

BUSINESS PRIVILEGE TAX: Nexus – Financial and Operational Leases

Q: For purposes of liability for the net income base of the Business Privilege Tax (“BPT”), please distinguish between an operational lease and a financial lease (i.e. conditional sale). Assume that the only presence in Philadelphia is that of a salesmen soliciting business, followed by the “leases” of tangible personal property. Also assume that the salesmen’s activities are sufficient to be considered “active presence” and subject the taxpayer to nexus for the gross receipts portion of the BPT. Additionally, what are the sourcing rules for sales in connection with a financial lease? In other words, will such transactions be treated as the sale of tangible personal property or as a service?

A: *The third paragraph of subsection A of Business Privilege Tax Regulation 103 [What Constitutes Doing Business (Having Nexus) in Philadelphia] states:*

“Only the sale of tangible personal property is afforded immunity under Public Law 86-272. The provision of services for a fee, the sale of other than tangible personal property, the leasing, renting, licensing or other disposition of tangible, intangible or any other type of property is not immune from taxation by reason of Public Law 86-272.”

Additionally, BPT Regulation 101CC defines the term “Sale” as the “(t) ransfer of title to goods, wares, commodities or merchandise...” Therefore, any lease of tangible personal property within the City of Philadelphia that does not provide for (or reasonably anticipates) the transfer of title /ownership to the lessee by the end of the lease term (i.e. operating leases) will subject the taxpayer (i.e. lessor) to both the gross receipts and net income bases of the BPT. If the lease terms provide for the lessor-taxpayer’s transfer of title to the tangible personal property (i.e. Sales-type leases) to the lessee, then the lessor-taxpayer is protected from the net income portion of the tax so long as there is no physical presence within Philadelphia and the activity is limited exclusively to solicitation for the sale. If the lessor-taxpayer is merely providing third party financing (and never had title or ownership to the tangible personal property), the taxpayer is not making sales and therefore not protected from the net income base of the BPT.

The receipts sourcing rules for leases that do not involve the transfer of title or ownership to the tangible personal property are found in BPT Regulation 303.