Sales Made to Out-of-State Purchasers Picked up at a Pennsylvania Facility Are Not Pennsylvania Sales for Purposes of the Pennsylvania Corporate Net Income Tax: Commonwealth of Pennsylvania v. Gilmour Manufacturing Company

Karen Oehling

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Sales Made to Out-of-State Purchasers Picked up at a Pennsylvania Facility are Not Pennsylvania Sales for Purposes of the Pennsylvania Corporate Net Income Tax: Commonwealth of Pennsylvania v. Gilmour Manufacturing Company

CORPORATE TAXATION – ALLOCATION AND APPORTIONMENT – SALES FACTOR – DOCK SALES MADE TO OUT-OF-STATE PURCHASERS – The Supreme Court of Pennsylvania held that sales of tangible personal property made to out-of-state purchasers who choose to pick up the property at a Pennsylvania seller's loading dock are not includable in the numerator of the seller's sales factor for the purpose of calculating the apportionment ratio used in determining the seller's Pennsylvania corporate net income tax liability.


Gilmour Manufacturing Company ("Gilmour") is a lawn and garden manufacturer located in Somerset, Pennsylvania. Gilmour sells lawn and garden equipment throughout the United States, usually shipping via common carriers. Gilmour typically provides its purchasers a freight discount on the sale of its products if the purchaser picks up the merchandise at Gilmour's dock in Pennsylvania. In most cases, Gilmour is aware of the final destination of these out-of-state dock sales.

During 1991, Gilmour sold its products to customers both inside and outside of Pennsylvania. Gilmour's sales included out-of-state dock sales totaling almost $2,400,000. Gilmour filed its 1991 Pennsylvania Corporate Net Income Tax Return by exclud-

2. Gilmour, 822 A.2d at 677. In the case of transportation through common carriers, Gilmour pays the freight charges for the shipping. Id.
3. Id. Sales made to purchasers who pick up the merchandise at the seller's dock and move it outside of the state are referred to as "dock sales." Id.
4. Id.
5. Id. Neither party disputes that Gilmour Manufacturing was entitled to apportion its business income based on its multi-state activity. Id.
6. Id. at 677-78.
ing these dock sales from its sales factor in the apportionment ratio when computing its Pennsylvania income tax liability.

The Pennsylvania Department of Revenue ("Department") recomputed Gilmour's Pennsylvania tax liability. Relying on its own regulation, the Department recalculated the apportionment ratio to include the dock sales as sales occurring inside Pennsylvania.

Gilmour paid the settled tax and filed a petition for refund with the Board of Finance and Revenue ("Board"). The Board denied

7. The sales factor is a fraction, the numerator of which equals the total dollar sales made in Pennsylvania, and the denominator of which equals the total dollar sales made everywhere. PA. STAT. ANN. tit. 72, § 7401(3)(2)(a)(15) (West 1971). The sales factor, when combined with a property factor and a payroll factor, is multiplied by taxable income to arrive at the taxable income in Pennsylvania. PA. STAT. ANN. tit. 72, § 7401(3)(2)(a)(9)(A) (West 1971).

8. Gilmour, 822 A.2d at 677.

9. Id. The Pennsylvania Department of Revenue enforces the corporate net income tax. PA. STAT. ANN. tit. 72, § 7408(a) (West 1971). The corporate net income tax is a self-assessed tax; the taxpayer computes and pays the tax before a deadline. CHARLES L. POTTER, JR. ET AL., 2003 GUIDEBOOK TO PENNSYLVANIA TAXES 350 (2002). The Department of Revenue settles each return by either accepting the tax as reported or recomputing the tax by making adjustments. PA. STAT. ANN. tit. 72, § 7407(a) (West 1971). The Department of the Auditor General then reviews the settlement. PA. STAT. ANN. tit. 72, § 802(a) (West 1971). The taxpayer must receive notification of settlement within 18 months of the date the return filing was due (or the date filed, if an extension was granted), or the taxpayer's report must be accepted as filed. PA. STAT. ANN. tit. 72, § 7407(a) (West 1971).

10. The Department of Revenue has the authority to promulgate regulations, interpreting statutory law, as part of its duty of enforcing the Tax Reform Code. PA. STAT. ANN. tit. 72, § 7408(a) (West 1971). The Department of Revenue's regulation at issue in Gilmour states: "Sales of tangible personal property are in the state in which delivery to the purchaser occurs." 61 PA. CODE § 153.26(b)(2) (2003) (emphasis added). Neither party disputed that the products that Gilmour Manufacturing sold were tangible personal property. Gilmour, 822 A.2d at 677. The Department's regulation also provided an example that stated that a New York producer selling products to a Pennsylvania distributor, who picks up the goods in New York and brings them back into Pennsylvania for resale, has delivered its goods in New York and, therefore, has New York sales. 61 PA. CODE § 153.26(b)(2) (2003). An example was later added to this regulation illustrating how dock sales are to be treated. Id.

11. Gilmour, 822 A.2d at 677.

12. Id. at 678. A taxpayer may petition for a refund of any taxes collected by the Department of Revenue, including the corporate net income tax. PA. STAT. ANN. tit. 72, § 10003.1 (West 1971). In the case of a refund of a settlement, the petition for refund must be filed within six months of the mailing date of the notice of settlement. PA. STAT. ANN. tit. 72, § 10003.1(d) (West 1971). The Department of Revenue then has six months to respond to the petition. PA. STAT. ANN. tit. 72, § 7253(c) (West 1971). Here, the Department of Revenue denied Gilmour's petition for refund for almost $18,000 of tax calculated by including dock sales in the sales factor in computing its corporate net income tax liability. Gilmour Mfg. Co. v. Commonwealth, 717 A.2d 619, 620 (Pa. Commw. Ct. 1998) (Gilmour I).

If dissatisfied with the result of the appeal to the Department of Revenue, the taxpayer may appeal the decision to the Board of Finance and Revenue. PA. STAT. ANN. tit. 72, §10003.1(e) (West 1971). The taxpayer must file such an appeal within 90 days of the mailing date of the Department's response to the taxpayer's petition. Id.
Gilmour's petition, and Gilmour sought to have the Board's decision reviewed by the Commonwealth Court. Gilmour argued that the Department of Revenue's regulation was inconsistent with the Tax Reform Code, and, therefore, should not govern the taxability of Gilmour's dock sales.

The Commonwealth Court, in an opinion authored by Judge Smith, analyzed the language of the Tax Reform Code defining the location of sales. The statute in question reads: "Sales of tangible personal property are in this State if the property is delivered or shipped to a purchaser, within this State regardless of the f.o.b. point or other conditions of the sale." Gilmour argued that the phrase "within this State" modified the term "purchaser." Under Gilmour's interpretation, the sale is an in-state sale only if the purchaser's ultimate destination is Pennsylvania. The Pennsylvania Department of Revenue, however, argued that the phrase modified the term "delivered." The Department's interpretation leads to an in-state sale if the actual delivery occurs inside the state borders, regardless of the ultimate destination of the goods.

13. Gilmour, 822 A.2d at 678. A taxpayer has 30 days from the date of the Board of Finance and Revenue's decision to appeal to the Commonwealth Court. 210 PA. CODE R. 1571. Appeals can be made from the decisions of the Commonwealth Court, but the appellant must first file exceptions to the Commonwealth Court decisions in order to be heard by the Pennsylvania Supreme Court. 210 PA. CODE R. 1571(e). Gilmour Manufacturing timely filed an appeal to the Commonwealth Court, filed exceptions to the decision, and appealed to the Pennsylvania Supreme Court. Gilmour, 822 A.2d at 678. See also Gilmour I, 717 A.2d 619; Gilmour Mfg. Co. v. Commonwealth, 750 A.2d 948 (Pa. Commw. Ct. 2000) (en banc) (Gilmour II).

14. Gilmour, 822 A.2d at 678. The Pennsylvania Department of Revenue is given statutory authority to interpret the Tax Reform Code and introduce regulations necessary to facilitate the enforcement of those provisions. PA. STAT. ANN. tit. 72, § 7408(a) (West 1971). See also Philadelphia Suburban Corp. v. Pennsylvania Bd. of Fin. and Revenue, 635 A.2d 116 (Pa. 1993). Because of this delegated authority, the Pennsylvania reviewing courts may give deference to the regulations adopted by the Department. Gilmour I, 717 A.2d at 621. See also Pennsylvania Human Relations Comm'n v. Uniontown Area Sch. Dist., 313 A.2d 156 (Pa. 1973). However, the interpretation of a statute is a question of law; the courts may find the regulation in conflict with the legislature's statutory intention. Gilmour I, 717 A.2d at 621.

15. Gilmour I, 717 A.2d at 621.

16. PA. STAT. ANN. tit. 72, § 7401(3)(2)(a)(16) (West 1971) (emphasis added). F.O.B. is an abbreviation for "free on board," a term used to establish the point at which the seller gives title to the tangible personal property sold to the purchaser. Gilmour, 822 A.2d at 678 n.2. There are two types of f.o.b. points: delivery and destination. Title to the goods passes in accordance with which point is used. See Shetzline v. C.&.M. Produce Co., 101 Pa. Super. 432 (1931).

17. Gilmour, 822 A.2d at 678.

18. Id.

19. Id.

20. Id.
Gilmour made three specific arguments to support its contention. Gilmour first contended that by placing the emphasis on the word "delivered," the statute would contradict itself. The last phrase of the statute insists that sales are Pennsylvania sales "regardless of the f.o.b. point." If the phrase "within this State" modifies delivery, as the Commonwealth challenged, then the last phrase relating to f.o.b. points is extraneous. Since Pennsylvania has ruled that no provision is to be "mere surplusage," Gilmour argued that the phrase must be meaningful. Gilmour concluded that if the phrase is to have effect, then the regulation is in direct conflict with the statute.

Judge Smith did not respond directly to this argument. However, at this point of the opinion, she reminded the court that regulations issued under the color of authority are entitled to deference, unless clearly against legislative intent.

Gilmour's second argument relied on the Florida Court of Appeal's opinion in Florida Department of Revenue v. Parker Banana Co. Parker Banana Company was a Florida corporation which imported bananas and resold them to out-of-state consumers. Parker Banana contended that sales to purchasers from outside of the State of Florida were not Florida sales for purposes of computing the Florida apportionment ratio. Judge Danahy, writing for the Florida court, interpreted the legislative intent surrounding the apportionment statute in Florida to involve only taxing sales made in the Florida market, determined by the ultimate destination of the goods.

Judge Smith found the majority argument in Parker unpersuasive. Although Gilmour argued that the language in the two

22. Id. at 621.
24. Gilmour I, 717 A.2d at 621.
25. Gilmour, 822 A.2d at 679. See also 1 PA. CONS. STAT. § 1903 (2003).
26. Gilmour I, 717 A.2d at 621.
27. Id.
28. Id.
29. Id.
30. Id. This case is a case of first impression in Pennsylvania; therefore, Gilmour Manufacturing introduced the opinions of several other jurisdictions to support its case. Gilmour, 822 A.2d at 677, 680-81.
32. Parker, 391 So. 2d at 762.
33. Id.
34. Gilmour I, 717 A.2d at 621.
states' statutes was similar, Gilmour did not argue that both states' legislatures had the similar legislative intents required to compare the statutory interpretations.\footnote{Id.} Looking to the Pennsylvania statute, Judge Smith determined that the opportunity to petition the Pennsylvania Secretary of Revenue for unfair apportionment provisions supported the legislative intent to tax the business activity of the taxpayer in Pennsylvania, as opposed to focusing on the destination of the purchaser.\footnote{Id.}

Gilmour's third argument looked at another Department regulation, which reads: "Property shall be deemed to be delivered to a purchaser within this Commonwealth if the shipment terminates in this Commonwealth, even though the property is subsequently transferred by the purchaser to another state."\footnote{Id. See 61 PA. CODE § 153.26(b)(4)(i) (2003).} Gilmour contended that this regulation illustrated an intent to implement a destination test, which would be similarly applicable to the statute at issue in Gilmour's case.\footnote{Gilmour I, 717 A.2d at 621-22.} Judge Smith disagreed with Gilmour's interpretation of the legislature's intent, determining that the focus was on the sales activity of the taxpayer, not on the activity of the purchaser or the purchaser's destination.\footnote{Id. at 622.}

Gilmour next cited a Minnesota case when it argued that the overriding purpose of the sales factor in the CNI tax calculation turns on destination as opposed to delivery.\footnote{Id. The Minnesota case cited was Olympia Brewing Co. v. Comm'n of Revenue, 326 N.W.2d 642 (Minn. 1982).} In *Olympia Brewing Co. v. Commissioner of Revenue,*\footnote{326 N.W.2d 642 (Minn. 1982).} the taxpayer was selling beer to out-of-state distributors who were picking up the beer in Minnesota at the taxpayer's warehouse.\footnote{Olympia Brewing, 326 N.W.2d at 643.} Olympia Brewing excluded all out-of-state sales from its apportionment ratio for the taxable year.\footnote{Id. at 644.} The Minnesota Supreme Court compared Minnesota's statute with the language and intent of the Uniform Division of Income for Tax Purposes Act ("UDITPA").\footnote{Id. at 646. See discussion on UDITPA infra notes 121-136 and accompanying text.} Finding that there must be a difference between delivery and shipment, the Minnesota court refused to support a delivery test.\footnote{Id. at 647.}
Judge Smith found this argument equally unconvincing, stating that the Minnesota court did not adopt the destination test as a result of examining the Minnesota statute, but rather determined that delivery ended when the initial purchaser's location was determined.\(^4\)

Gilmour's final argument turned to the purposes and language of the UDITPA.\(^4\) Gilmour argued that in order for state taxation laws to be uniform, Pennsylvania must interpret the Pennsylvania statute as other states have interpreted their statutes.\(^4\) Judge Smith rejected this argument on two grounds.\(^4\) First, other states, including Florida and Minnesota, have not in fact interpreted their respective statutes consistently.\(^5\) Also, Pennsylvania has not adopted the UDITPA.\(^6\)

Judge Smith found that the legislative intent of the regulation was to focus on the sales activity of Pennsylvania businesses, as opposed to concerning itself with the final destination of shipment.\(^6\) She also noted at the end of her opinion that it is much easier to determine the location of delivery than it is to determine the location of a final destination point of a customer.\(^6\) Because the regulation was neither found to be inconsistent with the statute nor unreasonable, the Board of Finance and Revenue's order was affirmed.\(^4\)

Gilmour filed exceptions with the Commonwealth Court, sitting en banc, on Judge Smith's order.\(^5\) Judge Doyle, authoring the majority opinion of the Commonwealth Court, analyzed two sources of guidance on interpretation of the statute, which are the regulations promulgated by the Department of Revenue and cases from other jurisdictions interpreting similar language.\(^5\)

Judge Doyle looked at Regulation Section 153.26, and analyzed the courts ability to review whether the regulation followed the

\(^{46.}\) *Gilmour I*, 717 A.2d at 622.
\(^{47.}\) *Id.*
\(^{48.}\) *Id.*
\(^{49.}\) *Id.*
\(^{50.}\) *Id.* Gilmour also cited cases from Connecticut, Kentucky, California, and Wisconsin. *Id.* These cases were not addressed by the Commonwealth Court; therefore, they are not addressed here. *Id.*
\(^{51.}\) *Gilmour I*, 717 A.2d at 622 (citing Welded Tube Co. of Am. v. Commonwealth, 515 A.2d 988 (Pa. Commw. Ct. 1986)).
\(^{52.}\) *Id.*
\(^{53.}\) *Id.*
\(^{54.}\) *Id.* Judge Doyle dissented, without opinion. *Id.*
\(^{55.}\) *Gilmour II*, 750 A.2d at 949.
\(^{56.}\) *Id.* at 950.
legislative intent of the corresponding statute; however, no solution was proposed based on this first source of guidance.57

The majority of Judge Doyle's opinion was spent discussing the opinions of various jurisdictions.58 The first case the Commonwealth Court analyzed was Olympia.59 After citing various portions of the Olympia opinion at length, Judge Doyle agreed with the proposition that the mode of transportation used when picking up products at a seller's location should not be indicative of whether the sale is an in-state or out-of-state sale.60

Judge Doyle conceded that Pennsylvania has not adopted the UDITPA.61 However, the language used in the Pennsylvania statute is almost exactly that of the uniform act.62 Because the language of the statute has been adopted almost verbatim from the UDITPA, other jurisdictions' interpretations of similar statutes can be persuasive.63

The Department of Revenue attempted to argue a delivery rule, based on the delivery rule in effect for sales tax purposes.64 Judge Doyle found that following the Department's construction of the statute allowed for different results depending on f.o.b. point, which is clearly inconsistent with the statute.65

Judge Doyle continued his analysis by affirming that the purpose of the Pennsylvania CNI tax is to measure the taxpayer-seller's activity in the Pennsylvania market, as opposed to that of the purchaser.66 Therefore, he declared that including dock sales to out-of-state purchasers in the numerator of the taxpayer's sales

57. Id. at 950-51.
58. Id. at 951-53.
59. Id. at 951.
60. Gilmour II, 750 A.2d at 951-52. Judge Doyle comments that similar results were reached in the five other jurisdictions mentioned above. Id. at 952. See infra note 90 for other jurisdictions.
61. Gilmour II, 750 A.2d at 952 n.5.
62. Id. The Pennsylvania statute reads: "Sales of tangible personal property are in this State if the property is delivered or shipped to a purchaser, within this State regardless of the f.o.b. point or other conditions of the sale." PA. STAT. ANN. tit. 72, § 7401(3)(a)(16) (West 1971). The UDITPA language states: "Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale." Uniform Division of Income Tax Purposes Act § 16(a). See discussion of UDITPA infra notes 121-136 and accompanying text.
63. Id. "Statutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them." 1 PA. CONS. STAT. § 1927 (2003).
64. Gilmour II, 750 A.2d at 952 (citing Commonwealth's brief at 17).
65. Id. See language of the Tax Reform Code supra note 61.
66. Gilmour II, 750 A.2d at 953.
factor would misrepresent the ratio of the Pennsylvania market to the total of the taxpayer’s sales. 67

Finally, Judge Doyle reminded the Commonwealth that any burden of proving final destination [as opposed to delivery site] rests with the taxpayer; the Commonwealth may presume Pennsylvania deliveries are Pennsylvania sales for CNI purposes until successfully rebutted by the taxpayer. 68

Judge Smith authored a dissenting opinion in this case. 69 She continued to express the importance of finding a violation of the legislative intent of a statute before interfering with the Department’s authority to issue regulations like that at issue in this case. 70 Judge Smith still found the Minnesota precedent to be uncontroverting, and she refused to weigh the implications of the UDITPA since Pennsylvania has not adopted the act. 71 Finally, Judge Smith weighed how easily a delivery point can be defined against the ease of determining the ultimate destination of a purchaser. 72

The Department of Revenue appealed to the Pennsylvania Supreme Court. 73 Justice Castille, writing the opinion of the court, began by stating the standard of review when interpreting a statute. 74 Statutory interpretation in Pennsylvania, according to Justice Castille, requires analyzing the legislative intention, the best indication of which is found in the plain language of the statute. 75 The plain language of the Tax Reform Code states that, “[s]ales of tangible personal property are in this State if the property is delivered or shipped to a purchaser, within this State regardless of the f.o.b. point or other conditions of the sale.” 76 The majority states that if the phrase “within this State” is read to modify the word “delivered,” then the legislation intended to utilize a delivery test, and dock sales would be taxable for corporate net income tax purposes in the state of delivery. 77 However, if the

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67. Id.
68. Gilmour II, 750 A.2d at 953-54. This is the same result that the Minnesota court observed in Olympia. Olympia, 326 N.W.2d at 647-48.
69. Gilmour II, 750 A.2d at 954. Judge Flaherty joined in Judge Smith’s dissent. Id. at 956.
70. Id. at 954-55.
71. Id. at 955-56.
72. Id. at 956.
73. Gilmour, 822 A.2d at 679.
74. Id.
76. PA. STAT. ANN. tit. 72, § 7401(3)(a)(16) (West 1971) (emphasis added).
77. Gilmour, 822 A.2d at 678.
phrase "within this State" is read to modify the word "purchaser," then a destination test is more appropriate, and dock sales are not taxable in the state of delivery but in the resident state of the purchaser. As a result, the Pennsylvania Supreme Court found that the plain language of the statute does not result in one interpretation.

The majority next observed that Pennsylvania construes the language of the statute in accordance with the rules of grammar and those of common usage, giving effect to all provisions such that no provision is superfluous. If the legislature intended a delivery test to be used, the final phrase of the statute regarding the f.o.b. points would be unnecessary. Justice Castille noted that the placement of the comma before the phrase "within this State" does not easily lead to the conclusion that the phrase modifies the word "delivered," reasoning that the comma could easily have been removed and the phrase repeated to implement a delivery test. However, the majority determined that rewording the statute would have departed from the language of the UDITPA, which the statute was clearly designed to imitate.

Finally, Justice Castille observed that all tax statutes are to be narrowly construed. In order to achieve this goal, the ambiguity of the statute must be resolved in favor of the taxpayer. In Gilmour Manufacturing's case, the majority established that this required interpreting the language of the Tax Reform Code as imposing a destination test as opposed to a delivery test, thus lowering the taxpayer's sales factor in the apportionment ratio.

Justice Castille recognized that administrative interpretations of a complex statute are entitled to some weight by the courts. However, in order for that deference to exist, the regulation must follow the meaning of the statute without violating the intent of the legislature. Although the Treasury issued the regulation in an attempt to interpret the Tax Reform Code, the majority deter-

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78. Id.
79. Id.
80. Id. at 679. 1 PA. CONS. STAT. §§ 1903, 1921(a) (2003).
81. Gilmour, 822 A.2d at 681.
82. Id. at 681-82.
83. Id. at 682.
84. 1 PA. CONS. STAT. ANN. § 1928(b)(3) (2003).
85. Gilmour, 822 A.2d at 682.
86. Id. at 679.
87. Id.
mined that the regulation was inconsistent with the intent of the legislature. Therefore, they could not uphold the regulation.

In addition to Florida and Minnesota, Gilmour Manufacturing relied heavily upon the jurisprudence of four other states. All six of these states have statutes with very similar language to that of Pennsylvania's statute, and Gilmour Manufacturing argued that each of those states has interpreted their respective statutes as Gilmour contended Pennsylvania's statute should be read: dock sales should be excluded from the numerator of the sales factor when computing the appropriate apportionment for corporate net income tax. The court found these arguments equally persuasive.

Justice Castille agreed with the en banc court that the construction of the statute leads to the conclusion that the phrase "within this State" must modify "purchaser," and only sales to Pennsylvania purchasers should be included in the numerator of the sales factor of the apportionment ratio for CNI tax purposes.

Although the right to tax is a power reserved to the states in the United States Constitution, there are several provisions which limit that power. The first limitation arises from the Commerce Clause. Congress has the exclusive authority to regulate interstate commerce. A state tax giving preference to in-state taxpayers will be found unconstitutional if it interferes with interstate commerce. While each state is entitled to impose an income tax on companies transacting business in interstate commerce, no state may tax a multi-state company on its entire income from everywhere.

88. Id. at 684.
89. Id.
90. Gilmour, 822 A.2d at 680. The four other states are California, Connecticut, Kentucky, and Wisconsin. Id. These states have derived the language of their statutes from the UDITPA. Id. at 681.
91. Gilmour, 822 A.2d at 680.
92. Id. at 682.
93. Gilmour, 822 A.2d at 681. The majority also admitted that the court must construe the taxing statute in favor of the taxpayer. Id. at 682. "Since we must apply the rules of grammar and since we must construe the taxing statute in favor of the taxpayer, then Gilmour must, perforce, prevail." Id.
94. 4-79 Business Organizations with Tax Planning §79.02. See U.S. CONST. amend. X; McCulloch v. Maryland, 17 U.S. 316 (1819).
95. 4-79 Business Organizations with Tax Planning §79.02.
The state taxation power over interstate transactions began with *Spector Motor Service v. O'Connor*. Spector Motor Service was a Missouri corporation engaged solely in interstate trucking. The Supreme Court held that the Connecticut tax on the "privilege" of doing business levied on a company that was solely engaged in interstate activity was invalid.

Louisiana confused the rule in *Spector* in deciding the cases of *Colonial Pipeline Company v. Mouton* and *Colonial Pipeline Company v. Traigle*. The state statute originally taxed corporations on the "privilege of doing business." When the tax was found to be unconstitutional, Louisiana changed the language of its statute to impose a tax on the "qualification to carry on or do business in this state or the actual doing of business." The United States Supreme Court upheld the updated language from *Traigle* in 1975. The question left unanswered by the *Colonial Pipeline* series of cases is the difference between a tax imposed on the "privilege of doing business," from a tax imposed on the "qualification to carry on or do business in this state or the actual doing of business."

The Supreme Court resolved this problematic distinction in *Complete Auto Transit, Inc. v. Brady*. Complete Auto, a Michigan corporation, was in the business of transporting motor vehicles for General Motors Corporation. Mississippi taxed Complete Auto on its sales in Mississippi, based on the privilege of doing business in Mississippi. Complete Auto, relying on the *Spec-

101. *Id.* at 609-10.
103. *Colonial (Mouton)*, 228 So. 2d at 720.
104. *Id.* at 723.
105. *Colonial (Traigle)*, 421 U.S. at 104 n.4.
106. *Id.* at 114.
107. *Id.* (Blackmun, J., concurring).
110. *Id.* at 277. The relevant statute in effect at the time of this case states:
    There is hereby levied and assessed and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

MISS. CODE ANN. § 10105 (Supp. 1972), as amended. Another relevant Mississippi statute states:

Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensa-
tor rule, argued that its business was part of interstate commerce, making the Mississippi tax imposed on Complete Auto an unconstitutional use of Mississippi's taxing power.\textsuperscript{111}

The Supreme Court overruled \textit{Spector}.\textsuperscript{112} While the Court recognized the reality that any tailored tax may result in discrimination against businesses engaged in interstate commerce, it found no solid reason to find that a tax on "the privilege of doing business" is per se unconstitutional.\textsuperscript{113} The four-factor test that \textit{Complete Auto} established to determine whether a tax on the privilege of doing business is unconstitutional is as follows: (1) the tax is applied to an activity with a substantial nexus with the taxing State; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the services provided by the State.\textsuperscript{114}

Multiple taxation may result from the decision that a tax on the privilege of doing business within a state is constitutional.\textsuperscript{115} The \textit{Complete Auto} test allows states to create their own apportionment formulas for taxation on the privilege of doing business.\textsuperscript{116} Where two states differ on their approach to apportioning corporate net income and both are constitutionally valid, neither state must alter its approach to eliminate the double taxation.\textsuperscript{117}

The second constitutional limitation placed on taxation turns on the Due Process Clause.\textsuperscript{118} Due process requires that a state provide the taxpayer with benefits before asking for a tax payment in return.\textsuperscript{119} Two specific issues arise when determining if there is a sufficient nexus between the tax imposed and the business activity taxed: "(1) whether the corporation's activities constitute an ade-

\textsuperscript{111} \textit{Complete Auto}, 430 U.S. at 279.
\textsuperscript{112} \textit{Id.} at 288-89.
\textsuperscript{113} \textit{Id.} at 289.
\textsuperscript{115} \textit{Mobil Oil Corp. v. Comm'rcr of Taxes of Vermont}, 445 U.S. 425, 445 (1980). In \textit{Mobil}, the New York taxpayer was trying to argue that dividends taxable in New York should have been allocated to New York as opposed to apportioned between the states because of the double taxation. \textit{Id.} at 430.
\textsuperscript{116} \textit{Complete Auto}, 430 U.S. at 280.
\textsuperscript{117} \textit{Mobil}, 445 U.S. at 444-45.
\textsuperscript{118} U.S. CONST. amend. XIV, § 1.
\textsuperscript{119} \textit{J.C. Penney}, 311 U.S. at 444.
quate basis for taxation, and (2) whether the method of taxation is reasonably related to the activities conducted.\textsuperscript{120}

In 1957, The Uniform Division of Income for Tax Purposes Act (UDITPA) was promulgated.\textsuperscript{121} The purpose of this act was to provide uniformity among the different states in taxing multi-state corporations.\textsuperscript{122} The UDITPA addresses many of the issues at hand in \textit{Gilmour}.\textsuperscript{123} Section 1 begins by defining business income.\textsuperscript{124} Section 2 allows the allocation and apportionment of business income where a taxpayer has a multi-state business.\textsuperscript{125} The UDITPA introduces the three factor apportionment ratio in Section 9, the sales factor of which is defined in Section 15.\textsuperscript{126} Most importantly, Section 16 illustrates the Act's definition of in-state sales of tangible personal property.\textsuperscript{127} However, it is the


\textsuperscript{121} 8 A.L.R. 4th 934, at § 2 (1981).

\textsuperscript{122} \textit{Id.} Otherwise, multi-state corporations would run the risk of being subject to several tax liabilities on the same income. \textit{Id.}

\textsuperscript{123} \textit{See generally} Uniform Division of Income for Tax Purposes Act §§ 1-3, 9, 15-16.

\textsuperscript{124} Uniform Division of Income Tax Purposes Act § 1(a). The UDITPA definition reads: Income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if \textit{the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.} \textit{Id.} (emphasis added). Compare with Pennsylvania's definition: Income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if \textit{either the acquisition, the management or the disposition of the property constitutes an integral part of the taxpayer's regular trade or business operations.} \textit{PA. STAT. ANN. tit. 72, § 7401(3)(a)(1)(A) (West 1971)} (emphasis added).

\textsuperscript{125} Uniform Division of Income Tax Purposes Act § 2. The UDITPA states: Any taxpayer having income from business activity which is taxable both within and without this State other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this Act (emphasis added).

\textit{Id.} (emphasis added). Compare with Pennsylvania's language: Any taxpayer having income from business activity which is taxable both within and without this State other than activity as a corporation whose allocation and apportionment of income is specifically provided for in section 401(3)(b), (c) and (d) shall allocate and apportion taxable income as provided in this definition (emphasis added).

\textit{PA. STAT. ANN. tit. 72, § 7401(3)(a)(2) (West 1971).}

\textsuperscript{126} Uniform Division of Income Tax Purposes Act §§ 9, 15. Section 9 illustrates a three factor test including equally weighted property, payroll, and sales factors. \textit{Id.}

\textsuperscript{127} Uniform Division of Income Tax Purposes Act § 16. The UDITPA specifically defines sales of tangible personal property as being in this state if: "the property is delivered or shipped to a purchaser . . . within this state regardless of the f.o.b. point or other conditions of the sale; or the property is shipped from an office . . . in this state and [either] the
Comments to Section 16 that provide guidance as to the Conference’s intention relating to the definition of in-state sales. The first comment following the text of Section 16 includes as in-state sales those sales that a purchaser directs to be delivered to an in-state “ultimate recipient.” The next comment specifically exempts sales to the U.S. government on the basis that ultimate destination would be very difficult to determine. It is clear that the drafters were concerned with the destination of goods as opposed to the location of delivery when defining in-state sales. One final particular feature of the UDITPA concerning the sales factor is known as the “throwback rule.” The throwback rule requires a corporation to include in the numerator of its sales factor any sales attributable to states in which the corporation is not taxable.

The UDITPA has been adopted by twenty-three states. Although Pennsylvania has not specifically adopted the UDITPA, the Pennsylvania statute is worded similarly to the Uniform Act. The Pennsylvania courts throughout Gilmour’s case repeatedly analyzed the statutes of several other states whose language paralleled that of the UDITPA.

The first state analyzed by the Commonwealth Court was the Florida Court of Appeal’s decision in Parker. The Florida apportionment statute defined sales as in-state sales if “the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale.”

purchaser is the United States government or the taxpayer is not taxable in the state of the purchaser.” Id.


129. Uniform Division of Income Tax Purposes Act § 16, Comment.

130. Id.

131. See Uniform Division of Income Tax Purposes Act § 16, Comment.

132. Uniform Division of Income Tax Purposes Act § 16(b)(2).

133. Id.


135. Gilmour, 822 A.2d at 681. See also Gilmour, 822 A.2d at 681 n.4.


137. Gilmour I, 717 A.2d at 621.

138. FLA. STAT. ch. 214.71 (1979). In 2002, the Florida statutes were changed to say: “Sales of tangible personal property occur in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point, other conditions of
partment of Revenue did not argue that all of Parker’s dock sales were in-state sales; the Department agreed that purchases picked up at Parker’s location via common carrier were properly characterized as out-of-state sales. The Florida Department of Revenue further argued that the phrase “within this state” only modified the word “delivered,” as opposed to both “delivered” and “shipped.”

Judge Danahy, writing for the Florida Court of Appeals, found the Department of Revenue’s arguments unpersuasive. Judge Danahy interpreted the legislative intent of the statute to require the taxation of sales made in the Florida market, determined by the destination of the goods, as opposed to the location of the purchaser. This legislative intent required that the phrase “within this state” modify the term “purchaser” in the statute. Additionally, the court found that the Department’s explanation that the phrase must modify “delivered” but not “shipped” had no merit. Finally, the Florida legislature specifically adopted the apportionment provision because it looked to a “destination” test.

Acting Chief Judge Ott authored the dissenting opinion in Parker. The Acting Chief Judge distinguished this case further by presenting the fact that every customer had to pick up the bananas from the Tampa dock. The only distinguishing factor that exists is whether the purchaser picked up his bananas with his

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the sale, or ultimate destination of the property, unless shipment is made via a common or contract carrier.” Fla. Stat. ch. 220.15(5)(b)(1) (2002) (emphasis added).
139. Parker, 391 So. 2d at 762-63. The Department of Revenue grounds this position by looking to a delivery test. Id. at 763. By law, all sales but those made by common carrier are delivered in Tampa. Id. However, delivery does not occur for sales transported by common carrier until reaching the purchaser’s location. Id.
140. Id. at 763.
141. Id.
142. Id.
143. Id.
144. Parker, 391 So. 2d at 763. Judge Danahy acknowledges the Department’s concern: to interpret the phrase as modifying both words would exempt from taxation a large portion of tax revenue from sales made by out-of-state seller to in-state purchasers. Id. However, the Department’s interpretation was found to be clearly inconsistent with the rules of grammar. Id.
145. See Gilmour I, 717 A.2d at 621. Under the destination test described in Parker, the ultimate destination of the goods, or the market in which the goods are sold, controls the taxability of the sale, regardless of the physical location of the purchaser himself. Parker, 391 So. 2d at 763-64.
146. Parker, 391 So. 2d at 765.
147. Id.
own truck, or rather if he received his fruit via common carrier. Moreover, because of the vast clientele purchasing bananas, Parker could not know with any certainty the plans for the fruit once it left its hands, meaning that Parker could not know the final destination for every sale made. According to Acting Chief Judge Ott, the destination system proposed by Judge Danahy turns to an “honor system,” which will inevitably result in lost tax revenue to the Department from simple strategic business planning on the part of corporations doing business in Florida.

The court in Gilmour next cited Olympia Brewing Co. v. Commissioner of Revenue. Olympia Brewing excluded all out-of-state sales from its apportionment ratio for the taxable year. The Minnesota Commissioner of Revenue agreed that sales delivered via rail or common carrier were properly excludable from in-state sales, but the Commissioner included sales where the beer was picked up by the purchaser’s own trucks. The Minnesota statute regarding in-state sales for apportionment purposes reads: “Sales of tangible personal property are made within this state if the property is delivered or shipped to a purchaser within this state, and the taxpayer is taxable in this state, regardless of the f.o.b. point or other conditions of the sale.”

Olympia set forth several arguments for interpreting Minnesota’s statute in its favor. First, looking at the legislative history, Minnesota rejected its previous “office test.” Additionally, Olympia contended that it was easy for taxpayers to avoid apportionment based on the “office test.” Tax avoidance is no longer a problem, as very few purchasers will move their business location solely to benefit a seller. Olympia also pointed out that other states use a destination test, and as a result, it is disadvantageous

148. Id. This fact shows more clearly why the Department made such a distinction in its argument between sales delivered via corporate truck and those made via common carrier.

149. Id.

150. Id. at 767. Acting Chief Judge Ott also refers to the difficulty in enforcing such a system. Id.

151. Gilmour I, 717 A.2d at 622.

152. Olympia, 326 N.W.2d at 644.

153. Id. This is the same treatment applied in Florida. See Parker, 391 So. 2d at 762-63.

154. MINN. STAT. § 290.19 subd. 1a (1980).

155. Olympia, 326 N.W.2d at 644-46.

156. Id. at 645. Minnesota’s “office test” was called such because Minnesota allocated sales to states based on the location of the purchaser’s office. Id.

157. Olympia, 326 N.W.2d at 645. The “office test” not only inquired into the purchaser’s location but also into marketing and shipping practices of the purchaser. Id.

158. Olympia, 326 N.W.2d at 645.
for a business to locate in Minnesota, as a sale could be taxed twice by combining one state's destination test with Minnesota's delivery test. Finally, the Minnesota Supreme Court then compared Minnesota's statute with the language and intent of the Uniform Division of Income for Tax Purposes Act (UDITPA). Judge Simonett both refused to support a delivery test, and to implement a test that produces different results depending on the mode of transportation that is used. Finally, the majority reminded the parties that the burden of proving destination is on the taxpayer; if the taxpayer cannot support its computed sales factor, then the Commissioner's determination will stand.

California contended with the same issue in McDonnell Douglas Corporation v. Franchise Tax Board. In McDonnell, McDonnell Douglas Corporation ("MDC") delivered aircraft to purchasers in California, who then arranged for transportation to the purchaser's ultimate location. The California statute regarding in-state sales reads:

Sales of tangible personal property are in this state if: (a) The property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or (b) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States government or (2) the taxpayer is not taxable in the state of the purchaser.

This was also a case of first impression in California. In addition to relying on the opinions of other jurisdictions, the California Court of Appeals recognized that the State Board of Equalization had previously ruled that "[s]ales of tangible

159. Id.
160. Id. at 646. See discussion on UDITPA supra notes 121-136 and accompanying text.
161. Id. at 647.
162. Id. If the Commissioner's argument were to stand, the apportionment would include sales picked up by the purchaser's own trucks, but the apportionment would not include sales picked up by the purchaser via common carrier. Id. The Minnesota court finds this distinction incredible. Id.
personal property are ordinarily assigned to the state of the des-
tination of the goods." California also examined the purpose of
the UDITPA, which is uniformity of taxation among the states.
Following this reasoning, California elected to interpret its statute
as a destination statute, negating the regulation in question.

Wisconsin dealt with the issue of dock sales in Pabst Brewing
Company v. Wisconsin Department of Revenue. Pabst Brewing
Company sold beer to out-of-state wholesalers, who chose to pick
up the beer at Pabst's location in Milwaukee. In a brief opinion
authored by Judge Gartzke, the majority of the Court of Appeals
of Wisconsin found the Wisconsin statute to be ambiguous.
Specifically, the majority found that the phrase "regardless of the
f.o.b. point or other conditions of the sale" required an interpreta-
tion favoring a destination test. Judge Dykman, in his dissent,
relies heavily on the rule in Wisconsin that the interpretation of a
statute by a regulating agency stands above any other.

Kentucky faced a slightly different issue in Revenue Cabinet,
Commonwealth of Kentucky v. Rohm and Haas Kentucky, Inc.
Rohm and Haas Kentucky was a subsidiary corporation selling its
products to its parent. The parent corporation picked up products
at the subsidiary location in Kentucky. After quoting several
lengthy passages from Parker, Olympia, Pabst, and McDon-
nell, Judge Gudgel, writing for the Court of Appeals in Kentucky,
announced that Kentucky would not follow a minority rule when
the purpose of the UDITPA was uniform taxation among the
states.

Connecticut also faced this issue in a case where purchasers
picked up petroleum products from a supplier in Connecticut to
take back to their home states. Although Connecticut had not

168. Id. at 1796 n.4. See also CAL. REV. & TAX. CODE §25135 (West 2003).
170. 387 N.W.2d 121 (Wis. App. 1986).
171. Pabst, 387 N.W.2d at 122.
172. Id. at 122. The Wisconsin statute states: "Sales of tangible personal property are
in this state if . . . [t]he property is delivered or shipped to a purchaser, other than the
federal government, within this state regardless of the f.o.b. point or other conditions of the
sale." WIS. STAT. § 71.25(9)(b)(1) (2003). At the time of Pabst, the location of the statute
was WIS. STAT. § 71.07(2)(c)(1) (2003). Pabst, 387 N.W.2d at 122.
173. Id. at 122-23.
174. Id. at 124.
175. 929 S.W.2d 741 (Ky. App. 1996).
176. Rohm, 929 S.W.2d at 742.
177. Id.
178. Id. at 743-45.
adopted the UDITPA, its statutory language was very similar to that of the Act.\textsuperscript{180} Connecticut too followed other jurisdictions' interpretations as well as resolving the matter in favor of the taxpayer, requiring a finding that dock sales were excludable from the sales factor in calculating the apportionment ratio.\textsuperscript{181}

The Pennsylvania Tax Reform Code of 1971 gives the Pennsylvania Department of Revenue the right to impose an excise tax on corporate net income for the privilege of doing business in Pennsylvania.\textsuperscript{182} The Pennsylvania Department of Revenue is authorized to tax businesses located inside Pennsylvania as well as businesses located outside of Pennsylvania that sell their goods or services within the state borders.\textsuperscript{183} The Tax Reform Code allows any company that transacts interstate business to apportion its business income for the purposes of the corporate net income (CNI) tax.\textsuperscript{184} Apportionment in Pennsylvania for CNI purposes requires a corporation to look at a three-factor apportionment ratio.\textsuperscript{185} A

\textsuperscript{180} Texaco, 574 A.2d at 1296. Connecticut's statute reads: "'[G]ross earnings' are those earnings from the sale of petroleum products to which the sales factor is applied under subdivision (3) of section 12-218 . . . " CONN. GEN. STAT. § 12-587 (2003).

\textsuperscript{181} Texaco, 574 A.2d at 1296.

\textsuperscript{182} PA. STAT. ANN. tit. 72, § 7402(a) (West 1971). The Pennsylvania statutes only impose this particular excise tax on corporations. \textit{Id}. A corporation is defined as any of the following:

(i) A corporation,

(ii) A joint-stock association,

(iii) A business trust, limited liability company or other entity which for Federal income tax purposes is classified as a corporation.

PA. STAT. ANN. tit. 72, § 7401(1) (West 1971).

\textsuperscript{183} PA. STAT. ANN. tit. 72, § 7402(a) (West 1971).

\textsuperscript{184} PA. STAT. ANN. tit. 72, § 7401(3)(2)(a)(2) (West 1971). Apportionment involves using a ratio of Pennsylvania activity to activity everywhere in order to limit the amount of income taxed in Pennsylvania. PA. STAT. ANN. tit., 72, § 7401(3)(2)(a)(10), (13), & (15) (West 1971). Apportionment is only appropriate if the business income can be taxable in another state, whether or not it actually is taxed in that state. PA. STAT. ANN. tit. 72, § 7401(3)(2)(a)(3) (West 1971). Pennsylvania distinguishes between business income, which arises from the taxpayer's ordinary course of business, and non-business income, all other income the business attains. PA. STAT. ANN. tit. 72, § 7401(3)(2)(a)(1)(A)&(D) (West 1971). Pennsylvania follows the United States Constitution in defining that only business income is apportionable. \textit{Id}.

\textsuperscript{185} PA. STAT. ANN. tit. 72, § 7401(3)(2)(a)(9)(A) (West 1971). The three factors are a property factor, a payroll expense factor, and a sales factor. \textit{Id}. The property factor is a fraction, the numerator of which is the average of all Pennsylvania real and tangible property owned, rented, or used during the taxable year, and the denominator of which is the total average real and tangible property owned, rented, or used during the taxable year everywhere. PA. STAT. ANN. tit. 72, § 7401(3)(2)(a)(10) (West 1971). The payroll factor is a fraction, the numerator of which represents the total compensation paid out by the corporation to employees located in Pennsylvania, and the denominator of which is the total compensation paid out by the corporation to employees located everywhere. PA. STAT. ANN. tit. 72, § 7401(3)(2)(a)(13) (West 1971). The sales factor is a fraction, the numerator of which equals the total number of dollar sales made in Pennsylvania, and the denominator of
ter calculating the apportionment ratio, the company multiplies the ratio by its business income.\textsuperscript{186} The foregoing results in Pennsylvania taxable income.\textsuperscript{187}

Pennsylvania began using a "cousin" of the UDITPA's "throwback rule," known as the "throw-out rule."\textsuperscript{188} The "throw-out" rule, rather than increasing the numerator of the sales factor, decreased the denominator by those sales attributable to states that either did not tax those sales or had no jurisdictional power over a business to tax such sales.\textsuperscript{189} Pennsylvania found authority for this rule under Section 7401(3)(a)(18), which allows the Secretary of Revenue to employ a different method of apportionment where the standard three factor ratio does not fairly and equitably apportion income.\textsuperscript{190}

The "throw-out rule" was heavily debated in Hellertown Manufacturing Company v. Commonwealth of Pennsylvania\textsuperscript{191} and Paris Manufacturing Company v. Commonwealth of Pennsylvania.\textsuperscript{192} In Hellertown, a Delaware corporation with all of its assets and payroll in Pennsylvania was forced to throw out sales made to states which did not have jurisdiction to tax such sales.\textsuperscript{193} Paris Manufacturing was also a corporation holding all of its assets and payroll in Pennsylvania.\textsuperscript{194} In Paris, the Department of Revenue attempted to throw out certain out-of-state sales, based on the same rationale as applied in Hellertown.\textsuperscript{195} The Pennsylvania Supreme Court overruled Hellertown, stating that the legislative intent behind apportionment was to tax income earned within Pennsyl-
vania. Whether another state chooses to similarly tax sales in those states is irrelevant for Pennsylvania tax purposes.

Most states that impose an income tax maintain rules for apportionment of that income for multi-state businesses. Pennsylvania, like many other states, chooses to weight its sales factor in relation to the other two factors. Additionally, not every state taxes income at the same tax rate. Pennsylvania taxes corporate net income at the highest rate among the states: 9.99%. Combining the high tax rate with the triple-weighted sales factor makes it advantageous for a company doing business in Pennsylvania to keep its sales outside of the state. By removing dock sales from the apportionment factor, a business liable for corpo-

196. Id.
197. Id. at 893.
198. See, e.g., MD. CODE ANN., TAX-GEN. § 10-402(c) (1957); MASS. GEN. LAWS ch. 63, § 38(c) (1932); N.Y. Tax Law § 210 (consol. 2002); OHIO REV. CODE ANN. § 5733.05 (West 2003); W. VA. CODE § 11-24-7 (1931).
199. PA. STAT. ANN. tit. 72, § 7401(3)2(a)(9)(A) (West 1971). Arizona, Florida, Georgia, Maryland, New York, and West Virginia all double weight their sales factors when calculating their income apportionment ratios. ARIZ. REV. STAT. § 43-1139 (2002); FLA. STAT. ch. 220.15 (2002); GA. CODE ANN. § 48-7-31 (1981); MD. CODE ANN., TAX-GEN. § 10-402(c) (1957); N.Y. Tax Law § 210 (consol. 2002); W.VA. CODE § 11-24-7 (1931). Pennsylvania triple weights its sales factor, as does Ohio. PA. STAT. ANN. tit. 72, § 7401(3)2(a)(9)(A) (West 1971); OHIO REV. CODE ANN. § 5733.05 (West 2003). Therefore, the Pennsylvania apportionment fraction looks like: (1 Property + 1 Payroll + 3 Sales)/5. PA. STAT. ANN. tit. 72, § 7401(3)2(a)(9)(A) (West 1971).
202. It has been proposed that for the tax years beginning in 2003 that the sales factor represent 80 percent of the apportionment factor. House Bill No. 334 (2003). For tax years after 2003, the sales factor would be the only factor used in apportioning income. Id.

For example, assume a taxpayer corporation that has $100,000 of business income, $50,000 of assets, $50,000 of payroll, and $200,000 of total sales ($100,000 of which are to Florida customers). All assets and payroll are located in Pennsylvania. The corporation sells to customers in Florida, which taxes corporate net income at a rate of 5.5%. FLA. STAT. ch. 220.11 (2003). Florida only double weights its sales factor. FLA. STAT. ch. 220.15 (2002). If the corporation allows the Florida purchaser to pick up the sales at the Pennsylvania location, under the Department's interpretation of the Pennsylvania statute, the seller's apportionment factor for Pennsylvania corporate net income tax purposes would be 100%. All $100,000 of business income would be allocated to Pennsylvania, and the seller would be have a tax liability of $9,990. However, if the Pennsylvania seller either delivers to the Florida location or excludes the dock sales from the sales factor (the result in Gilmour), then the Pennsylvania apportionment ratio is 3.5/5 = 70%, leading to a Pennsylvania tax liability of $6,993. The Florida apportionment ratio is ¼ = 25%, leading to a Florida tax liability of $1,375. The total tax liability is $8,368, which is $1,622 less than if all of the sales are attributable to Pennsylvania.
rate net income tax in Pennsylvania can take advantage of the opportunity of an out-of-state purchaser taking responsibility for the transportation of the sold property without incurring additional liability.

The destination test adopted by the Pennsylvania Supreme Court in *Gilmour* follows this logic. As mentioned in a few of the opinions analyzed by the Pennsylvania courts, mode of delivery does not make sense as a determining factor as to where a sale occurs for income taxation purposes. A taxpayer in Pennsylvania would never allow a purchaser to pick up sold merchandise at its dock if it would incur a greater tax liability in doing so. Also, shipping expenses are fully deductible for both federal and Pennsylvania income tax purposes. By refusing out-of-state treatment of dock sales, Pennsylvania is encouraging Pennsylvania businesses to incur more expenses, leading to tax deductions, as opposed to increased tax revenue. This result is clearly in opposition to that which the state should strive to reach.

One can certainly appreciate the arguments raised by the Department of Revenue. The Department also collects sales and use taxes on "each separate sale at retail of tangible personal property and specified services within Pennsylvania."\(^{203}\) Sales tax is assessed based on a delivery test.\(^{204}\) From a strictly logical point of view, it is difficult to reconcile the theory that a sale can occur in Pennsylvania and outside of Pennsylvania at the same time.\(^{205}\) It would appear that treating dock sales as in-state sales would be consistent with the sales and use tax.

Similarly, the Pennsylvania courts do not really address the fact that the Pennsylvania statute includes a comma before the phrase "within this State."\(^{206}\) Several of the states upon which the Pennsylvania courts so heavily relied were interpreting statutes that did not include this comma.\(^{207}\) The UDITPA language, as well as the remaining states upon which the court relied, uses the comma

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203. PA. STAT. ANN. tit. 72, § 7202(a) (West 1971).
204. PA. STAT. ANN. tit. 72, § 7201(b) (West 1971). The sales tax is imposed on sellers who maintain a business in Pennsylvania. *Id.* The Pennsylvania statute states that maintaining a business in Pennsylvania includes making delivery within the state. *Id.*
205. This is precisely the case of a dock sale. Delivery occurs within Pennsylvania, incurring a sales tax liability. However, according to *Gilmour*, the sale is not includible in the sales factor for corporate net income tax purposes.
207. *See Texaco*, 574 A.2d at 1294-95; *Olympia*, 326 N.W.2d at 644; *Parker*, 391 So. 2d at 762.
to enclose a phrase. Pennsylvania is not enclosing a phrase, so the use of the comma is not consistent with that of the UDITPA or the other states. The Pennsylvania courts' reliance on the interpretations of other states' statutes, which are grammatically different from that of Pennsylvania's, appears misguided.

Still, despite the inconsistency of the grammar, the language of the Pennsylvania statute clearly resembles that of the UDITPA. It appears that the legislative intent was for Pennsylvania to follow the same guidance as promulgated in the Uniform Act. The UDITPA encourages uniform treatment of taxation among the states. Following the guidance of six other jurisdictions undoubtedly achieves that uniform goal. Furthermore, after Gilmour paid the computed settled tax, the Department proposed an amendment to regulation 153.24. The amendment would have changed the requirement that dock sales be included in the sales factor for purposes of corporate net income tax apportionment. This specifically shows that the legislative intent relating to dock sales was to exclude such sales in the numerator of the sales factor in computing corporate net income tax liability in Pennsylvania.

The question raised before the Pennsylvania Supreme Court in Gilmour was a difficult one. Arguments for both sides can be made. However, one thing is clear: If the Pennsylvania Supreme Court misinterpreted the legislative intent when deciding the Gilmour case, it is up to the Pennsylvania legislature to make that fact known by enacting new legislation, more clearly understood, for guidance.

Karen Oehling

208. Uniform Division of Income Tax Purposes Act § 16(a). See also McDonnell, 26 Cal. App. 4th at 1793; Pabst, 387 N.W.2d at 122; Rohm, 929 S.W.2d at 742.
209. Gilmour I, 717 A.2d at 619.
210. Id.