[Mercer Law Review](https://digitalcommons.law.mercer.edu/jour_mlr)

Volume 71
Number 1 *Annual Survey of Georgia Law*

Article 16

1-2020

State and Local Taxation

Brian Sengson

DiAndria Green

David Greenberg

State and Local Taxation: A Two-Year Survey

by Brian Sengson*

DiAndria Green**

and David Greenberg***

I. INTRODUCTION

This Article surveys the most critical and comprehensive changes in Georgia law occurring between June 1, 2017, and May 31, 2019.[1] In addition to noteworthy cases decided in state and federal courts, this Article details legislation enacted during the survey period that affects Georgia tax law.

*Manager, Bennett Thrasher, LLP, Atlanta, Georgia. Lee University (B.S., magna cum laude, 2009); Georgia State University College of Law (J.D., 2014). Member, State Bar of Georgia.

**Manager, Bennett Thrasher, LLP, Atlanta, Georgia. Florida Agricultural and Mechanical University (B.B.A., 2002); Texas Southern University Thurgood Marshall School of Law (J.D., cum laude, 2006); Boston University (LL.M., 2008). Member, State Bars of Georgia and Texas.

***Staff Attorney, Bennett Thrasher, LLP, Atlanta, Georgia. Georgia Southern University (B.A., magna cum laude, 2013); Mercer University School of Law (J.D., cum laude, 2016); Villanova University (LL.M., 2019). Member, Mercer Law Review (2014–2016); Articles Editor (2015–2016). Member, State Bar of Georgia.

1. *See* Crawford B. Edward, Jr., *State and Local Taxation, Annual Survey of Georgia Law*, 42 MERCER L. REV. 421 (1990). Since the last Article, statewide taxation has been independently and indirectly addressed in several different Georgia Survey Articles. *See generally* Jennifer B. Alewine, Courtney E. Ferrell & Allison W. Pryor, *Administrative Law, Annual Survey of Georgia Law*, 69 MERCER L. REV. 15, 21–22 (2017); Patrick Emery Longan, *Legal Ethics, Annual Survey of Georgia Law*, 69 MERCER L. REV. 157, 159 (2017); Linda S. Finley, *Real Property, Annual Survey of Georgia Law*, 69 MERCER L. REV. 251, 252 (2017).

II. State Constitutional Changes

House Resolution 238,[2] the Georgia Outdoor Stewardship Act, authorized the Georgia General Assembly to allocate up to 80% of sales tax revenues derived from outdoor and recreational sporting equipment sales to a trust fund used to protect and preserve conservation land.[3] Additionally, the General Assembly enacted House Bill 332,[4] which provided the mechanism to effectuate the sales tax distributions to the Georgia Outdoor Stewardship Trust Fund.[5] The proposed amendment appeared on the 2018 ballot as Amendment 1, and the electorate approved the amendment.[6] The new allocation went into effect for transactions occurring on or after July 1, 2019.[7]

III. Georgia Sales and Use Taxation

A. New Economic Nexus Requirements

Beginning in 2017, several states enacted statutes or regulations directly challenging the physical presence requirement under the Dormant Commerce Clause[8] established in *Quill Corp. v. North Dakota*[9] for states to assert sales tax nexus.[10] Notably, South Dakota's statute[11] mandated taxpayers without a physical presence in the state collect and remit sales taxes if their in-state sales exceed $100,000 or they have more than 200 transactions in the state.[12] Several large online retailers, citing *Quill*, challenged the constitutionality of South Dakota's statute.[13]

---

2. Ga. H.R. Res. 238, Reg. Sess., 2018 Ga. Laws 1138 (amending GA. CONST. art. III, § 9, para. 6).

3. *Id.* § 1.

4. Ga. H.R. Bill 332, Reg. Sess., 2018 Ga. Laws 542 (codified at O.C.G.A. §§ 12-6A-1–12-6A-12 (2019)).

5. *Id.* § 1.

6. Georgia Secretary of State Robyn A. Crittenden, *November 6, 2018, General Election Results Constitutional Amendment #1*, GEORGIA SECRETARY OF STATE (Nov. 17, 2018, 4:27 PM), https://results.enr.clarityelections.com/GA/91639/Web02-state.221451/#/cid/901000.

7. Ga. H.R. Bill. 332, Reg. Sess., § 3 (2018).

8. U.S. CONST. art. I, § 8, cl. 3.

9. 504 U.S. 298 (1992).

10. *See* R. Lainie W. Harris, *Did SCOTUS Do Congress' Dirty Work When It Killed Quill? State Sales Tax on Remote Sellers and Wayfair*, 72 THE TAX LAWYER 671 (2019).

11. S.D. CODIFIED LAWS § 10-64-2 (2016).

12. *Id.*

13. *See* State v. Wayfair, Inc., 901 N.W.2d 754 (S.D. 2017).

On June 21, 2018, in *South Dakota v. Wayfair, Inc.*,[14] the Supreme Court of the United States made two holdings.[15] First, the Court held that a state may assert nexus when a taxpayer "'avails itself of the substantial privilege of carrying on [a] business' in that jurisdiction."[16] In doing so, the Court acknowledged a fundamental distinction between the country's economic and political borders, noting taxpayers can avail themselves of the privilege of carrying on a business in a state through economic and virtual contacts.[17] Second, the Court held South Dakota's economic nexus statute sufficient under the Dormant Commerce Clause.[18] The Court identified the following three characteristics of the South Dakota statute as materially determinant, though the individual weight of each characteristic is unknown: (1) the small seller safe harbor based on the sales and transaction thresholds; (2) non-retroactive application; and (3) South Dakota's adoption of the Streamlined Sales and Use Tax Agreement, which presumably reflects reduced compliance costs for business owners.[19]

Days prior to the Supreme Court's decision in *Wayfair*, House Bill 61[20] established an economic nexus test for remote retailers selling to Georgia customers.[21] Effective for sales after January 1, 2019, all businesses with either gross revenue exceeding $250,000 in the current or previous tax year or 200 or more separate transactions in the current or previous tax year must collect and remit sales taxes.[22] The provision authorized the Georgia Department of Revenue (Department of Revenue) to bring a declaratory action in any superior court against any remote reseller who failed to collect and remit sales taxes from its customers.[23] After *Wayfair*, effective for transactions on or after

14. 138 S. Ct. 2080 (2018).

15. *Id.*

16. *Id.* at 2099 (quoting Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)).

17. *Id.*

18. *Id.* at 2099–100.

19. *Id.* at 2098.

20. Ga. H.R. Bill 61, Reg. Sess., 2018 Ga. Laws 259 (codified at O.C.G.A. §§ 48-8-2, 48-8-30 (2019)).

21. *Id.* § 1. *See also* Taylor N. Armstrong & Caitlin E. Correa, *HB 61–Revenue and Taxation*, 35 GA. STATE UNIV. L. REV. 187 (2018).

22. *Id.* §§ 1, 3. House Bill 61 also included use taxes reporting option modeled after Colorado's statute. *See* Armstrong & Correa, *supra* note 21, at 200–01. House Bill 182 repealed this option effective April 28, 2019. Ga. H.R. Bill 61 § 2. *See* Georgia Department of Revenue, Policy Bulletin SUT-2019-02, 2 (May 7, 2019) [hereinafter PB SUT-2019-02].

23. *Id.* § 2.

January 1, 2020, House Bill 182[24] lowered the gross revenue requirement to $100,000.[25]

B. High-Technology Data Center Equipment Exemption

House Bill 696[26] created an exemption from sales and use tax for "high-technology data center equipment"[27] used in a qualified "high-technology data center"[28] beginning July 1, 2018 and ending on December 31, 2028.[29] Both the qualified high-technology data center and its customers may apply for the certificate for use for any qualified purchase.[30]

The exemption is to encourage new quality jobs throughout Georgia.[31] Accordingly, high-technology data centers must meet an investment threshold over seven years.[32] Georgia law defines the investment threshold as creating twenty new quality jobs and making a local investment based on a population-based tiered system.[33] These

---

24. Ga. H.R. Bill 182, Reg. Sess., 2019 Ga. Laws 282 (to be codified at O.C.G.A. § 48-8-2).

25. *Id.* § 1. For businesses that were complying with the notice provision, they should comply with the sales tax collect and remittance requirement for all transaction on and after April 28, 2019. PB SUT-2019-02, *supra* note 22, at 2.

26. Ga. H.R. Bill 696, Reg. Sess., 2018 Ga. Laws 624 (codified at O.C.G.A. § 48-8-3(68.1) (2019)).

27. High-technology data equipment includes computer equipment, computer software, and computer systems as well as equipment necessary to create, facilitate, or maintain the equipment, protect the equipment or data from cyber threats, or ensure the equipment receives necessary power or proper environmental conditions. O.C.G.A. § 48-8-3(68.1)(G)(iv) (2019).

28. High-technology data centers are defined as "facilities, campuses of facilities, or [an] array of interconnected facilities [within Georgia] developed to power, cool, secure, and connect" high-technology data center equipment. O.C.G.A. § 48-8-3(68.1)(G)(ii) (2019).

29. Ga. H.R. Bill 696, Reg. Sess., 2018 Ga. Laws 624 (codified at O.C.G.A. § 48-8-3(68.1)).

30. O.C.G.A. § 48-8-3(68.1)(C)(i) (2019).

31. *See* O.C.G.A. § 48-8-3(68.1)(D)(ii) (2019).

32. O.C.G.A. § 48-8-3(68.1)(A)–(C)(iii)(I) (2019).

33. O.C.G.A. § 48-8-3(68.1)(G)(v) (2019). Centers constructed in a county with a population greater than 50,000 must have aggregate expenditures on qualified purchases exceeding $250 million over the investment period. O.C.G.A. § 48-8-3(68.1)(G)(v)(1) (2019). Centers constructed in a county with a population less than 50,001 people but greater than 30,000 must have aggregate expenditures on qualified purchased exceeding $150 million over investment period. O.C.G.A. § 48-8-3(68.1)(G)(v)(2) (2019). Centers constructed in a county with a population less than 30,001 people must have aggregate expenditures on qualified purchased exceeding $100 million over investment period. O.C.G.A. § 48-8-3(68.1)(G)(v)(3) (2019).

new quality jobs must meet the same requirements as the quality jobs tax credit.[34]

The Department of Revenue recently adopted regulations to provide additional clarification for the exemption's enforcement and implementation.[35] The Department of Revenue began accepting electronic applications for the new exemption certificates on January 1, 2019.[36] Once approved, the Department of Revenue provides the high-technology data center a sales tax exemption certificate.[37] High-technology data centers must submit their annual report by April 30th of the year the exemption is claimed or will be claimed for the prior year.[38]

IV. GEORGIA INCOME TAXATION

The United States Congress enacted the Tax Cuts and Jobs Act of 2017 (TCJA)[39] during the survey period, which radically affected Georgia's income tax laws. Georgia has a "static conformity" provision, which means the state legislature must enact legislation each year to adopt the changes to the Internal Revenue Code (I.R.C.).[40] As discussed further below, Georgia's conformity provisions to the TCJA alter Georgia's existing regulations and how taxpayers calculate their state tax burdens.

---

34. O.C.G.A. § 48-8-3(68.1)(G)(vi) (2019) (citing O.C.G.A. § 48-7-40.17(a)(2) (2019)) (providing that the definition for "new quality job" is the same as for the quality job income tax credit).

35. GA. COMP. R. & REGS. 560-12-2-.117 (2019).

36. GA. COMP. R. & REGS. 560-12-2-.117(5)(a)(2) (2019). The application must include the high-technology center's legal name, mailing address, facility location, investment start date, Georgia income tax filing and payment history, the value of the center's title or interest in real property owned within Georgia, a limited waiver of confidentiality for the administration of the exemption, documents showing the likelihood of satisfying the minimum investment threshold, and any follow up documentation the Department requests. GA. COMP. R. & REGS. 560-12-2-.117(5)(a)(3) (2019).

37. GA. COMP. R. & REGS. 560-12-2-.117(5)(b) (2019).

38. O.C.G.A. § 48-8-3(68.1)(D)(i) (2019); GA. COMP. R. & REGS. 560-12-2-.117(7)(a)(1) (2019).

39. Pub. L. 115-97, 131 Stat. 2054 (2017).

40. O.C.G.A. §§ 48-1-2(14)–48-1-2(14.3) (2019) (providing the provisions not adopted for tax years beginning after December 31, 2007).

A. *Georgia Internal Revenue Code Conformity and Decoupling from Certain Tax Reform Provisions*

Applicable to tax years beginning on or after January 1, 2018, Georgia conforms to the Internal Revenue Code as of January 1, 2019, with certain exceptions and modifications.[41]

Georgia has not adopted the 20% qualified business income deduction pursuant to section 199A of the I.R.C.,[42] which provides S-Corporations, partnerships, sole proprietorships, and others a reduction in taxable income comparable to the federal reduction in corporate income tax.[43]

Additionally, Georgia did not adopt sections 163(e)(5)(F)[44] and 163(i)(1)[45] of the I.R.C., which grant modified rules for high yield, original issue discount obligations.[46]

Georgia modified the accelerated cost recovery system by excluding certain provisions.[47] Specifically, Georgia did not adopt I.R.C. section 168(m),[48] which provides a special allowance equal to 50% of a qualified reuse and recycling property's adjusted basis when calculating that property's I.R.C. section 167(a)[49] depreciation deduction.[50] Additionally, Georgia does not permit the special allowances provided to qualified property under I.R.C. § 168(k).[51] Furthermore, Georgia does not use the five-year depreciation life rules for new farming machinery or equipment as defined by I.R.C. § 168(e)(3)(B)(vii).[52]

Georgia did not adopt the new I.R.C. § 163(j),[53] which provided a 30% limitation on business interest and special provisions for electing real property trade or businesses.[54] Instead, Georgia continues to comply

---

41. During the survey period the General Assembly enacted two different conformity provisions: Ga. H.R. Bill 419, Reg. Sess., 2019 Ga. Laws 817; Ga. H.R. Bill 918, Reg. Sess., 2018 Ga. Laws 8. Georgia retained other modifications and exemptions to the IRC from prior provisions not discussed in this section. O.C.G.A. § 48-1-2(14) (2019).

42. I.R.C. § 199A (2019).

43. O.C.G.A. § 48-1-2(14).

44. *See* I.R.C. § 163(e)(5)(F) (2019).

45. *See* I.R.C. § 163(i)(1) (2019).

46. O.C.G.A. § 48-1-2(14). *See also* I.R.C. § 163(e)(5)(F).

47. *See generally* I.R.C. § 168 (2019).

48. I.R.C. § 168(m) (2019).

49. I.R.C. § 167(a) (2019).

50. O.C.G.A. § 48-1-2(14). *See also* I.R.C. § 168(m) (2019).

51. O.C.G.A. § 48-1-2(14). *See also* I.R.C. § 168(k) (2019).

52. O.C.G.A. § 48-1-2(14). *See also* I.R.C. § 168(e)(3)(B)(vii) (2019).

53. *See* I.R.C. § 163(j) (2019).

54. O.C.G.A. § 48-1-2(14).

with former I.R.C. § 163(j),[55] which only applies to interest paid by certain corporations.[56] Accordingly, for Georgia income tax purposes, taxpayers may continue to depreciate their assets regardless of the TCJA's modified I.R.C. § 163(j) and, consequently, are not subject to the alternative depreciation methods under I.R.C. § 168(g).[57]

Additionally, effective for tax years beginning on or after January 1, 2018, Georgia adopted the increased I.R.C. § 179[58] deduction of $1 million and the $2.5 million phaseout.[59] This deduction allows taxpayers to treat the cost of "Section 179 Property"[60] as an expense not chargeable to the capital account, and thereby, they are allowed to deduct it for the tax year the property is placed in service.[61] Nevertheless, Georgia did not expand Section 179 Property to include "qualified real property"[62] as provided under sections 179(d)(1)(B)(ii) and 179(f) of the I.R.C.[63]

B. State and Local Tax Cap Workaround Restrictions Affect Georgia's Existing Tax Credits

One of the more heavily criticized TCJA provisions is the state and local tax (SALT) deduction limitation.[64] To detail, individual taxpayers

55. I.R.C. § 163(j) (2017).

56. *Id.*

57. I.R.C. § 168(g) (2019).

58. I.R.C. § 179 (2017).

59. *Id.*

60. Section 179 Property is tangible property (as applicable under I.R.C. § 168 (2019)) or computer software (as defined in I.R.C. § 197(e)(3)(B) (2019), described in I.R.C. § 197(e)(3)(A)(i), and applicable under I.R.C. § 167 (2019)), which also meets the requirements of I.R.C. § 1245(a)(3) (2019), the taxpayer acquired for use in an active trade or business. I.R.C. § 179(d)(1) (2017).

61. I.R.C. § 179(a) (2017).

62. Qualified real property is the interior portion of non-residential property (excluding building enlargements, elevators, escalators, or internal structural framework) involving roofs, heating, ventilation, air-conditioning, fire protection, alarm systems, and security systems. *See* I.R.C. §§ 168(e)(6), 179(f) (2017).

63. Ga. H.R. Bill 419. I.R.C. § 179(d)(1)(B)(ii), (f) (2017). *See also* I.R.C. § 179(b) (2017).

64. *See, e.g.*, H.R. 1757, 116th Cong. (2019) (proposing increasing the deduction cap and allowing for increases based on inflation); Nicole Kaeding, *Testimony before the House Ways and Means Select Revenue Measures Subcommittee*, TAX FOUNDATION (Jun. 25, 2019), https://files.taxfoundation.org/20190625091113/Testimony-The-Impacts-of-Limiting-the-State-and-Local-Taxes-Paid-Deduction-SALT-Deduction.pdf; Xavier Becerra et. al., *Comments of the Attorneys General of New Jersey, California, Connecticut, and New York*, OFFICIAL WEBSITE FOR THE STATE OF NEW JERSEY (Oct. 11, 2018), https://www.nj.gov/oag/newsreleases18/IRS-REG-112176-18_Comment-of-NJ-CA-CT-NY-AGs.pdf.

are limited to deducting up to $10,000 for state and local income tax paid for the tax years beginning January 1, 2018 through December 31, 2025.[65] Considering the ramifications to state residents with high income tax rates, states such as New York, California, and New Jersey, initiated workarounds to the deduction limitation by creating charitable funds for state programs where resident donors would receive a state tax credit for a donation, effectively bypassing the deduction limitation.[66]

In response to states' workarounds, the Internal Revenue Service released temporary regulations seeking to prevent this workaround.[67] The Internal Revenue Service stated, "[W]hen a taxpayer receives or expects to receive a state or local tax credit in return for a payment or transfer to an entity listed in section 170(c), the receipt of this tax benefit constitutes a *quid pro quo* that may preclude a full deduction under section 170(a)."[68] In characterizing these entity level tax credits as *quid pro quo*, the proposed regulations require pass-through entities to pass the tax credit for federal purposes to the organization's members as a tax deduction subject to the cap.[69]

Notwithstanding this national debate, prior to the TCJA, Georgia enacted the Pay It Forward Scholarship[70] tax credit and Helping Enhance Access to Rural Treatment[71] (HEART) tax credit, which provide a tax credit for donors to qualified organizations under the two programs. In application, these credits operate similarly to the other states' SALT limitation workarounds, since both credits can provide an entity level tax credit against Georgia income for donations made by pass-through entities.[72] As a result, Georgia rural healthcare organizations and education advocates hope that the final regulations,

---

65. Kaeding, *supra* note 64, at 5.

66. *See generally* Jaye Calhoun, *States Work to Avoid Impact of TCJA Limitation on State and Local Tax Deduction and IRS Weighs in on Attempted Workarounds*, 38 ABA TAX TIMES 18 (2018).

67. *Contributions in Exchange for State or Local Tax Credits*, 83 Fed. Reg 43,563 (Aug. 27, 2018) (codified at Prop. Treas. Reg. § 1.170A-1(h)(3) (2018)).

68. *Id.* at 43,565.

69. *See* Prop. Treas. Regs. § 1.170A-1(h)(3)(ii) (2018).

70. *See* Ga. H.R. Bill 283, Reg. Sess., 2013 Ga. Laws 1061 (codified at O.C.G.A. § 48-7-29.16 (2013)) (providing for the Pay It Forward Scholarship tax credit).

71. Ga. S. Bill 258, Reg. Sess., 2016 Ga. Laws 166 (codified at O.C.G.A. § 48-7-29.20 (2016)) (providing for the HEART rural hospital tax credit).

72. *See* O.C.G.A. §§ 48-7-29.16(c), 48-7-29.20(c).

which are to be released after the survey period, will provide a safe harbor provision for state tax credits created prior to the new law.[73]

V. STATE TAX CREDITS

In consideration of Georgia's numerous tax credits recently revised and enacted,[74] this Article details the more substantive changes as well as recent developments with Georgia's more economically impactful credits.

A. Rural Economic Development Tax Credits

House Bill 224[75] modified several different tax credits intended to encourage rural Georgia economic development.[76] First, effective June 1, 2019,[77] taxpayers may claim a certified rehabilitation tax credit for rehabilitating historic structures and placing them in service. Taxpayers may continue claiming the credit two years after the original taxable year the credit was reserved.[78] Second, House Bill 224 modifies the quality jobs tax credit's qualification thresholds for employers in rural counties, effective for tax years beginning on or after January 1, 2020.[79] To detail, employers may claim the quality jobs tax credit when hiring or relocating jobs to rural counties, which are defined as having a population of less than 50,000 persons with 10% or more under the U.S. poverty line.[80] The hiring threshold varies, depending on the county's

73. *See generally* Public Comment from Daniel C. Langford, Jr., Mayor of Brooks, Georgia, REGULATIONS.GOV (Sept. 18, 2018), https://www.regulations.gov/document?D=IRS-2018-0025-7758 (supporting the Pay It Forward Tax Credit); Public Comment from Phoebe Sumter Medical Center, REGULATIONS.GOV (Sep. 13, 2018), https://www.regulations.gov/document?D=IRS-2018-0025-7757. *But see* Public Comment of the Law Office of Tim Schwartz, REGULATIONS.GOV (Oct. 10, 2018) https://www.regulations.gov/document?D=IRS-2018-0025-6652 (characterizing the Pay It Forward Tax Credit as a method to receive a federal subsidy to send their children to private schools); Public Comment from AASA, REGULATIONS.GOV (Oct. 8, 2018), https://www.regulations.gov/document?D=IRS-2018-0025-5130 (stating the Pay It Forward Scholarship as *quid pro quo* due to a 2017 marketing campaign stating, "[Y]ou will end with more money than when you started.").

74. *See Tax Credits Summaries*, GEORGIA DEPARTMENT OF REVENUE (Nov. 6, 2018), https://dor.georgia.gov/documents/tax-credit-summaries.

75. Ga. H.R. Bill 224, Reg. Sess., 2019 Ga. Laws 661 (codified at scattered provisions in O.C.G.A. tit. 48).

76. *Id.*

77. *Id.* § 4-1.

78. *Id.* § 1-1 (codified at O.C.G.A. § 48-7-29.8(b)(2019)).

79. *Id.* § 3-2 (codified at O.C.G.A. § 48-7-40.3 (2019)).

80. *Id.* § 2-1 (codified at O.C.G.A. § 48-7-40.17(a)(6)).

state-designated tier status.[81] Lastly, House Bill 224 revised the Georgia investment tax credit, which specifically allows taxpayers that operate existing manufacturing or telecommunications facilities in Georgia's rural counties for the previous three years to obtain a credit against their Georgia income tax liability.[82] The credit ranges from one to five percent of qualified property; however, the credit can be increased to as much as 8% for investment in recycled or pollution control equipment and for conversion of a defense plant to manufacturing a new product.[83] To claim the credit, the taxpayer's qualified investment property must have a value of $50,000 or more; however, the standard valuation requirement increases to $100,000 for tax years beginning on or after January 1, 2020.[84] Finally, the statute provides an allocation cap for the rural tax credit of $10 million per year in aggregate and $1 million per taxpayer, per year cap.[85]

B. Georgia Musical Tax Credit

Attempting to replicate the Film Tax Credit's success, the General Assembly enacted the House Bill 155,[86] the Georgia Musical Investment Act, for touring musical or theatrical productions and recorded musical performances. Specifically, an eligible taxpayer is allowed income tax credit equal to 15% of its "qualified production expenditures"[87] in Georgia.[88] The credit may be increased by an additional 5% for expenses incurred in Georgia's least developed counties.[89] The credit will be awarded on a first-come, first-served basis; however, no taxpayer may

---

81. *Id.*

82. *Id.* part 3, §§ 3-1–3-3 (codified at O.C.G.A. § 48-7-40.2(a)(7), 48-7-40.3(a)(7), 48-7-40.4(b) (2019)).

83. *See* O.C.G.A. § 48-7-40.2(b) (2019).

84. *See* O.C.G.A. § 48-7-40.2(c)(1) (2019).

85. Ga. H.R. Bill 224, Reg. Sess., 2019 Ga. Laws 661 §§ 3-1–3-2 (codified at O.C.G.A. §§ 48-7-40.2(c)(2)(B)(ii), 48-7-40.3(c)(2)(B)(ii) (2019)). If the $10 million cap is reached, the allocation will be prorated among all applicants. *Id.*

86. Ga. H.R. Bill 155, Reg. Sess., 2017 Ga. Laws 574 (codified at O.C.G.A. § 48-7-40.33 (2017)).

87. Qualified production expenditures include costs for recording, studio and music equipment rentals, set construction and operation, wardrobe, makeup, accessories, photography, lighting, editing, vehicle and transportation costs, food and lodging, payments to employees, talent and producers or their loan outs, insurance and bonding, and other direct costs of production in accordance with generally accepted music industry practices. O.C.G.A. § 48-7-40.33(b)(4)(A) (2019).

88. Ga. H.R. Bill 155, Reg. Sess., 2017 Ga. Laws 574 § 1 (codified at O.C.G.A. § 48-7-40.33(c)(1) (2019)).

89. *Id.* (codified at O.C.G.A. § 48-7-40.33(c)(2) (2019)).

claim more than 20% of the annual credit allocation.[90] Additionally, certain spending thresholds must be met, ranging from $100,000 to $500,000.[91] Unlike the film tax credit, the music tax credit is capped annually, with the cap set at $5 million for 2018, $10 million for 2019, and $15 million thereafter until the credit sunsets in 2023. Accordingly, Georgia limits the value of the credit to the taxpayer's Georgia income tax or employer withholding tax liability over a six-year period.[92]

C. Preceptor Tax Incentive Program Tax Credit

During the 2014 session, the General Assembly created the nation's first preceptor tax incentive program (PTIP),[93] which granted uncompensated faculty physicians a reduction in taxable income for training medical systems in a qualified clerkship.[94] In an effort to further bolster medical training for Georgia practitioners, House Bill 287[95] replaced the law underlying the original program and expanded the program's scope to include other medical professionals and converted the reduction to taxable income into a nonrefundable tax credit.[96] The new PTIP applies to tax years beginning on or after January 1, 2019, and ending on or before December 31, 2023.[97]

The new PTIP legislation enables eligible community-based faculty preceptors to receive a tax benefit if they conduct a preceptorship rotation.[98] For these purposes, Georgia law expands the definition of eligible preceptor to include any Georgia licensed physician, advanced practice registered nurse, or physician assistant.[99] Further, like the prior program, the medical professional cannot receive compensation

---

90. *Id.* (codified at O.C.G.A. § 48-7-40.33(e)(1) (2019)).

91. *Id.* (codified at O.C.G.A. § 48-7-40.33(b)(7) (2019)). For musical or theatrical productions, $500,000 during a taxable year. O.C.G.A. § 48-7-40.33(b)(7)(A) (2019). For a recorded musical performance incorporated into a film, television, or digital interactive entertainment production, $250,000 during a taxable year. O.C.G.A. § 48-7-40.33(b)(7)(B) (2019). For any other kind of recorded musical performance, $100,000 during a taxable year. *Id.*

92. Ga. H.R. Bill 155, Reg. Sess., 2017 Ga. Laws 575 § 1 (codified at O.C.G.A. § 48-7-40.33(d) (2019)).

93. O.C.G.A. § 48-7-27(a)(13.2) (2018) (repealed by Ga. H.R. Bill 287, § 3).

94. *Id.*

95. Ga. H.R. Bill 287, Reg. Sess., 2019 Ga. Laws 195 (codified at O.C.G.A. §§ 48-7-27, 48-7-29.22 (2019)).

96. *Id.* §§ 3–4.

97. *Id.* § 5.

98. O.C.G.A. § 48-7-29.22(b)(1) (2019).

99. O.C.G.A. § 48-7-29.22(a)(2) (2019) (relying on the medical practice licensing board's definitions for these terms).

associated with the training or teaching of students, including outside this program.[100] These students, who must be enrolled in a Georgia medical, osteopathic, physician assistant, or nurse practitioner program, still must receive 160 hours of training under the preceptor.[101]

D. Increased Funding Cap for the Qualified Educational Tax Credit

House Bill 217[102] modified Georgia's qualified education tax credit, created new sales tax exemptions for scholarship organizations, established expenditure limitations, provided additional reporting and audit requirements, and modified the Public Education Innovation Fund Foundation.[103] The bill expanded the qualified educational tax credit's funding from $58 million to $100 million dollars for tax years beginning on and after January 1, 2019 until December 31, 2028. The expanded credit returns to $58 million for tax years beginning after January 1, 2029.[104] Additionally, House Bill 217 created a sales and use tax exemption for noncommercial written materials or mailings by any tax-exempt organization under I.R.C. section 501(c)(3) from July 1, 2018 until July 1, 2021. To exercise this exemption, a qualified organization must pay the sales or use tax at retail then file a claim for refund with the Department of Revenue.[105]

VI. STATE TAX CONTROVERSY

A. New Cingular Wireless PCS, LLC v. Georgia Department of Revenue

Recent tax developments have overshadowed a long-standing dispute between AT&T and the Georgia Department of Revenue (Department of Revenue) regarding whether a dealer could request a refund for improperly collected and remitted sales taxes on behalf of its

100. O.C.G.A. § 48-7-29.22(a)(6) (2019). *See also Preceptor Registration Form*, AUGUSTA UNIVERSITY, https://formstack.io/60EAD (last visited Nov. 11, 2019).

101. O.C.G.A. § 48-7-29.22(a)(1), (3)–(6) (2019). Augusta University maintains a list of approved programs. *See Eligibility*, AUGUSTA UNIVERSITY, https://www.augusta.edu/ahec/ptip/eligibility.php (last visited Nov. 11, 2019).

102. Ga. H.R. Bill 217, Reg. Sess., 2018 Ga. Laws 644 (codified at O.C.G.A. §§ 48-7-29.16, 20-2A-2, 20-2A-3 (2019)).

103. *Id.*

104. *Id.* § 1 (codified at O.C.G.A. § 48-7-29.16(f)(1) (2019)). For the 2019 credit, preapproved applications processed through June 18, 2019 account for $98,546,678 of the $100 million of funding. *See 2019 Qualified Education Expense Tax Credit*, GEORGIA DEPARTMENT OF REVENUE (Jun. 18, 2019), go to https://dor.georgia.gov/documents/qualified-education-expense-tax-credit and select "report's title."

105. *Id.*

customers.[106] The Department of Revenue promulgated regulations under Official Code of Georgia (O.C.G.A.) section 48-2-35.1[107] to provide procedures for requesting a refund under the statute. In the regulations, the Department of Revenue required the dealer to refund its customers prior to requesting a reimbursement for taxes paid.[108]

Between November 1, 2005 and September 7, 2010, AT&T and its subsidiaries (AT&T) improperly collected sales tax on wireless internet access services, which under O.C.G.A. § 48-8-2[109] is exempt from state sales tax.[110] After a federal class action lawsuit ending in a settlement agreement, AT&T filed requests for refunds in November of 2010 for these taxes paid on behalf of their customers.[111] On March 19, 2015, the department officially denied the request.[112]

The Dekalb County Superior Court dismissed AT&T's subsequent complaint due to a lack of standing for two reasons. First, O.C.G.A. § 48-2-35.1 was not in effect prior to May 5, 2009.[113] Second, the entire claim violated Georgia's class action statute because AT&T represented a class of similarly situated taxpayers.[114] AT&T appealed the decision to the court of appeals, which unanimously affirmed.[115]

On appeal, the Georgia Supreme Court ruled in favor of AT&T, holding that the Department of Revenue's interpretation of its

---

106. *See* New Cingular Wireless PCS, LLC vs. Ga. Dep't of Revenue, No. 15CV4536 (Dekalb Super. Ct. Mar. 17, 2016), *aff'd*, 340 Ga. App. 316, 797 S.E.2d 190 (2017); New Cingular Wireless PCS, LLC v. Ga. Dep't of Revenue, 303 Ga. 468, 813 S.E.2d 388 (2018), *vacated in part and rev'd in part*, 348 Ga. App. 516, 823 S.E.2d 833 (2019); *see also* O.C.G.A. § 48-2-35.1(d) (2019).

107. O.C.G.A. § 48-2-35.1 (2019).

108. GA. COMP. R. & REGS. 560-12-1-.25(2) (2019) ("In the case of taxes illegally or erroneously collected, the dealer may secure a refund . . . provided, however, the dealer must affirmatively show that the tax so illegally or erroneously collected was paid by him and not paid by the consumer, or that such tax was collected from the consumer as tax and has since been refunded to the consumer."). *See also New Cingular Wireless*, 340 Ga. App. at 319 ("The Department asserts that . . . before seeking a refund on behalf of their customers . . . the appellants were required to affirmatively show that the alleged erroneously or illegally collected tax had been refunded by them to their customers.").

109. O.C.G.A. § 48-8-2 (2019).

110. *New Cingular Wireless*, 303 Ga. at 470, 813 S.E.2d at 391.

111. *New Cingular Wireless*, 340 Ga. App. at 316, 797 S.E.2d at 191.

112. *New Cingular Wireless*, 303 Ga. at 469, 813 S.E.2d at 390 (quoting *New Cingular Wireless*, 340 Ga. App. at 316, 797 S.E.2d at 191).

113. *New Cingular Wireless*, 348 Ga. App. at 519, 823 S.E.2d at 836.

114. *New Cingular Wireless*, 340 Ga. App. at 316, 797 S.E.2d at 191.

115. *Id.* The Georgia Court of Appeals noted it would not address the class action question or standing question. *Id.* at 317, 797 S.E.2d at 192. For more information about this decision, see Alewine et al., *supra* note 1, at 21–22.

regulation was unreasonable for three reasons.[116] First, the supreme court held that the plain language of the regulation did not support the Department of Revenue's interpretation.[117] The supreme court emphasized that it must

> "construe the [regulation] according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage . . . [and] effectuate the intent of the Georgia legislature . . . [by considering] the entire scheme of the statute and attempt[ing] to gather the legislative intent from the statute as a whole."[118]

As such, the supreme court noted that the regulation only required a dealer to pay any refund to its customers prior to the point that the dealer acquires repayment from the Department of Revenue.[119] The regulation did not, as the Department of Revenue insisted, require "a dealer to repay funds to its customers prior to filing a request for a refund or prior to the department's determination of whether or not any refund is due."[120] Accordingly, requiring repayment prior to filing a request for refund was "an extraneous prerequisite that the Department has superimposed on the statute and its own regulation."[121]

Second, the supreme court held that if the regulation and statute were ambiguous, the department's construction "would upend this orderly and logical refund process" and was therefore unreasonable.[122] The supreme court stated that a state agency must resolve ambiguity in reasonable terms with respect to the statute.[123] To contrast, the structure proposed by the department required dealers to repay customers potentially millions of dollars prior to actually knowing whether they would receive the refund.[124] Consequently, the supreme court ruled that the department's process was "illogical, and creates a strong disincentive for dealers to seek refunds on behalf of

---

116. *New Cingular Wireless*, 303 Ga. at 471, 813 S.E.2d at 392.

117. *Id.*

118. *Id.* at 472, 813 S.E.2d at 392. (quoting Georgia Department of Community Health v. Northside Hospital, 295 Ga. 446, 450, 761 S.E.2d 74, 77 (2014)).

119. *Id.* (citing O.C.G.A. § 48-2-35 (2017)).

120. *Id.* (emphasis omitted).

121. *Id.*

122. *Id.* (citing O.C.G.A. § 48-2-35(c) (2017)).

123. *Id.* at 472–73, 813 S.E.2d at 392–93 (quoting Tibbles v. Teachers Ret. Sys. of Ga., 297 Ga. 557, 558–59, 775 S.E.2d 527, 529 (2015)).

124. *Id.* at 473, 813 S.E.2d at 393.

customers."[125] Put simply, the department's regulations undercut the statute's clear intent.[126]

Finally, the supreme court rebuked both the court of appeals and trial court for their reliance on the AT&T settlement agreement terms, which gave rise to the initial request for refund.[127] The supreme court attested that "[p]arties to a lawsuit have no power to fix the meanings of legislative or regulatory enactments by their agreements."[128] Separately, the supreme court remanded the question of whether AT&T had standing for tax periods prior to May 5, 2009, and whether the action violated Georgia's class action statutes.[129]

On remand, the court of appeals held that AT&T did not have standing for the periods in question, concluding that the statute provided a new right to request a refund on behalf of its customers that AT&T did not possess prior to May 5, 2009.[130] Because the law did not apply retroactively, AT&T lacked standing for taxes improperly collected between November 1, 2005 and May 4, 2009.[131]

Nevertheless, the court of appeals agreed that the trial court erred in its determination that the refund action was a class-action suit barred by Georgia law, providing that AT&T was not seeking a refund for similarly situated taxpayer–dealers, but solely for its customers. Accordingly, the court of appeals reversed the trial court's determination as to tax payments taking place after May 5, 2009.[132]

B. Sewon America, Inc. v. Commissioner

Although the Georgia Tax Tribunal issued its opinion outside the survey period, the lasting implications as to how the tribunal will review administrative guidance and regulations, pursuant to its decision in *Sewon America, Inc. v. Commissioner*,[133] remain. The tribunal in *Sewon America* addressed whether the department's regulations for the Quality Jobs Tax Credit (QJTC) were a valid exercise of statutory authority.[134] Relying on *Tibbles v. Teachers*

---

125. *Id.*
126. *Id.*
127. *Id.* at 473–74, 813 S.E.2d at 393.
128. *Id.*
129. *Id.* at 474, 813 S.E.2d at 393.
130. *New Cingular Wireless*, 348 Ga. App. at 520, 828 S.E.2d at 837.
131. *Id.* at 520–21, 828 S.E.2d at 838.
132. *Id.* at 521–22, 828 S.E.2d at 838.
133. No. 1627180, slip op. (Ga. Tax Trib. Jan. 24, 2017).
134. *Id.* at 9.

Retirement System of Georgia,[135] the tax tribunal held it was to interpret state tax regulations using federal jurisprudence established by the Supreme Court of the United States in *Chevron U.S.A., Inc. v. National Resource Defense Council*,[136] instead of comparable state precedent.[137]

While Georgia courts use a similar two-step approach,[138] the tribunal made a notable deviation by adopting federal common law to interpret state law. For example, the tax tribunal relied on Judge Posner's opinion in *Lantz v. Commissioner*[139] for its understanding on statutory silence instead of a comparable Georgia Supreme Court or Georgia Court of Appeals decision.[140] The tax tribunal's reference to state jurisprudence was limited to validity. The state uses a similar two-step process, but it is not used to interpret these two steps.[141] Practitioners should be aware that the tribunal relies on a general federal jurisprudence—like the United States Tax Court[142]—for interpreting a state tax regulation's validity.

---

135. 297 Ga. 557, 775 S.E.2d 527.

136. 467 U.S. 837 (1984).

137. *Sewon America*, slip op. at 9 & n.3. *See also* Jennifer B. Alewine, Courtney E. Ferrell & Erin G. Watstein, *Administrative Law, Annual Survey of Georgia Law*, 68 MERCER L. REV. 59, 63 (2016).

138. *See* David E. Shipley, *The Chevron Two-Step in Georgia's Administrative Law*, 46 GA. L. REV. 871, 888–916 (2012).

139. 607 F.3d 479 (7th Cir. 2010).

140. *Sewon America*, slip op. at 10–11.

141. *See id.* at 9–13.

142. *See e.g.*, Golsen v. Comm'r, 54 T.C. 742 (1970) (adopting the United States Court of Appeals for the Tenth Circuit's opinion in Goldman v. United States, 403 F.2d 776 (10th Cir. 1968), as its national jurisprudence in all circuits without a contrary opinion, such as the United States Court of Appeals for the Fifth Circuit, and reversing Lawrence v. Comm'r, 27 T.C. 713 (1957), for that purpose).