

# State and Local Tax Bulletin

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Alabama Edition



## Governor Signs Legislation Rejecting Controversial Business Privilege Tax Regulation

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

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

#### March 30, 2011

The American Bar Association will sponsor a national teleconference on the use and taxation of series limited liability companies, titled "Series LLCs. No, It's Not a New TV Series," with co-presenters: Bruce Ely; Allan Donn of Willcox & Savage, P.C., Norfolk, Virginia; and Bahar Schippel of Snell & Wilmer, LLP, Phoenix. For more information on the teleconference, visit [www.aba.org](http://www.aba.org).

#### May 10, 2011:

The Council On State Taxation Southeast Regional State Tax Update will be held in Birmingham at Regions Bank, Upper Lobby Auditorium. This half-day seminar will present an update on significant state tax issues for the Southeast states, and includes both industry and Alabama Department of Revenue speakers. The best view of the seminar is located on the COST calendar for May; click the date of May 10, and all of the necessary information will be available. The COST website: [www.cost.org](http://www.cost.org).

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. Last year, the Alabama Department of Revenue (the "Department") proposed a controversial regulation that would have deleted this statutory deduction for all tax years beginning on or after January 1, 2010. Prop. Ala. Admin. Code r. 810-2-8-.08. In advance of that, they also issued an amended BPT form, without public notice and comment, which simply deleted the line that formerly allowed the deduction. The 2011 form contains the same error.

**On March 17, 2011, at the urging of the business community, Governor Robert Bentley signed into law Senate Joint Resolution 4 ("SJR 4") that permanently rejects the Department's proposed BPT regulation. It is now Act No. 2011-17.**

Readers may recall that the Department held a public hearing on the regulation in March 2010, at which many of the attendees 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. Despite these objections, the Department certified the regulation on June 21, 2010.

The business community's and tax practitioners' concerns were heard by the Alabama Legislature's administrative agency oversight committee, known as the Legislative Council, which unanimously voted to reject the Department's regulation. After a Department official testified regarding the background and perceived need for the BPT regulation, while conceding that a legislative solution was preferable, several members of the Council became quite vocal in stating their opposition and voted to reject the regulation. As required by the Alabama Administrative Procedure Act, SJR 4 was introduced to sustain the Council's veto of the Department's controversial regulation.

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

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authors' firm represented the taxpayer. In *AT&T*, both the trial court and appellate court 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 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.

**Taxpayers and their advisers should continue to monitor this issue because legislation may be introduced during the current session that would amend the statute to comport with Act No. 2011-17 or possibly repeal the deduction entirely.**

*The authors' firm was privileged to serve as counsel to the Alabama Society of CPAs in this matter.*

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