

PUBLICATION

Spotlight on Tennessee: Settlement Opportunity for Previously Deducted Intangible Expenses

December 8, 2011

Since 2004, Tennessee franchise and excise taxpayers have been required to disclose "intangible expenses" paid to affiliated entities on Schedule J of their annual Franchise, Excise Tax Return. By disclosing these intangible expenses, a taxpayer was able to deduct the intangible expenses on the Return, but such expenses were denied as deductions if not so disclosed. Also, the taxpayer could be subjected to significant penalties if not so disclosed.

The Tennessee Department of Revenue has regularly reviewed these disclosure forms and in late 2009 began to issue assessments to taxpayers disallowing their intangible expense deductions, even though the expenses were disclosed. The Department claimed authority to do so under the Tennessee variance (or alternative apportionment) statute based on the Department's assertions that the underlying transactions and arrangements giving rise to the intangible expenses lacked business purpose and/or economic substance.

The Department has now issued Notice 11-17, dated November 2011, offering a settlement and compromise opportunity for taxpayers (a) who received assessments disallowing their disclosed intangible expense deductions, and (b) those who did not disclose but are concerned about potential disallowance. The Department will agree to consider requests to compromise and settle these issues for any open tax years ending on or before June 30, 2012. Under such a compromise and settlement request which is approved by the Department, a specific percentage of the intangible expenses will be disallowed and an assessment of tax and interest will be imposed for such disallowed expenses, while the remainder will be allowed as a deduction. The Department has indicated that a penalty would not be applied.

To be eligible, a taxpayer must request to be included in the global compromise initiative by December 31, 2011. Those submitting such requests after December 31, 2011 may also obtain settlement with the Department, but the Notice seems to indicate that the Department will evaluate more closely whether the same terms offered before January 1, 2012 should still apply.

If you would like to discuss the particular terms of this settlement initiative, how it may affect your company based on your facts and circumstances, or help you evaluate participating, please contact any attorney in the Firm's Tax Department.