, Inc. v. Southern York Cty. Sch. Dist.*, 44 Pa. Cmwlth. 227, 233, 403 A.2d 1034, 1037 (1979) (tax did not violate the uniformity clause since it was a tax on an owner's privilege of using his realty as a location for his residence); *In re Lawrence Twp. Sch. Dist. 1947 Taxes*, 362 Pa. 377, 383, 67 A.2d 372, 374 (1949)(the tax imposed by the Resolution under consideration is a property tax on coal and violates constitutional requirement of uniformity in that, being a property tax, it is imposed on a quantity and not an *ad valorem* basis.).

valorm. The PBT does not violate the Uniformity Clause of the Pennsylvania Constitution and defendants' preliminary objection to counts IV-VII is sustained and the counts are dismissed.

CONCLUSION

For the forgoing reasons, defendants' preliminary objections are sustained and the complaint is dismissed in its entirety.

BY THE COURT,

GLAZER, J.