

How can Pennsylvania disagree with itself?



- ***Synthes USA HQ, Inc. v. Commonwealth, 236 A.3d 1190 (Pa. Commw. Ct. 2020).***
 - Office of Attorney General (OAG) is served (by statute) as the representative of the Commonwealth (named party by statute)
 - Court grants Department of Revenue (DOR) application to intervene because the:

Commonwealth has taken a position before this Court that would alter drastically the Department's longstanding interpretation of a corporate net income tax provision applicable to [the] tax years [at issue in this case.

- **Substantive issue:** what is the proper interpretation of the statute that sources receipts from the sales of services for corporate net income tax (CNIT) purposes?
- **Procedural issue:** when the OAG and DOR disagree on the interpretation of a statute whose interpretation controls?

Background

- ***Synthes USA HQ, Inc. v. Commonwealth***, 236 A.3d 1190 (Pa. Commw. Ct. 2020).
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Huh?

- **Substantive issue:** what is the proper interpretation of the statute that sources receipts from the sales of services for corporate net income tax (CNIT) purposes?
- **Procedural issue:** when the OAG and DOR disagree on the interpretation of a statute whose interpretation controls and who represents the “Commonwealth?”

Procedural history

- Synthes files original return sourcing receipts to PA [AG's interpretation].
- Synthes files refund claim asserting receipts are to be sourced outside of PA. [DOR's interpretation].
 - Board of Appeals (within the DOR) denies refund claim for failure to provide sufficient evidentiary support.
 - Board of Finance & Revenue (BF&R), following adversarial hearing at which DOR Chief Counsel represented the DOR, denies refund claim for failure to provide sufficient evidentiary support.
- Synthes files petition for review at Commonwealth Court
 - OAG files brief contending that Synthes is not entitled to a refund under OAG's interpretation of the statute
 - Synthes files brief contending it is entitled to refund under OAG's interpretation
 - DOR applies to intervene
 - OAG and DOR agree that Synthes has provided sufficient evidence to support its refund claim under the DOR's interpretation of the statute

So – who represents the Commonwealth and whose interpretation of the statute controls???

Commonwealth Court Majority

Body of majority (5 – 2) opinion only addresses statutory construction and upholds DOR's interpretation, but footnote 12 provides:

We note with dismay the [OAG's] Attorney General's assertion in this case of a legal position directly adverse to that of its client, the [DOR]. Rather than advocating the [DOR's] longstanding construction of a tax statute, a matter peculiarly within the [DOR's] expertise, the [OAG] has forced the [DOR] to seek intervention in order to defend its interpretation of the tax provision at issue. (emphasis added)

[Section 204(a) of] The Commonwealth Attorneys Act requires an agency to follow the advice of the [OAG] when sought, or seek a declaratory judgment from this Court if the agency disagrees with the advice in question. Here, however, [no advice was sought]. Moreover, to the extent the [OAG] believed itself entitled to control the position to be advocated in this Court, and upon reaching a legal interpretation contrary to that of the [DOR], the [OAG] should have so advised the [DOR]. The [DOR] could then have initiated a request for a declaratory judgment as anticipated by Section 204(a). (emphasis in original and citations omitted)

Here, rather than acting directly adversely to its client's position, the [OAG] could have authorized counsel for the [DOR] to litigate this matter before this Court, thereby avoiding this unseemly conflict between the Commonwealth and its own agency concerning a statutory construction issue within the agency's expertise. (emphasis added)

However, Section 403 of the CAA addresses the interplay between the [OAG's] representation of the Commonwealth's and an agency's interests in a matter, and the agency's representation of its own interests, stating:

- (a) Representation of agency by agency counsel.** Whenever any action is brought by or against any independent agency[], the agency head may request in writing, setting forth his reasons, the Attorney General to authorize the agency counsel to supersede the Attorney General and represent the agency[.]
- (b) Intervention by agency counsel.** If the Attorney General does not grant the request, the agency head may authorize the agency counsel to intervene in the litigation. Such intervention shall be a matter of right and when exercised, confer upon the agency counsel the obligation to represent the agency. The Attorney General shall at all times continue to represent the Commonwealth.

Synthes HQ USA Inc. v. Commonwealth, 11 MAP 2021

- Argued March 10, 2022
- Post-argument submission



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