

BUSINESS PRIVILEGE TAX: Active Presence - QED Decision and Act 511 Townships

Q: In light of the decision in *Township of Lower Merion vs. QED Inc.*, 738 A.2d 1066, (Pa. Commw. October 22, 1999), what is the PHLDOR's position on "active presence" if QED asserts that it is a privilege tax and is attributable back to its home office? Can the City of Philadelphia impose a tax, in addition to the Act 511 townships on the same receipts? Would this be considered "double taxation"? Are there any crediting provisions between the City of Philadelphia and the Act 511 townships?

A: In *Township of Lower Merion vs. QED Inc.*, the Commonwealth Court of Pennsylvania held that receipts from a general contractor's work performed within Lower Merion Township was not subject to the Lower Merion Business Privilege Tax since the contractor's sole office was located in another township. (i.e. Radnor). The tax in QED was a privilege tax imposed on all of the gross receipts from all business activities anywhere, so long as the base of operations is within the political subdivision. The Court stated that under the Local Tax Enabling Act ("LTEA"), QED was only responsible for the payment of a business privilege tax on gross receipts to one municipality for the privilege of having a base of operations. Since QED had its sole office in Radnor Township, Lower Merion Township could not impose its business privilege tax on the service receipts earned within its jurisdiction.

The QED decision does not negatively impact on the City's ability to impose the BPT on non-Philadelphia businesses since the authority for the tax does not come from the LTEA. Philadelphia's BPT, as opposed to the tax in QED, is a transaction tax imposed on the receipts from transactions that are actually performed within Philadelphia. The City of Philadelphia's BPT is authorized by the Commonwealth of Pennsylvania's First Class City Business Tax Reform Act (53 P.S. § 16181 et seq.). This enabling legislation allows a city of the first class (i.e. Philadelphia), in spite of any other Commonwealth provision to the contrary, to tax every "person" engaging in any "business" within the City of Philadelphia. The Commonwealth statute does not specify that a person must have a physical location within the City of Philadelphia in order to be subject to the BPT. This point is emphasized in the BPT ordinance at Philadelphia Code § 19-2603(3) which states, "**(p) hysical presence (the maintenance of an office or property) in the City is not required to establish active presence in the City**".

If QED (or any other similarly-situated taxpayer) were to engage in the performance of building construction services (or any other service) within the City of Philadelphia, the PHLDOR would assert nexus for the BPT in spite of that taxpayer's payment of a privilege or transaction tax on all of their receipts (i.e. 100%) to their home township (e.g. Radnor). The City would not have to

provide any credit on the BPT for taxes paid on the same receipts to the home township.