ALERT
FEBRUARY 1, 2010

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FLAT TAX ON BUSINESSES UPHELD

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A panel of the Commonwealth Court concluded that a flat tax of $2,600 on all businesses in a township with gross receipts of over $1 million was lawful. *Shelly Funeral Home, Inc. v. Warrington Township*, No. 769 C.D. 2009 (Pa. Cmwlth. Dec. 31, 2009) (unreported). The appeal is probably correctly decided, but it highlights several serious policy mistakes by the General Assembly.

A 1988 statute provides:

> (a) General rule. After November 30, 1988, and notwithstanding any other provision of this act except for subsection (b), no political subdivision may levy, assess or collect or provide for the levying, assessment or collection of a mercantile or business privilege tax on gross receipts or part thereof.

Local Tax Reform Act § 533, 72 P.S. § 4750.533. The effect of the rule is that those localities in Pennsylvania that are grandfathered can impose a business privilege tax on gross receipts and others cannot.

The court held, probably correctly, that a flat tax of $2,600 on a business with gross receipts of over $1 million did not constitute a business privilege tax on gross receipts or part thereof. While the cutoff is measured by gross receipts, the tax base is not. Previously, the court rejected a similar argument in *Smith & McMaster P.C. v. Newtown Borough*, 669 A.2d 452 (Pa. Cmwlth. 1995). The court added that the $1 million cutoff was not unreasonable because businesses with larger gross receipts were likely to place greater service demands on a locality.

The policy mistakes in the statutory scheme are that the General Assembly generally restricts localities from taxing what the Commonwealth taxes and is equivocal about gross receipts taxes. The Local Tax Enabling Act permits a locality in the first instance to tax almost anything, but then prohibits taxes on things taxed by the Commonwealth and imposes a list of further restrictions and rate limitations. 53 P.S. § 6924.1.1 et seq. The effect is to drive localities away from what are probably the fairest subjects of taxation: net income and consumption (i.e., the Sales Tax). Consequently, localities impose taxes on gross receipts, a highly criticized form of taxation with bad tax policy results. The faults are explained at length in *J. Mikesell, State Gross Receipts Taxes and the Fundamental Principles of Tax Policy*, 43 *State Tax Notes* 615 (2007). The matter is made worse because over 20 years ago the General Assembly only partially dealt with dissatisfaction of gross taxes by banning further enactment of gross receipts taxes. The entire subject should be revisited by the General Assembly.