State and Local Tax Bulletin

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Bradley Arant Boult Cummings LLP

Mandatory Unitary Combined Reporting Bill Introduced Yesterday

By Bruce P. Ely and James E. Long, Jr.

House Bill 865 by Rep. Jeff McLauglin (D-Guntersville) would require a group of two or more corporations to file a "combined report" – an income tax return – that includes the income and apportionment factors of all corporations that are members of a "unitary" business, whether or not they do business in or otherwise have nexus with Alabama. The bill would simultaneously **repeal Alabama's existing consolidated return regime** for all tax years beginning ***after December 31, 2009***. The bill does ***not*** repeal the controversial intangibles add-back statute, however.

We are curious to see the fiscal note for this bill – especially in this current economic environment. The bill could actually cost the Education Trust Fund revenue in the short-run, not even taking into account the detrimental effect on our industrial recruiting efforts.

The bill largely adopts the Multistate Tax Commission's very broad definition of "unitary" business, contained in its model combined reporting act, and provides that "unitary" should be construed to the broadest extent possible under the U.S. Constitution. The bill does not provide any equity ownership requirement or threshold for inclusion in the Alabama combined group, which is a deviation from the vast majority of state combined reporting schemes that typically require at least a 50% threshold equity interest before an entity is included in the combined group. The bill does provide a so-called "water's-edge election," which would presumably include in the group only those members with U.S. operations, but it leaves much of the detail of the election to be defined by Alabama Department of Revenue regulation. There are no standards or guidance until then.

Despite requiring a combined report, the bill places several restrictions on the sharing of tax attributes among members of a combined group. For example, net operating losses ("NOL") may only be carried forward and deducted against the Alabama income of the corporation that generated the NOL (similar to the separate return limitation year or "SRLY" rule). Additionally, post-apportionment deductions and tax credits, such as Alabama's capital credit, that are not fully utilized by one member of the group may not be used by another member of the group or applied against the total income of the combined group.

Similar to the combined reporting proposal last Spring, HB 865 attempts to ***include all income of the members in the tax base while keeping losses and other tax attributes trapped within the individual corporate members. This could be a detriment to our industrial recruiting efforts; and existing manufacturers that***

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Upcoming Seminars Involving Members Of Our SALT Practice Group

April 26 - 30, 2009
Council On State Taxation (COST) 2009 Intermediate State Income Tax School, Georgia Tech Hotel & Conference Center, Atlanta, Georgia. Chris Grissom will be a co-panelist in a presentation on the State Taxation of Pass-Through Entities and Their Corporate Owners. For more information, please visit the COST website: www.cost.org.

May 6, 2009
COST 2009 Southeastern Regional Meeting, Grandview Conference Center, Birmingham, Alabama. The conference will feature an update on critical state and local tax issues and legislation throughout the Southeast. Presenters will include representatives of COST, Bradley Arant Boult Cummings LLP, PricewaterhouseCoopers LLP, HealthSouth, Vulcan Materials, and the Commissioner of Revenue of the State of Alabama and his staff. For more information, please visit the COST website: www.cost.org.

May 18 – 21, 2009
COST 2009 Spring Audit Session/ Income Tax Conference, Hyatt Regency Cambridge, Boston, Massachusetts. Bruce Ely will be a co-presenter in an update on the state taxation of LLCs and LLPs and their members/partners. For more information, please visit the COST website: www.cost.org.

May 20, 2009
Tax Executives Institute (TEI) State & Local Taxes Seminar, Lakewood Country Club, Lakewood, Colorado. Chris Grissom will be speaking on the State Taxation of LLPs/LLCs. For more information, please visit TEI's website: www.tei.org.

chose to locate in our state due in part to the valuable Capital Credits Program may find themselves paying Alabama income tax on the profits of related companies that are not even located here. Heads the Department of Revenue (and the Alabama Education Association) wins, tails the taxpayer loses?

We expect to see the bill brought up for a quick vote in committee next week. The Council On State Taxation (COST) has already indicated their opposition to HB 865. For further information, please contact Bruce Ely, Jimmy Long or other members of our SALT practice group.

As of January 1, 2009, Bradley Arant Rose & White LLP and Nashville's well-respected Boult, Cummings, Conners & Berry PLC have merged to form Bradley Arant Boult Cummings LLP. Our new firm has more than 350 attorneys in seven offices strategically located in Tennessee, Alabama, Mississippi, North Carolina, and the District of Columbia. Together, we will offer you or your clients a talented legal team with not only expanded areas of service and enhanced industry knowledge, but also the continued dedication to excellence in client service you have come to expect from our firms.

Bradley Arant Boult Cummings Office Locations:

ALABAMA

One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
205.521.8000

200 Clinton Avenue West, Suite 900
Huntsville, AL 35801
256.517.5100

The Alabama Center for Commerce
401 Adams Avenue, Suite 780
Montgomery, AL 36104
334.956.7700

MISSISSIPPI

188 E. Capitol Street, Suite 450
Jackson, MS 39201
601.948.8000

NORTH CAROLINA

100 North Tryon Street, Suite 2690
Charlotte, NC 28202
704.338.6000

TENNESSEE

Roundabout Plaza
1600 Division Street, Suite 700
Nashville, TN 37203
615.244.2582

WASHINGTON, DC

1133 Connecticut Avenue NW, 12th Floor
Washington, DC 20036
202.393.7150

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SALT Practice Group:

Bruce P. Ely, Chair
(205) 521-8366
bely@babc.com

Stuart J. Frentz
(205) 521-8216
sfrentz@babc.com

Joseph W. Gibbs
(615) 252-2317
jgibbs@babc.com

W. Stanley Gregory
(334) 956-7604
sgregory@babc.com

Christopher R. Grissom
(205) 521-8514
cgrissom@babc.com

K. Wood Herren
(205) 521-8505
wherren@babc.com

Matthew S. Houser
(205) 521-8680
mhouser@babc.com

James E. Long, Jr.
(205) 521-8626
jelong@babc.com

Patricia Head Moskal
(615) 252-2369
pmoskal@babc.com

Brian S. Shelton
(615) 252-2313
bshelton@babc.com

William T. Thistle, II
(205) 521-8985
wthistle@babc.com

Robert C. Walthall
(205) 521-8308
rwalthall@babc.com

Ashley G. White
(256) 517-5106
awhite@babc.com