



Leventry, Haschak & Rodkey, LLC

1397 Eisenhower Boulevard
Richland Square III, Suite 202
Johnstown, PA 15904
Telephone: (814) 266-1799 FAX: (814) 266-5108
www.lhrklaw.com

Municipal Newsletter

Summer / Autumn 2014

Challenge to Municipalities Imposing Business Privilege Tax on Rental Real Estate Businesses

On September 19, 2014, the Pennsylvania Commonwealth Court ruled that Pennsylvania subdivisions, as they are indicated in Section 301.1(a) of the Local Tax Enabling Act, 53 P.S. Section 6924.101 *et seq.* (hereinafter, the "Act"), may not impose a business privilege tax not only on rental real estate businesses but also any business involved with leasing any type of property. Those subdivisions, as described in Section 301.1(a), are second class and second class A cities; third class cities; boroughs; towns; townships of the first and second classes; and school districts of the second, third and fourth classes (including in all cases independent school districts).

In *Fish v. Twp. Of Lower Merion*, *Fish v. Twp. Of Lower Merion*, ___, Pa. Commw. ___, ___ A.3d ___ (2014), the Commonwealth Court agreed the Act prohibits any tax on leases or lease transactions, whether it is a direct tax on a lease or an indirect tax on the privilege of engaging in a leasing business. The Act is the Pennsylvania statute allowing the subdivisions specified above to impose local business taxes. Specifically, these subdivisions:

in their discretion, by ordinance or resolution, for general revenue purposes, levy, assess and collect or provide for the levying, assessment and collection of such taxes as they shall determine on persons, transactions, occupations, privileges, subjects and personal property within the limits of such political subdivisions and upon the transfer of real property, or of any interest in real property, situate within the political subdivision levying and assessing the tax, regardless of where the instruments making the transfers are made, executed or delivered... 53 P.S. Section 6924.301(a).

On or about February 6, 2012, George D. Fish, Stephen Hrabrick and Jonathan A Brisk (hereinafter the "Litigants") commenced a declaratory judgment action against the Town-

ship of Lower Merion (hereinafter "Township") in Montgomery County, Pennsylvania. The primary issue of the case involved the Township's imposition of a business privilege tax on the Litigants who leased real property within the Township. Per the Lower Merion, Pa., Mun. Code (hereinafter "Lower Merion Code") Section 138-42, "Every person engaging in a business, trade, occupation or profession in the Township shall pay an annual business privilege tax for the year beginning January 1, 1981, and for each tax year thereafter at the rate of 1.5 mills on such person's gross receipts." The Litigants contended 53 P.S. Section 6924.301.1(f)(1) restricted the Township's power to "levy, assess and collect or provide for the levying, assessment and collection of any tax on... leases or lease transactions..."

Lower Merion Code Section 138-41 defined a "business, trade, occupation or profession" as:

Any [enterprise] in which there is offered any service or services to the general public or a limited number thereof, including but not limited to... those enterprises engaged in by hotel operators; motel operators; office and/or residential apartment building operators; parking lot and garage operators; warehouse operators... real estate brokers...

On September 24, 2013, the trial court rejected the Litigants' argument and ruled in favor of the Township. The court opined that the tax was on the Litigants' aggregate annual income/proceeds from the leases, not the lease transactions. Dissatisfied with this judgment, the Litigants appealed to the Pennsylvania Commonwealth Court.

Before the Commonwealth Court, the Litigants maintained their Section 301.1(f)(1) position, that any tax on leases or lease transactions was not permissible. The Township argued that while this exclusion prohibits it from imposing a direct tax on a lease, it was authorized to tax the three Litigants for the privilege of engaging in a leasing business in the Township.

In a 5-2 decision, the Commonwealth Court held that the Township is prohibited by the Act from imposing "any

Contact Information

Randall C. Rodkey, Esquire
rrodkey@lhrklaw.com

Timothy C. Leventry, Esquire
tleventry@lhrklaw.com

tax'—i.e., privilege, transactional, or otherwise—on leases or lease transactions.” Fish at 12. The Court stated that it was compelled to reach this conclusion by the “binding guidance” of the Pennsylvania Supreme Court’s holding in Lynnebrook and Woodbrook Associates, L.P. ex rel. Lynnebrook Manor, Inc. v. Borough of Millersville, 600 Pa. 108, 963 A.2d 1261 (Pa. 2008). The Supreme Court had invalidated a direct \$30.00 flat tax on residential lease transactions, stating that the Act’s lease tax exclusion had to be interpreted in a manner “that most restricts the taxing authority—that is, the broadest interpretation of the lease exception: an unqualified prohibition on the taxing of leases.” Lynnebrook 963 A.2d at 1267.

The Commonwealth Court found:

Regardless of title, there is no material difference between a tax scheme that imposes a 1.5 mill tax upon the receipt of each rent payment (arguably a transactional tax), and a scheme that imposes a 1.5 mill tax payment annually based on all rent receipts (characterized by the Township as a business privilege tax). The only differences are title and timing.

The Court held that while the Litigants had to register with the Township, because they were conducting business there, the lease receipts were not taxable due to the Act’s lease tax exclusion.

If this decision stands, it would apply to receipts from all leasing businesses. For example, an automobile dealer that leases cars would not have to pay local business privilege tax on its lease receipts.

More than likely, the Township will appeal the Commonwealth Court’s ruling to the Pennsylvania Supreme Court. If the Supreme Court agrees to do so, the final outcome may not be known for another year or so.

Refund claims generally must be filed within three years of the due date of the BPT return, but the BPT ordinance or regulation for each municipality must be reviewed to determine if a different period applies. If the Supreme Court is asked and agrees to hear an appeal, a protective refund claim could be filed for any expiring limitations period while the case is pending at the Supreme Court. If no appeal is sought or allowed, refund claims could be filed for all open years.