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**Is There A Limit to Taxable Privileges in Pennsylvania?**

The Local Tax Enabling Act (Act 511 of 1965) is Pennsylvania's guiding statute for local taxes other than real estate. The statute sets out a list of explicitly permissible taxes as well as restrictions on how those taxes can be used. The act applies to all municipalities and school districts in the state, with the exception of Philadelphia, and has become the genesis of what could be a brewing controversy here in Allegheny County. The taxes most commonly levied under the act include the wage tax, business gross receipts tax, realty transfer tax, amusement tax, and local services tax (the \$52 tax).

At the same time, Act 511 contains some language granting very broad leeway to municipalities in establishing taxes. Specifically, Section 2(a) of the act delegates taxing powers to these taxing bodies who "...may, in their discretion, by ordinance or resolution, for general revenue purposes, levy, assess, and collect...such taxes as they shall determine on persons, transactions, occupations, privileges, subjects, and personal property..." . There are a few restrictions on this expansive language. For example, local governments cannot tax activities that are already subject to state taxation, natural resources or manufacturing activity and a few other special exceptions.

Given the latitude created by Section 2(a) and faced with increasing costs and a misconception that businesses aren't paying their fair share of taxes, there are municipalities in Allegheny County who have either enacted or are contemplating enacting a tax on free parking spaces (see *Policy Brief Volume 8, Number 29* for information on Robinson Township's attempt to create this tax). In existing ordinances, municipalities have defined free commercial parking as "a privilege subject to taxation under the Local Tax Enabling Act" and have levied a per space annual tax on businesses.

Is there room in Act 511 for municipalities to levy a parking privilege tax? While it can be argued that there may be scope under the language contained in Section 2 for a municipality to finesse a tax on free parking, it certainly represents a tremendous and highly questionable stretch of authority.

The fundamental question here is whether a business providing free parking for its customers is a government granted privilege that has heretofore been untaxed. Since the existing and proposed parking privilege taxes in Allegheny County are levied on business, the municipality has assigned the privilege to businesses. If the privilege to park in free spaces is being granted to customers, then the tax should be levied on

customers. Of course, taxing individual parkers would present an administrative nightmare, making such a tax largely unenforceable. Thus, in practice the privilege has been assigned to businesses offering free parking in order to make collecting the tax reasonably efficient.

Clearly, the recent discovery of a government granted privilege to provide free parking to customers opens the door to untold numbers of discoverable privileges municipalities can levy taxes on. For instance, why not a “sign or display in the window privilege” or perhaps a “price sticker on merchandise” privilege? After all, just as is the case with free parking, each of these activities is designed to facilitate customer shopping and is a part of a seamless series of efforts by businesses to attract and serve customers.

Moreover, a parking privilege tax on free parking spaces built and maintained as an integral part of the business enterprise amounts to double taxation. The land whereon the parking space is situated is already subject to property taxes. Thus, a parking tax on free parking spaces amounts to double taxation. If a parking space is being sold or leased, there might be a legitimate subject for taxation since there is market transaction with exchange of money. Pittsburgh levies very heavy taxes on such transactions.

Still, the worst part of this parking privilege idea is its capriciousness and what it says about the mentality of officials who attempt to levy such a tax. It reflects an anti-business bias and the view that government can go after business in any way it wishes. If the officials want to exhibit real courage when more tax revenue is needed, they should simply raise the millage rate a little so that all property owners share in the burden. Or, alternatively, they could levy one of the already permissible taxes under Act 511.

With over 2,000 municipalities in Pennsylvania and no one really watching over them in terms of the creation of new taxes, it is likely the legality of a parking privilege tax will be sorted out only if and when a party injured by the tax takes the matter to court. The court will have to address a number of issues, such as “did the legislature intend for municipalities to levy taxes that aren’t specifically mentioned in the act?”; “can a municipality impose any rate it chooses on a newly tax it has created?”; and “is free parking a privilege subject to taxation?” According to the 2002 edition of the Pennsylvania Tax Manual, this is the typical manner in which earlier taxes enacted pursuant to the Enabling Act have had their legality or illegality established.

Here’s a better and more efficient way to solve the problem. The legislature needs to amend the Enabling Act and all related municipal codes to outline strictly which taxes are permissible, their maximum rates, and include language that prevents maneuvering outside of the guidelines. This is not to discourage flexibility at the local level; rather it is to ensure that the state’s power of taxation, which is delegated to its local instrumentalities, is exercised carefully and thoughtfully. Further, it is to prevent abuse by prohibiting rapacious local officials from continually pushing the envelope in a search for new subjects of taxation.

When an idea for a new tax comes along that makes sense and meets legal criteria, local governments can petition the legislature for an amendment to create the tax. No doubt they will have plenty of support from like-minded officials from other municipalities across the state.

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