

# State and Local Tax Bulletin

March 28, 2011  
Alabama Edition



BRADLEY ARANT  
BOULT CUMMINGS  
LLP

## Alabama Corporate Taxpayers Beware: House Bills Target Unitary Combined Reporting, Section 199 Deduction and Bonus Depreciation

By Bruce P. Ely, James E. Long, Jr. and J. Sims Rhyne, III

### 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.americanbar.org](http://www.americanbar.org).

#### May 7, 2011

The American Bar Association Section of Taxation's annual meeting will be held in Washington, D.C. at the Grand Hyatt. The LLC's and LLP's Subcommittee will feature a panel presentation titled "State Tax Implications of the Proposed Series LLCs Regulations," with co-presenters Jimmy Long and Leigh Griffith of Waller Lansden Dortch & Davis, LLP, Nashville. For more information, please visit [www.americanbar.org](http://www.americanbar.org).

#### May 10, 2011:

The Council On State Taxation (COST) 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).

On March 22, 2011, Representative Richard Lindsey (D-Cherokee County) introduced three bills of significant interest to Alabama corporate taxpayers: House Bill 299 would limit the domestic production activities deduction ("DPAD") under IRC section 199; House Bill 300 would limit the 100% bonus depreciation provisions enacted by Congress last December; while House Bill 301 would authorize the Commissioner of Revenue to force unitary combined reporting ("MUCR") for certain U.S. and foreign business entities. All three bills have been assigned to the House Ways and Means-Education Committee. A detailed summary of each bill, along with a link to the full text, is provided below.

#### **HB 301 - Power to Impose MUCR**

Similar to the proposals introduced in the 2008 and 2009 regular sessions, this bill would require the Commissioner of Revenue to impose mandatory unitary combined reporting "when an Alabama taxpayer is part of a unitary business consisting of multiple business entities." The bill essentially adopts the Multistate Tax Commission's broad definition of a "unitary business," as contained in its Model Combined Reporting Act. In addition, the bill provides that the term "unitary business" shall be interpreted as broadly as possible, limited only by the bounds of the U.S. Constitution, as a backstop to the MTC definition.

The combined report must include all members of the unitary group doing business in the United States or commercially domiciled in certain foreign "tax havens." The bill does not provide any qualitative requirement for a foreign entity's activities within the United States as compared to its activities abroad. Apparently, simply maintaining a commercial domicile in a disfavored country will subject the unitary entity's income to apportionment by Alabama via a combined return, which is constitutionally suspect.

The combined group of business entities would apportion their total income to Alabama using the group's Alabama "source apportionment data relative to the combined group's apportionment data from all sources." The remaining details and mechanics of the unitary report must be addressed by the Department of Revenue through regulations.

Perhaps the most frightening aspect of this bill is its lack of detail. The bill is silent regarding the calculation of income tax liability, the impact on credits and other tax attributes of the unitary group's members, the effect on Alabama's existing consolidated return filing regime (the bill does not propose any amendments to this section), and whether it could apply to the current tax year. The bill is also silent with respect to any equity ownership requirement or threshold for inclusion in the Alabama combined group, which is a deviation from the vast majority of state combined reporting schemes that typically require a 50% or greater threshold equity interest

*continued on page 2*

before an entity is included in the combined group. Additionally, taxpayers do not appear to have the option under this unique bill to elect unitary combined reporting, which is a fundamentally unfair result.

### **HB 299 – Partial Decoupling from DPAD**

Alabama levies an income tax on all corporations doing business or deriving income from sources within the state, and the tax base is tied directly to the federal definition of “taxable income.” One deduction that is currently allowed in determining federal taxable income is DPAD pursuant to IRC section 199, which is equal to 9% of the lesser of the taxpayer’s “qualified production activities income” or its taxable income. This bill would limit an Alabama taxpayer’s DPAD to one-third of its federal DPAD by requiring corporations to add-back any amount deducted in accordance with IRC section 199 that is in excess of 3% of the lesser of qualified production activities income or taxable income. This bill would apply to all tax years beginning on or after January 1, 2012.

### **HB 300 – Partial Decoupling from Bonus Depreciation**

Another deduction currently available to Alabama corporate income taxpayers by virtue of the link to federal taxable income is the temporary 100% bonus depreciation deduction for qualified property pursuant to the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (P.L. 111-312). This bill would limit bonus depreciation allowed under that Act to 50% rather than the full 100% that is now available under federal law. Taxpayers essentially would be forced to add-back one-half the amount deducted in accordance with IRC section 168. This bill would apply retroactively to all tax years beginning on or after January 1, 2011.

### **BABC Comment**

We anticipate opposition from the business community and tax practitioners to all three bills, which apparently are part of the Democratic Caucus’ package of “loophole” closers.

### **Bradley Arant Boulton Cummings LLP Office Locations:**

#### **ALABAMA**

One Federal Place  
1819 Fifth Avenue North  
Birmingham, AL 35203  
(205) 521-8000

200 Clinton Avenue West, Suite 900  
Huntsville, AL 35801  
(256) 517-5100

The Alabama Center for Commerce  
401 Adams Avenue, Suite 780  
Montgomery, AL 36104  
(334) 956-7700

#### **MISSISSIPPI**

188 E. Capitol Street, Suite 400  
Jackson, MS 39201  
(601) 948-8000

#### **NORTH CAROLINA**

100 North Tryon Street, Suite 2690  
Charlotte, NC 28202  
(704) 332-8842

#### **TENNESSEE**

1600 Division Street, Suite 700  
Nashville, TN 37203  
(615) 244-2582

#### **WASHINGTON, DC**

1615 L Street, N.W., Suite 1350  
Washington, DC 20036  
(202) 393-7150

### **SALT Practice Group:**

Bruce P. Ely, Chair  
(205) 521-8366  
bely@babbc.com

Joseph W. Gibbs  
(615) 252-2317  
jgibbs@babbc.com

W. Stanley Gregory  
(334) 956-7604  
sgregory@babbc.com

Christopher R. Grissom  
(205) 521-8514  
cgrissom@babbc.com

K. Wood Herren  
(205) 521-8505  
wherren@babbc.com

James E. Long, Jr.  
(205) 521-8626  
jelong@babbc.com

Patricia Head Moskal  
(615) 252-2369  
pmoskal@babbc.com

Brian S. Shelton  
(615) 252-2313  
bshelton@babbc.com

William T. Thistle, II  
(205) 521-8985  
wthistle@babbc.com

Robert D. Thorington  
(334) 956-7609  
rthorington@babbc.com

Robert C. Walthall  
(205) 521-8308  
rwalthall@babbc.com

Stephen M. Wilson  
(601) 592-9957  
swilson@babbc.com

This newsletter is sent to our friends as a courtesy of Bradley Arant Boulton Cummings LLP. If you would prefer not to receive future emailings of this type, please email our practice group assistant Sherry Barber at [sbarber@babbc.com](mailto:sbarber@babbc.com).

This newsletter is a periodic publication of Bradley Arant Boulton Cummings LLP and should not be construed as legal advice or legal opinions on any specific facts or circumstances. The contents are intended for general information only, and you are urged to consult your own lawyer or other tax advisor concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our practice group.

The Alabama State Bar requires the following disclosure: “No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.”

©2011 Bradley Arant Boulton Cummings LLP