

State and Local Tax Bulletin

March 2, 2011
Alabama Edition



Legislation Introduced to Confirm Rejection of Controversial ADOR BPT Regulation

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

Upcoming Seminars Involving Members Of Our SALT Practice Group

March 7, 2011

The Council On State Taxation 2011 COST Sales Tax School will be held again at the Georgia Tech Hotel & Conference Center in Atlanta, Georgia. Bruce Ely and Will Thistle will be speaking, with Alan Poe of Holland & Hart, LLP, Denver, on the topic of "Dealing with 'Home Rule' Jurisdictions; Disturbing Trends." For more information, visit www.cost.org.

March 22-23, 2011

The American Bar Association-Institute for Professionals in Taxation (ABA-IPT) Advanced Income Tax Seminar will be held at the Ritz-Carlton Hotel in New Orleans, Louisiana again this year. Chris Grissom will be providing an update and recent developments involving intangibles add-back statutes around the country. For more information, visit www.ipt.org.

March 25, 2011

A tax seminar designed for our general contractor clients and friends will be held at our Birmingham office that morning. Stuart Frentz, Axel Bolvig, Bruce Ely, Steve Wilson (from our Jackson office), Jimmy Long and Will Thistle will be the co-presenters. For more information, visit www.babc.com/general-contractor-tax-seminar

March 30, 2011

The ABA 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.

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 purported to deny this statutory deduction for all tax years beginning on or after January 1, 2010. Prop. Ala. Admin. Code r. 810-2-8-.08. The Department also issued an amended BPT return for both 2010 and 2011, without public notice and comment, that simply deleted the line that formerly allowed the deduction.

On Tuesday, March 1, the first day of the 2011 regular session, Senator Roger Bedford (D-Russellville) introduced Senate Joint Resolution 4 ("SJR 4") that would permanently reject the Department's proposed BPT regulation.

The Department held a public hearing on the regulation last March during 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 assets. 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 called for an immediate vote 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 regulation. If the resolution is not passed this session, however, the regulation will automatically be retroactively reinstated.

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Readers may recall that the Department's basis for this regulation stemmed 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 corporate shares tax deductions were limited 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 both in terms of the status of SJR 4 as well as any corrective legislation that may be introduced during the current session. The authors' firm served as counsel to the Alabama Society of CPAs in this matter.

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