

# State and Local Tax Bulletin

July 22, 2010  
Alabama Edition



## Controversial ADOR Regulation Rejected By Legislative Council

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

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

#### July 22 – 25, 2010

The Tax Executives Institute (TEI) Region VII Annual Conference, Hilton Head Island, South Carolina – Chris Grissom and David Huizenga of Jefferson Wells will be speaking on the topic of *State Tax Audit Techniques & Current Trends*. For more information, go to [www.tei.org](http://www.tei.org).

#### September 3 & 21, 2010

Alabama Society of CPAs – Alabama Sales and Use Tax Seminar in Birmingham, Alabama. Bruce Ely, Jimmy Long and Will Thistle will be speaking on numerous sales, use, rental and business license tax topics. A similar seminar will be offered on September 21 in Montgomery, Alabama for CPAs. For more information, go to [www.ascpa.org](http://www.ascpa.org).

#### September 22, 2010

Unclaimed Property Reporting, Lorman Educational Services, Birmingham, Alabama. Chris Grissom and Jimmy Long will be speaking on the topics of *Unclaimed Property Fundamentals and General Legal Issues On Unclaimed Property*. For more information, please visit [www.lorman.com](http://www.lorman.com).

Alabama's business privilege tax ("BPT") is imposed on every business entity doing business or registered to do business in Alabama, and provides for a deduction in computing the taxable base equal to the book value of the taxpayer's investment in the equity of any other business entity *that is also doing business in Alabama*. Ala. Code § 40-14A-23. The Alabama Department of Revenue (the "Department") proposed a controversial regulation last August that would have deleted this statutory deduction for all tax years beginning on or after January 1, 2010. They also issued an amended BPT form (without public notice and comment) to delete the line that formerly allowed the deduction. While the Department wisely allowed the first proposed regulation to lapse in early January, the same proposed regulation – with an exception applicable to certain investments by financial institutions – was published in the January 29 *Alabama Administrative Monthly* and a public hearing was held on Wednesday, March 24.

Many of the attendees at the March 24 hearing commented that by denying the deduction for in-state investments, the regulation in many instances would subject taxpayers to multiple taxation on the same property. Others noted that eliminating the deduction is equivalent to levying a tax because it increases revenue – a fact conceded by the Department – even though levying taxes is purely a legislative function. Lastly, several of the comments focused on the Department's inability to issue a valid regulation that directly contradicts the statute under which it is promulgated.

These concerns were heard by the Alabama Legislature's administrative agency oversight committee, known as the Legislative Council, which met at the State House on Wednesday, July 21, with an overflow crowd in the committee room. After the Department official testified regarding the background and perceived need for the BPT regulation, while conceding that a legislative solution was needed, several members of the Council became quite vocal and called for an immediate vote to reject the regulation. The Council's unanimous veto, however, must be confirmed by the Legislature during the Spring 2011 regular session, either through a Senate or House joint resolution. Otherwise, the regulation will automatically be retroactively reinstated, according to the Alabama Administrative Procedure Act.

Readers may recall that the Department's stated need for this regulation stems from its interpretation of the Alabama Court of Civil Appeals' decision in *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*, both the trial court and appellate court held that because the BPT and the now-repealed

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corporate shares tax deductions were limited only to entities *doing business in Alabama*, the deduction scheme facially discriminated against interstate commerce in violation of the Commerce Clause of the U.S. Constitution. The appeals 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. On remand, the trial court ruled against the Department but ordered the parties to mediation. The parties thereafter settled.

As a result of numerous comments filed in opposition to the first proposed regulation, last Fall, officials from the Department began informal talks with various business groups regarding an alternative legislative proposal, which apparently has now been agreed to by most if not all the parties. It's clear that all parties believe legislation is needed to correct the discriminatory deduction scheme, and the Legislative Council loudly echoed that sentiment during their hearing yesterday.

Taxpayers and their advisers should continue to monitor this issue both in terms of the required Senate or House joint resolution mentioned above as well as the corrective legislation. The authors' firm serves as counsel to the Alabama Society of CPAs in this matter. If you have any questions regarding this issue or the proposed legislation, please contact Bruce Ely, Chris Grissom, Jimmy Long or Will Thistle at their telephone number or email address listed to the right.

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