

JOURNAL of LAW REFORM ONLINE

COMMENT

THE COMMONWEALTH OF PENNSYLVANIA'S ANTIQUATED AND OFT-ABUSED OCCUPATION TAX: A CALL FOR ABOLITION

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Under Pennsylvania law, counties, cities, boroughs, first-class townships, municipalities, and school districts can levy an occupation tax.¹ An occupation tax taxes an individual based on the individual's occupation, which, historically, was considered to be a form of transferable property.² Not only is the occupation tax based on an outdated model of employment practices, but it is also a source of abuse and inequity.³ Consequently, the occupation tax should be abolished in favor of other more just taxation models.

I. THE OCCUPATION TAX IS AN ANTIQUATED FORM OF TAXATION

The occupation tax was historically considered to be a tax on property.⁴ Clearly, one's occupation could be a source of property in the colonial era, when occupations were frequently created by grant or letter of appointment and could be transferred and inherited.⁵ To say today, however, that the logic for an occupation tax is antiquated is a gross understatement. One's occupation is no longer a piece of property that can be bought, sold, and inherited; an employee cannot sell or pass on the employee's occupation today. Even as early as the late nineteenth century, the Supreme Court of Pennsylvania understood employment practices to have changed when it found that one's occupation was not a form of

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1. See PA. DEPT OF CMTY. & ECON. DEV., TAXATION MANUAL 39-40 (2004), available at http://www.newpa.com/webfm_send/1520.

2. *Id.*

3. PA. TAX COMM'N, FINAL REPORT OF THE PENNSYLVANIA TAX COMMISSION 36 (1981) available at http://www.andrew.cmu.edu/org/rs9f/final_report_pa_tax_commission_March_1981.pdf.

4. See PA. DEPT OF CMTY. & ECON. DEV., *supra* note 1, at 39.

5. See *id.*

property.⁶ Thus, given that the employment model that served as the justification for the occupation tax no longer exists,⁷ the tax itself should also cease to exist. Although one's occupation may once have been a good indication of one's wealth, and hence an indication of who should bear the costs—through taxation—of a functioning society, it is no longer a good indication of one's ability to pay.⁸

II. HOW THE OCCUPATION TAX WORKS IN PENNSYLVANIA

Under Pennsylvania law, occupation taxes can be assessed in three ways. The first method allows for a tax based on assessments of occupations with a maximum rate equal to the real estate tax rate, under the laws pertaining to counties, cities, boroughs and first-class townships.⁹ The second and third methods, authorized by the Local Tax Enabling Act,¹⁰ allow municipalities and school districts to levy either a flat rate tax with a limit of ten dollars or an unlimited rate¹¹ “applied against the assessed value of occupations.”¹² Under the first and third methods, occupations must be classified into groups and county assessors must place a value on occupations; however, “there are no statutory guidelines as to the number of classifications or how they are to be made.”¹³

While the occupation tax is not a tax on income,¹⁴ “usually

6. See *Banger's Appeal*, 109 Pa. 79, 95 (1885).

7. See PA. DEP'T OF CMTY. & ECON. DEV., *supra* note 1, at 39 (“Unlike earlier centuries, modern occupations are not transferable by the occupant, and some may choose to call the practice of the occupation or profession a privilege rather than a property right.”).

8. An occupation title is not a good indication of one's ability to pay because incomes vary within occupations. For example, the Bureau of Labor Statistics (BLS) reports that the median annual wage for lawyers is \$112,760 in May 2010 and that “the lowest 10 percent earned less than \$54,130 and the top 10 percent earned more than \$166,400.” *Occupational Outlook Handbook: Lawyers: Pay*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/ooh/legal/lawyers.htm#tab-5> (last visited Oct. 28, 2012). The BLS also notes, “Salaries of experienced lawyers vary widely according to the type, size and location of their employer.” *Id.* This is not just the case for lawyers: incomes vary widely among other professions like physicians, salesmen, and artists. See *id.*

9. See PA. DEP'T OF CMTY. & ECON. DEV., *supra* note 1, at 39.

10. 53 PA. CONS. STAT. § 6924.101 (2011).

11. See § 6924.311(7).

12. See PA. DEP'T OF CMTY. & ECON. DEV., *supra* note 1, at 39.

13. *Id.* at 40.

14. See *Banger's Appeal*, *supra* note 6, at 95 (“An ‘occupation’ tax is peculiar in its character. It is not a tax upon property, but upon the pursuit which a man follows in order to acquire property and support his family. It is a tax upon income in the sense only that

categories do reflect ... the differential in earning power among occupations.”¹⁵ Yet, the Supreme Court of Pennsylvania held that factors other than income “affect the value which may be attributed to an occupation. These may include social status, historical attributes, type, kind and quantity of work required, degree of education and training demanded, and many other such real or fancied social and economic distinctions.”¹⁶ As such, it is unclear how county assessors should place a value on any given occupation. And despite the fact that the occupation tax is not a tax on income, income seems to be a guiding factor in creating and assessing the value of the taxable occupation categories.¹⁷

III. THE OCCUPATION TAX FOSTERS ABUSIVE TAXATION AND CREATES INEQUITIES

The provision of the Local Tax Enabling Act that allows municipalities and school districts to levy an occupation tax with an unlimited rate has led school districts to exploit the provision and charge exorbitant tax rates that in many districts yield more revenue than from earned income taxes.¹⁸ For example, Montgomery Area School District in Lycoming County had the highest occupational tax rate in 2000, taxing residents at a rate of 4,275 mills¹⁹ or 427.5 percent of the assessed occupational value.²⁰

every tax is a tax upon income; that is to say, it reduces a man's clear income by the precise amount of the tax. But it is an income tax in no sense.”)

15. PA. DEP'T OF CMTY. & ECON. DEV., *supra* note 1, at 40. The Pennsylvania Department of Community and Economic Development's *Taxation Manual* provides a simplified occupational assessment schedule. *Id.* at 41. In the sample schedule, corporation executives, contractors, county judges, surgeons, superintendents, and physicians are taxed at the highest level; followed by accountants, attorneys, architects, bank executives, engineers, executives, stockbrokers, county and city officials; followed by bank cashiers, chefs, draftsman, electricians, foremen, government employees, and skilled labors; followed by weavers, welders, tanners, painters, and masons; followed by auctioneers, bank clerks, barbers, bartenders, beauticians, bookkeepers, butchers, office clerks; followed by restaurant servers, township supervisors, laborers, and factory workers; followed by homemakers, students, disabled persons, and retired persons, all of whom are not taxed. *Id.*

16. *Crosson v. Downingtown Area Sch. Dist.*, 270 A.2d 377, 381 (Pa. 1970) (internal quotation marks omitted) (internal citations omitted).

17. *See* PA. DEP'T OF CMTY. & ECON. DEV., *supra* note 1, at 40 (noting that the categories reflect to some degree the differences in earning power among different occupations).

18. *See id.*

19. A state may tax property on a millage or mill rate. *See, e.g., id.* at 12. A mill is 1/1,000 of a dollar. *See* BLACK'S LAW DICTIONARY 1084 (9th ed. 2009) (“[E]ach mill represents \$1 of tax assessment per \$1,000 of the property's assessed value”). Thus, to calculate the tax owed, one divides the number of mills by 1,000 and multiplies that number by the assessed value of the property. *See id.*

In the past, the occupation tax has been the major source of revenue for Pennsylvania school districts.²¹ During the 2000–2001 fiscal year, the Pennsylvania School Boards Association reported that school districts generated \$110,343,558.00 in occupational tax revenues alone.²²

In addition to fostering abusive taxation practices, the occupation tax generates inequities by taxing members of the same occupation at the same rate regardless of income, and by taxing individuals with the same incomes at different rates, because they have different occupations.²³ For example, take two attorneys who would be taxed at the same rate under an occupation tax. Though taxed the same amount, one is a partner at a national law firm and the other works for legal aid. Similarly, take a painter who owns a painting company and an attorney. Though both earn the same income, the attorney is taxed at a higher rate. Both scenarios result in economic inequity. Additionally, the occupation tax is regressive: the less one makes the higher the effective tax rate.²⁴ Thus, the burden of funding schools in Pennsylvania has largely fallen on lower-income families.²⁵

IV. DESPITE JUDICIAL CHALLENGES AND ATTEMPTS AT LEGISLATIVE REFORM, THE ASSESSMENT OF OCCUPATION TAXES PERSISTS IN PENNSYLVANIA

Over the years, several lawsuits have been filed challenging the constitutionality of the occupation tax; however, none have been successful.²⁶ Most recently, the Pennsylvania State Legislature passed the Optional Occupational Tax Elimination Act in 2008, which gives school districts and municipalities the power

20. See PA. DEP'T OF CMTY. & ECON. DEV., *supra* note 1, at 40.

21. See PA. GEN. ASSEMBLY LOCAL GOV'T COMM'N, PENNSYLVANIA LEGISLATOR'S MUNICIPAL DESKBOOK 169 n.2 (3rd ed. 2006) *available at* http://www.lgc.state.pa.us/deskbook06/Issues_Taxation_and_Finance_07_Eliminating_Occ_Taxes.pdf

22. *Id.*

23. See PA. TAX COMM'N, *supra* note 3, at 36.

24. See *id.* (citing Rodger Downing, THE PA. STATE UNIV., A LOOK AT THE OCCUPATION (ASSESSED) TAX IN PENNSYLVANIA (1979) (“[T]he ratio of assessed occupation tax paid to family income falls as family income rises.”)).

25. *Id.*

26. See *e.g.*, *Stajkowski v. Carbon Cnty. Bd. of Assessment & Revision of Taxes*, 541 A.2d 1384, 1385 (Pa. 1988) (noting that the State's power to impose occupation taxes “has consistently been upheld since 1857 against a variety of constitutional challenges”).

to abolish the occupation tax and replace lost revenues with an earned income tax levied in accordance with the provisions of the Act.²⁷ While some school districts have opted to abolish the occupation tax under this provision,²⁸ not all have done so. Thus, there is still a need for further reform.

The Pennsylvania State Legislature should take it upon itself to, at the very least, abolish the provision of the Local Tax Enabling Act that allows school districts and municipalities to levy taxes with unlimited rates. In the districts where the occupation tax remains, abusive and inequitable tax rates continue to exist. The only solution is complete abolition. Reform short of complete abolition will perpetuate inequities arising under the tax as a result of the antiquated employment model. For example, if the Pennsylvania Legislature eliminated the provision of the Local Tax Enabling Act that allows school districts and municipalities to levy unlimited rates, such a reform would not solve the problem completely because the tax would still be based on an outdated model where one's occupation is a proxy for ability to pay. Similar inequities stemming from one's ability to pay would remain even if the legislature reformed the law to only allow for a flat tax of ten dollars on every occupation. Furthermore, replacing the occupation tax with a higher property tax to offset the loss of income to school districts and municipalities, as the Optional Occupational Tax Elimination Act proposes, serves as a more equitable solution than any proposal for reforming the occupation tax.

Property is still a good indication of one's ability to pay and does not create the same types of inequities that a tax on one's occupation does. Consequently, the only way to eliminate all of the problems that the occupation tax creates is to abolish it.

27. 53 PA. CONS. STAT. §§ 6924.401–409 (2011).

28. See PA. GEN. ASSEMBLY LOCAL GOV'T COMM'N, *supra* note 21, at 169 n.2.