

State and Local Tax Bulletin

February 4, 2010
Alabama Edition



BRADLEY ARANT
BOULT CUMMINGS
LLP

Alabama Regulation Striking Business Privilege Tax Deduction Reissued

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

Upcoming Seminars Involving Members Of Our SALT Practice Group

February 22-24, 2010

Council On State Taxation – 2010 Sales Tax Conference and Audit Session, San Diego, California. Bruce Ely will be a co-panelist in a presentation on Dealing with Contingent Fee Audits and Class Action Law Suits. For more information, please visit the COST website: www.statetax.org.

March 22-23, 2010

2010 ABA/IPT Advanced Income Tax Seminar. Chris Grissom will be a co-speaker with Erica L. Horn of Stites & Harbison PLLC and David J. Shipley of McCarter & English, LLP. Their topic will be "Add-Back Statutes: The Construction of Exemptions, the Disappointing Decision in the VFJ Ventures Case, Other Pending Litigation and Similarly Annoying Issues." For more information, please visit the ABA website: <https://meetings.abanet.org/meeting/tax/ipt10>.

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 Alabama Department of Revenue (the "Department") proposed a regulation last August that would have deleted this statutory deduction for all tax years beginning on or after January 1, 2010. Proposed Admin. Code r. 810-2-8-.08. While the Department thankfully allowed the first proposed regulation to lapse earlier this month, the same proposed regulation – with an exception applicable only to certain investments by financial institutions – was published in the January 29 *Alabama Administrative Monthly* and a public hearing is scheduled for March 24. A copy of the proposed rule and hearing notice is available on the Department's website, <http://www.revenue.alabama.gov/rulehear.html>.

The Department's explanation of the need for its proposed regulation again indicates 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. In *AT&T*, the Court of Civil Appeals held that because the BPT and the now-repealed corporate shares tax deductions were limited only to entities doing business in Alabama, the deduction scheme constituted a facially discriminatory violation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 remanded the case to the trial court in order for the Department to offer a permissible justification for the discriminatory scheme (which it could not) or else provide a remedy for the discrimination. It is very likely the Court thought it best to leave such a decision to the Alabama legislature. The parties thereafter settled AT&T's refund claim.

Adding to the confusion, the 2010 BPT return and related instructions have already been revised to reflect the proposed regulation. The line on the prior years' return that permitted the deduction for investments in entities doing business or registered to do business in Alabama now reads "(Reserved for future use)." As a result of numerous comments filed in opposition to the proposed regulation last Fall, representatives from the Department began informal talks with various business groups regarding an alternative legislative proposal that would include (a) a deduction for investments in all entities, (b) coupled with a formulaic add-back of certain liabilities and (c) an increase in the current (general) \$15,000 cap. The status of this proposal or any other possible legislation is uncertain at this time, although it appears that all parties believe legislation is needed to correct the discriminatory

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deduction scheme. Taxpayers and their advisers should monitor both the proposed regulation and possible legislation when preparing 2010 BPT returns.

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 or legislation.

Cash Contributions to Haiti Earthquake Relief

Governor Bob Riley and Commissioner Tim Russell recently announced that Alabama taxpayers contributing cash to charities providing earthquake relief in Haiti may claim these donations on their 2009 state income tax return, following the federal tax relief provision passed by Congress on January 22. Deductible contributions can be made by text message, check or credit card, provided they are made after January 11 and before March 1. "Alabamians have been so generous in coming to the aid of the people of Haiti during this time of need," said Governor Riley. "This tax benefit, hopefully, will encourage even more Alabamians to come forward and assist those who are suffering."

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