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APPENDIX A

SUPREME COURT OF PENNSYLVANIA.

No. 20 EAP 2022, No. 21 EAP 2022

DIANE ZILKA,

Appellant

v.

TAX REVIEW BOARD CITY OF PHILADELPHIA,

Appellee

DIANE ZILKA,

Appellant

v.

TAX REVIEW BOARD CITY OF PHILADELPHIA,

Appellee

Argued: March 7, 2023

Decided: November 22, 2023

OPINION

CHIEF JUSTICE TODD

In this appeal by allowance, we consider whether the City of Philadelphia (the "City" or "Philadelphia") unconstitutionally discriminated against interstate commerce by subjecting a Philadelphia resident who worked exclusively out of state to its wage tax (the "Philadelphia Tax"), and allowing her credit against

that tax only for the local income tax she paid to another jurisdiction, while declining to afford her additional credit for the out-of-state income tax she paid. In conjunction with this overarching issue, we must determine whether, for purposes of the dormant Commerce Clause analysis implicated herein, state and local taxes must be considered in the aggregate. For the reasons that follow, we conclude that state and local taxes need not be aggregated in conducting a dormant Commerce Clause analysis, and that, ultimately, the City's tax scheme does not discriminate against interstate commerce. Accordingly, we affirm the order of the Commonwealth Court.

I. Introduction: The Commerce Clause

By way of background, the Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. Const. art. 1, § 8, cl. 3 (first ellipses original). While the Commerce Clause is an express grant of power to Congress, the United States Supreme Court has consistently held that the language also contains a "negative command, known as the dormant Commerce Clause," which prohibits "certain state taxation even when Congress has failed to legislate on the subject." *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 549, 135 S.Ct. 1787, 191 L.Ed.2d 813 (2015) (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)). Notably, the high Court has explained that the crux of the dormant Commerce Clause is 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," *id.* (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984)), nor may it "impose a tax which discriminates against

interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of 'multiple taxation,'" *id.* at 549-50, 135 S.Ct. 1787 (quoting *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959)). However, where alleged taxation disparities stem from the combined effect of two otherwise lawful income tax schemes, the Court has manifestly determined that there is no discrimination against interstate commerce. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978) (observing that "[t]he prevention of duplicative taxation[ ] . . . would require national uniform rules for the division of income," which is a task solely in the province of Congress).

Significantly, in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), the high Court crafted a four-part test for determining whether a state or local tax unconstitutionally burdens interstate commerce. Under this test, a tax does not violate the dormant Commerce Clause if it: (1) is applied to an activity with a substantial nexus to the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state.[1] *Id.* at 279, 97 S.Ct. 1076. Relevant to the instant appeal, to determine whether a tax is fairly apportioned, a court must assess whether the tax is internally and externally consistent. The high Court has explained that internal consistency is met "when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that

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[1] Presently, Appellant contends that the Philadelphia Tax violates the fair apportionment and discrimination prongs of the *Complete Auto* test.

intrastate commerce would not also bear." *Jefferson Lines*, 514 U.S. at 185, 115 S.Ct. 1331. Conversely, an internally inconsistent tax demonstrates that a state "is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax." *Id.* (citation omitted). As for external consistency, a court must examine "the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Id.* (citation omitted).

Relevant to the instant appeal, in 2015, the high Court grappled with these issues in *Wynne*, *supra.* Therein, the Court examined Maryland's tax scheme, under which Maryland required its residents to pay a "state" income tax which was set at a graduated rate, and a "county" income tax, the rate of which varied by county for wages earned both in and out of state, and additionally imposed upon nonresidents a "special nonresident" tax on their income earned in Maryland. *Wynne*, 575 U.S. at 545-46, 135 S.Ct. 1787. While Maryland allowed residents who earned income out of state a credit against the state tax, it did not permit them any credit against the county tax. *Id.* at 546, 135 S.Ct. 1787. Critically, the high Court determined that, "[d]espite the names that Maryland ha[d] assigned to these taxes, both [were] State taxes," noting that "both [were] collected by the State's Comptroller of the Treasury." *Id.* (citation omitted).

Turning to *Complete Auto*, the *Wynne* Court observed that the internal consistency test "allows courts to isolate the effect of a defendant State's tax scheme" by

"hypothetically assuming that every State has the same tax structure." *Wynne*, 575 U.S. at 562, 135 S.Ct. 1787. In this vein, the Court explained that the internal consistency test permits courts to distinguish between "tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States," and "tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes," emphasizing that the former category of taxes are generally unconstitutional, while the latter are not. *Id.* (citing, *inter alia*, *Armco Inc.*, 467 U.S. at 645-46, 104 S.Ct. 2620; *Moorman Mfg. Co.*, 437 U.S. at 277 n.12, 98 S.Ct. 2340).

Ultimately, bearing in mind these principles, the Court found that Maryland's county tax was unconstitutional because Maryland failed to permit residents a credit for similar taxes paid to out-of-state jurisdictions, thus resulting in double taxation on a portion of residents' income. Indeed, applying the internal consistency test to Maryland's tax scheme, the Court assumed that all states adopted the following taxes, consistent with Maryland's county and special nonresident taxes: "(1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State."[2] *Id.* at 564-65, 135 S.Ct. 1787. The Court observed that, under this

[2] The Court appears to have used the 1.25% rate for all three taxes simply for ease of applying the internal consistency test, as the rate is not reflective of the actual rates of Maryland's relevant taxes.

scenario, an in-state resident and an out-of-state resident would incur disparate tax obligations:

> Assume . . . that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income.

Id. at 565, 135 S.Ct. 1787. Based on this analysis, the Court concluded that Maryland's tax scheme was unconstitutional, as the disparate treatment of interstate commerce emanating therefrom was "not simply the result of [the tax scheme's] interaction with the taxing schemes of other States," but, rather, stemmed from inherent discrimination contained within the scheme. *Id.* (citations omitted).

Aptly, the Court stressed that "Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States," which would vindicate the tax scheme under the internal consistency test. *Id.* at 568, 135 S.Ct. 1787 (citation omitted). Illustrating this point, the Court tweaked the above hypothetical scenario to assume that all states impose those same taxes but also allow a credit against income taxes paid by residents to other jurisdictions. Under such circumstances, the Court noted that "April (who lives and works in State A) and Bob (who lives in State A but works in State B) would pay the same tax," observing that "April would pay a 1.25% tax only once (to State A), and Bob would pay a 1.25% tax only once (to State

B, because State A would give him a credit against the tax he paid to State B)." *Id.* However, as Maryland offered no such credit against its county tax, the Court declared the tax scheme unconstitutional.

II. Factual and Procedural Background

With that backdrop, we now turn to the facts of this appeal. In April 2017 and June 2017, Appellant Diane Zilka filed petitions with the City's Department of Revenue (the "Department"), seeking refunds for the Philadelphia Tax she paid from 2013 to 2015, and in 2016, respectively.[3] During the relevant tax years, Appellant resided in the City, but worked exclusively in Wilmington, Delaware. Thus, she was subject to four income taxes (and tax rates) during that time: the Philadelphia Tax (3.922%); the Pennsylvania Income Tax ("PIT") (3.07%); the Wilmington Earned Income Tax ("Wilmington Tax") (1.25%); and the Delaware Income Tax ("DIT") (5%).[4] The Commonwealth granted Appellant credit for her DIT liability to completely offset the PIT she paid for the tax years 2013 through 2016; because of the respective tax rates in our Commonwealth versus the State of Delaware, after this offsetting, Appellant paid the remaining 1.93% in DIT. Although the City similarly credited against Appellant's Philadelphia Tax liability the amount she paid in the Wilmington Tax — specifically, the City credited Appellant 1.25% against her Philadelphia Tax liability of 3.922%, leaving her with a remainder of 2.672% owed to the City — Appellant claimed that

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[3] While Appellant filed two separate refund petitions, for ease of reference, we will simply refer to her request for refunds singularly, as the resolution of each petition hinges upon the same issue.

[4] Herein, we will employ the figures utilized by the Commonwealth Court below, which represent the tax rates of the 2014 tax year.

the City was required to afford her an additional credit of 1.93% against the Philadelphia Tax, representing the remainder of the DIT she owed after the Commonwealth credited Appellant for her PIT.

After the City refused to permit her this credit against her Philadelphia Tax liability, Appellant appealed to the City's Tax Review Board (the "Board"). Following two hearings on the matter, the Board denied Appellant's refund request. Appellant then appealed to the trial court, which affirmed the decision of the Board without taking additional evidence.

Thereafter, Appellant appealed to the Commonwealth Court, renewing her claim that she was owed a credit against the Philadelphia Tax for the portion of her DIT liability which was not offset/credited against her PIT. Appellant suggested that the failure to grant her this credit amounted to double taxation in violation of the Commerce Clause. More specifically, Appellant asserted that, because the City failed to offset her Philadelphia Tax with the remainder of her DIT liability, the tax scheme failed the *Complete Auto* test. In that regard, Appellant contended that: (1) the tax is not fairly apportioned, as it lacks a mechanism to mitigate the risk of duplicative taxation for income earned from interstate commerce, thus failing to meet the internal and external consistency tests; and (2) the City's partial credit practice discriminatorily forces her to pay more in taxes than her intrastate counterparts. Notably, in support of her claim, Appellant relied heavily on *Wynne*, *supra*, contending that the high Court's decision requires state and local taxes to be considered as one.

In a unanimous, unpublished memorandum opinion authored by Judge Michael H. Wojcik, the Commonwealth Court affirmed. *Zilka v. Tax Rev. Bd. City of*

Phila., 1063-1064 C.D. 2019, 2022 WL 67789 (Pa. Cmwlth. filed Jan. 7, 2022) (*en banc*). In so doing, the court concluded that Appellant was not subject to double taxation in violation of the Commerce Clause, as she never paid more than one local and one state tax at a time. From the court's perspective, the City taxed Appellant at the same rate (3.922%) as it taxed other residents who worked in Pennsylvania, and she paid 1.93% more in taxes than her intrastate counterparts only because she chose to work in Delaware, which charges a higher income tax than Pennsylvania. Indeed, the court highlighted that the City credited Appellant the full amount of her Wilmington Tax liability to offset the Philadelphia Tax she incurred, while declining to apply tax credit for the balance of the DIT which remained "unused" after offsetting the PIT (namely, 1.93%). The court emphasized that, in its view, the City's decision not to apply the remainder of Appellant's DIT to offset her Philadelphia Tax simply did not amount to double taxation.

Nevertheless, assuming that there was a risk of double taxation, the court analyzed the City's taxation scheme under the *Complete Auto* test. First, focusing on the "fair apportionment" prong of the test, the court determined that the Philadelphia Tax is internally consistent, as "all individuals earning income outside of their home locality would receive a credit for income taxes paid to the foreign locality and would pay no more than their intrastate counterpart" if the wage tax were imposed in every jurisdiction. *Id.* at 8. Likewise, the court found that the Philadelphia Tax meets the external consistency test, explaining that the tax "reasonably reflects how and where [Appellant's] income is generated," and "is not taxing all of [Appellant's] income regardless of source." *Id.* at 9. In that vein, the court opined that the City "fairly apportions the tax

according to its relation to the income by providing a credit for the tax owed to Wilmington," such that the City never taxed more than its fair share of Appellant's wages. *Id.* Relatedly, the court reasoned that "Philadelphia's provision of municipal benefits and services to its residents provides sufficient economic justification for the imposition of [the Philadelphia Tax]." *Id.* (citing *Lawrence v. State Tax Comm'n of Miss.*, 286 U.S. 276, 279, 52 S.Ct. 556, 76 L.Ed. 1102 (1932) (observing that "domicile in itself establishes a basis for taxation," as "[e]njoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government")).

Next, turning to the "discrimination" prong of the *Complete Auto* test, the court highlighted that the City taxes all of its residents' income at the rate of 3.922% and fully credits any similar taxes a resident paid to another jurisdiction. To that end, the court noted that, here, because Appellant's income was taxed at 1.25% by Wilmington, the City applied 1.25% credit toward her Philadelphia Tax. Thus, the court found that Appellant did not pay double taxes on her income; instead, the court determined, she paid the same 3.922% rate as all of the City's residents, with the only difference being that the City "receiv[ed] only 2.67%, while Wilmington . . . receiv[ed] 1.25%." *Id.* at 10.

Finally, the court found that "*Wynne* does not compel Philadelphia to apply an additional credit for any dissimilar taxes, such as the [DIT] . . . ." *Id.* at 13. From the court's perspective, "[a]lthough the *Wynne* Court held that Maryland was required to offset its so-called 'county' tax against other 'state' taxes, the 'county' tax was actually a state tax because it was administered, adopted, mandated, and collected by the state." *Id.*

Conversely, the court emphasized that, here, "both the [Philadelphia Tax] and Wilmington Tax are municipal taxes." *Id.* On that basis, the court opined that Appellant's taxes were appropriately credited in an "apples to apples" manner — with Delaware's state tax offsetting Pennsylvania's state tax and Wilmington's municipal tax offsetting the City's municipal tax. This approach, in the court's view, comported with the high Court's holding in *Wynne*, and, moreover, passed constitutional muster. Thus, reiterating that the taxation of Appellant's income in excess of the taxation of her intrastate cohorts stemmed solely from her decision to work in Delaware, which has a higher rate of taxation than Pennsylvania — and not from the City's tax scheme — the court found that Appellant was not subject to double taxation. Accordingly, the court affirmed the trial court's decision.

Appellant subsequently filed a petition for allowance of appeal with our Court, and we granted review to consider whether the City, in declining to apply the remainder of Appellant's DIT liability to offset her Philadelphia Tax liability, discriminated against interstate commerce in violation of the dormant Commerce Clause.[5] As illuminated by the parties'

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[5] The question, as phrased by Appellant, reads:

> [Appellant], a Philadelphia resident who worked in Wilmington, Delaware, was subject to [the PIT, the Philadelphia Tax, the DIT, and the Wilmington Tax]. Pennsylvania allowed [Appellant] to credit [the] DIT paid against her PIT liability. The City . . . allowed [Appellant] to credit [the] Wilmington Tax paid against her [Philadelphia Tax] liability. [The] DIT [which Appellant] paid exceeded the PIT credit she was allowed ("Unapplied Credit"). The City did not allow [Appellant] to apply the Unapplied Credit against the [Philadelphia] Tax. The U.S. Supreme Court held the Commerce Clause of the U.S. Constitution dictates that

arguments, this question necessarily requires us to determine whether state and local taxes are indistinguishable when analyzing a challenged tax scheme under the dormant Commerce Clause.

III. Arguments

Regarding that prefatory issue, Appellant initially contends that state and local income tax burdens must be aggregated in reviewing a dormant Commerce Clause challenge, in essence, maintaining that local or municipal taxes, such as the Philadelphia Tax, are indistinguishable from state taxes because political subdivisions are creatures of the state. According to Appellant, in *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994) (holding that Missouri's use tax scheme impermissibly discriminated against interstate commerce in certain localities in which the use tax exceeded the sales tax), the United States Supreme Court endorsed the notion that federal constitutional restraints on state and local taxation of cross-border economic activity must be evaluated in light of the state's tax scheme in its entirety. Appellant asserts that, more recently, in *Wynne*, the high Court made no distinction between state and local taxes, as it determined that, "[i]n applying the dormant Commerce Clause, they must be considered as one." Appellant's Brief at 13

> taxing jurisdictions must grant their residents a credit for state and local income taxes paid to other state and local taxing jurisdictions. [*Wynne*, *supra*]. Did the Commonwealth Court err, as a matter of law, where it held it was constitutional for the City not to apply [Appellant's] Unapplied Credit against her [Philadelphia] Tax liability?

Zilka v. Tax Rev. Bd. City of Phila., 281 A.3d 1029 (Pa. 2022) (order).

(emphasis omitted) (quoting *Wynne*, 575 U.S. at 564 n.8, 135 S.Ct. 1787).

Relatedly, Appellant proffers that appellate courts in West Virginia, Colorado, and Arizona have found that state and local tax schemes must be considered in tandem under the Commerce Clause. Appellant notes that the West Virginia Supreme Court invalidated a tax scheme in which the state failed to grant credit against its state-level use tax for local sales taxes paid out of state. *See Matkovich v. CSX Transp. Inc.*, 238 W.Va. 238, 793 S.E.2d 888 (2016). Appellant highlights that, in doing so, the *Matkovich* court "evaluated all of the taxes at issue at the state level – regardless of whether they were imposed by a state or locality." Appellant's Brief at 14. Similarly, Appellant posits that, in *General Motors Corp. v. City & County of Denver*, 990 P.2d 59 (Colo. 1999), the Colorado Supreme Court invalidated a Denver tax scheme which did not provide credit for sales and use taxes paid to other states and their subdivisions. Appellant stresses that, in deeming the tax scheme unconstitutional, the *General Motors* court explained: "Internal consistency requires that states impose identical taxes when viewed in the aggregate – as 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." *Id.* at 69. Appellant also suggests that *Arizona Department of Revenue v. Arizona Public Service Co.*, 188 Ariz. 232, 934 P.2d 796 (Ariz. Ct. App. 1997), supports her position that state and local taxes must be considered together, as, therein, the Arizona Court of Appeals held that "[t]he derivative relationship between a state and its counties means that when a county imposes a tax, it does so pursuant to a delegation of state tax authority." *Id.* at 799.

Moreover, Appellant submits that our Court's jurisprudence supports her construction of the dormant Commerce Clause and the need to aggregate state and local taxes thereunder. In that regard, Appellant cites to *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 573 Pa. 189, 823 A.2d 108 (2003) (OAJC) ("*Philadelphia Eagles*"), and, with little additional analysis, claims that, in that case, we required "[a]pportionment of a local tax . . . as a result of the state taxes in the other states to which the [Philadelphia Eagles] [t]eam was subject." Appellant's Brief at 16 (emphasis omitted). Appellant similarly avers that, in *Northwood Construction Co. v. Township of Upper Moreland*, 579 Pa. 463, 856 A.2d 789 (2004), we "held that the Commerce Clause mandated that the Township of Upper Moreland . . . apportion the taxpayer's receipts derived from its Maryland, Delaware, and New Jersey construction activities," requiring apportionment for "state taxes, not any local tax." Appellant's Brief at 16-17. Additionally, Appellant contends that the Commonwealth Court endorsed an analysis which relates local tax to state tax in *Upper Moreland Township v. 7-Eleven, Inc.*, 160 A.3d 921 (Pa. Cmwlth. 2017), wherein the intermediate court "held that the Commerce Clause mandated that the [t]ownship apportion the taxpayer's receipts derived from its Pennsylvania franchisees because much of the activities supporting the Pennsylvania franchisees were performed in Texas, the company's headquarters, or elsewhere outside of Pennsylvania." Appellant's Brief at 17. According to Appellant, these three cases demonstrate that our Court and the lower court "have consistently recognized that a Commerce Clause analysis *must* examine the local tax as it relates to the state tax." *Id.* at 17 (emphasis original).

Appellant next argues that "Philadelphia is part of Pennsylvania and is subject to the laws and restrictions imposed upon it by Pennsylvania." *Id.* at 19. To that end, Appellant observes that, "unless authorized by state statute, Philadelphia does not have the power to impose any tax." *Id.* (emphasis omitted). Indeed, Appellant asserts that, because the City derives its authority to impose taxes by way of state statute,[6] its "ability to assess and collect any tax,

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[6] Appellant notes that the City obtained its right to self-governance via the First Class City Home Rule Act, 53 P.S. § 13101 *et seq.*, which precludes the City from enacting taxes without an express grant of authority from the General Assembly, *see id.* § 13133(a)(8). Appellant further explains that the City procured the right to impose the Philadelphia Tax by way of the Sterling Act, *id.* § 15971, which provides, in relevant part:

> From and after the effective date of this act, the council of any city of the first 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 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.

Id. Appellant also highlights that the General Assembly carved out a savings clause in the PIT, expressly permitting the City to impose the Philadelphia Tax:

> Notwithstanding anything contained in any law to the contrary, including but not limited to the provisions of . . . the Sterling Act, the validity of any ordinance or part of any ordinance or any resolution or part of any resolution, and any amendments or supplements thereto now or hereafter enacted or adopted by any political subdivision of this Commonwealth for or relating to the imposition, levy or

including the [Philadelphia] Tax, is at the absolute behest of Pennsylvania." *Id.* at 20. Thus, Appellant insists that we must examine the state and local tax burdens placed upon her simultaneously to determine whether the City violated the dormant Commerce Clause in imposing upon her the Philadelphia Tax, while declining to afford her credit against that tax for her DIT liability.

Pivoting to the *Complete Auto* test, Appellant avers that the City's tax practice discriminates against interstate commerce, renewing her contention that she has been subject to double taxation, as her tax burden was 1.93% higher than her intrastate counterparts. Appellant argues that the City's "partial-credit practice," as she phrases it, discriminates against interstate commerce by imposing a tax burden on cross-border activity which "exceeds the tax burden that [the City] imposes upon commercial activity that takes place solely within Pennsylvania." *Id.* at 30-31. In Appellant's view, it matters not that she chose to work in Delaware, rather than Pennsylvania, because taxpayers who choose to work in Pennsylvania received a lower tax rate than she did. In this vein, Appellant concludes that "any tax scheme which encourages a taxpayer to conduct intrastate activities instead of interstate activities unconstitutionally burdens interstate commerce." *Id.* at 31 (citations omitted).

With respect to the fair apportionment prong of the *Complete Auto* test, Appellant contends that the City's tax practice fails "because it does not provide a mechanism to mitigate the risk of duplicative taxation

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> collection of any tax, shall not be affected or impaired by anything contained in this article . . . .

72 P.S. § 7359(a) (internal footnote omitted).

for income earned from interstate commerce," thus flouting "the constitutional restriction limiting a [state's] taxing powers." *Id.* at 33 (citation omitted). In this regard, Appellant correctly acknowledges that, under the internal consistency test, we must "assume that every state/local government enacts the same tax regime," and determine "whether such hypothetical harmonization imposes a greater burden upon interstate commerce than is imposed upon intrastate commerce." *Id.* at 36 (citing *Goldberg v. Sweet*, 488 U.S. 252, 261, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989)). Nevertheless, instead of applying the internal consistency test in this manner — *i.e.*, assuming that all states and local jurisdictions adopt the same tax rates and tax crediting systems as the Commonwealth and the City — Appellant merely hypothesizes that the taxing jurisdictions adopt the same systems of providing credit, but maintain their own differing tax rates. In so doing, Appellant opines that the City's taxation scheme is internally inconsistent, proclaiming: "if every [s]tate or locality adopted [the City's] tax practice, interstate income would be subjected to multiple taxation nationwide." *Id.* at 38.

Appellant likewise avers that the City's tax scheme is not externally consistent, as the City taxed her income generated in Wilmington, despite the fact that she had conducted no business in Philadelphia. In essence, Appellant asserts that she was taxed merely because she lived in the City, with no legitimate nexus between her economic activity conducted in Wilmington and the City to justify imposition of the Philadelphia Tax. According to Appellant, "[i]t is clear that taxing Appellant's income, where none of it is earned in Philadelphia, is disproportionate to the business (or lack thereof) transacted by Appellant in Philadelphia." *Id.* at 40. Appellant suggests that *Philadelphia Eagles*,

Northwood Construction, and *7-Eleven* establish that a locality may not impose a tax upon 100% of a taxpayer's activity when such activity did not occur in that locality. While she acknowledges that, here, the City granted a tax credit representing the Wilmington Tax, Appellant contends that the City nonetheless "subject[ed] 69% of [her] income to [the Philadelphia] Tax for work performed entirely outside of the state." *Id.* at 43 (emphasis omitted). Finally, Appellant discounts the Commonwealth Court's conclusion that her residency in the City is reason enough to justify imposition of the Philadelphia Tax, arguing:

> All states and localities, including Philadelphia, can meet the fair apportionment requirement by imposing taxes upon their residents the same way they tax their non-residents – by taxing only income generated in Philadelphia, and allowing other jurisdictions to impose their own taxes upon income generated elsewhere. Alternatively, states and localities can choose to tax all of their residents' income regardless of where earned, but provide credits for income taxes paid elsewhere. But whichever system is chosen, it must be fair, and it must attempt to allocate the tax based upon where the economic activity occurs, [*i.e.*,] where the income is *generated.* [The City's] practice makes no such effort.

Id. at 45-46 (emphasis original). Appellant, thus, concludes that, "[w]hile [the City] may have the jurisdiction to tax all of Appellant's income, that does not mean its ability to do so does not violate the Commerce Clause." *Id.* at 47.[7]

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[7] The American College of Tax Counsel ("ACTC") submitted an *amicus* brief in support of Appellant, agreeing with her position

The City counters by first emphasizing that, contrary to Appellant's assertions, our Court has, in the past, distinguished state taxes from local taxes. *See McClelland v. City of Pittsburgh*, 358 Pa. 448, 57 A.2d 846, 848 (1948) ("State taxes stand on a different basis from local levies; the former are essential to the very 'preservation' of the state itself, while the latter are authorized or permitted by the state, not for its actual preservation, but merely to maintain the machinery of local government." (citation and internal citation omitted)); *Nat'l Biscuit v. City of Phila.*, 374 Pa. 604, 98 A.2d 182, 186-87 (1953) (finding that a tax administered entirely for the benefit of a municipality was not a state tax, but a local tax); *F. J. Busse Co. v. City of Pittsburgh*, 443 Pa. 349, 279 A.2d 14, 18 (1971) (determining that a local tax was not duplicative of the

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that, by refusing to grant her full credit for her DIT liability, the City is taxing Appellant at a higher rate than it would if she was a Philadelphia resident working entirely in Philadelphia, thus burdening her participation in interstate commerce. In so reasoning, ACTC proffers that, under *Wynne*, the City was required to give Appellant a credit for her excess DIT to offset the Philadelphia Tax, claiming that the Philadelphia Tax is indistinguishable from the "county" tax which was at issue in *Wynne*, given that municipal governments are "nothing more than creatures of the state." ACTC's Brief at 9. Relatedly, ACTC proffers that, because state and local taxes must, in its view, be considered as one, the lower court erred in finding that Appellant was subjected to a higher tax rate simply as a result of her choice to work in Delaware, which has a higher state tax rate. According to ACTC, "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." *Id.* at 11. ACTC argues that, here, the City should have credited the Wilmington Tax and the remainder of the DIT which did not offset the PIT against Appellant's Philadelphia Tax liability, in order to place Appellant on "the same tax liability as . . . a Pennsylvania resident with the same income who worked solely in Philadelphia." *Id.* at 13.

state tax). The City asks our Court to uphold this view, stressing that the Philadelphia Tax is a local tax which was enacted via an ordinance passed by Philadelphia's City Council, and is administered, collected, and distributed by the Department solely for the benefit of the City and its citizenry. Indeed, the City argues that a municipality's status as a creature of the state — and its attendant authority to impose only such taxes as are permitted by the Commonwealth — "in no way converts a purely local tax into a state tax." City's Brief at 14. In the City's summation, "the [d]ormant Commerce Clause does not require the City of Philadelphia to subsidize Delaware's decision to impose a higher tax rate on [Appellant] than the Commonwealth of Pennsylvania." *Id.* at 17.

Critically, the City contends that Appellant has failed to provide any case law which actually supports her argument that state and local taxes must be assessed unitarily for dormant Commerce Clause purposes. In that regard, the City maintains that Appellant misconstrues *Philadelphia Eagles*, *Northwood Construction*, and *7-Eleven*, as, according to the City, those decisions merely affirmed that localities imposing taxes must satisfy the requirements of the dormant Commerce Clause, including by providing credit for taxable activity which occurred outside of the taxing jurisdiction, which the City stresses that it did here. The City expounds that, in that trio of cases, this Court and the Commonwealth Court "did not address whether local taxes and state taxes must be aggregated because that question was not before any of the Courts." City's Brief at 18 (emphasis omitted).

Moreover, the City asserts that Appellant persistently misinterprets *Wynne*, as, therein, the high Court

did not find Maryland's tax scheme unconstitutional on the basis that state and local taxes must be considered in tandem, but, rather, it condemned Maryland's tax scheme because Maryland's "county" tax was actually a duplicative state tax against which the state refused to offer credit for out-of-state taxes paid. The City, thus, maintains that the manner in which the "county" tax functioned (*i.e.*, it was enacted by the state legislature and administered, collected, and distributed by Maryland's Comptroller) rendered it a state tax in disguise, whereas the Philadelphia Tax is a purely local tax which is administered, collected, and distributed by the Department, and was enacted by the Philadelphia City Council.

Contemplating Appellant's claim that she was subjected to double taxation, the City argues that the Department provided Appellant a full credit for income taxes paid to Wilmington, leading her to incur only the same 3.922% Philadelphia Tax rate as a Philadelphia resident working entirely in Philadelphia. From the City's perspective, the flaw in Appellant's double taxation claim is palpable "when you consider what the outcome would be if neither Wilmington nor Philadelphia had an income tax and [Appellant] was only subject to Delaware and Pennsylvania income taxes." *Id.* at 22. Specifically, the City points out that, under such circumstances, Appellant would be taxed at Delaware's rate of 5% and would receive a credit from Pennsylvania equal to its tax rate of 3.07%, such that Appellant would still incur a tax rate that is 1.93% higher than her in-state cohorts (namely, Delaware's full 5%). The City emphasizes that this scenario would present no dormant Commerce Clause violation, as Pennsylvania would not be expected to issue a further refund to account for Delaware's higher tax rate. In the City's view, then, "[t]he Commonwealth

Court correctly applied the same logic to the instant matter and found that there was no double taxation because '[Appellant] never pays more than one local tax or more than one state tax.'" *Id.* at 23 (quoting *Zilka*, 1063-1064 C.D. 2019, at 5).

The City next addresses the *Complete Auto* test, preliminarily suggesting that the two prongs thereof which are relevant in this case (specifically, the discrimination and fair apportionment prongs) address the same issue — the risk of double taxation. To that end, the City asserts that the discrimination prong of the test is subsumed by the fair apportionment prong, as the former prevents states from "discriminat[ing] against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of 'multiple taxation,'" *Nw. States Portland Cement Co.*, 358 U.S. at 458, 79 S.Ct. 357 (citations and internal citations omitted), while the latter ensures that "there is no danger of interstate commerce being smothered by cumulative taxes of several states," *Complete Auto*, 430 U.S. at 277, 97 S.Ct. 1076. The City contends that, here, there is no risk of double taxation, as the Philadelphia Tax meets both the internal and external consistency tests of the fair apportionment prong of *Complete Auto*.

Maintaining that the Philadelphia Tax is internally consistent, the City reasons that all taxpayers would face the same local income tax rate of 3.922% if every local taxing authority in the nation imposed Philadelphia's taxation scheme — collecting wage taxes on income earned by residents within the jurisdiction and on income earned by residents working outside of that taxing authority's jurisdiction, but allowing the latter a credit against their local wage

taxes for wage taxes paid to out-of-state local taxing authorities. Furthermore, the City argues that the result remains the same when the analysis is expanded to assume that all states adopt Pennsylvania's state income tax rate of 3.07%, as well as its practice of providing credit against an individual's income tax liability for income taxes paid out-of-state. Critically, the City contends that Appellant "continues to offer a distorted version of the internal consistency test" in reaching her conclusion that the Philadelphia Tax is unconstitutional, City's Brief at 28, as she utilized a hypothetical scenario in which every taxing jurisdiction adopts a different tax rate, as opposed to the correct hypothetical in which every taxing jurisdiction adopts the same practice *and* the same tax rate, *id.* at 32. Thus, according to the City, "[w]hen the internal consistency test is applied correctly – using identical tax rates – Philadelphia's (and Pennsylvania's) [income tax] schemes satisfy the internal consistency test." *Id.*

Likewise, the City claims that its tax scheme is externally consistent, as the City has authority to tax all of Appellant's income, wherever earned, based on her domicile in Philadelphia. *See Okla. Tax. Cmm'n v. Chickasaw Nation*, 515 U.S. 450, 463, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) ("Domicile itself affords a basis for . . . taxation."). In any event, the City asserts that it "negates any claim of unfair apportionment or double taxation" by "provid[ing] a credit for a resident's out-of-state activity." City's Brief at 33 (citing, *inter alia*, *House of Lloyd v. Commonwealth*, 684 A.2d 213, 217 (Pa. Cmwlth. 1996) ("The Commonwealth's use tax is fairly apportioned in that it includes the customary provisions against duplication, including a credit for sales tax paid to another state."); *Goldberg,* 488 U.S. at 264, 109 S.Ct. 582 ("The . . . taxing scheme is fairly apportioned, for it provides a credit against its use tax

for sales taxes that have been paid in other States." (ellipses original))). Lastly, the City maintains that *Philadelphia Eagles*, *Northwood Construction*, and *7-Eleven* do not support Appellant's argument that the full credit she received for her Wilmington Tax is insufficient to satisfy the external consistency test. Indeed, the City contends that this trio of cases is distinguishable from the instant matter because, in each of those cases, "the offending jurisdiction failed to give any credit for taxes paid to another jurisdiction," *id.* at 34, whereas, here, "the City provided full credit for any out-of-jurisdiction activity, satisfying the external consistency test," *id.* at 35. Accordingly, in light of the foregoing, the City asks our Court to affirm the decision of the court below.[8]

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[8] The Pennsylvania Department of Revenue ("PDOR") submitted an *amicus* brief in support of the City. Therein, PDOR avers that the Commonwealth Court properly applied the *Complete Auto* test and found this matter distinguishable from *Wynne*. Countering Appellant's *Complete Auto* assessment, PDOR argues that the City's tax scheme meets the internal consistency test because, unlike the Maryland tax scheme in *Wynne*, the City offsets the Philadelphia Tax by granting residents credit for taxes paid to other local jurisdictions, such as Wilmington. In that regard, PDOR emphasizes that, if the Philadelphia/Pennsylvania tax scheme was applied in every jurisdiction, no resident would ever be subject to double taxation, thus demonstrating internal consistency. PDOR explains that any heightened tax burden on Appellant versus that incurred by her intrastate peers stems from the interaction of two different — but nondiscriminatory — tax schemes, which is permissible under the dormant Commerce Clause.

PDOR next highlights that, while the external consistency test has been employed by the high Court in corporate tax cases and sales tax cases, *Wynne* presented the Court with the first opportunity to apply the test in the context of a resident-based individual income tax, but the Court declined to do so, finding that the tax in question failed the internal consistency test.

Moreover, PDOR notes that the *Wynne* Court "endorse[d] the ability of a resident state to tax all of its resident's income, so long as it does not run afoul of the internal consistency test." PDOR's Brief at 14 (emphasis omitted) (citing *Wynne*, 575 U.S. at 566-68, 135 S.Ct. 1787). Hence, PDOR concludes that "there is no clear holding in *Wynne* that a residence-based income tax must be externally consistent." *Id.* at 15.

PDOR additionally directs our Court to Justice Ginsburg's dissenting opinion in *Wynne*, and the hypothetical "fix" she offered — specifically, Justice Ginsburg suggested that Maryland could amend its tax code to eliminate the special non-resident tax and simply continue taxing all residents' income regardless of source, *Wynne*, 575 U.S. at 582, 135 S.Ct. 1787 (Ginsburg, J., dissenting) — with which the *Wynne* majority ultimately acquiesced, *see id.* at 568-69, 135 S.Ct. 1787 (majority opinion). PDOR explains that, in its view, the *Wynne* Court could not have envisioned applying the external consistency test in the context of a resident-based individual income tax, as this "fix" would indubitably fail the test. PDOR submits that a recent Utah Supreme Court decision, *Steiner v. Utah State Tax Comm'n*, 449 P.3d 189, 197 (Utah 2019) (opining that the *Wynne* Court "strongly implied that tax systems that fail external consistency would nonetheless pass constitutional muster"), underscores its reasoning in this regard.

In any event, PDOR agrees with the Commonwealth Court's determination that the Philadelphia Tax is externally consistent because the City provides its residents with tax credit for wage taxes paid to outside jurisdictions and, in so doing, does not tax more than its fair share of residents' income. In PDOR's view, the City "is economically justified [in] taxing a resident on all of his income because residents receive all of the protections and benefits afforded by the resident jurisdiction, *e.g.*, fire, police, public utilities." PDOR's Brief at 18.

Lastly, PDOR avers that our Court's adoption of Appellant's argument would detrimentally impact state and local tax revenues "without any clear indication from the U.S. Supreme Court that such a result is mandated." *Id.* at 19. PDOR submits that Appellant's argument, if adopted, would require "the Commonwealth and its political subdivisions, which have lower tax rates, to export their tax revenues to bordering states and

IV. Analysis

As an initial matter, we emphasize that the question of aggregation for purposes of a dormant Commerce Clause analysis is a matter of first impression for this Court. To that end, we reject Appellant's assertion that *Philadelphia Eagles*, *Northwood Construction*, and *7-Eleven* demonstrate that this Court and the Commonwealth Court "have consistently recognized that a Commerce Clause analysis *must* examine the local tax as it relates to the state tax." Appellant's Brief at 17 (emphasis original). In this trio of cases, neither our Court nor the lower court pronounced that local and state taxes must be aggregated in conducting a *Complete Auto* analysis under the dormant Commerce Clause; thus, these cases do not control our initial query.[9] Instead, we place paramount importance on the high Court's decision in *Wynne*, which we find to be instructive on the question of aggregation. Based thereon, we find that, in addressing Appellant's dormant Commerce Clause challenge, we must examine the circumstances surrounding the Philadelphia Tax in order to determine whether it is truly a local tax or is, instead, a state tax masquerading as a local tax.

As noted, in *Wynne*, the high Court found that Maryland's "county" tax was essentially little more than a state tax masquerading as a local tax, given

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jurisdictions with higher tax rates," thus threatening "the Commonwealth's 'fiscal well-being'" and encouraging our government "to increase its tax rates to keep from losing revenue to other states." *Id.* at 21. Accordingly, PDOR urges our Court to affirm the decision of the Commonwealth Court.

[9] We similarly find that *Lohman*, *supra*, is not relevant to our consideration of this issue, as it does not address the need, *vel non*, to aggregate state and local taxes in a dormant Commerce Clause analysis.

that the state imposed the tax via state legislation and the state's comptroller collected the tax. *See Wynne*, 575 U.S. at 546, 135 S.Ct. 1787. In our view, the Court's logic and characterization of the county tax as a state tax based on the circumstances underlying its creation and the manner of its collection via the state's comptroller reveal that state and local taxes need not be aggregated for purposes of a dormant Commerce Clause analysis, as Appellant contends. Indeed, nowhere in its comprehensive opinion did the *Wynne* Court endorse the notion that local taxes are essentially a legal fiction, indistinguishable from state taxes. Rather, in our view, the Court sanctioned an *ad hoc* approach, under which a "local" income tax may be deemed indistinguishable from the corresponding state's income tax only if, like Maryland's "county" tax, it is actually a duplicative state tax in disguise.

Here, the Philadelphia Tax is readily distinguishable from the county tax at issue in *Wynne*, as the latter was enacted by the State of Maryland and collected by Maryland's comptroller, whereas the Philadelphia Tax was enacted by Philadelphia's City Council and is collected by the City's Department of Revenue solely for the benefit of the City and its citizenry. In light of this stark contrast, we reject Appellant's argument that *Wynne* mandates that we aggregate the Philadelphia Tax with the PIT in discerning whether it violates the dormant Commerce Clause, as her view in that regard is contrary to the high Court's teachings in *Wynne*.

We likewise reject Appellant's claim that the City was required to aggregate the Philadelphia Tax and the PIT because local governments, such as the City, are creatures of statute, which derive taxation authority solely from the legislative enactments of our General

Assembly. It is axiomatic that "[t]he validity of the taxing ordinance does not depend upon whether the tax is regarded in a legal sense as a state or local tax," given that "[a]ll taxes in Pennsylvania levied by municipal and quasi municipal corporations must, of course, be authorized by the legislature." *McClelland*, 57 A.2d at 848. Indeed, our Court has recognized that, "*[i]n that sense*, therefore, all [taxes] may be considered state taxes." *Id.* (emphasis original). Nevertheless, although our Court has acknowledged that, *in a sense*, state and local taxes are indistinguishable, as both are authorized by state legislation, we have also stressed that "[s]tate taxes stand on a different basis from local levies." *Id.* In that vein, we have highlighted that state taxes "are essential to the very 'preservation' of the state itself," whereas local taxes "are authorized or permitted by the state, not for its actual preservation, but merely to maintain the machinery of local government." *Id.* (internal citations omitted); *see Nat'l Biscuit*, 98 A.2d at 186 (observing that, in *McClelland*, we concluded that "a tax imposed for the benefit merely of a local political subdivision, and not for general State purposes, is not to be regarded as a State tax"). Thus, nothing in the high Court's teachings, nor in our own jurisprudence, stands for the premise that state and local taxes are broadly indistinguishable, much less supports Appellant's conclusion that state and local taxes *must* be aggregated for purposes of a dormant Commerce Clause analysis.

Aside from her reliance on *Wynne*, which, as explained above, undermines her argument in favor of aggregation, and *Philadelphia Eagles*, *Northwood Construction*, and *7-Eleven*, which are inapposite to the issue, Appellant provides little else to justify her view that we must consider the Philadelphia Tax in tandem with the PIT in addressing her dormant Commerce Clause

challenge. In her final effort to sway this Court with respect to the question of aggregation, Appellant proffers three out-of-state cases — *Arizona Public Service*, *supra*; *General Motors*, *supra*; and *Matkovich*, *supra.* In the first of these cases, an Arizona court of appeals held that an Arizona public utility company which purchased coal from a mine located in McKinley County, New Mexico, was entitled to tax credits, against the amount it paid in Arizona's use tax, for gross receipts taxes which the company paid to both New Mexico and McKinley County. In so concluding, the Arizona court of appeals examined A.R.S. § 42-1409,[10] which governed the state's use tax and provided an express exemption whereby the use tax did not apply to "[t]angible personal property the sale or use of which has already been subjected to an excise tax at a rate equal to or exceeding the tax imposed by this article under the laws of another state of the United States." *Id.* § 42-1409(A)(2). The provision further provided that, "[i]f the excise tax imposed by the other state is at a rate less than the tax imposed by this article, the tax imposed by this article is reduced by the amount of the tax already imposed by the other state." *Id.* The court found that the plain language of the statute — crediting a taxpayer for excise taxes paid on personal property "under the laws of another state" to offset Arizona's use tax — required it to exempt the utility company from the use tax for the gross receipts taxes paid to both the State of New Mexico and McKinley County. With respect to the latter taxing authority, the court observed that the county was entitled to impose its gross receipts tax on taxpayers solely by virtue of its "derivative relation-

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[10] Section 42-1409 was renumbered following the court's decision in *Arizona Public Service.*

ship" with the state, and, more precisely, from the state's enabling statutes. *Ariz. Pub. Serv. Co.*, 934 P.2d at 799. Tellingly, however, the court concluded that this relationship between the state and county revealed that the word "under," as employed by Arizona's legislature in Section 42-1409(A)(2), was unambiguous and justified an exemption for the gross receipts tax which the utility company paid to McKinley County.

While the Arizona intermediate court briefly mentioned the Commerce Clause in its disposition of the tax issue before it, its focus, undoubtedly, was on the language of its state's legislation, and it is that legislation which governed the outcome of the case. As such, *Arizona Public Service* does not support the novel practice of aggregating state and local taxes for purposes of a dormant Commerce Clause analysis.

Likewise, *General Motors* is of limited value. Therein, the Colorado Supreme Court was tasked with determining whether a use tax imposed by the City and County of Denver violated the dormant Commerce Clause. In finding that it did, the court preliminarily concluded that "[i]nternal consistency [under *Complete Auto*] requires that states impose identical taxes when viewed in the aggregate — as a collection of state and sub-state taxing jurisdictions." *General Motors*, 990 P.2d at 69. Markedly, this brief conclusory statement represents the entirety of the court's reasoning, or lack thereof, underlying its determination that state and local taxes must be aggregated for consideration under the dormant Commerce Clause. Thus, *General Motors* provides a poor basis on which for our Court to declare,

for the first time, that state and local level taxes are one and the same for purposes of the Commerce Clause.[11]

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[11] Notably, the *General Motors* court also erroneously employed the *Complete Auto* test. Specifically, in attempting to discern whether Denver's taxation scheme was internally consistent, the court provided the following hypothetical scenario:

> [I]f Colorado imposed a 1% sales or use tax and Denver a 2% tax, a purchaser or user would owe a 3% total tax. Similarly, if Michigan collected a 2% sales or use tax and Detroit a 1% tax, a purchaser or user in Detroit would pay a 3% total tax. However, a user who purchased the item in Detroit would be subject to an additional 1% tax upon the storage or use of the item in Denver because section 53–92(c) only credits taxes paid to other municipalities. Thus, Denver's use tax could burden interstate commerce if every other state and municipality employed the same tax structure as Colorado and Denver, but imposed different tax rates.

General Motors, 990 P.2d at 70. This is an inaccurate application of the internal consistency test, as the Colorado Supreme Court invented a scenario with "similar" tax schemes in Colorado and Michigan, but with differing rates of taxation, and which are inverted such that Colorado's tax rate matched that of Detroit, and Michigan's tax rate matched the rate imposed by Denver. The court was correct that this scenario could have led to double taxation, as an individual who purchased an item in Detroit would have received a 1% credit against his or her Denver tax, leaving 1% remaining. Based on its view in this regard, the court reasoned that Denver's tax structure was "internally inconsistent because Denver's credit mechanism could cause multiple taxation even if every state and municipality were to impose a taxing scheme *similar* to the one present in Colorado and Denver." *Id.* at 69 (emphasis added).

Yet, the internal consistency test does not operate, as the Colorado Supreme Court suggested, in terms of "similar taxes." Rather, the appropriate question, which we address below, is whether an individual would be subject to double taxation if all states and local taxing authorities were to adopt the *same* taxes and crediting systems as Pennsylvania and Philadelphia. *See Wynne*, 575 U.S. at 562, 135 S.Ct. 1787 ("This test, which helps courts identify tax schemes that discriminate against interstate

The third and final out-of-state case on which Appellant relies, *Matkovich*, also provides negligible support for her claim that state and local income taxes must be viewed as one under the dormant Commerce Clause. In *Matkovich*, the West Virginia Supreme Court concluded that a tax credit statute, W. Va. Code § 11-15A-10a, which operated to offset the state's motor fuel use tax, violated the dormant Commerce Clause because the state's tax department applied the statute in a manner which provided a taxpayer credit only for sales taxes paid on fuel to other states and not for such taxes paid to cities, counties, and localities of other states. Relying on *Wynne*, *Arizona Public Service*, and *General Motors*, the court found that proper application of the statute entitled taxpayers to receive sales tax credits for sales taxes paid to other states and to subdivisions of other states. In so doing, the court opined that "[a]ny other construction of th[e] statute would invariably violate the Commerce Clause's prohibition on subjecting interstate transactions to a greater tax burden than that imposed on strictly intrastate dealings." *Matkovich*, 793 S.E.2d at 897. We are unpersuaded by *Matkovich*, given that the court therein derived support for its conclusion from *Arizona Public Service*, which, as discussed, is distinguishable from the instant case, and from *General Motors*, which, as noted, concluded that state and local taxes must be aggregated without citing any authority or undertaking any semblance of a substantive analysis with respect to the issue. Moreover, we find that the *Matkovich* court's ruling contravenes the high Court's reasoning

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commerce, looks to the structure of the tax at issue to see whether its *identical* application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." (emphasis added; citations and internal quotation marks omitted)).

in *Wynne*, which, as explained, requires an *ad hoc* assessment of the local income tax scheme at issue to discern whether it is distinct from the corresponding state income tax or indistinguishable therefrom for purposes of a *Complete Auto* analysis.

Thus, Appellant has failed to persuade us that her construction of the dormant Commerce Clause aligns with *Wynne*, and these three out-of-state cases do not sway us in her favor. Accordingly, consistent with *Wynne*, we conclude that the Philadelphia Tax was enacted, and operates, as a purely local tax, given that it was promulgated by Philadelphia's City Council and is collected by the Department for the sole benefit of the City and its residents; as a result, we will not consider these state and local taxes in the aggregate in applying the *Complete Auto* test.

Having determined that the Philadelphia Tax and the PIT should be treated as discrete taxes, we must consider whether the City's tax scheme discriminates against interstate commerce. We conclude, as did the Commonwealth Court, that the Philadelphia Tax and the City's corresponding crediting system satisfy the test set forth in *Complete Auto*.

As explained above, Appellant challenges the Philadelphia Tax under two prongs of the *Complete Auto* test: first, she contends that the City's tax scheme is not fairly apportioned; and second, she avers that the tax scheme discriminates against interstate commerce. In assessing whether the tax scheme is fairly apportioned, we must determine whether it is internally and externally consistent. Once more, the high Court's decision in *Wynne* provides clear guidance with respect to this endeavor.

To briefly reiterate, the *Wynne* Court found that Maryland's tax scheme was not internally consistent

because, if every state adopted the three taxes at issue (the county tax, the state tax, and the special non-resident tax) and adopted Maryland's system of not crediting against those taxes, residents who paid income tax to out-of-state jurisdictions would incur double taxation. *Wynne*, 575 U.S. at 565, 135 S.Ct. 1787. The Court stressed that such double taxation was "not simply the result of [the tax scheme's] interaction with the taxing schemes of other States," but, instead, emanated from inherent discrimination contained within the scheme. *Id.* (citations omitted). Pertinently, in declaring Maryland's tax scheme unconstitutional, the Court explained that "Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States," which would vindicate the tax scheme under the internal consistency test. *Id.* at 568, 135 S.Ct. 1787 (citation omitted).

In accordance with *Wynne*, we must now determine whether the City's tax scheme is internally consistent. To do so, we must assume that all local taxing jurisdictions adopt the Philadelphia Tax rate of 3.922% and the City's corresponding practice of crediting taxpayers for local taxes paid to other jurisdictions. In this scenario, April, who lives in State A and works exclusively in State A, would pay 3.922% once to State A, while Bob, who lives in State A but works in State B, would also pay only 3.922% once, to State B, because State A would permit him a credit against its own tax. Thus, both in-state and out-of-state taxpayers would yield the same tax obligation. The same remains true even if we add the Commonwealth's state tax to this hypothetical, as each taxpayer would simply incur an additional state tax obligation of 3.07% consistent with the PIT and the Commonwealth's corresponding practice of offsetting the PIT with state taxes paid

elsewhere. Accordingly, when the internal consistency test is properly applied to the Philadelphia Tax and the PIT, along with the corresponding tax credits permitted by the City and the Commonwealth, it is evident that any remaining "disparate incentives to engage in interstate commerce" stem solely from "the interaction of two different but nondiscriminatory and internally consistent schemes." *Id.* at 562, 135 S.Ct. 1787 (citations omitted); *see Steiner*, 449 P.3d at 197 (finding that, because Utah offered a tax credit for out-of-state taxes, it was internally consistent and compatible with *Wynne*); *Goggin v. State Tax Assessor*, 191 A.3d 341, 347 (Me. 2018) ("Here, the Maine statute expressly allows a credit for the payment of individual income taxes to other states . . . and therefore does not run afoul of *Wynne*.").

Hence, the Commonwealth Court correctly determined that any excess taxes paid by Appellant were simply the result of Delaware's higher income tax rate of 5%, rather than any inherent discrimination contained in the Philadelphia Tax or the City's practice of offsetting its tax with credits paid only to local taxing jurisdictions. A simple hypothetical bolsters our conclusion in this regard: If neither Philadelphia nor Wilmington imposed a local wage tax, Appellant would have nonetheless paid 1.93% more in income taxes than her Pennsylvania counterparts who worked solely in the Commonwealth, as the DIT rate was 5% while the PIT rate was 3.07%. In this hypothetical, Commerce Clause principles would not have required the Commonwealth to credit Appellant beyond the 3.07% which it already permitted her, nor would Delaware incur any similar obligation to lessen Appellant's tax burden, given that states may set their own income tax rates. Certainly, the City should not be required to subsidize Delaware's higher tax rate when

it already offsets its Wage Tax by crediting taxpayers for analogous local taxes paid outside of its jurisdiction. For these reasons, we find that the Philadelphia Tax meets the internal consistency test, and that, relatedly, the tax is not discriminatory under the third prong of the *Complete Auto* test because the City imposes a consistent tax on all residents and provides the necessary credit against similar out-of-state local taxes paid by them. *See Armco Inc.*, 467 U.S. at 644, 104 S.Ct. 2620 (commingling consideration of the internal consistency test and the discrimination prong of the *Complete Auto* test because "[a] tax that unfairly apportions income from other States is a form of discrimination against interstate commerce"); *see also* City's Brief at 25-26 (advocating that the discrimination and fair apportionment prongs of the *Complete Auto* test merge).

Additionally, we find that the Philadelphia Tax meets *Complete Auto's* external consistency test, which examines "the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Jefferson Lines*, 514 U.S. at 185, 115 S.Ct. 1331. It is well-established that "domicile in itself establishes a basis for taxation" because the "[e]njoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government." *Lawrence*, 286 U.S. at 279, 52 S.Ct. 556. Indeed, "[a] tax measured by the net income of residents is an equitable method of distributing the burdens of government," which include public education and emergency services, "among those who are privileged to enjoy its benefits." *People of State of N.Y. ex rel. Cohn v. Graves*, 300 U.S. 308, 313,

57 S.Ct. 466, 81 L.Ed. 666 (1937). Consequently, we agree with the lower court that "Philadelphia's provision of municipal benefits and services to its residents provides sufficient economic justification for the imposition of its Wage Tax." *Zilka*, 1063-1064 C.D. 2019, at 9 (citation omitted). Moreover, as the lower court explained, "Philadelphia avoided taxing more than its fair share of [Appellant's] wages by providing a tax credit for 100% of the Wilmington Tax." *Id.* Thus, we find that the City's tax scheme is externally consistent under *Complete Auto*.

For these reasons, we conclude that the City did not violate the dormant Commerce Clause by imposing upon Appellant the Philadelphia Tax, crediting her for the similar local tax she paid to Wilmington, but declining to afford her an additional credit for the state taxes she paid to Delaware, as the tax scheme is both internally and externally consistent and is not discriminatory against interstate commerce, in conformance with the *Complete Auto* test. To hold otherwise would, in effect, nullify the high Court's venerable recognition that "tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes" are not unconstitutional. *Wynne*, 575 U.S. at 562, 135 S.Ct. 1787. Accordingly, we affirm the Commonwealth Court's decision concluding that the tax scheme is constitutional.

Justices Donohue and Wecht join the opinion.

Justice Wecht files a concurring opinion.

Justice Dougherty files a dissenting opinion in which Justice Mundy joins.

Justice Brobson did not participate in the consideration or decision of this matter.

CONCURRING OPINION

JUSTICE WECHT

I agree that the tax scheme before us passes the internal consistency test as applied in *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542, 135 S.Ct. 1787, 191 L.Ed.2d 813 (2015). I write separately to explain that, while I discern some logical valence in Diane Zilka's novel legal argument, I am distinctly reluctant to expand upon the holding in *Wynne* given the protean and unpredictable nature of the dormant Commerce Clause jurisprudence expounded by the Supreme Court of the United States.[1]

Article I Section 8 of the United States Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[2] This represents a positive conferral of power to Congress. In addition, the Supreme Court "consistently [has] held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject."[3] This negative (or dormant) Commerce Clause aims to prevent "a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not

[1] In this opinion, my discussion of "the Supreme Court" refers to the Supreme Court of the United States, and not to this Supreme Court or the Supreme Court of any state.

[2] U.S. Const. art. I, § 8, cl. 3.

[3] *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) (citations omitted).

bear."[4] The doctrine " 'reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the 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.' "[5]

By the Supreme Court's own admission, though, the dormant Commerce Clause's "command has been stated more easily than its object has been attained," leading the Court to revamp the doctrine many times.[6] Early in the history of the dormant Commerce Clause, "the Court held the view that interstate commerce was wholly immune from state taxation 'in any form[.]' "[7] "This position gave way in time to a less uncompromising," if still "formal approach," in which the Court would allow some taxes on interstate commerce so long they were given the correct name.[8] The Court

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[4] *Id.* at 180, 115 S.Ct. 1331.

[5] *Id.* (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979)).

[6] *Id.* (remarking that "the Court's understanding of the dormant Commerce Clause has taken some turns").

[7] *Id.* (quoting *Leloup v. Port of Mobile*, 127 U.S. 640, 648, 8 S.Ct. 1380, 32 L.Ed. 311 (1888), *overruled by Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)).

[8] *Id.* at 181, 115 S.Ct. 1331 (recounting that "the Court would invalidate a state tax levied on gross receipts from interstate commerce, or upon the 'freight carried' in interstate commerce, but would allow a tax merely measured by gross receipts from interstate commerce as long as the tax was formally imposed upon franchises, or 'in lieu of all taxes upon [the taxpayer's] property[.]' " (internal citations omitted)); *Di Santo v. Pennsylvania*, 273 U.S. 34, 44, 47 S.Ct. 267, 71 L.Ed. 524 (1927) (Stone, J., dissenting) (calling the Court's formal approach "too mechanical,

eventually tired of this formal approach too, abandoning it in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), which marks the beginning of the Court's modern dormant Commerce Clause jurisprudence.

The *Complete Auto* Court upheld a Mississippi privilege tax as applied to a Michigan company that shipped automobiles to dealers in Mississippi. The Court explained that:

> Appellant's attack is based solely on decisions of this Court holding that a tax on the "privilege" of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce. *See*, *e.g.*, *Spector Motor Service v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951); *Freeman v. Hewit*, 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265 (1946). This rule looks only to the fact that the incidence of the tax is the "privilege of doing business"; it deems irrelevant any consideration of the practical effect of the tax. The rule reflects an underlying philosophy that interstate commerce should enjoy a sort of "free trade" immunity from state taxation.[9]

In upholding the Mississippi privilege tax, the *Complete Auto* Court stated: "We note again that no claim is made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce,

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too uncertain in its application, and too remote from actualities, to be of value").

[9] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

or that the tax is not fairly apportioned."[10] This has since become the controlling test to determine whether a state tax violates the dormant commerce clause. Under *Complete Auto*, a state tax can be levied on interstate commerce as long as the tax: (1) has a sufficient nexus with the state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is related to services provided by the state.

Although it is often said that a tax is unconstitutional if it fails to meet any one prong of the *Complete Auto* test, the Supreme Court's recent precedent suggests that a levy that theoretically could result in double taxation nonetheless may be constitutional if it passes what is called the internal consistency test.[11] The Supreme Court has explained that:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate

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[10] *Id.* at 287, 97 S.Ct. 1076.

[11] *Compare Zilka*, 2022 WL 67789, at *3 ("Failure to meet any one prong [of the *Complete Auto* test] renders the tax unconstitutional."), *with Wynne*, 575 U.S. at 561-62, 135 S.Ct. 1787 ("[T]he tax schemes held to be unconstitutional in [prior cases] had the potential to result in the discriminatory double taxation of income earned out of state and created a powerful incentive to engage in intrastate rather than interstate economic activity. Although we did not use the term in those cases, we held that those schemes could be cured by taxes that satisfy what we have subsequently labeled the 'internal consistency' test.").

> commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.[12]

In arguing that the tax scheme at issue here violates the internal consistency test, Zilka relies on the Supreme Court's decision in *Wynne*. The Maryland tax scheme at issue in that case had two parts: a "state" income tax, which was set at a graduated rate, and a so-called "county" income tax, which was set at a rate that varied by county but was capped at 3.2%. In addition to these taxes, Maryland also taxed the income of nonresidents who worked in the state. This nonresident tax also had two parts. First, nonresidents paid the "state" income tax on all the income they earned from sources within Maryland. Second, nonresidents were required to pay a "special nonresident tax" in lieu of the "county" tax. The "special nonresident tax" was levied on income earned from sources within Maryland, and its rate was equal to the lowest county income tax rate set by any Maryland county.

Maryland residents who paid income tax to another jurisdiction for income earned in that jurisdiction were allowed a credit against the Maryland "state" tax, but not the "county" tax. Thus, part of the income that a Maryland resident earned outside of the State could be taxed twice.

The Wynnes were Maryland residents who earned pass-through income from a Subchapter S corporation

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[12] *Jefferson Lines, Inc.*, 514 U.S. at 185, 115 S.Ct. 1331.

that operated in thirty-nine states. When filing their Maryland income taxes, the Wynnes claimed a credit for the taxes they paid in other states. The Maryland State Comptroller of the Treasury allowed the Wynnes a credit against their "state" income tax, but not against their "county" tax.

The Supreme Court held that Maryland's tax scheme was unconstitutional, since a portion of the taxpayer's income tax burden (the "county" portion) could not be reduced by taxes paid in other jurisdictions. After applying the internal consistency test, the Court concluded that the "Maryland scheme's discriminatory treatment of interstate commerce is not simply the result of its interaction with the taxing schemes of other States. Instead, the internal consistency test reveals [that] Maryland's tax scheme is inherently discriminatory and operates as a tariff."[13] The Court illustrated proper application of the internal consistency test as follows:

> Assume that every State imposed the following taxes, which are similar to Maryland's "county" and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. Assume further that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25%

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[13] *Wynne*, 575 U.S. at 565, 135 S.Ct. 1787.

> tax twice: once to State A, where he resides, and once to State B, where he earns the income.[14]

The Court then modified its hypothetical to illustrate how the tax scheme would satisfy the internal consistency test if it allowed credits.

> [A]ssume that all States impose a 1.25% tax on all three categories of income but also allow a credit against income taxes that residents pay to other jurisdictions. In that circumstance, April (who lives and works in State A) and Bob (who lives in State A but works in State B) would pay the same tax. Specifically, April would pay a 1.25% tax only once (to State A), and Bob would pay a 1.25% tax only once (to State B, because State A would give him a credit against the tax he paid to State B).[15]

Justice Antonin Scalia dissented in *Wynne*, calling the dormant Commerce Clause "utterly illogical" and "a judicial fraud."[16] Expressing his disapproval of the doctrine, Justice Scalia wrote:

> The Court's efforts to justify this judicial economic veto come to naught. The Court claims that the doctrine "has deep roots." So it does, like many weeds. But age alone does not make up for brazen invention. And the doctrine in any event is not quite as old as the Court makes it seem. The idea that the Commerce Clause of its own force limits state power "finds no expression" in discussions surrounding the Constitution's ratification. F. Frankfurter, The Commerce Clause under Marshall, Taney and Waite 13 (1937). For years after the

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[14] *Id.* at 567-68, 135 S.Ct. 1787.

[15] *Id.* at 568, 135 S.Ct. 1787.

[16] *Id.* at 572, 135 S.Ct. 1787 (Scalia, J., dissenting).

> adoption of the Constitution, States continually made regulations that burdened interstate commerce (like pilotage laws and quarantine laws) without provoking any doubts about their constitutionality. This Court's earliest allusions to a negative Commerce Clause came only in *dicta*—ambiguous *dicta*, at that—and were vigorously contested at the time. Our first clear holding setting aside a state law under the negative Commerce Clause came after the Civil War, more than 80 years after the Constitution's adoption. *Case of the State Freight Tax*, 15 Wall. 232, 21 L.Ed. 146 (1872). Since then, we have tended to revamp the doctrine every couple of decades upon finding existing decisions unworkable or unsatisfactory. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 309, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). The negative Commerce Clause applied today has little in common with the negative Commerce Clause of the 19th century, except perhaps for incoherence.[17]

Justice Scalia also took aim at the internal consistency test, calling it an "exercise in counterfactuals"[18] and noting that the test:

> bears no resemblance ... to anything in the text or structure of the Constitution. Nor can one discern an obligation of internal consistency from our legal traditions, which show that States have been imposing internally inconsistent taxes for quite a while—until recently with our approval. *See*, *e.g.*, *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964) (upholding internally inconsistent business activities tax);

[17] *Id.* at 572-73, 135 S.Ct. 1787.

[18] *Id.* at 574, 135 S.Ct. 1787.

> *Hinson v. Lott*, 8 Wall. 148, 75 U.S. 148, 19 L.Ed. 387 (1868) (upholding internally inconsistent liquor tax). No, the only justification for the test seems to be that this Court disapproves of "'cross-border tax disadvantage[s]'" when created by internally inconsistent taxes, but is willing to tolerate them when created by "the interaction of . . . internally consistent schemes." *Ante*, at 1802.[19]

Justice Scalia's observation that the internal consistency test does not prevent all double taxation is especially relevant here inasmuch as the tax scheme before us passes the internal consistency test yet still results in a state of affairs in which those who work across state lines are taxed more heavily than those who do not. AS Justice Scalia observed:

> The one sure way to eliminate all double taxation is to prescribe uniform national tax rules—for example, to allow taxation of income only where earned. But a program of prescribing a national tax code plainly exceeds the judicial competence. (It may even exceed the legislative competence to come up with a uniform code that accounts for the many political and economic differences among the States.) As an alternative, we could consider whether a State's taxes in practice overlap too much with the taxes of other States. But any such approach would drive us "to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to an abuse of power." *McCulloch v. Maryland*, 4 Wheat. 316, 430, 4 L.Ed. 579 (1819). The Court today chooses a third approach, prohibiting States from imposing

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[19] *Id.* at 575, 135 S.Ct. 1787.

> internally inconsistent taxes. *Ante*, at 1802. But that rule avoids double taxation only in the hypothetical world where all States adopt the same internally consistent tax, not in the real world where different States might adopt different internally consistent taxes.[20]

As the Majority explains, Zilka argues that *Wynne* requires us to aggregate her "state" and "local" tax burden before applying the internal consistency test in order to determine whether the scheme as a whole discriminates against interstate commerce. In support of that argument, Zilka relies heavily upon footnote eight in *Wynne*, where the Court stated:

> to apply the internal consistency test in this case, *we must evaluate the Maryland income tax scheme as a whole.* That scheme taxes three separate categories of income: (1) the "county tax" on income that Maryland residents earn in Maryland; (2) the "county tax" on income that Maryland residents earn in other States; and (3) the "special nonresident tax" on income that nonresidents earn in Maryland. For Commerce Clause purposes, it is immaterial that Maryland assigns different labels (*i.e.*, "county tax" and "special nonresident

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[20] *Id.* at 577, 135 S.Ct. 1787. Justice Scalia concluded by saying that, "[f]or reasons of *stare decisis*," he would "vote to set aside a tax under the negative Commerce Clause if (but only if) it discriminates on its face against interstate commerce or cannot be distinguished from a tax this Court has already held unconstitutional." *Id.* at 578, 135 S.Ct. 1787. Justice Ruth Bader Ginsburg also authored a dissent, which Justice Scalia and Justice Elena Kagan joined. Justice Ginsburg wrote that "nothing in the Constitution or in prior decisions of this Court dictates that one of two States, the domiciliary State or the source State, must recede simply because both have lawful tax regimes reaching the same income." *Id.* at 582, 135 S.Ct. 1787 (Ginsburg, J., dissenting).

> tax") to these taxes. In applying the dormant Commerce Clause, they must be considered as one. *Cf. Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 102-03, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (independent taxes on intrastate and interstate commerce are "compensatory" if they are rough equivalents imposed upon substantially similar events). If state labels controlled, a State would always be free to tax domestic, inbound, and outbound income at discriminatory rates simply by attaching different labels.[21]

Citing this language, Zilka contends that Pennsylvania's income tax and Philadelphia's wage tax "must be considered as one" so that "the total tax burden upon interstate commerce" can be evaluated.[22] In other words, looking at it Zilka's way, Philadelphia residents do not pay a 3.07% Pennsylvania income tax and a 3.92% Philadelphia wage tax; rather, they pay a total "state" tax of 6.99%. Similarly, those who work or live in Wilmington in essence pay a total "state" tax of 6.25%, even though 1.25% of that tax is collected by the City of Wilmington.

Zilka relies upon the scholarship of University of Georgia Law School professor Walter Hellerstein, who

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[21] *Id.* at 564 n.8, 135 S.Ct. 1787 (emphasis added).

[22] Brief for Zilka at 8 (emphasis omitted). Zilka also cites case law which suggests that, constitutionally speaking, all "local" or "county" taxes are just state taxes by another name, since all taxing authority initially resides with the state government. *See id.* at 11 (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79, 28 S.Ct. 40, 52 L.Ed. 151 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be instructed by them.")).

argues that the internal consistency test requires courts to evaluate the total aggregate state and local tax burden in Commerce Clause cases, since all taxes in some sense are "state" taxes regardless of what the state calls them or how they are collected. Like Zilka, Professor Hellerstein believes that the Commonwealth Court's decision below was incorrect because the court failed to recognize that "all exercises of state taxing authority affecting cross-border economic activity (whether denominated state or local taxes under the taxing regime) should be evaluated at the state level and in light of the state's tax structure as a whole."[23] According to Professor Hellerstein:

> Because political subdivisions of a state are creatures of the state, their exercises of tax power are treated as the exercise of state tax power and adjudicated according to the standards restraining the exercise of state tax power. In short, the fact that the state tax power is exercised by a political subdivision of the state rather than by the state itself is of no constitutional moment. Indeed, many of the decisions delineating the constitutional limitations on 'state' taxation affecting cross-border economic activity involve local taxes.[24]

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[23] Walter Hellerstein, *Are State and Local Taxes Constitutionally Distinguishable?* (Revised), Tax Notes State, Vol. 103 at 755 (Feb. 14, 2022) (arguing that "the Pennsylvania Commonwealth Court's analysis in *Zilka* is fundamentally flawed because it fails to examine the constitutional issues, particularly the commerce clause's internal consistency doctrine, at the state level.") (footnote omitted).

[24] Jerome R. Hellerstein & Walter Hellerstein, State Taxation, ¶20.10; *see* Hellerstein, *Are State and Local Taxes Constitutionally Distinguishable?* (Revised), at 748 ("[T]axes imposed by a 'county,

I agree with the Majority that the internal consistency test, as articulated in *Wynne*, does not mandate the sort of state-level aggregation that Professor Hellerstein describes.[25] I note that the *Wynne* Court itself did not focus its analysis on Maryland's *aggregate* state and local tax burden. Rather, the Court mostly ignored the "state" portion of Maryland's tax scheme (which did allow credits) and emphasized the "county" and "special nonresident" taxes (which did not allow credits).[26] So if Zilka is correct that the *Wynne* Court held that the "state and local income tax burden must be considered together,"[27] one wonders why the *Wynne* Court didn't consider the Maryland taxes together.

In fact, there would have been no need for the *Wynne* Court to aggregate the Maryland taxes, since the Court believed that the scheme was unconstitutional on its face given the lack of credits. In the *Wynne* Court's telling, the issue with the scheme was that the "county" portion of the Maryland tax and the equivalent tax on nonresidents did not give taxpayers a credit for local taxes that they paid to another jurisdiction. And if every state enacted an identical scheme, some taxpayers inevitably would be double-taxed. The *Wynne* Court even said point blank that "Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States . . . . If it did, Maryland's tax

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city, or other locality' must be evaluated as a tax at the state level and in light of the state's tax structure as a whole.").

[25] *See* Majority Opinion at 1167-68.

[26] *Wynne*, 575 U.S. at 567-68, 135 S.Ct. 1787.

[27] Brief for Zilka at 9.

scheme would survive the internal consistency test and would not be inherently discriminatory."[28]

Here, though, if every state adopted a scheme exactly like the one before us—with a 3.07% Tax A and a 3.92% Tax B, each of which gives credits for identical taxes paid elsewhere—those who live in one state and work in another would not be double-taxed, as one state's taxes will always be offset by credits for taxes paid to the other state. Thus, the tax scheme before us passes the internal consistency test as the United States Supreme Court has articulated it. Zilka did not pay more in taxes than Philadelphia residents who work in-state because Pennsylvania's tax scheme is internally inconsistent. Rather, she paid more in taxes because Pennsylvania and Delaware each have different, internally *consistent* tax schemes.[29]

Doctrinally speaking, this occurs because the United States Supreme Court's internal consistency test does not prevent all taxes that burden interstate commerce. Instead, the test:

> avoids double taxation only in the hypothetical world where all States adopt the same internally consistent tax, not in the real world where different States might adopt different internally consistent taxes. For example, if Maryland

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[28] *Wynne*, 575 U.S. at 568, 135 S.Ct. 1787.

[29] *Jefferson Lines, Inc.*, 514 U.S. at 185, 115 S.Ct. 1331 ("Internal consistency is preserved when the imposition of *a tax identical to the one in question* by every other State would add no burden to interstate commerce that intrastate commerce would not also bear.") (emphasis added); *see Zilka*, 2022 WL 67789, at *6 ("Although we understand that [Zilka] pays more than her intrastate counterparts, such is not the result of an unconstitutional tax scheme. Rather, it is simply the 'result of the interaction of two different but nondiscriminatory and internally consistent schemes.'").

> imposes its income tax on people who live in Maryland regardless of where they work (one internally consistent scheme), while Virginia imposes its income tax on people who work in Virginia regardless of where they live (another internally consistent scheme), Marylanders who work in Virginia still face double taxation.[30]

While I agree with the Majority's decision not to adopt Zilka's aggregation theory for purposes of the internal consistency test, I acknowledge the very real possibility that the Supreme Court will modify its precedent in this area, as it has many times throughout history.[31] Indeed, this case may be worthy of certiorari so that the Court can consider whether the internal consistency test should be applied as a state-level inquiry, as Zilka and Professor Hellerstein suggest. I concede that, without some form of state-level aggregation, a state potentially could avoid providing full credits to its residents for taxes paid to other states on income earned in the other states by authorizing cities or political subdivisions to impose a portion of the tax directly. And allowing the result in any one case to hinge on whether a given tax is labeled state, local, county, city, or non-resident is reminiscent of the unworkable formalism that the Court's modern dormant Commerce Clause cases have eschewed since *Complete Auto*.[32]

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[30] *Wynne*, 575 U.S. at 577, 135 S.Ct. 1787 (Scalia, J., dissenting) (emphasis omitted); *id.* ("Then again, it is only fitting that the Imaginary Commerce Clause would lead to imaginary benefits.").

[31] *Jefferson Lines, Inc.*, 514 U.S. at 180, 115 S.Ct. 1331 (conceding, somewhat euphemistically, that the Court's dormant Commerce Clause jurisprudence "has taken some turns").

[32] *See Jefferson Lines, Inc.*, 514 U.S. at 181, 115 S.Ct. 1331 (discussing the Court's pre-*Complete Auto* formalist approach,

Nevertheless, I believe that the task of modifying this doctrine (if at all) should be left for the Court that invented it in the first place. While it is generally the case that state courts "should proceed cautiously when asked to be the engine of innovation in federal constitutional law,"[33] the concerns here are even more acute because the dormant Commerce Clause rests on an unstable foundation seemingly unmoored from any discernible legal principle.[34] Because I am not confident in my ability to predict the next twist or turn in the Supreme Court's ever-changing dormant Commerce Clause jurisprudence, I join the Majority's decision affirming the Commonwealth Court and distinguishing the challenged tax scheme from the one at issue in *Wynne.*

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which was "too mechanical, too uncertain in its application, and too remote from actualities, to be of value") (citation omitted); *cf. Wynne*, 575 U.S. at 565 n.8, 135 S.Ct. 1787 ("If state labels controlled, a State would always be free to tax domestic, inbound, and outbound income at discriminatory rates simply by attaching different labels.").

[33] *Commonwealth v. Molina*, 628 Pa. 465, 104 A.3d 430, 458 (2014) (Castille, C.J., dissenting).

[34] *Wynne*, 575 U.S. at 575, 135 S.Ct. 1787 (Scalia, J., dissenting) ("Because no principle anchors our development of this doctrine—and because the line between wise regulation and burdensome interference changes from age to economic age—one can never tell when the Court will make up a new rule or throw away an old one."); *Am. Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 203, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990) (Scalia, J., concurring) (remarking that "[c]hange is almost [the doctrine's] natural state").

DISSENTING OPINION

JUSTICE DOUGHERTY

The Majority correctly recognizes "the crux of the dormant Commerce Clause is 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, nor may it impose a tax which discriminates against interstate commerce . . . to the burden of multiple taxation[.]" Majority Opinion at 1156 (internal quotation marks and citations omitted). But, in my view, failing to aggregate state and local taxes plainly results in discrimination against interstate commerce, so I must dissent.[1]

Like the Majority, I find *Comptroller of Treasury v. Wynne*, 575 U.S. 542, 135 S.Ct. 1787, 191 L.Ed.2d 813 (2015) to be "instructive on the question of aggregation." Majority Opinion at 1167. However, *Wynne* is not on all fours with the present scenario and thus is persuasive, but not controlling. The *Wynne* Court did not declare that state and local taxes must be aggregated for purposes of the dormant Commerce Clause. Taxpayer culled a few passages in *Wynne* to argue to the contrary. For example, prior to its analysis, the Court stated "[d]espite the names that Maryland has assigned to these taxes, both are State taxes, and both are collected by the State's Comptroller of the Treasury." *Wynne*, 575 U.S. at 546, 135 S.Ct.

[1] A tax violates the dormant Commerce Clause if it fails to do any of the following: (1) apply to an activity with a substantial nexus to the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state. *See Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

1787, *citing Frey v. Comptroller of Treasury*, 422 Md. 111, 29 A.3d 475, 483, 492 (2011). The High Court also called the county portion of the Maryland tax "a so-called 'county' income tax[.]" *Id.* And the Court declared in a footnote that "it is immaterial that Maryland assigns different labels . . . to these taxes. In applying the dormant Commerce Clause, they must be considered as one." *Id.* at 564 n.8, 135 S.Ct. 1787. However, these statements plainly indicate the *Wynne* Court did not consider the "county" tax to be a local tax and thus the Court could not conceivably have decided the issue we face in the present dispute. Indeed, even the footnoted quote taxpayer seizes upon specifically referenced Maryland, a state, to make the point that a state cannot simply label a state tax as a local tax to overcome the constitutional demands of the dormant Commerce Clause.[2]

But certain portions of *Wynne* are particularly instructive here. The decision makes clear "that we must consider 'not the formal language of the tax statute but rather its practical effect.'" *Wynne,* 575 U.S. at 551, 135 S.Ct. 1787, *quoting Complete Auto Transit Inc.*, 430 U.S. at 279, 97 S.Ct. 1076. The practical effect of a tax, according to the *Wynne* Court, is "the economic impact of the tax." *Id.* at 552, 135 S.Ct. 1787. This aligns with prior case law discussing how to determine whether a tax discriminates against interstate commerce.

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[2] I also agree with the Majority that numerous other cases cited by taxpayer, including *Associated Industries*, *Philadelphia Eagles*, *Northwood Construction*, and *7-Eleven* do not resolve the federal issue as they do not discuss or decide whether state and local income taxes must be considered in the aggregate for purposes of a dormant Commerce Clause analysis. *See* Majority Opinion at 1167.

A fundamental principle of dormant Commerce Clause jurisprudence is that no state may "impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977) (internal citation and ellipses omitted). To determine whether a state tax is discriminatory, it "must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana*, 451 U.S. 725, 756, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). As such, "it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Id.*, *quoting Best & Co. v. Maxwell*, 311 U.S. 454, 455-56, 61 S.Ct. 334, 85 L.Ed. 275 (1940).

In order to determine the actual effect of the City's failure to provide taxpayer a credit for the remaining Delaware Income Tax (DIT) balance, we consider it "in conjunction with other provisions of the State's tax scheme[,]" *id.,* including the Pennsylvania Income Tax (PIT). First, we note "[s]tate taxes stand on a different basis from local levies" as state taxes "are essential to the very 'preservation' of the state itself[,]" while local taxes "are authorized or permitted by the state, not for its actual preservation, but merely to maintain the machinery of local government." *McClelland v. City of Pittsburgh*, 358 Pa. 448, 57 A.2d 846, 848 (1948). Notwithstanding this observation about the different *purposes* behind these taxes, the *McClelland* Court's explanation of the ultimate *authority* for all taxes imposed in this Commonwealth supports my position here:

> [t]he validity of [a] taxing ordinance does not depend upon whether the tax is regarded in a

> legal sense as a state or local tax. All taxes in Pennsylvania levied by municipal and quasi municipal corporations must, of course, be authorized by the legislature. In that sense, therefore, all may be considered state taxes.

Id. (emphasis omitted).[3] *See also Allegheny Cnty. v. Commonwealth*, 517 Pa. 65, 534 A.2d 760, 766 (1987) (Nix, C.J., dissenting) ("The majority ignores the fact that the county's taxing power is not separate and independent of the state's taxing power. Rather, the authority to tax is a power of the state which is delegated by the state to the counties to be exercised by them in accordance with the terms of that delegation."), *citing Mastrangelo v. Buckley*, 433 Pa. 352, 250 A.2d 447 (1969); *Fischer v. City of Pittsburgh*, 383 Pa. 138, 118 A.2d 157 (1955); *Evans v. West Norriton Twp.*, 370 Pa. 150, 87 A.2d 474 (1952); and *Wilson v. Sch. Dist. of Philadelphia*, 328 Pa. 225, 195 A. 90 (1937). This remains true today as Philadelphia, despite its Home Rule Charter, is unable to impose taxes unless granted the power by the Commonwealth's General Assembly. *See* 53 P.S. § 13133(a)(8). Indeed,

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[3] The Supreme Court of the United States has also made this same point:

> We think the following principles have been established by [prior decisions] and have become settled doctrines of this court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be [e]ntrusted to them . . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state . . . . The power is in the state[.]

Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79, 28 S.Ct. 40, 52 L.Ed. 151 (1907).

the state statute implementing the PIT, first enacted in 1971, contains a saving clause, specifically permitting Philadelphia to continue imposing its City Wage Tax, which was implemented in 1939; that tax would have otherwise been preempted by the Sterling Act, 53 P.S. § 15971.[4] *See* 72 P.S. § 7359(a)-(b) (specifically permitting Pennsylvania political subdivisions to continue collecting income taxes regardless of the Sterling Act). Furthermore, the saving clause was amended, beginning with tax year 1977, to limit the rate of the City Wage Tax imposed on nonresidents of Philadelphia. *See id.* § 7359(b)(1)-(2). These legislative enactments prove the *McClelland* Court's point: for validity purposes, local taxes are considered state taxes. *See McClelland*, 57 A.2d at 848. The fact that the City Wage Tax was enacted by the City Council and is collected by the City's Department of Revenue are of no constitutional significance.

This view is supported by decisions from other jurisdictions. These decisions discuss use and sales taxes, but *Wynne* made clear that a distinction between use and sales taxes and income taxes is not relevant in the constitutional analysis. The *Wynne* Court stated as follows:

> The discarded distinction between taxes on gross receipts and net income was based on the notion, endorsed in some early cases, that a tax on gross receipts is an impermissible "direct and immediate burden" on interstate commerce, whereas a tax on net income is merely an "indirect and

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[4] The Sterling Act provides the City "an enormously broad and sweeping power of taxation[,]" while "recogniz[ing] that the City cannot duplicate the Commonwealth's imposition of a tax[.]" *Williams v. City of Philadelphia*, 647 Pa. 126, 188 A.3d 421, 429 (2018) (internal citations omitted).

> incidental" burden. This arid distinction between direct and indirect burdens allowed "very little coherent, trustworthy guidance as to tax validity." And so, beginning with Justice Stone's seminal opinion in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 [ ] (1938), and continuing through [more recent cases], the direct-indirect burdens test was replaced with a more practical approach that looked to the economic impact of the tax.

Wynne, 575 U.S. at 552, 135 S.Ct. 1787 (internal citations omitted). Accordingly, I consider the following additional cases for their persuasive value.[5]

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[5] The Majority would not rely on these decisions, and I certainly do not suggest they are binding. But they all stand for the proposition that a failure to aggregate state and local taxes results in a violation of the dormant Commerce Clause and, as such, their persuasive value is clear. *See, e.g.*, *League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 803 (2018) ("we may consider, as necessary, . . . any extra-jurisdictional case law from states[,] . . . which may be helpful and persuasive"); *Commonwealth v. Small*, 647 Pa. 423, 189 A.3d 961, 973 (2018) (turning "to other jurisdictions for guidance"). *See also Obiter Dictum*, Black's Law Dictionary (11th ed. 2019) (explaining even *dicta* "may be considered persuasive"). In any event, and respectfully, the Majority does not present support for its opposite conclusion, instead relying on *Wynne* to state "the Court's logic and characterization of the county tax as a state tax based on the circumstances underlying its creation and the manner of its collection via the state's comptroller reveal that state and local taxes need not be aggregated for purposes of a dormant Commerce Clause analysis[.]" Majority Opinion at 1167. As I have explained, *Wynne* is persuasive, but it does not control this matter. *See supra*; *see also* Concurring Opinion (Wecht, J.) at 1179 ("the *Wynne* Court itself did not focus its analysis on Maryland's aggregate state and local tax burden") (emphasis omitted). Its reasoning, however,

In *Arizona Department of Revenue v. Arizona Public Service Co.*, 188 Ariz. 232, 934 P.2d 796 (Ariz. Ct. App. 1997), a public utility company located in Arizona bought coal from a mine in McKinley County, New Mexico and paid gross receipts taxes to McKinley County and New Mexico as well as excise and severance taxes to New Mexico. *See id.* at 798. Arizona assessed use taxes against the company for those purchases and the company claimed a credit for all taxes paid in New Mexico. *See id.* Arizona allowed a credit for the New Mexico gross receipts tax, but denied credit for the remaining taxes. *See id.* On appeal, the Arizona tax court reversed, granting the company credit for the McKinley County gross receipts tax, and the Arizona Court of Appeals affirmed. *See id.* at 798-99, 801. The court held the statutory exemption for taxes paid "under the laws of another state of the United States" included county taxes, explaining as follows:

> [Arizona] ignores the inherent relationship McKinley County necessarily shares with the state of New Mexico. Counties are state-created entities. Counties have only the powers that a state gives them. Counties draw their taxing authority from the state constitution.
>
> The derivative relationship between a state and its counties means that when a county imposes a tax, it does so pursuant to a delegation of state tax authority. McKinley County is no exception. Its tax was imposed under the laws of New Mexico because that state's enabling statutes created its

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clearly supports my conclusion and cuts against the conclusion of the Majority.

> taxing power. Given this relationship, the word "under" is not ambiguous.
>
> Furthermore, and contrary to our analysis above, if we agreed with [Arizona] that the term "under" refers only to a state tax, the outcome would raise a constitutional problem. The Commerce Clause of the United States Constitution forbids discrimination against interstate commerce. A state may not subject a transaction to a greater tax when it crosses state lines than when it occurs entirely intrastate.

Id. at 799 (internal citations omitted). The court of appeals thus declined to read the exemption as providing credits for other state taxes (but not county taxes) as such an interpretation "would pose serious constitutional problems[.]" *Id.*

The Supreme Court of Colorado reached a similar result in *General Motors Corp. v. City & County of Denver*, 990 P.2d 59 (Colo. 1999). In that case, the City and County of Denver imposed a use tax on vehicles that were purchased in Michigan, passed through an emissions testing lab run by General Motors in Denver, and sold in Michigan. *See id.* at 64. Denver provided a credit for sales or use taxes paid "to other municipalities on the materials costs of the vehicles prior to the vehicles' arrival in Denver[,]" and General Motors sought credit for taxes paid to other states as well. *Id.* at 64-65 (emphasis omitted). The court held a provision of Denver's tax code that provides an exemption for "sales which the city is prohibited from taxing under the Constitution or laws of the United States" prevented it "from invalidating the use tax in its entirety[,]" but the court also held Denver's tax structure discriminated against interstate commerce by only "credit[ing] taxes paid to other municipalities."

Id. at 70 (internal citation omitted). The court concluded that, pursuant to the dormant Commerce Clause, General Motors was entitled to credits for taxes paid to other states and municipalities. *See id.* at 71.

The Supreme Court of Appeals of West Virginia also tackled this issue. In *Matkovich v. CSX Transp. Inc.,* 238 W.Va. 238, 793 S.E.2d 888 (2016), CSX, a railroad company, was directed to pay the West Virginia Motor Fuel Use Tax on the fuel it buys in other jurisdictions and uses in West Virginia. *See id.* at 891. While West Virginia afforded a tax credit for sales taxes on fuel paid to other states, CSX also sought credit for sales taxes on fuel paid to cities, counties, and localities of other states. *See id.* The Office of Tax Appeals granted CSX's petition for refund, determining CSX was entitled to the credit it sought. *See id.* at 892. Eventually the West Virginia Tax Commissioner's appeals reached the state's supreme court, and, relying on *Wynne*, *General Motors*, and *Arizona Public Service*, that court affirmed. *See id.* at 896-98. The supreme court determined the tax credit must "extend[ ] both to sales taxes CSX has paid to other states on its purchases of motor fuel therein and to sales taxes that CSX has paid to the subdivisions of other states when it has purchased motor fuel in such locales[,]" and that "[a]ny other construction of this statute would invariably violate the Commerce Clause's prohibition on subjecting interstate transactions to a greater tax burden than that imposed on strictly intrastate dealings." *Id.* at 897 (emphasis omitted). "[B]ecause disallowance of the sales tax credit for sales taxes imposed by the subdivisions of other states would produce a 'total tax burden on interstate commerce [that] is higher' than a purely intrastate transaction," the Court held any other construction of the statute would "be violative of

the dormant Commerce Clause." *Id.* at 898, *quoting Wynne*, 575 U.S. at 567, 135 S.Ct. 1787.

Based on all the above, I would hold for purposes of a dormant Commerce Clause analysis, the City Wage Tax, and the City's crediting system, must be considered as part of the Commonwealth's income tax scheme.[6] Otherwise, its economic impact cannot be assessed "in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana*, 451 U.S. at 756, 101 S.Ct. 2114. When PIT and the City Wage Tax are considered together in this way, it becomes clear that the City's failure to grant taxpayer's refund petition unconstitutionally discriminated against interstate commerce. The tables below further illustrate this discriminatory effect.[7]

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[6] Justice Wecht acknowledges there must be "some form of state-level aggregation" as otherwise "a state potentially could avoid providing full credits to its residents for taxes paid to other states on income earned in the other states by authorizing cities or political subdivisions to impose a portion of the tax directly." Concurring Opinion (Wecht, J.) at 1180. We agree that "allowing the result in any one case to hinge on whether a given tax is labeled state, local, county, city, or non-resident is . . . unworkable[.]" *Id.* at 1180. We disagree, however, that we must permit the continuation of this unworkable (and unconstitutional) practice simply because the United States Supreme Court has yet to confront the issue.

[7] These tables use approximate tax rates.

Table 1: Current Tax Structure Denying Additional DIT Credit

	Working in Philadelphia	Working in Wilmington
City Wage Tax Rate	4.00%	4.00%
PIT Rate	3.00%	3.00%
Wilmington Tax Rate	N/A	1.25%
DIT Rate	N/A	5.00%
Total Tax Rate Before Credits	7.00%	13.25%
Less PIT Credit	N/A	(3.00%)
Less City Wage Tax Credit	N/A	(1.25%)
Total Tax Rate After Credits	7.00%	9.00%

Table 2: Tax Structure if Additional DIT Credit is Allowed

	Working in Philadelphia	Working in Wilmington
City Wage Tax Rate	4.00%	4.00%
PIT Rate	3.00%	3.00%
Wilmington Tax Rate	N/A	1.25%
DIT Rate	N/A	5.00%
Total Tax Rate Before Credits	7.00%	13.25%
Less PIT Credit	N/A	(3.00%)
Less City Wage Tax Credit	N/A	(1.25% + 2.00% DIT = 3.25%)
Total Tax Rate After Credits	7.00%	7.00%

The tables reflect how disallowing the credit at issue here causes those living in the City and working in Wilmington to have their income taxed at a rate two percent higher than those who live and work in the City. The City's practice of allowing a credit only for taxes paid to other municipalities results in the total tax burden being higher on City residents engaged in interstate commerce, *i.e.*, those who choose to work in

Wilmington, than City residents who choose to work in the City. Stated another way, the City's practice of disallowing a credit for additional non-credited state taxes discriminates against interstate commerce by providing a direct commercial advantage to those who live and work in Philadelphia; it thus violates the dormant Commerce Clause. *See Wynne*, 575 U.S. at 549-50, 135 S.Ct. 1787 (dormant Commerce Clause "precludes States from discriminating between transactions on the basis of some interstate element," including "tax[ing] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State" or "impos[ing] a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of multiple taxation.") (internal quotation marks, brackets, and citations omitted).[8]

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[8] It appears the Majority is reluctant to mandate aggregation of state and local taxes in a dormant Commerce Clause analysis before the U.S. Supreme Court itself does so. *See* Majority Opinion at 1169 (out-of-jurisdiction case law "provides a poor basis on which for our Court to declare, **for the first time**, that state and local level taxes are one and the same for purposes of the Commerce Clause") (emphasis added); Concurring Opinion (Wecht, J.) at 1180 ("I believe that the task of modifying [the dormant Commerce Clause] doctrine (if at all) should be left for the Court that invented it in the first place."). Generally speaking, I agree this Court "should proceed cautiously when asked to be the engine of innovation in federal constitutional law, since mistaken predictive judgments can be disruptive of Pennsylvania law and can cause substantial injustice where the predictive judgments are erroneous." *Commonwealth v. Molina*, 628 Pa. 465, 104 A.3d 430, 458 (2014) (Opinion Announcing the Judgment of the Court) (Castille, C.J., dissenting). Nevertheless, the question of aggregation is now squarely before this Court and we must answer it consistent with the Constitution of the United States

Justice Mundy joins this dissenting opinion.

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and related case law. *See Burt v. Titlow*, 571 U.S. 12, 19, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013) ("state courts have the solemn responsibility equally with the federal courts to safeguard constitutional rights") (internal citation omitted). In so doing, we merely interpret and "implement the federal command up to its limits, but no farther." *Commonwealth v. Sanchez*, 623 Pa. 253, 82 A.3d 943, 994 (2013) (Castille, C.J., concurring). And "[f]ederal review is always available to correct errors" in our interpretation. *Id.* It may well be this case is worthy of *certiorari* so that the Court can provide further guidance with respect to its dormant Commerce Clause jurisprudence.

APPENDIX B

Unpublished Disposition

See Pa. Commonwealth Court Internal Operating Procedures, Sec. 414 before citing.

OPINION NOT REPORTED

COMMONWEALTH COURT OF PENNSYLVANIA.

No. 1063 C.D. 2019, No. 1064 C.D. 2019

DIANE ZILKA,

Appellant

v.

TAX REVIEW BOARD CITY OF PHILADELPHIA

Argued February 10, 2021
Filed January 7, 2022

BEFORE: HONORABLE P. KEVIN BROBSON, President Judge[1], HONORABLE MARY HANNAH LEAVITT, Judge[2], HONORABLE PATRICIA A. McCULLOUGH, Judge, HONORABLE ANNE E. COVEY, Judge, HONORABLE MICHAEL H. WOJCIK, Judge, HONORABLE CHRISTINE

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[1] The Court reached the decision in this case prior to the conclusion of President Judge Emeritus Brobson's service on the Commonwealth Court.

[2] This matter was assigned to the panel before January 3, 2022, when President Judge Emerita Leavitt became a senior judge on the Court.

FIZZANO CANNON, Judge, HONORABLE ELLEN CEISLER, Judge

Opinion

MEMORANDUM OPINION BY JUDGE WOJCIK

In these consolidated cases, Diane Zilka (Taxpayer) appeals the orders of the Philadelphia County Court of Common Pleas (trial court) affirming the decisions of the City of Philadelphia's (Philadelphia) Tax Review Board (Board) that denied her petitions seeking a refund of the Philadelphia Wage Tax paid on her income for the taxable periods of January 1, 2013, to December 31, 2015, and January 1, 2016, to December 31, 2016. Taxpayer argues that she is entitled to a refund to avoid unconstitutional double taxation on the same income caused by the Philadelphia Wage Tax. Discerning no error, we affirm.

I. Background

Taxpayer is a resident of Philadelphia, Pennsylvania, but during the tax years at issue, she worked full time in Wilmington, Delaware. In April 2017 and June 2017, Taxpayer filed petitions with the Philadelphia Department of Revenue (Department) seeking refunds for Philadelphia Wage Taxes paid from 2013 through 2015 and 2016, respectively. During those tax periods, Taxpayer's Delaware employer withheld the following taxes: Philadelphia Wage Tax, Wilmington Earned Income Tax (Wilmington Tax), Pennsylvania Income Tax (Pennsylvania Tax), and Delaware Income Tax (Delaware Tax). Taxpayer claimed a credit for the Delaware Tax (5%) to offset the Pennsylvania Tax (3.07%) on her Pennsylvania Personal Income Tax (PIT) return; Pennsylvania allowed a full credit. Taxpayer also claimed a credit for the Wilmington Tax (1.25%) *and* the balance of the Delaware Tax (5% -

3.07% = 1.93%) to offset the Philadelphia Wage Tax (3.92%).[3] The Department allowed a credit for the Wilmington Tax against the Philadelphia Wage Tax but not for the remainder of the Delaware Tax.

Taxpayer appealed to the Board challenging the Department's denials as to both tax periods on the basis that she was entitled to a refund for a portion of the unused Delaware Tax credits. Taxpayer argued that she was taxed, on average, 1.93% higher than her intrastate counterparts. Taxpayer claimed that the Department's refusal to apply the remainder of the Delaware Tax as credit against the Philadelphia Wage Tax amounted to an unconstitutional burden on interstate commerce. The Board denied her appeals, and the trial court affirmed without taking additional evidence. Taxpayer appealed both decisions to this Court, which we have consolidated for review.[4]

II. Issues

Before this Court, Taxpayer argues that the trial court erred by denying her a credit against her Philadelphia Wage Taxes for the portion of income

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[3] Taxpayer and Philadelphia both utilized percentages and calculations from the 2014 tax year as the primary example in their briefs. For sake of simplicity, this Court has done the same. The 2014 tax year is representative of the other years, albeit slight variations exist.

[4] Where, as here, the trial court took no additional evidence, our review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether the Board's findings of fact are supported by substantial evidence. Section 754(b) of the Administrative Agency Law, 2 Pa. C.S. § 754(b); *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108, 118 (Pa. 2003). Because the issue in this case is a question of law, our scope of review is plenary. *Philadelphia Eagles*, 823 A.2d at 118.

taxes that she paid to Delaware, which was not credited against her income taxes paid to Pennsylvania. Taxpayer contends that the failure to award a credit amounts to double taxation in violation of the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3.

According to Taxpayer, she was taxed four times on the same income by Pennsylvania, Philadelphia, Delaware and Wilmington. The Department's "policy"[5] is to refund similar taxes withheld by other *local* jurisdictions, but not by other *states*. By failing to apply the remainder of the taxes withheld by Delaware (after the offset applied by Pennsylvania) to offset her Philadelphia Wage Tax, she maintains that the Philadelphia Wage Tax and the tax scheme fail the test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), in two ways. First, the tax is not fairly apportioned because it fails to provide a mechanism to mitigate the risk of duplicative taxation for income earned from interstate commerce and fails to meet the internal and external consistency tests. The Philadelphia Wage Tax does not meet the internal consistency test because it taxes interstate wages at a higher rate than intrastate wages. It does not meet the external consistency test because the tax "reaches beyond" that portion of the value fairly attributable to economic activity in the taxing state. Taxpayer conducted no business in Philadelphia; she simply resided there during the tax years at issue. There is no connection between Philadelphia and the activity being taxed.

[5] Taxpayer takes issue with the fact that the Department's policy is not a formal written policy, but a practice. Appellant's Brief at 8-9, 9 n.6. However, the manner in which the Department applied the tax credits, whether pursuant to a formal written "policy" or an informal "practice," is irrelevant for a Commerce Clause analysis.

Second, Philadelphia's partial credit practice discriminates against her because she pays more in tax than her intrastate counterparts. In support of her position, Taxpayer relies heavily on *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015), in which the United States Supreme Court applied the *Complete Auto* test and invalidated a similar tax scheme under the Commerce Clause.

III. Discussion

A. Commerce Clause - Double Taxation

The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States." U.S. Const. art. 1, § 8, cl. 3. "Although the Clause is framed as a positive grant of power to Congress," the United States Supreme Court has "'consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject.'" *Wynne*, 575 U.S. at 549 (quoting *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)). Under the dormant Commerce Clause, States "'may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Id.* (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)). "'Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of 'multiple taxation.'" *Id.* at 549-50 (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)). In short, the Commerce Clause forbids double taxation. *Id.* at 550-51; *see, e.g.*, *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660 (1948) (New York tax scheme that sought to tax a

portion of a domiciliary bus company's gross receipts that were derived from services provided in neighboring States violated dormant Commerce Clause because it imposed an "unfair burden" on interstate commerce); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939) (Washington state's tax on income that a corporation earned in shipping fruit from Washington to other States and foreign countries discriminated against interstate commerce because the scheme did not similarly expose local commerce to the tax burden); *J.D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307 (1938) (State income tax on a corporation's out-of-state sales violated the dormant Commerce Clause by subjecting interstate commerce to double taxation but not intrastate commerce).

Upon review, Taxpayer's income is not being doubly taxed. Taxpayer never pays more than one local tax or more than one state tax. In other words, Philadelphia is not taxing Taxpayer's income "more heavily when it crosses state lines than when it occurs entirely within the State." *Wynne*, 575 U.S. at 549. Rather, Philadelphia is taxing Taxpayer the same as other residents who worked intrastate – 3.92%. Although we recognize that Taxpayer pays 1.93% more than her intrastate counterparts, that is because Taxpayer chose to work in Delaware, *which charges a higher income tax than Pennsylvania*. As the trial court recognized, Delaware's higher income tax "is neither unconstitutional, nor attributable to any unconstitutional action taken by . . . Philadelphia." Trial Court Op., 8/28/2019, at 5. While Wilmington charges less than Philadelphia, Philadelphia credited 100% of the Wilmington Tax to offset the Philadelphia Wage Tax. The fact that Philadelphia chose not to additionally apply credit for the "unused" balance of the Delaware Tax towards its Wage Tax does not amount to double taxation. *See Wynne*. Assuming

the risk that a double tax burden may exist, we examine whether the Philadelphia Wage Tax withstands the constitutional test set forth in *Complete Auto*.

B. *Complete Auto*

Complete Auto is the seminal United States Supreme Court case addressing the applicability of the Commerce Clause to state and local taxation. In *Complete Auto*, the Court fashioned a four-prong test to determine whether a state or local tax unconstitutionally burdens interstate commerce. 430 U.S. at 279. The test requires: (1) the activity must have a substantial nexus with the taxing district; (2) the tax must be fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) there must be a reasonable relationship between the tax imposed upon the taxpayer and the services provided by the taxing district. *Id.* Failure to meet any one prong renders the tax unconstitutional. *Id.* Our focus here is on the second and third prongs.

1. Second Prong - Fair Apportionment

The second prong of the *Complete Auto* test "'ensures that each State taxes only its fair share of an interstate transaction.'" *Jefferson Lines, Inc.*, 514 U.S. at 184 (quoting *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989)). The purpose is to eliminate the "danger of interstate commerce being smothered by cumulative taxes of several states." *Complete Auto*, 430 U.S. 277 (citation omitted). We determine whether a tax on interstate commerce is fairly apportioned by examining whether it is internally and externally consistent. *Jefferson Lines*, 514 U.S. at 185 (quoting *Goldberg*, 488 U.S. at 261).

a. Internal Consistency

The internal consistency test " 'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.' " *Wynne*, 575 U.S. at 562 (quoting *Jefferson Lines*, 514 U.S. at 185). The test helps courts identify tax schemes that discriminate against interstate commerce. *Id.* Assuming that every State has the same uniform tax scheme, all states would grant a credit that precisely reduces the taxpayers' in-state tax to the same amount they would pay if they earned all that income in-state. *See id.* Such a scheme would add no burden to interstate commerce that intrastate commerce would not also bear. *See id.*

"Although the adoption of a uniform code would undeniably advance the policies that underlie the Commerce Clause," it is not required. *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 279 (1978). The dormant Commerce Clause does not prohibit jurisdictions from using different tax formulas; rather, it prohibits discrimination that "inhere[s] in either State's formula." *Id.* at 277 n.12. In other words, there is no "discriminat[ion] against interstate commerce" where the alleged taxation disparities are "the consequence of the combined effect" of two otherwise lawful income tax schemes. *Id.*

The United States Supreme Court has repeatedly held that the internal consistency test is met by a system of credits, which exempts the taxpayer to the extent that he or she has already paid the same tax in another state. *See Jefferson Lines*, 514 U.S. at 185; *Goldberg*, 488 U.S. at 262; *see also Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 245 n.13 (1987) (noting that

"[m]any States provide tax credits that alleviate or eliminate the potential multiple taxation that results when two or more sovereigns have jurisdiction to tax parts of the same chain of commercial events").

Applied here, the Philadelphia Wage Tax meets the internal consistency test. If every jurisdiction imposed a tax scheme identical to Philadelphia's, all individuals earning income outside of their home locality would receive a credit for income taxes paid to the foreign locality and would pay no more than their intrastate counterpart. Any additional tax owed by the interstate taxpayer simply results from the higher tax rate charged on the income by the foreign state. Such consequence does not render Philadelphia's tax formula discriminatory under the internal consistency test. *See Moorman*.

b. External Consistency

Next, even if a tax is internally consistent, it must also meet the second component of fair apportionment, *i.e.*, external consistency. *Jefferson Lines*, 514 U.S. at 184. External consistency examines "the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Id.* at 185 (citing *Goldberg*, 488 U.S. at 262). "[T]he threat of real multiple taxation (though not by literally identical statutes) may indicate a State's impermissible overreaching." *Id.*

The Philadelphia Wage Tax meets the external consistency test. The Philadelphia Wage Tax reasonably reflects how and where Taxpayer's income is generated – in Wilmington, Delaware. The Philadelphia Wage Tax is not taxing all of Taxpayer's income regardless of

source. Rather, Philadelphia fairly apportions the tax according to its relation to the income by providing a credit for the tax owed to Wilmington. Philadelphia avoided taxing more than its fair share of Taxpayer's wages by providing a tax credit for 100% of the Wilmington Tax. As for Taxpayer's challenge that Philadelphia has no right to tax her out-of-state income, Philadelphia's provision of municipal benefits and services to its residents provides sufficient economic justification for the imposition of its Wage Tax. *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 279 (1932) (recognizing that "domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government.").

2. Third Prong – Discrimination

A State may not "impose a tax [that] discriminates against interstate commerce either by providing a direct commercial advantage to local business . . . or by subjecting interstate commerce to the burden of 'multiple taxation.'" *Wynne*, 575 U.S. at 549-50 (quoting *Northwestern States*, 358 U.S. at 458) (citations omitted); *accord Jefferson Lines*, 514 U.S. at 197. "Thus, States are barred from discriminating against foreign enterprises competing with local business . . . and from discriminating against commercial activity occurring outside the taxing State[.]" *Jefferson Lines*, 514 U.S. at 197 (citations omitted).

Here, Philadelphia taxes all of its residents' income at the rate of 3.92%. It also permits a full credit for any similar taxes paid to other jurisdictions. Because Taxpayer's income was subject to the 1.25% Wilmington Tax, Philadelphia applied 1.25% credit toward her

Philadelphia Wage Tax. Consequently, Taxpayer is not paying income tax twice on her interstate income. Rather, Taxpayer is paying the same 3.92% rate as her Philadelphia counterparts. The difference is that Philadelphia is receiving only 2.67%, while Wilmington is receiving 1.25%. By extending a full credit for taxes paid to Wilmington, Taxpayer's income is not subject to double taxation. There is no disparate treatment or discrimination between Taxpayer and other resident taxpayers of Philadelphia. Thus, the Philadelphia Wage Tax does not discriminate against Taxpayer.

C. *Wynne*

Wynne illustrates the application of the *Complete Auto* test. In *Wynne*, the United States Supreme Court analyzed the constitutionality of Maryland's personal income tax scheme to determine whether it discriminated in favor of intrastate over interstate economic activity. *Wynne*, 575 U.S. at 545. Maryland residents were subject to a two-part income tax: (1) a "state" income tax; and (2) a "county" income tax. *Id.* Residents who paid income tax to another jurisdiction for income earned in that jurisdiction were allowed a credit against the "state" tax, but not the "county" tax. *Id.* at 545-46. Despite the assigned name, the "county" tax was a state tax because it was collected by the Maryland State Comptroller of the Treasury. *Id.* at 546. Consequently, part of the income that a Maryland resident earned outside of the State could be taxed twice. *Id.*

The Wynnes were Maryland residents who earned pass-through income from a Subchapter S corporation that earned income in 39 States. *Wynne*, 575 U.S. at 546-47. When filing their Maryland income taxes, the Wynnes claimed an income tax credit for the taxes paid to the other 39 States. *Id.* at 547. The Maryland

State Comptroller of the Treasury allowed the Wynnes a credit against their "state" income tax, but not against their "county" income tax. *Id.* The Wynnes challenged the tax scheme as double taxation. The United States Supreme Court agreed. *Id.*

The *Wynne* Court opined that, pursuant to the Commerce Clause of the United States Constitution, a State may not impose a tax that discriminates against interstate commerce either by providing a direct commercial advantage to local business or by subjecting interstate commerce to the burden of multiple taxation. *Wynne*, 575 U.S. at 549-50. The *Wynne* Court examined tax schemes that it had previously found to be unconstitutional because they "had the potential to result in the discriminatory double taxation of income earned out of state and created a powerful incentive to engage in intrastate rather than interstate economic activity." *Id.* at 561; *see, e.g.*, *Central Greyhound Lines*; *Gwin, White & Prince*; *J.D. Adams*. The *Wynne* Court noted that the tax schemes in the aforementioned three cases "could be cured by taxes that satisfy ... the 'internal consistency' test." *Id.* at 561-62 (quoting *Jefferson Lines*, 514 U.S. at 18).

The *Wynne* Court opined that for a tax to satisfy the internal consistency test, there must be a credit for similar taxes paid by a resident taxpayer to other jurisdictions based on income earned there. *Wynne*, 575 U.S. at 561-62. Otherwise, the tax amounts to a tariff, "which is fatal because tariffs are '[t]he paradigmatic example of a law discriminating against interstate commerce.'" *Id.* at 565 (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994)). The Court illustrated:

> Assume that every State imposed the following taxes, which are similar to Maryland's "county"

> and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. Assume further that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income.

Id. at 567-68.

The flaw in Maryland's personal income tax scheme was that it imposed a "county" income tax without any credit for similar income taxes paid by resident taxpayers to other states based on income earned in those states. *Wynne*, 575 U.S. at 564-65. The scheme resulted in double taxation of some income earned by Maryland residents outside the state. *Id.* at 565. The *Wynne* Court emphasized that the "Maryland scheme's discriminatory treatment of interstate commerce is not *simply the result of its interaction with the taxing schemes of other States*." *Id.* (emphasis added). Instead, the Court ruled that Maryland's tax scheme was inherently discriminatory and operated as a tariff in violation of the Commerce Clause. *Id.*

Notably, the *Wynne* Court explained that "Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States . . . . If it did, Maryland's tax scheme would survive the internal consistency test and would not be inherently discriminatory." *Wynne*,

575 U.S. at 568. The Court then tweaked its hypothetical:

> [A]ssume that all States impose a 1.25% tax on all three categories of income but also allow a credit against income taxes that residents pay to other jurisdictions. In that circumstance, April (who lives and works in State A) and Bob (who lives in State A but works in State B) would pay the same tax. Specifically, April would pay a 1.25% tax only once (to State A), and Bob would pay a 1.25% tax only once (to State B, because State A would give him a credit against the tax he paid to State B).

Id. at 568.

Although factually distinguishable, *Wynne* is instructive here. *Wynne* specifically recognized that a constitutional infirmity of double taxation can be avoided by offering a credit against similar income taxes paid out of state. Philadelphia did just that by providing a full credit for the Wilmington Tax, which is similar to the Philadelphia Wage Tax, just as Pennsylvania provided a credit for the Delaware Tax.

Contrary to Taxpayer's assertions, *Wynne* does not compel Philadelphia to apply an additional credit for any dissimilar taxes, such as the Delaware Tax or otherwise aggregate of tax credits. Although the *Wynne* Court held that Maryland was required to offset its so-called "county" tax against other "state" taxes, the "county" tax was actually a state tax because it was administered, adopted, mandated, and collected by the state. Here, both the Philadelphia Wage Tax and Wilmington Tax are municipal taxes. As the trial court aptly observed, it is a "simple 'apples to apples' approach – state taxes to state taxes and local taxes to local taxes." Reproduced Record at 89a. Based upon

our reading of *Wynne*, such an approach is reasonable and passes constitutional muster.

Although we understand that Taxpayer pays more than her intrastate counterparts, such is not the result of an unconstitutional tax scheme. Rather, it is simply the "result of the interaction of two different but nondiscriminatory and internally consistent schemes." *Wynne*, 575 U.S. at 562. Taxpayer chose to work in a jurisdiction with a higher tax rate. Philadelphia is not responsible for the fact that Delaware charges 1.93% more than Pennsylvania. Consequently, even after Philadelphia and Pennsylvania applied credits to corresponding income taxes paid to Wilmington and Delaware, respectively, Taxpayer's income was subject to a higher tax rate because of tax disparities that exist between the taxing districts, not because of a discriminatory policy or practice. In short, Taxpayer is not paying income tax twice on her interstate income. There is no support for Taxpayer's position that local and state taxes must be aggregated for Commerce Clause purposes. Philadelphia and Pennsylvania are two distinct taxing jurisdictions administering two distinct taxes to two different sets of citizenry.

IV. Conclusion

Upon review, because Philadelphia fully credited income tax withheld for the Wilmington Tax, Philadelphia's refusal to additionally credit the remaining income tax withheld for the Delaware Tax does not amount to double taxation. Accordingly, we affirm the orders of the trial court.

ORDER

AND NOW, this 7th day of January, 2022, the orders of the Court of Common Pleas of Philadelphia County, dated June 26, 2019, are AFFIRMED.

APPENDIX C

COURT OF COMMON PLEAS OF PENNSYLVANIA.
FIRST JUDICIAL DISTRICT
CIVIL TRIAL DIVISION
PHILADELPHIA COUNTY

Nos. 02438, 02439, 1063 CD 2019, 1064 CD 2019.

DIANE ZILKA,

Plaintiff/Appellant,

v.

CITY OF PHILADELPHIA TAX REVIEW BOARD,

Defendant/Appellee.

August 28, 2019.

OCTOBER TERM, 2018

Opinion

Paula A. Patrick, Judge.

Patrick, J.

August 28, 2019

Plaintiff/Appellant, Diane Zilka filed an appeal from this Court's Order dated June 29, 2019, denying Appellant's Appeal and affirming the decision of the Philadelphia Tax Review Board ("Appellee"). This Court now submits the following Opinion in support of its ruling and in accordance with the requirements of Rule 1925(a) of the Pennsylvania Rules of Appellate

Procedure. For the reasons set forth below, this Court's decision should be affirmed.

FACTUAL / PROCEDURAL HISTORY

Diane Zilka ("Appellant") is a resident of Philadelphia Pennsylvania. During tax years 2013-2016, Appellant worked full-time in Wilmington, DE.

On April 9, 2017, Appellant submitted a Refund Petition to the Philadelphia Department of Revenue seeking a refund of $29,497.00 for Philadelphia wage taxes paid from 2013-2015. In her refund request, Appellant claimed a credit against her Philadelphia wage taxes for income taxes paid to the City of Wilmington, and also the State of Delaware. The Philadelphia Department of Revenue allowed appellant a credit for income taxes paid to the City of Wilmington, however Appellant's claim for a credit against her Philadelphia wage taxes for taxes paid to the State of Delaware was denied.

On June 30, 2017, Appellant submitted a second Refund Petition to the Department of Revenue seeking a refund of Philadelphia wage tax paid for the year of 2016. Appellant, again claimed a tax credit for income taxes paid to the City of Wilmington, and the State of Delaware. The Department of Revenue again allowed Appellant a tax credit for income taxes paid to Wilmington, but disallowed any credit for income taxes paid to the State of Delaware.

Subsequently, Appellant filed appeals with the Philadelphia Tax Review Board ("TRB") in regards to both decisions. Appellant asserted that she was entitled to a refund for a portion of her unused Delaware income tax credits which she had remaining after paying her Pennsylvania state income taxes. Two hearings were held on the matter on April 24, 2017,

and on September 20, 2018. On September 20, 2018, the TRB decided to deny Appellant's request(s) for a refunds [sic]. On October 18, 2018, Appellant filed a Notice of Statutory Appeal of the TRB's decision to deny her request(s) for a refund. On December 6, 2018 the Philadelphia Court of Common Pleas issued a Scheduling Order setting forth relevant due dates for motions, and briefs in this matter as well as setting a tentative time table for oral arguments to be held. On February 7, 2019, Appellant filed a Motion for Extraordinary Relief requesting that the court permit Appellant to file a Reply brief to the Appellee's response to Appellant's opening brief. On February 8, 2019, Appellant's Motion for Extraordinary Relief was granted by the Honorable Edward C. Wright. The Appellant and Appellee filed timely briefs addressing the pertinent issues in this matter. Oral Arguments were held on May 22, 2019, before the Honorable Judge Paula Patrick. On June 29, 2019, this Court entered an order denying the Appellant's request for an Appeal, and affirming the decision of the Tax Review Board. On July 17, 2019, Appellant filed an Appeal to the Commonwealth Court of Pennsylvania. [sic] of this Court's Order dated June 29, 2019. On July 23, 2019, this Court ordered Appellant to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). Appellant filed a timely Statement of Matters Complained of on Appeal on August 5, 2019.

ISSUES

Appellant raised the following issues *verbatim* in her 1925(b) Statement of Matters Complained of on Appeal:

1. Where Appellant a resident of the City of Philadelphia ("City" or "Appellee") worked in Wilmington

Delaware DE (Wilmington); where Appellant paid a Wage Tax to the City ("Wage Tax"); where Appellant paid state income taxes to the State of Delaware ("Delaware"); where the United States Supreme Court held it unconstitutional not to allow a credit for a tax paid to a state other than the taxpayer's state of residence against a local tax obligation in the tax payer's state of residence; and where Appellee denied Appellant a credit against Appellant's Wage Tax obligation for taxes paid to Delaware, thereby resulting in double taxation of income earned out-of-state and discriminating in favor of intrastate commerce over interstate economic activity, the TRB and this Court made an error of law when it denied Appellant's petitions for refund of a Wage Tax.

2. The TRB made an error of law when it distinguished the United States Supreme Court's *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015), decision.

3. Where the City conceded that its practice of only allowing a credit against its Wage Tax for taxes paid to other local governments outside the Commonwealth of Pennsylvania, *e.g.*, Wilmington, was not a policy, the TRB abused its discretion by characterizing the practice as a policy and then using that practice as a basis to deny Appellant a credit against Appellant's Wage Tax obligation for taxes paid to Delaware.

4. The TRB erred as a matter of law by failing to find that the City's denial of credit to Appellant against her Wage Tax obligations for taxes paid to Delaware discriminated against interstate commerce, violating the Commerce Clause of the United States Constitution because it failed the fair apportionment prong and the anti-discrimination prong of the United

States Supreme Court Decision in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).

5. The TRB erred as a matter of law when it failed to conclude that state and local taxes must be construed together for purposes of a Commerce Clause analysis.

DISCUSSION

I. *THIS COURT PROPERLY DENIED APPELLANT'S APPEAL AND AFFIRMED THE DECISION OF THE TAX REVIEW BOARD BECAUSE APPELLANT WAS NEVER SUBJECTED TO DOUBLE TAXATION*

On Appeal, Appellant claims that "where Appellee denied Appellant a credit against Appellant's Wage Tax obligation for taxes paid to Delaware, thereby resulting in double taxation of income earned out-of-state and discriminating in favor of intrastate commerce over interstate economic activity, the TRB and this Court made an error of law when it denied Appellant's Petition for refund of Wage Tax." Appellant's claim must fail. It should be noted that Appellant does not cite to or include any evidence, authority, or exhibits in furtherance of this claim. Accordingly, Appellant's claim should be dismissed.

Under the Commerce Clause, a state "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," or "impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business," or "by subjecting interstate commerce to the burden of 'multiple taxation'" *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1790 (2015) (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458). Courts

have held invalid state tax schemes that might lead to double taxation of out-of-state income, and that discriminate in favor of intrastate over interstate economic activity. *Id.*

Here there is insufficient evidence in the record to suggest Appellant has been the subject of unconstitutional discrimination against interstate commerce in the form of either a burden or risk of double taxation. The facts in the record demonstrate that based on the amount of current tax credits received by Appellant, the Appellant has never paid more than one state tax, and has never paid more than one local or municipal tax. For example, in 2014 Appellant paid 3.922% in Philadelphia city taxes and 5% in Delaware State taxes. *See* Appellant's Brief at 14 (Chart Indicating Rates of Taxation for PA Resident's Working In-State vs Out-of-State). In the year 2014 Appellant was given a refund on her Pennsylvania taxes reflecting the full amount she had paid that year in regards to her Pennsylvania state taxes, and was also given a refund reflecting the full amount of Wilmington city taxes she had paid. As such, for the year 2014 Appellant only paid one municipal tax to the City of Philadelphia, and one state tax to the state of Delaware. While, it is true that Appellant did pay state income taxes in Delaware at a higher rate of [sic] than that of her fellow Pennsylvania residents, this is due to the simple fact that Appellant chose to work in Delaware which has a higher income tax rate than Pennsylvania. This higher income tax rate implemented by the state of Delaware is neither unconstitutional, nor attributable to any unconstitutional action taken by the City of Philadelphia. Furthermore, for Constitutional purposes the higher income tax rate does not mandate that the City of Philadelphia grant Appellant a tax refund for any taxes she has paid to the state of

Delaware.[1] As noted above, Appellant was never subject to double taxation, or even the risk of double taxation, because at all times Appellant was only subject to one state tax by the state of Delaware, and one municipal tax by the City of Philadelphia. Accordingly, Appellant's claim should be dismissed.

II. *THIS COURT PROPERLY DENIED APPELLANT'S APPEAL AND AFFIRMED THE DECISION OF THE TAX REVIEW BOARD BECAUSE WYNNE IS DISTINGUISHABLE FROM THE FACTS AT ISSUE IN THIS MATTER*

On Appeal, Appellant claims that "[t]he TRB made an error of law when it distinguished the United States Supreme Court's *Comptroller of Treasury v. Wynne*, 135 S Ct. (2015), decision" [sic] Appellant's claim must fail. It should be noted that Appellant does not cite to or include any evidence, or exhibits in furtherance of this claim. Further, Appellant fails to identify with sufficient specificity how, or in what manner this Court committed an error of law, but rather only refers to errors made by the TRB. Accordingly, Appellant's claims as they pertain to the *Wynne* decision should be dismissed.

In *Wynne* the court was dealing with a Maryland state tax system that constituted two parts, one of which was a formal state tax levied by the state of Maryland, and the other was a "county tax" also

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[1] While Appellant seems to assert that she is entitled to a tax refund largely based upon the United States Supreme Court decision in *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1792 (2015); the holding in *Wynne* appears to be specifically limited to state administered two-part unitary tax schemes which are not at issue in the present action. *See Infra*

imposed by the state of Maryland. *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1792 (2015). The court found that "[d]espite the names that Maryland has assigned to these taxes, both are State taxes, and both are collected by the State's Comptroller of the Treasury." *Id.*, *see also Frey v. Comptroller of Treasury*, 29 A.3d 475, 492 (2011). One of the fundamental factors in the court's decision to construe the county tax and state tax unitarily included the fact that the tax was administered, collected, and distributed by the Comptroller of the Treasury for the state of Maryland. *See Frey v. Comptroller of Treasury*, 29 A.3d 475, 483 (2011).

However, unlike the Maryland county tax at issue in *Wynne*, in this case the Philadelphia wage tax system is levied by the Philadelphia City Council, and is solely administered, collected, and distributed by the Philadelphia Department of Revenue for the sole benefit of the city, thus the tax is wholly separate, and distinct from any levied by the state of Pennsylvania. These key facts make the Philadelphia wage tax system different than the tax system at issue in *Wynne.* In addition the Supreme Court in *Wynne* at no point specifically addressed the issue of local taxes such as city or municipal taxes. If anything, the holding in *Wynne* appears specifically limited to state administered two-part unitary tax schemes which are not at issue in the present action. Accordingly, Appellant's claims should be dismissed.

III. *FOR PURPOSES OF LEGAL ANALYSIS UNDER THE COMMERCE CLAUSE IT DOES NOT MATTER WHETHER THE DEPARTMENT OF REVENUE'S DECISION TO DENY APPELLANT A CREDIT AGAINST HER WAGE TAX OBLIGATION FOR TAXES PAID TO THE STATE OF DELAWARE WAS A PRACTICE OR A POLICY*

On Appeal, Appellant claims that "The TRB abused its discretion by characterizing the [Department of Revenue's] practice as a policy and then using that practice as a basis to Deny Appellant a credit against Appellant's Wage Tax Obligation for taxes paid to Delaware." Appellant's claim must fail. It should be noted that Appellant does not cite to or include any evidence, or exhibits in furtherance of this claim. Further, Appellant fails to identify with sufficient specificity how, or in what manner this Court committed an error of law, but rather only refers to errors made by the TRB. Accordingly, Appellant's claims should be dismissed.

Under Pennsylvania jurisprudence, a rule 1925 (b) Statement "shall concisely identify each ruling or error that Appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge." Pa.R.A.P. 1925 "A Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent to no Concise Statement at all. *Commonwealth v. Dowling*, 778 A.2d 683, 686-87 (Pa.Super. 2001). Further, "[w]hen a court has to guess what issues an appellant is appealing, that is not enough for meaningful review." *Commonwealth v. Thompson*, 778 A.2d 1215, 1223 (Pa.Super. 2001). Moreover [w]hen an appellant fails adequately to identify in a concise manner the issues sought to be

pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues." *In re Estate of Daubert*, 757 A.2d 962, 963 (Pa.Super. 2000). Ultimately, mere issue spotting without analysis or legal citation to support an assertion can preclude appellate review of a matter. *Commonwealth v. Spontarelli*, 791 A.2d 1254, 1259 (Pa.Cmwlth. 2002). "Our law makes it clear that Pa.R.A.P. 1925(b) is not satisfied by filing any statement. Rather, the statement must be 'concise' and coherent as to permit the trial court to understand the specific issues being raised on appeal." *Commonwealth v. Vurimindi*, 200 A.3d 1031, 1038 (2018). Even if the trial court correctly guesses the issues [a]ppellants raise on appeal and writes an opinion pursuant to that supposition the issues [are] still waived. *Id.*

Here, the Appellant to fails to explain or elaborate regarding why it is relevant whether the city's decision to deny Appellant a tax refund is a "practice" or "policy." Further, upon examination of the certified record in this matter, there is strange absence of specific references to the city's tax "policies" or "practices." *See* Certified Record of the Tax Review Board. In fact, the word "policy" seems to appear only once in the record within the TRB's conclusions of law and it is not clear from context whether such language is meant to be binding or mere dicta. *Id.* Further, such specific language is completely absent from the TRB's findings of fact. *Id.* Accordingly, these claims should be deemed waived due to lack of specificity, and the absence of meaningful evidentiary support contained in Appellant's 1925 (b) Statement of Matters Complained of On Appeal. Given Appellant's complete lack of clarity and vagueness, Appellant's Concise Statement is essentially the functional equivalent to no Concise Statement at all. *See Commonwealth v. Dowling*, 778

A.2d 683, 686-87 (Pa.Super. 2001). Accordingly, Appellant's claims should be dismissed.

IV. *THIS COURT PROPERLY DENIED APPELLANT'S APPEAL AND AFFIRMED THE DECISION OF THE TRB BECAUSE THE CITY'S DENIAL OF A TAX CREDIT TO THE APPELLANT DID NOT VIOLATE THE COMMERCE CLAUSE*

On Appeal, Appellant claims that "The TRB erred a matter of law by failing to find that the City's denial of a credit to Appellant against her Wage Tax obligations for taxes paid to Delaware discriminated against interstate commerce . . . because it failed the fair apportionment and anti-discrimination prong of the United States Supreme Court's decision in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977)." Appellant's claim must fail. It should be noted that Appellant does not cite to or include any evidence, or exhibits in furtherance of this claim. Further, Appellant fails to identify with sufficient specificity how, or in what manner this Court committed an error of law, but rather only refers to errors made by the TRB. Accordingly, Appellant's claims should be dismissed.

Under *Brady* there is a four prong test for determining whether state or local taxation imposes an unconstitutional burden upon interstate commerce: (1) a tax payer must have substantial nexus with the taxing jurisdiction; (2) the tax may not discriminate against interstate commerce; (3) the tax must be fairly apportioned; and (4) there must be a reasonable relationship between the tax imposed upon the tax payer and the services provided by the taxing jurisdiction. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Failure to meet any of the one above prongs will render a state or municipal tax

unconstitutional. Appellant appears to only be arguing that the Philadelphia wage tax system violates the 2nd and 3rd prong of the above referenced test.

A. *THERE WAS NO UNLAWFUL DISCRIMINATION AGAINST INTERSTATE COMMERCE*

As discussed *supra* there was no unlawful discrimination against interstate commerce or violations of the anti-discrimination prong of *Brady* in this matter because Appellant was never subjected to risk or burden of multiple taxation because at all relevant times Appellant only paid one state and one municipal tax. *See* Section I.

B. *THE PHILAELPHIA TAX SCHEME DOES NOT FAIL THE FAIR APPORTIONMENT REQUIRMENT [sic] OF THE COMMERCE CLAUSE*

To be fairly apportioned, a tax scheme must be both "internally" and "externally consistent." The "internal consistency test" helps courts identify tax schemes that discriminate against interstate commerce, the test "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would result in multiple taxation or place interstate commerce at a disadvantage as compared with commerce intrastate. *See Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1802 (2015); *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989).

The virtue of the test is that it allows courts to distinguish between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double

taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes. *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1802 (2015). The first category of taxes is typically unconstitutional; the second is not. *Id.* Tax schemes that fail the internal consistency test will fall into the first category, not the second: "[A]ny cross-border tax disadvantage that remains after application of the [test] cannot be due to tax disparities" but is instead attributable to the taxing State's discriminatory policies alone. *Id.* It should also be noted that states can avoid violations of the internal consistency test, and problems associated with double taxation by offering tax payers a credit for income taxes paid to other states or equivalent taxing authority. *See Id.* at 1805-06.

Here, the Philadelphia tax policy is internally consistent because if every local taxing authority adopted Philadelphia tax policies there would be no "inherent discrimination against interstate commerce." Under current Philadelphia tax policies a tax payer living in the city pays a standard tax rate of 3.922%, and is granted a tax credit for taxes paid to other localities in separate states or jurisdictions. As such, if every locality or municipality adopted a similar system to that of Philadelphia, a tax payer working out of state would only be charged one single 3.922% tax rate, which is the same as a Philadelphia resident. While it is true that a resident working out of state could end up paying separate municipal taxes in a separate state in which they work, this tax would be offset or nullified by an appropriate tax credit granted to them based on the tax rate in that locality. Therefore, a taxpayer would never paying more than one municipal tax. As such, there would be no risk of double municipal taxation, and no greater locality tax

burden to resident's [sic] working out of state versus those working within their state of residence if every state locality adopted an identical tax structure to that of Philadelphia. As such, Appellant's claims should be dismissed.

Further, the Philadelphia tax scheme is also externally consistent. The external consistency test asks whether a State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989). The court will thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity. *Id.* Specifically the court will attempt to determine the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185, (1995).

Here, the Philadelphia tax system is likewise externally consistent because Philadelphia does not subject Appellant to double taxation as outlined *supra*, and does not tax more than its fair share of Appellant's wages. Furthermore the taxes charged reasonably reflect the in-state component of Appellant's activities which are being taxed. Here, the city's justification for its tax upon Appellant is based on her residency within the City of Philadelphia and the economic advantages relevant to her residency. As a resident, Appellant performs multiple activities within the state and receives numerous benefits, and protections from the City of Philadelphia. This includes the use of public roadways, use of municipal sewers, use of municipal

waterlines, use of municipal trash collection services, the availability of emergency and fire protection services well as many other municipal public benefits. The city's provision of these services, as well as Appellant's residency alone provide the city with significant economic justification for the taxes it imposes upon Appellant, and thus satisfies the "external consistency test" Accordingly, Appellant's claims should be dismissed.

V. *THIS COURT PROPERLY DENIED APPELLANT'S APPEAL AND AFFIRMED THE DECISION OF THE TRB BECAUSE EXISTING PENNSYLVANIA LAW AND JUDICIAL PRECEDENT SUPPORT THE CONTENTION THAT LOCAL AND STATE TAXES NEED NOT BE CONSTRUED TOGETHER FOR PURPOSES OF THE COMMERCE CLAUSE*

On Appeal, Appellant claims that "The TRB erred as a matter of law when it failed to conclude that state and local taxes must be construed together for purposes of the Commerce Clause." Appellant's claim must fail. It should be noted that Appellant does not cite to or include any evidence, or exhibits in furtherance of this claim. Further, Appellant fails to identify with sufficient specificity how, or in what manner this Court committed an error of law, but rather only refers to errors made by the TRB. Accordingly, Appellant's claims should be dismissed.

It should be noted that existing Pennsylvania law and judicial precedent, support the contention that the Philadelphia wage tax is not a state tax that needs to be construed together with other Pennsylvania state taxes. The City of Philadelphia was specifically granted authority to impose its own taxes through the Sterling Act which permits it to impose its own taxes

separate and distinct from those imposed by the Commonwealth of Pennsylvania. *See* Act of August 5, 1932, P.L. 45 53 P.S. §15971. Further, the City of Philadelphia and the Commonwealth of Pennsylvania have long been recognized as two distinct separate taxing jurisdictions. *Id. See National Biscuit Co. v. City of Philadelphia*, 98 A.2d 186 (Pa. 1953). (Finding that a local tax administered and collected solely for the benefit of the municipality is not a state tax for purposes of the Sterling Act). In addition, "State taxes stand on a different basis from local levies; the former are essential to the very 'preservation' of the state itself [,] while the latter are authorized or permitted by the state, not for its actual preservation, but merely to maintain the machinery of local government. *McClelland v. City of Pittsburgh*, 57 A.2d 846, 848 (1948); *see also F. J. Busse Co. v. City of Pittsburgh*, 279 A.2d 14, 18 (1971) (Holding that a local business privilege tax was not duplicative of several state taxes and basing its holding on its conclusion that the incidence of the local and state taxes were not the same).

Here again, the Appellant seems to alluding [sic] to her interpretation of the *Wynne* decision. As discussed *supra*, *Wynne* is factually distinguishable from the facts at issue in this present action. Further, there is no additional United States Supreme Court or otherwise applicable Pennsylvania precedent that would help support Appellant's contention that Philadelphia wage taxes and Pennsylvania State taxes must be construed together as one unitary state tax. Accordingly, Appellant's claims should be dismissed.

CONCLUSION

For all the foregoing reasons, this Court respectfully requests that its judgment be affirmed in its entirety.

BY THE COURT:

/s/ Paula A. Patrick
PAULA A. PATRICK, J.

APPENDIX D

January 28, 2019

IN RE: Zilka, Diane

Docket No: 36WMREFZZ9447 and 36WMREFZZ9445

Statement of Record:

1) Diane Zilka (hereafter "Petitioner") filed a Petition for Appeal with the Office of Administrative Review (OAR) on October 6, 2017. The petition requested a review of the September 26, 2017 partial refund denial by the Department of Revenue. Petitioner had requested a refund for Philadelphia wage taxes withheld from years 2013 to 2015, docket number 36WMREFZZ9447 and 2016, docket number 36WMREFZZ9487.

2) A public hearing before the Tax Review Board was held on April 24, 2017.

3) Petitioner is represented by attorneys, Mr. Stewart Weintraub from Chamberlain Hrdklicka.

4) The hearing was continued for additional submissions from the parties and rescheduled for September 20, 2018.

5) The Tax Review Board denied the petition.

6) Petitioner has filed an appeal to the Philadelphia Court of Common Pleas.

Findings of Fact:

1) At issue is the Department of Revenue's partial denial of a refund requested by Petitioner for years 2013-2015 and 2016 for income taxes paid to the State of Delaware.

2) During the periods in question, the Petitioner remained a resident of the City of Philadelphia, Pennsylvania and worked as an attorney in the City of Wilmington, Delaware.

3) Petitioner paid income taxes to both the City of Wilmington and State of Delaware. Additionally, the Petitioner's employer withheld Philadelphia city wage taxes.

4) Petitioner requested a refund of [redacted] for Philadelphia Wage Taxes paid for years 2013 to 2015 based on credits for income taxes paid to the City of Wilmington and the State of Delaware. The Department of Revenue granted a credit for taxes paid to City of Wilmington but not those paid to the State of Delaware and issued a partial refund of [redacted] the remainder, [redacted] was denied.

5) For the year 2016, Petitioner requested a refund for income taxes paid to the City of Wilmington and the State of Delaware. Again, the Department of Revenue granted a partial refund, allowing credits for income taxes paid to the City of Wilmington but not to the State of Delaware. The amount at issue remains [redacted]

Conclusions of Law:

The Philadelphia Code Chapter 19-1703(7) provides that a denial of refund request by the Department of Revenue may be appealed to the Tax Review Board. "Any decision of the Department [of Revenue] denying a refund in whole or in part may be appealed to the Tax Review Board by the petitioner within 90 days after the mailing of notice of such decision to the petitioner by the Department".

A recent US Supreme Court decision, *Maryland v. Wynne*, 135 S. Ct. 1787 (2015), held that Maryland's personal income tax scheme, which consisted of state and county income taxes, violated the dormant Commerce Clause as Maryland did not offer its residents full credit against the income taxes that they pay to other States. Specifically, Maryland provided a credit for state income taxes paid to other states but not credit for taxes paid for county taxes. This resulted in what the Court believed was "double taxation of income earned out of the state and that discriminated in favor of intrastate over interstate economic activity." *Id*. at 1795. *Wynne* has raised the issue of whether the City of Philadelphia's denial of credits for taxes paid to the State of Delaware against the Petitioner's City Wage Tax liability is unconstitutional and violates the Commerce Clause of the Constitution.

Petitioner's argument asserts that the City of Philadelphia's tax scheme is unconstitutional and discriminatory as it causes the Petitioner to pay multiple taxes, both Delaware and Philadelphia state and city taxes, without providing full credits in return. The Petitioner's Brief, highlights this in Figures 1 and 2, detailing the differences in 2014 tax rates and impact on Petitioner; higher tax rates under the City's scheme for residents working-out-of-state versus in-state. *Petitioner's Brief*, Pg. 9. The Petitioner explains, "As a result of this taxing position, this Petitioner, a Philadelphia resident working interstate, is being taxed at almost a 2% higher rate than her identical intrastate counterpart." *Id*. at 10.

In response, City's argument focused on distinguishing the facts of the *Wynne* case to those of the Petitioners and explaining how Philadelphia's tax scheme is in fact constitutional. The *City's Brief* explained in

Wynne, "Maryland's state income taxes consists of two parts: the "state" tax and the so-called "county" tax... The so-called Maryland "county" tax, which is administered, collected, and distributed by the Comptroller of Maryland, is a state tax." *Maryland v. Wynne*, 135 S. at 1792. "The Wynnes challenged Maryland's refusal to allow any credit against the so-called "county" tax portion of the Maryland state income tax." *City's Brief*, pg. 4 The City asserts that the *Wynne* Court decision found Maryland's tax scheme unconstitutional because it failed to provide residents "full credits for income taxes paid to other states against Maryland's two-part state tax" and not those of local taxing authorities. *Id*. at 5.

In fact, the City argues that the Petitioner's application of Wynne is "beyond what the Court intended and what the Constitution requires." *Id.* As explained through the testimony of Philadelphia Department of Revenue's Deputy Commissioner David Dorman, the City's wage tax is administered, collected, and distributed by the Philadelphia Department of Revenue, *Transcript*, pg. 82:12-23 and 84:21-85:12. Further, Philadelphia issues credits against its city wage taxes for the income taxes paid to other cities. Unlike *Wynne*, the Philadelphia City wage tax is not part and has no connection to the state taxes collected by the Commonwealth of Pennsylvania. Therefore, credits against the income tax liability for City wage taxes should not be provided for state income taxes paid to other states.

The Tax Review Board found that the City's arguments distinguishing the *Wynne* case facts from that of the Petitioner's was very persuasive. Specifically, by highlighting that the Supreme Court determined that Maryland's tax scheme was unconstitutional as it failed to give full credits for state taxes paid in a state

with a "two-part state tax" and that the City did in fact issue refunds/credits for taxes paid to other cities, as it did in the case of the Petitioner. Further, the Tax Review Board find the City's simple 'apple to apples' approach; state taxes to state taxes and local taxes to local taxes; a reasonable policy in regard to the application of credits since the *Wynne* decision.

Therefore, the decision was to deny the petition.

Concurred:

Nancy Kammerdeiner, Chair
Joseph Ferla
Gaetano Piccirilli Esq.
George Matthew
Ryan Boyer