

State and Local Tax Bulletin

September 21, 2009

Alabama Edition



Proposed Alabama Regulation Strikes Business Privilege Tax Deduction

By Christopher R. Grissom and James E. Long, Jr.

Upcoming Seminars Involving Members Of Our SALT Practice Group

September 23-25, 2009

The 16th Annual Paul J. Hartman State and Local Tax Forum will be held at the Loews Vanderbilt Hotel in Nashville, Tennessee. Bruce Ely will co-present with Jeff Friedman and Professor Richard Pomp, "Adding Back? Throwing Out? Just Combine Us Already!" For more information, please visit www.hartmansaltforum.org.

October 20, 2009

Alabama Society of CPAs – Birmingham Chapter. Bruce Ely and Jimmy Long will present "Recent Alabama and Local Tax Developments and Predictions for the Spring 2010 Legislative Session" at the Harbert Center, Birmingham, Alabama.

October 20 - 23, 2009

COST's 40th Annual Meeting will be held in Las Vegas, Nevada at The Caesars Palace. "State Taxation of Flow-Through Entities & Their Owners" will be co-presented by Chris Grissom and Bill Backstrom on October 21. There is also a special tribute to SALT Pioneers on Friday, October 23. For more information, please visit www.cost.org.

December 14-15, 2009

The 28th NYU Institute on State and Local Taxation will be held at The Grand Hyatt, New York. Bruce Ely will serve on a panel providing an in-depth review of significant tax developments from regions across the country, entitled: "What's Happening Everywhere Today?" For more information, please visit www.scps.nyu.edu/salt.

Alabama's business privilege tax ("BPT"), which is imposed on every business entity doing business or registered to do business in Alabama, provides for a deduction in computing the taxable base equal to the book value of the taxpayer's investments in the equity of any other taxpayer *that is doing business in Alabama*. Ala. Code § 40-14A-23. The deduction is designed to avoid the inherent double taxation that would result if the net worth of both the parent/investor and subsidiary/investee are subject to the same tax. The Alabama Department of Revenue (the "Department"), however, has recently proposed a regulation that would strike this statutory deduction for all tax years beginning on or after January 1, 2010.

The Department's curt description of its proposed regulation claims that the BPT deduction for investments in Alabama entities "will no longer be allowed ... per *AT&T Corporation v. Surtees*, 953 So. 2d 1240 (Ala. Civ. App. 2006)," a case in which the authors' firm represented the taxpayer, AT&T. In *AT&T*, the Alabama Court of Civil Appeals held that because the BPT and the now-repealed corporate shares tax deductions were limited only to entities doing business in Alabama, the deduction scheme constituted a facially discriminatory violation of the Commerce Clause of the U. S. Constitution. The Court, however, did not hold that the deduction should be stricken, but rather remanded the case to the trial court in order for the Department to offer a permissible justification for the discriminatory scheme. It is very likely the Court thought it best to leave such a decision to the Alabama legislature.

The parties eventually settled the refund issue, and thus no Alabama court has decided whether the BPT deduction for Alabama investments should be stricken, or conversely, if the deduction should be broadened to include all equity investments in other entities (not just those doing business in Alabama) to cure the facial discrimination.

The Department's proposed regulation was published in the *Alabama Administrative Monthly* on August 31; interested parties wishing to file written comments in opposition to the proposal must do so by **October 5, 2009**. The public hearing on the proposed regulation is set for **October 13, 2009**. While not yet available on the Department's website, the authors have been informed that the 2010 BPT return and related instructions have been revised to reflect the proposed regulation. The line on the return that permitted the deduction for investments in entities doing business or registered to do business in Alabama was simply erased – with no explanation.

continued on page 2

Please contact Chris Grissom, Bruce Ely or Jimmy Long of our SALT Practice Group to discuss any questions you may have regarding the proposed regulation (the text of which is set forth below).

810-2-8-.08 Subtraction from Net Worth for the Investment in the Equity of Any Other Taxpayer Doing Business in Alabama. (NEW RULE)

(1) Section 40-14A-23, Code of Alabama 1975, provides that in computing net worth for Alabama business privilege tax purposes, the taxpayer may take a deduction for the book value of the investment by the taxpayer in the equity of any other taxpayer that is doing business in Alabama.

(2) Effective for business privilege taxable years beginning on or after January 1, 2010, and business privilege tax determination periods beginning on or after January 1, 2009, taxpayers will no longer be allowed the deduction described in paragraph (1) in computing the taxpayer's net worth for Alabama business privilege tax purposes, per AT&T Corporation v. Surtees, 953 So. 2d 1240 (Ala. Civ. App. 2006).

Bradley Arant Boulton Cummings LLP Office Locations:

ALABAMA

One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35023
(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

WASHINGTON, DC

1133 Connecticut Avenue NW,
12th Floor
Washington, DC 20036
(202) 393-7150

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

1600 Division Street, Suite 700
Nashville, TN 37203
(615) 244-2582

SALT Practice Group:

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

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

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

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

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

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

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

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

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

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

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

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

www.babbc.com

This newsletter is sent to our friends as a courtesy of Bradley Arant Boulton Cummings LLP. If you would prefer not to receive future emailings of this type, please email our practice group assistant, Sherry Barber, at sbarber@babbc.com.

This newsletter is a periodic publication of Bradley Arant Boulton Cummings LLP and should not be construed as legal advice or legal opinions on any specific facts or circumstances. The contents are intended for general information only, and you are urged to consult your own lawyer or other tax advisor concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our practice group.

The Alabama State Bar requires the following disclosure: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."