

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.

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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).

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