

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

NATIONAL HOCKEY LEAGUE
PLAYERS ASSOCIATION, MAJOR
LEAGUE BASEBALL PLAYERS
ASSOCIATION, NATIONAL
FOOTBALL LEAGUE PLAYERS
ASSOCIATION, JEFFERY B.
FRANCOEUR, KYLE C. PALMIERI,
AND SCOTT WILSON,

Plaintiffs,

v.

CITY OF PITTSBURGH,

Defendant.

CIVIL DIVISION

No.: GD-19-015542

**MEMORANDUM OPINION
AND ORDER**

Hon. Christine Ward

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

NATIONAL HOCKEY LEAGUE	:	CIVIL DIVISION
PLAYERS ASSOCIATION, MAJOR	:	
LEAGUE BASEBALL PLAYERS	:	No.: GD-19-015542
ASSOCIATION, NATIONAL	:	
FOOTBALL LEAGUE PLAYERS	:	
ASSOCIATION, JEFFERY B.	:	
FRANCOEUR, KYLE C. PALMIERI,	:	
AND SCOTT WILSON,	:	
	:	
	:	
Plaintiffs,	:	
v.	:	
	:	
CITY OF PITTSBURGH,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

I. The Parties

The National Hockey League Players’ Association, Major League Baseball Players’ Association, and National Football League Players’ Association (hereinafter “Plaintiffs”) are organizations representing the interests of professional athletes playing in the National Hockey League (“NHL”), Major League Baseball (“MLB”), and National Football League (“NFL”).

Jeffrey B. Francoeur, Kyle C. Palmieri, and Scott Wilson (hereinafter “Named Plaintiffs”) are persons who are employed or were formerly employed by the NHL, MLB, or NFL, and during the course of their career, have played in a sports venue located in the Pittsburgh, PA.

The City of Pittsburgh (hereinafter “Defendant”) is a city of the second class and is granted authority to enact tax laws in its jurisdiction under the Pennsylvania Constitution. The

City of Pittsburgh contains PPG Arena, PNC Park, and Acrisure Stadium, which host events for the NHL, MLB, and NHL respectively.

II. Introduction

Defendant instituted a Non-Resident Sports Facility Usage Fee ("Facility Fee") pursuant to Pittsburgh City § 271.01, and the Pennsylvania Local Tax Enabling Act, 53 P.S. § 6924.304. Under this program, Non-Residents of Pittsburgh who use the city's sports venues (Heinz Field, PPG Paints Arena, or PNC Park) are subject to the Facility Fee in the amount of a 3% assessment on personal income earned while in Pittsburgh. Similarly situated resident athletes of Pittsburgh are not subject to this tax program and are not required to pay the Facility Fee.

The portion of personal earned income of professional athletes subject to the fee is assessed differently against athletes for each of the professional sports leagues in this case. By statute, income subject to the fee for athletes in the NFL is calculated by dividing the athletes' league-sanctioned team activities time in Pittsburgh by their league sanctioned activities time for the year. League-sanctioned activities are known as duty days. Duty days include preseason games and practices, regular season games and practices, and post season games and practices. This ratio is then multiplied by total earned income to determine income subject to the Facility Fee.

Also by statute, income subject to the Facility Fee for MLB and NHL athletes is calculated differently than the NFL. Income subject the Facility Fee for MLB and NHL athletes is calculated by dividing the number of games played in Pittsburgh by total games played, including preseason and postseason games. This ratio is then multiplied by total earned income to determine income subject to the fee.

Named Defendants are all active or retired professional athletes who were subject to the tax while playing away games in Pittsburgh. Following a game in Pittsburgh, 3% of the players' game checks would be withheld by the club and paid to the City of Pittsburgh. By statute, if a player's club did not withhold the Facility Fee from them, the player would be responsible for paying the Facility Fee directly to the City of Pittsburgh.

On November 5, 2019, the Plaintiffs filed a complaint against the City of Pittsburgh concerning the constitutionality of the Facility Fee. On January 21, 2020, Defendant filed an answer and new matter to the complaint. On February 13, 2020, Plaintiffs filed a reply to the new matter. March 10, 2021, Plaintiffs filed motions for admission of counsel pro hac vice, and on March 19, 2021, this Court granted those motions for admission of counsel. On January 28, 2022, Plaintiffs filed a motion for summary judgment.

III. Standard of Review

Summary judgment is appropriate “where the record demonstrates that there are no genuine issues of material fact, and it is apparent that the moving party is entitled to judgment as a matter of law.” *City of Philadelphia v. Cumberland County Bd. Of Assessment Appeals*, 81 A.3d 24, 44 (Pa. 2013). Furthermore, “the moving party's right to summary judgment has to be clear and free from doubt after examination of the record in a light most favorable to the nonmoving party. *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652, 658 (Pa. 2009).

IV. Discussion

Plaintiffs' arguments stem from their assertion that the Facility Fee is, in fact, a tax in substance. If the Facility Fee is, in fact, a substantive tax, then the discriminatory rates at which residents and nonresidents were taxed would violate the Uniformity Clause of the Pennsylvania

Constitution, as well as both the Privileges and Immunities and Dormant Commerce Clauses of the United States Constitution. Additionally, Plaintiffs claim that the disparity in treatment of nonresident and resident taxpayers is discriminatory practice which cannot stand on any level. Since a violation of either the Pennsylvania Constitution or United States Constitution would be sufficient on its own to be fatal to the Facility Fee, this Court need not address each violation. This Court will instead examine the constitutionality of the Facility Fee under Pennsylvania law.

The Uniformity Clause of the Pennsylvania Constitution requires uniformity in tax across the same class of subjects. Pa. Const. art. 8 § 1. In order for the Facility Fee to be struck down as a violation of the Uniformity Clause of the Pennsylvania Constitution, the Facility Fee must first be shown to be a tax in substance, and that the Facility Fee is not uniform across Pennsylvania residents.

a. The Facility Fee as a Tax

It is the substance of a tax measure that determines its true nature. *Gaugler v. Allentown*, 189 A.2d 264, 265 (Pa. 1963). The name given to the tax by the authority is of no moment, rather the function of the tax determines its identity. *Phila. Coca-Cola Bottling Co. v. City of Phila.*, 115 A.2d 207, 210. The Pennsylvania Supreme Court has previously differentiated between taxes and fees, stating that taxes raise revenue for general public purposes while fees defray the cost of government regulatory activities. *Nat'l Biscuit Co. v. City of Phila.*, 98 A.2d 182 (Pa. 1953). The *National Biscuit* Court further differentiated between fees and taxes, stating that

The distinguishing features of a license fee are (1) that it is applicable only to a type of business or occupation which is subject to supervision and regulation by the licensing authority under its police power; (2) that such supervision and regulation are in fact conducted by the licensing authority; (3) that the payment of the fee is a condition upon which the licensee is permitted to transact his business or pursue his occupation; and (4) that the legislative purpose in exacting the

charge is to reimburse the licensing authority for the expense of the supervision and regulation conducted by it.

Nat'l Biscuit Co. 98 A.2d at 188.

Applying these factors, the Facility Fee cannot be said to be a fee. The first two features of a fee are not present in the present case. While the Facility Fee is only applicable to one occupation, professional athletes, it is not subject to any supervision or regulation, nor is there a licensing authority that exists to collect the fee and regulate use of the sports venues in question. As to the third feature, use of the sports venues is not conditional upon the payment of the Facility Fee. The Facility Fee is assessed based on the amount of time an athlete has used the sports venues and paid after the use. Finally, the fourth distinguishing feature is not present in the Facility Fee as the funds go to Defendant's general fund. Additionally, even if the funds did not go to the general fund, there is no regulatory body that exists to reimburse for the cost of supervision. The Facility Fee lacks the distinguishing features of a fee, and therefore cannot be considered a true licensing fee.

The Facility Fee rather seems to fit the *National Biscuit* Court's description of a tax. It is a measure specifically enacted to raise revenue for general public purposes. *Id.* at 182. Revenue from the Facility Fee is paid directly into the general fund of the city, and as recently as 2021 was included in a budget report by Defendant under the category of "sources of tax revenue."¹ Furthermore, the legislative purpose of the Facility Fee can be found in 16 P.S. § 6171-B(a)(3.1),

¹ Other sources of tax revenue for the City of Pittsburgh are the Earned Income Tax, the Payroll Preparation Tax, the Parking Tax, the Local Service Tax, *the Amusement Tax and Non-Resident Sports Facility Usage Fee*, the Deed Transfer Tax, the Public Service Privilege Tax, and the Institution and Service Privilege Tax. (Emphasis added). City of Pittsburgh 2021 Operating Budget, p. 20.

which stated that the city shall use “two thirds of [the facility fee] to reduce the amount of tax on admissions to places of amusement that are involved with performing arts.”

In addition to the purpose of the Facility Fee being related to offsetting a different tax, it also seems to fall more appropriately under both the state and city definition of income tax, as it is an assessment against salaries and wages. The State of Pennsylvania defines taxable income as “all salaries, wages, commissions, bonuses and incentive payments whether based on profits or otherwise, fees, tips and similar remuneration received for services rendered...” 72 Pa.C.S. § 7303(a)(1)(i). Pittsburgh City Code § 245.02 defines taxable income as any “salaries, wages, commissions and other compensation earned by City residents or by nonresidents for work done or services performed or rendered in the City and paid by an employer or his or her agent to the person who is employed by or renders services to the employer.” Both definitions cover salaries based on services rendered, which includes athletic performances.

The Facility Fee cannot be considered a fee by the *National Biscuit* factors, and the nature of the fee seems to share substantial similarities with a tax. It raises revenue for general purposes, it assesses a “fee” against taxable income, and the legislative purpose specifically mentions a goal in reducing a different tax. The Facility Fee is a tax in function, and should be recognized as such.

b. Violation of Uniformity Provisions in Pennsylvania

Article VIII, § 1 of the Pennsylvania Constitution, more commonly known as the Uniformity Clause, states that “all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.” However, the Uniformity Clause does not require absolute equality, but rather substantial uniformity as much as is practicable in view of the instrumentalities in which the tax

laws operate. *Clifton v. Allegheny County*, 969 A.2d 1197, 1210 (Pa. 2009). In order to determine whether an exception to the Uniformity Clause is acceptable under the circumstances, it must be supported by a “non-arbitrary, reasonable and just basis for the disparate treatment.” *Nextel Communications v. Commonwealth*, 171 A.3d 682, 696 (Pa. 2017). The burden of proving that there is not substantial uniformity in tax and that there is no rational basis for the exception falls to the taxpayer due to the strong presumption that the legislature did not intend to violate the constitution. *Id.* at 754.

Pennsylvania Courts have consistently held that residence cannot be made the basis of discrimination in taxation of persons engaged in the same profession. *Danyluk v. Johnstown*, 178 A.2d 609, 610. (Pa. 1962). In *Danyluk*, the Court held a tax levied on nonresidents of Johnstown to be unconstitutional as a violation of the Uniformity Clause. Furthermore, the *Danyluk* Court also stated that even if the tax was to be administered as an excise tax for the privilege of doing business in the city, the tax would still violate the Uniformity Clause as discriminatory tax practice across the same occupation. *Id.* at 611.

Here, Defendant has discriminated on both counts. The Facility Fee is facially discriminatory as it levies a 3% income tax against nonresidents in comparison to a 1% income tax on residents, and there are discriminatory tax rates across the same occupation. Defendants assert that even if the fee were found to be a tax, it would be permissible as both resident and nonresidents pay the same effective tax rate. Pittsburgh residents pay a 2% income tax towards Pittsburgh school districts in addition to the 1% statutory tax on income by the city. However, Defendants assertion is in error, and this does not remedy the difference in rates. The 2% school tax is levied by the school board, not the city, and directly funds the schools whereas revenue from the Facility Fee is paid into the general fund. Defendants cannot find uniformity where a

separate entity taxes residents for a separate purpose. *Danyluk*, 178 A.2d at 610. Similarly, while Pittsburgh athletes pay a 1% tax on their income to the City, other Pennsylvania athletes pay a 3% tax on their income due to the Facility Fee. There is no permissible or rational basis for an unequal application of tax rates across residents and nonresidents, and unequal application of tax rates across the same profession. With no rational basis for this discriminatory practice, the Facility Fee is a clear violation of the Uniformity Clause of the Pennsylvania Constitution.

V. Conclusion

The Facility Fee is a tax in function, and therefore is governed by the Pennsylvania and United States laws concerning tax. The Facility Fee presents a discriminatory burden on out-of-state residents, with no like tax levied upon Pittsburgh residents. Plaintiffs' motion for summary judgment is granted.

ORDER

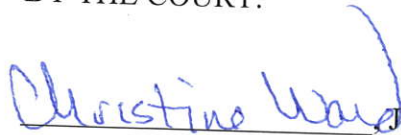
And now, to wit, this 21st day of September, 2022, upon due consideration of Plaintiffs' Motion for Summary Judgment, all filings relevant thereto, and after oral argument on the same, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Plaintiffs' Motion for Summary Judgment is GRANTED;
2. The following is hereby DECLARED:
 - a. The "Nonresident Sports Facility Usage Fee" imposed pursuant to 53 Pa. C.S. § 6924.304, and Pittsburgh City Code § 271.01 et seq. ("Facility Fee") is a tax and not a fee;
 - b. The facility fee is unconstitutional on its face and as applied to plaintiffs Francoeur, Palmieri, and Wilson, and to any and all nonresident professional

athletes represented by plaintiffs National Hockey League Players Association, Major League Baseball Players Association, and National Football League Players Association;

- c. The Facility Fee violates the uniformity provisions of the Pennsylvania Constitution, Pa. Const. art. 8 § 1;
3. An injunction is hereby ENTERED barring any action by the City of Pittsburgh intended to assess, impose, or collect the Facility Fee.

BY THE COURT:



Hon. Christine A. Ward