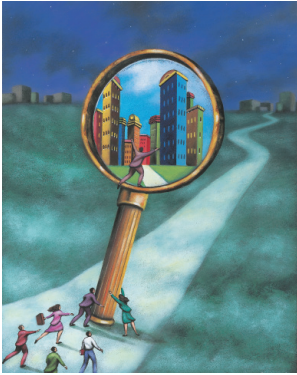


# THE PUBLIC RECORD

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## **Pennsylvania Supreme Court to Offer Clarity on the Scope of Local Tax Enabling Act's Prohibition Against Taxing Leases or Lease Transactions**

On April 8, 2015, the Pennsylvania Supreme Court agreed to hear an appeal from the Pennsylvania Commonwealth Court's decision in *Fish v. Township of Lower Merion*. In *Fish*, the Commonwealth Court determined that the Local Tax Enabling Act (LTEA), the state law that authorizes and regulates local taxes, prohibits a political subdivision from imposing a business privilege tax on lease revenue. The Supreme Court's decision in *Fish* will constitute an important development in the law as many municipalities currently collect business privilege tax on lease income.

In *Fish*, several individuals who own and rent property in Lower Merion Township (Township) challenged the Township's collection of a 1.5 mill business privilege tax on their lease revenue. The property owners based their challenge on an exclusion set forth under Section 301.1(f)(1) of the LTEA, which expressly prohibits a political subdivision from taxing leases or lease transactions if the tax was not imposed prior to July 1, 2008. According to the property owners, a tax on gross receipts from lease revenue is the same as a tax on individual leases or lease transactions, as prohibited under Section 301.1(f)(1). The Township took the position that Section 301.1(f)(1) prohibits the imposition of a "direct tax," e.g. a per-lease tax, but not the imposition of a tax on lease revenue. The Township argued that it was taxing the privilege of doing business in the Township, as authorized under the LTEA, not leases or lease transactions.

Rejecting the lessors' argument, the Montgomery County Court of Common Pleas ruled in favor of the Township. On appeal, however, the Commonwealth Court, strictly construing Section 301.1(f)(1) of the LTEA against the Township, disagreed and reversed. In doing so, the Pennsylvania Commonwealth Court concluded that Section 301.1(f)(1) of the LTEA "bars 'any tax' – i.e., privilege, transactional, or otherwise – on leases or lease transactions", noting that it is thus immaterial that the challenged tax was characterized by the Township as a tax on the privilege of engaging in business, and not on a particular lease or lease transaction.

The property owners also argued that the Township could not require them to comply with the annual registration and fee requirements set forth in the Township's Code, which applied to persons engaging in a business, trade, occupation or profession within the Township. The Commonwealth Court clarified that although the property owners' rental income was not subject to the Township's business privilege tax, or any other type of tax authorized pursuant to the LTEA, their rental activities constituted a "business activity" under the Township's Code and were, therefore, subject to the annual registration requirement and related fees.

Despite the Commonwealth Court's seemingly straightforward decision in *Fish* (i.e., that the LTEA prohibits a political subdivision from imposing a business privilege tax on lease revenue), it is critical to note that in reaching this decision the Commonwealth Court did not address, or even acknowledge the existence of, the

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express exception to the prohibition. More specifically, the Commonwealth Court did not acknowledge or address the fact that Section 301.1(f)(1) of the LTEA “does not apply to municipalities imposing a tax on leases or lease transactions prior to July 1, 2008.” The Commonwealth Court’s silence on the exception is significant because it creates confusion over whether a municipality that imposed a tax implicating a lease or lease transaction prior to July 1, 2008 is permitted to continue collecting the tax.

The Township appealed the Commonwealth Court’s decision in *Fish* to the Pennsylvania Supreme Court on October 20, 2014. Until the Supreme Court decides the case, all that appears certain at this time is that municipal entities desiring to impose a new tax authorized under the LTEA should proceed with caution to ensure that the tax, regardless of form, does not implicate a lease, a lease transaction or income derived from either. Those municipal entities that have imposed a tax that implicates either, directly or indirectly, a lease or lease transaction prior to July 1, 2008 should be aware that the tax may be subject to challenge under *Fish*.

Babst Calland’s Public Sector Services Group will continue to keep public agencies apprised of further developments related to this and other issues. If you have any questions or need assistance in addressing the above-mentioned area of concern, please contact Stephen L. Korbel at 412-394-5627 or [skorbel@babstcalland.com](mailto:skorbel@babstcalland.com), or Krista-Ann M. Staley at 412-394-5406 or [kstaley@babstcalland.com](mailto:kstaley@babstcalland.com).