

# State and Local Tax Bulletin

April 20, 2010  
Alabama Edition



## New COST Scorecard Dings Alabama's State and Local Tax System

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

### Upcoming Seminars Involving Members Of Our SALT Practice Group

#### April 25 – 29, 2010

Council On State Taxation (COST) – 2010 Intermediate/Advanced State Income Tax School, Atlanta, Georgia. Chris Grissom will be a co-speaker with Kent Clay of Deloitte Tax LLP on the State Taxation of Pass-Through Entities and Their Corporate Owners. For more information, please visit the COST website: [www.statetax.org](http://www.statetax.org).

#### May 3, 2010

Tax Executives Institute, Houston Chapter. Chris Grissom will be speaking on the State Taxation of Pass-Through Entities. For more information, please visit the TEI website: [www.tei.org](http://www.tei.org).

#### May 13-14, 2010

Alabama Society of CPAs Annual Business and Industry Conference, Hyundai Motor Manufacturing Plant, Montgomery, Alabama. Jimmy Long and Will Thistle will be speakers in a presentation on Recent Alabama Tax Developments. For more information, please visit the ASCPA website: [www.ascpa.org](http://www.ascpa.org).

The annual Council On State Taxation (COST) Scorecard on state tax administration was issued last month ([www.cost.org](http://www.cost.org)) and is a helpful public service that requires both tax administrators and business taxpayers to focus on the fairness of their respective state and local tax system. Alabama received a "D" and was ranked in the select group of states that scored the worst – a group that also included California, Florida, Illinois, Louisiana, New Mexico, Pennsylvania, and Rhode Island. The COST Scorecard evaluates the rules governing the degree of taxpayer access to an independent appeals process and the state treatment of selected procedural elements that affect a taxpayer's perceptions of fairness and efficiency. In the former category, COST's criteria are:

- The appeals forum must be truly independent;
- Taxpayers must not be forced to pay or post a bond prior to an independent hearing and resolution of a dispute;
- The record for further appeals must be established before an independent body; and
- The arbiter at the hearing must be well-versed in the intricacies of state tax laws and concepts.

The COST Scorecard also focuses on procedural fairness, including whether the state has adopted:

- Even-handed statutes of limitations for refunds and assessments (not including an extended statute of limitations for assessments involving 25% understatements);
- Equalized interest rates on refunds and assessments (not including the typical penalty rate for large corporate underpayments);
- Due dates for corporate income tax returns that are at least 30 days beyond the federal return due date, with an automatic extension of the state return due date based on the federal extension;
- Adequate time to file a protest before an independent dispute forum;
- Reasonable and clearly defined procedures for filing amended state income/franchise tax returns following an adjustment [by the IRS] to a taxpayer's federal corporate tax liability; and

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- Any additional ineffective, burdensome, or inequitable practices, such as contingent fee audits, duplicative local revenue departments, use of outside counsel to litigate cases, or retroactive penalties, etc.

Applying these criteria to Alabama, COST dinged the state especially hard with respect to the lack of an independent dispute forum; a pay-to-play requirement to gain access to circuit court; a short, 30 day, non-extendable appeal period by taxpayers; and “other issues.” To sum it up, COST President Doug Lindholm remarked: “I think taxpayers are much more willing to fully comply with state laws they perceive to be fair and effective. It is unfortunate that Alabama scores so poorly on the Scorecard when so much of their score is based on items that are easy and inexpensive for their legislature to correct. They could start by moving Judge Thompson out of the embrace of the ADOR, lengthening their short protest period, and forbidding the use of outside counsel to pursue costly and time-consuming litigation.”

Ironically, three out of four of COST’s major concerns and two of their lesser concerns would be addressed by two items of proposed legislation: the Alabama Tax Appeals Commission Act and the Alabama Taxpayers’ Bill of Rights II. The so-called ATAC bill, patterned in large part after the ABA’s Model State Administrative Tax Tribunal Act, has not been introduced in the past two legislative sessions due to previous opposition by the ADOR and the powerful Alabama Education Association teachers union. COST’s concerns about Alabama’s fragmented local tax system, which allows any municipality or county (if it so chooses) not only to levy but also to collect its own sales, use, rental and lodgings taxes, would be partly addressed by a proposed amendment to the ATAC bill that would allow taxpayers to appeal final assessments of those local taxes to the ATAC.

The Alabama Taxpayers’ Bill of Rights II is a work in progress and is being circulated for review. It would, among other things, extend the appeal period from 30 to 60 days, including appeals from both preliminary and final assessments, and broaden the state’s “innocent spouse” relief. (Members of our SALT Practice Group are members of the working group on this bill.) Proposed amendments to the federal RAR reporting statute would also address COST’s concerns in that regard as well but would in large part adopt the Multistate Tax Commission’s model RAR statute.

Another concern of COST regarding the Alabama tax system relates to the state’s use of outside counsel in major tax litigation, a concern focusing primarily on the ongoing franchise tax litigation that began in 1999 after the landmark U.S. Supreme Court ruling in *South Central Bell Telephone Company v. Alabama*. As readers may recall, subsequent to that decision, the Alabama Supreme Court, relying on both the 1992 Alabama Taxpayers’ Bill of Rights refund procedure and sovereign immunity, ruled that taxpayers could not pursue a class action against the State for their franchise tax refunds. Instead, each taxpayer was required to prosecute its refund claim separately. As previously reported, the state has spent millions of dollars in legal fees on outside counsel in defending the numerous taxpayer appeals over the past ten years and in settling many of them.

In response to COST’s “D” grade for Alabama, ADOR officials pointed out that their agency automatically grants an extension of time to file the Alabama income tax return (they just don’t grant an extra 30 days); that the Alabama income tax changes are limited to the federal RAR changes; and that, in practice, their appeal period is longer than 30 days since they don’t issue the notice of final assessment immediately upon the expiration of the appeal period for the preliminary assessment. The officials acknowledged that a supersedeas/appeal bond (or payment of the tax assessment) is indeed required in order to gain access to circuit court, but they referred to recent legislation that at least reduced the supersedeas bond amount from double the amount of the challenged assessment to 125% of the assessment.

With respect to the ADOR’s use of outside counsel in certain large or complex tax cases, ADOR officials simply stated that outside attorneys are sometimes needed in situations where the demand for legal services outstrips the Department’s resources, as in the ongoing franchise tax refund cases.

Although the ATAC bill or the Alabama Taxpayers’ Bill of Rights II won’t be introduced in the waning days of this legislative session, the COST Scorecard brings the concerns addressed by these two bills to the attention of the business community, the ADOR and, hopefully, state legislators as well, in the hope that many of those concerns will be addressed in the next legislative session.

# 34th Annual American Institute on Federal Taxation to be held in Birmingham—June 23-25, 2010

Although the American Institute on Federal Taxation has a decidedly federal tax bent, Alabama Commissioner of Revenue Tim Russell (or his successor), Joe Garrett, Tax Policy Administrator for the ADOR, and our own Bruce Ely will offer a panel presentation during the Institute titled "Recent Developments in Alabama Taxation: Judicial, Legislative and Administrative." The Institute is a two and half-day marathon of hot income tax, estate and gift tax, ERISA and yes, even SALT topics, that begins Wednesday morning, June 23 and lasts through Friday noon, June 25. It will be held at the Hilton Perimeter Park Hotel.

Topics also include: "Estate Tax Uncertainty in 2010, 2011 and Beyond;" "Practical Strategies for Complying with the Revised Tax Preparer Penalty Statute;" "Recent Federal Income Tax Developments;" "The Evolving Nature of Partnership Workouts;" and "Current Trends in Designing Qualified Plans for Closely-Held and Family Businesses"—to name just a few. For more information, visit the AIFT website: <http://www.amfedtax.org> or contact Carol Short at [cshort@babarc.com](mailto:cshort@babarc.com) or (205) 521-8175.

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