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State and Local Taxation

Brian Sengson*

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I. INTRODUCTION

This Article surveys the most critical and comprehensive changes in Georgia law occurring between June 1, 2020 and May 31, 2021.¹ Most notably, this Article discusses Georgia's continued response to the Coronavirus (COVID-19); pass-through entity election for the state and local tax deduction cap workaround; amendments to deference accorded to determinations and interpretations issued by the Georgia Department of Revenue (Department); and other important topics impacting income tax, sales tax, and tax controversy.

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1. For an analysis of state and local tax during the prior survey period, see Brian Sengson, DiAndria Green, Blake Joiner, and David Greenberg, *State and Local Taxation, Annual Survey of Georgia Law*, 72 MERCER L. REV. 287 (2020).

II. GEORGIA INCOME TAXATION

*A. Georgia Updates Federal Conformity***1. House Bill 846 Updates Conformity to March 2020**

On June 30, 2020, Governor Brian Kemp signed House Bill 846.² The Bill revises Chapter 1 of Title 48 to incorporate certain provisions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), and adopts the Internal Revenue Code (IRC) as of March 27, 2020.³ The amendment continues to exclude previously enumerated provisions of the IRC and adopts new provisions enacted through the CARES Act.⁴ Notably, H.B. 846 expressly decouples from the CARES Act amendments to IRC sections 172 and 461(l).⁵

H.B. 846 expressly rejects CARES Act amendments relating to modifications for net operating losses (NOL) under IRC § 172.⁶ There are two notable provisions relating to federal treatment of NOLs under the CARES Act that were not incorporated through H.B. 846.⁷ First, the CARES Act temporarily repealed the taxable income limitation under IRC § 172(a) and (b).⁸ For tax years beginning before January 1, 2021, the CARES Act amended IRC § 172(a) by striking the language “an amount equal to” and inserting expanded provisions applicable to each tax year.⁹ Second, the CARES Act amended the IRC to allow a temporary modification of rules relating to NOL carrybacks.¹⁰ Specifically, the CARES Act enacted a special rule for losses arising in 2018, 2019, and 2020.¹¹

In the case of any net operating loss arising in a taxable year beginning after December 31, 2017, and before January 1, 2021—such loss shall be a net operating loss carryback to each of the 5 taxable years preceding the taxable year of such loss, and subparagraphs (B) and (C)(i) shall not apply.¹²

2. Ga. H.R. Bill 846, Reg. Sess., 2020 Ga. Laws 411 (codified at O.C.G.A. § 48-1-2(14) (2021)).

3. *Id.*

4. *Id.*

5. *Id.*; see also C.A.R.E.S. Act, Pub. L. No. 116–136, 134 Stat. 281, § 2303 (2020).

6. C.A.R.E.S. Act § 2303.

7. Ga. H.R. Bill 846 § 1-1.

8. C.A.R.E.S. Act § 2303(a)(1).

9. *Id.*

10. *Id.*

11. I.R.C. § 172(a) (2021).

12. C.A.R.E.S. Act § 2303(b)(1)(D)(i)(1) and (2).

The CARES Act also amended IRC § 461(l) concerning modification of limitations on losses for taxpayers and other corporations.¹³ Notably, the CARES Act made temporary, substantive modifications to the IRC's limitation on excess business losses of noncorporate taxpayers.¹⁴ Like IRC § 172, H.B. 846 expressly decouples from the CARES Act amendments to IRC § 461(l).¹⁵ The statutory amendments to Official Code of Georgia Annotated § 48-1-2(14) apply to all taxable years beginning on or after January 1, 2019.¹⁶

2. House Bill 265 Updates Conformity to January 1, 2021

With the passage of the federal Consolidation Appropriations Act (CAA), effective December 21, 2020, Georgia updated House Bill 265 to conform to the IRC as of January 1, 2021.¹⁷ H.B. 265 does not provide new decoupling from existing Georgia law. However, Georgia's conformity to CAA confirms the deductibility of expenses paid with proceeds from forgiven loans under the Paycheck Protection Program.¹⁸

H.B. 265 does not address conformity to IRC amendments resulting from the passage of the American Rescue Plan Act of 2021 (ARPA), which was signed into law on March 11, 2021. Therefore, unemployment income remains taxable at the state level and is included in a taxpayer's income reported on a Georgia individual's income tax return.¹⁹

B. Georgia's Elective Pass-Through Entity Tax Regime

The Tax Cuts and Jobs Act of 2017 (TCJA)²⁰ limits an individual's deduction for state and local taxes paid during the calendar year.²¹ For tax years beginning after December 31, 2017, and before January 1, 2026, the deduction is limited to \$10,000 (State and Local Taxes (SALT) Cap).²² The TCJA did not limit the SALT deduction for business entities but did put businesses structured as pass-through entities (PTEs) at a

13. *Id.* § 2304.

14. *Id.*

15. Ga. H.R. Bill 846 § 1-1.

16. *Id.*

17. Ga. H.R. Bill 265, Reg. Sess., 2021 Ga. Laws 3 (codified at O.C.G.A. § 48-1-2 (2021)).

18. Ga. Dep't of Revenue, *Income Tax Federal Tax Changes*, DEP'T OF REVENUE, <https://dor.georgia.gov/rules-policies/income-tax/income-tax-federal-tax-changes> (last visited Aug. 1, 2021).

19. *Id.*

20. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054, § 11042 (2017).

21. *Id.*

22. *Id.*

disadvantage. PTEs, such as partnerships and S-corporations, are therefore subject to the \$10,000 SALT Cap for state and local income.²³

Initially, states attempted to mitigate the impact of the SALT Cap by engineering workarounds, such as state tax credits through charitable contributions. These workarounds were initially rejected by the U.S. Department of the Treasury and the IRS.²⁴ More recently, the IRS issued Notice 2020-75 in November 2020, announcing that the Treasury and IRS plan to issue proposed regulations to clarify that state and local income taxes imposed on and paid by partnerships and S-corporations are not subject to the \$10,000 SALT Cap for their partners or shareholders.²⁵ Accordingly, states have begun passing legislation allowing PTE owners to elect to be taxed at the entity level.²⁶ Georgia is one of the latest states to join this trend with House Bill 149.²⁷

Effective May 4, 2021, H.B. 149 permits Georgia qualified Subchapter S-corporations and partnerships to elect to pay Georgia income tax at the entity level.²⁸ The new law allows individual Georgia residents to avoid the federal \$10,000 SALT Cap. Electing PTEs will continue computing net income pursuant to the entities' relevant rules and will pay a 5.75% tax²⁹ on Georgia-source net income pursuant to the corporate allocation and apportionment rules.³⁰ Electing PTEs are not permitted any credits or deductions for other state income or gross receipts taxes paid pursuant to O.C.G.A. §§ 48-7-27(d) and 48-7-28.³¹ The election is available for tax years on or after January 1, 2022, and must be filed annually on or before

23. *Id.*

24. Internal Revenue Service, *Treasury, IRS Issue Proposed Regulations on Charitable Contributions in State and Local Tax Credits*, IRS, <https://www.irs.gov/newsroom/treasury-irs-issue-proposed-regulations-on-charitable-contributions-and-state-and-local-tax-credits> (last visited Aug. 19, 2021).

25. I.R.S. Notice 2020-75, 2020-49 I.R.B. 1453.

26. See Walter Hellerstein and Andrew Appleby, *State Tax Credit Issues Raised by SALT Cap Workaround Legislation*, TAX NOTES STATE (Jan. 14, 2021).

27. Ga. H.R. Bill 149, Reg. Sess., 2021 Ga. Laws 164 (codified at O.C.G.A. §§ 48-7-21, 48-7-23, 48-7-24, 48-7-27, 48-7-100, 48-7-129 (2021)).

28. *Id.* Qualified Subchapter S-corporations must be wholly and directly owned by persons eligible to be shareholders of an S-corporation under I.R.C. § 1361 (2021).

29. O.C.G.A. § 48-7-20 (2021). The corporate income tax rate is calculated pursuant to § 48-7-21. To contrast, Georgia's current highest individual income tax rate is 5.5% and is expected to drop to 5.375% once the tax becomes effective. *Id.*

30. O.C.G.A. §§ 48-7-21(b)(B)(7)(C)(ii), 48-7-23(b)(3) (2021). The computation of net income for electing S corporations will be computed under O.C.G.A. § 48-7-21. The computation of net income for electing partnerships will be computed under O.C.G.A. § 48-7-23.

31. O.C.G.A. §§ 48-7-27(d), 48-7-28.

the return filing due date, including extensions. PTEs with corporate members are not permitted to make the election.³²

Unlike most state SALT Cap workarounds, H.B. 149 bars a resident PTE member from taking credits for other state entity-level income taxes paid.³³ Instead, the income taxed under Georgia PTE tax is excluded from the PTE member's calculation of taxable net income.³⁴ Further, partners to the electing partnerships are subsequently excluded from the income tax filing requirements for resident partners to a nonresident partnership, or nonresident partners to a resident partnership pursuant to O.C.G.A. § 48-7-24.³⁵ Similarly, partners or shareholders of electing partnerships or S-corporations are excluded from the withholding tax on distributions to nonresident partners, shareholders, or members under O.C.G.A. § 48-7-129.³⁶ In effect, Georgia residents will not be subject to Georgia tax on income apportioned to other states. The Department has not yet issued any relevant regulations, instructions, or forms.

C. Updated Electronic Signature Requirements

On November 10, 2020, the Department issued Policy Bulletin ADMIN-2020-02 to clarify and update some of its requirements for electronic signatures.³⁷ One important update is that taxpayers are automatically accepted into the Georgia electronic filing program if they are accepted by the IRS and have provided a properly executed IRS Form 8879 for the federal return.³⁸ In the event a taxpayer has not been accepted into the IRS e-filing program or has not provided a properly executed IRS Form 8879, the general requirements for electronic signatures still apply for Georgia.³⁹ Specifically, the Department accepts electronic signatures that are on acceptable forms;⁴⁰ demonstrate an

32. O.C.G.A. §§ 48-7-21(b)(B)(7)(C)(vi), 48-7-23(b)(7).

33. O.C.G.A. §§ 48-7-21(b)(B)(7)(C)(iii), 48-7-23(b)(4).

34. O.C.G.A. §§ 48-7-21(b)(B)(7)(C)(ii), 48-7-23(b)(3). This mechanism under Georgia's PTE tax regime deviates from the *Rosenberg* decision, which articulates the exclusion from federal adjusted gross income for PTE members when such entities are subject to an entity-level tax on or measured by income in another state. See *Rosenberg v. MacGinnittie*, No. TAX-IIT-1414626 (Ga. Tax Trib. Nov. 25, 2014).

35. O.C.G.A. § 48-7-24(a) (2021).

36. O.C.G.A. § 48-7-129(a)(1).

37. Ga. Dep't of Revenue, Policy Bulletin ADMIN-2020-02 (Nov. 10, 2020).

38. *Id.*

39. *Id.*

40. *Id.* An acceptable form includes a typed name within or attached to the electronic document being submitted to Department; a scanned or digitized image of a handwritten signature attached to the electronic document; a handwritten signature input on an

intent to sign; evidence an association or connection between the e-signature and the document; contain an authenticated signature; and preserve the document's integrity.⁴¹

D. Taxpayer-Favorable Changes to Jobs and Quality Jobs Tax Credits

1. Personal Protective Equipment Manufacturing Credit Increase

As part of Georgia's COVID-19 relief efforts, H.B. 846 provides an additional \$1,250 job tax credit for personal protective equipment (PPE) manufacturers.⁴² The credit is effective from January 1, 2020 through December 31, 2024.⁴³ Taxpayers must qualify for the original Jobs Tax credit and must engage in PPE manufacturing activities in Georgia during the tax year that the taxpayer claims the additional credit.⁴⁴ Upon claiming the credit, taxpayers are required to attach a schedule to the respective Georgia income tax return providing specific information, including but not limited to, the number of jobs claimed pursuant to this credit provision and verification that the taxpayer is a PPE manufacturer.⁴⁵ The credit can be used to offset a taxpayer's entire Georgia income tax liability or to offset against Georgia payroll withholding tax liability.⁴⁶ Unused credits may be carried forward for up to ten years.⁴⁷

2. Election to Carry-Over 2019 Credit for 2020 and 2021 Tax Years

H.B. 846 also amends the Georgia Jobs and Quality Jobs Tax credit to permit taxpayers that claimed either credit during the 2019 tax year to utilize the same number of jobs claimed in that year for the 2020 and 2021 tax years.⁴⁸

electronic signature pad; or a handwritten signature, mark, or command input on a display screen by means of a stylus device.

41. *Id.*

42. O.C.G.A. § 48-7-40.1A(b)(1) (2021).

43. O.C.G.A. §§ 48-7-40.1A(d), 48-7-40.1A(e).

44. O.C.G.A. § 48-7-40.1A(b)(1)

45. O.C.G.A. § 48-7-40.1A(c)(1).

46. O.C.G.A. § 48-7-40.1A(c)(2).

47. *Id.*

48. O.C.G.A. §§ 48-7-40(m), 48-7-40.1(k), 48-7-40.17(i) (2021).

III. GEORGIA SALES AND USE TAXATION

A. Sales Tax and Direct Pay Permits

1. Payments of Refunds by Political Subdivisions

H.B. 846 amended Chapter 2 of Title 48, concerning the payment of final refund amounts resulting from an audit by the Department.⁴⁹ Political subdivisions are now afforded the option to repay a taxpayer over time when a refund is owed from an overpayment of taxes pursuant to a direct pay permit issued in accordance with O.C.G.A. § 48-8-49.1.⁵⁰ The political subdivision may elect to repay a taxpayer the final refund amount owed, including applicable interest “over a time period less than or equal to the total duration of the periods subject to the [refund claim.]”⁵¹ The political subdivision must make the election within thirty days of being notified “of the final refund amount for which the political subdivision is responsible.”⁵² Upon making the election, refund payments must be made in monthly installments, due on or before the fifteenth day of the month.⁵³

H.B. 846 also amends O.C.G.A. § 48-2-35.1(a) to provide for the payment of interest.⁵⁴ When a political subdivision elects to repay a taxpayer in the manner prescribed in O.C.G.A. § 48-8-49.1, interest is to accrue on the unpaid balance.⁵⁵ Interest is to be paid on the overpayment or fees and shall begin to accrue from the date an amended return or refund claim is filed.⁵⁶

2. Direct Pay Permits

H.B. 846 amends Title 48 to add a new code section relating to direct pay permits.⁵⁷ Direct pay permits allow a “qualified taxpayer” to accrue and pay sales taxes directly to the Department.⁵⁸ A “qualified taxpayer is defined as a taxpayer that: (1) purchased more than \$2 million of tangible personal property (TPP) in the prior twelve months; (2) purchased an annual average amount exceeding \$2 million of TPP during

49. Ga. H.R. Bill 846 § 1-2 (codified at O.C.G.A. § 48-2-35(h)(1)(C) (2021)).

50. O.C.G.A. § 48-2-35(h)(1)(C)(i).

51. *Id.*

52. *Id.*

53. O.C.G.A. § 48-2-35 (h)(2)(C)(ii).

54. Ga. H.R. Bill 846 § 1-3 (codified at O.C.G.A. § 48-2-35.1(a)(2) (2021)).

55. O.C.G.A. § 48-2-35 (h)(2)(C)(ii).

56. O.C.G.A. § 48-2-35.1(a)(2).

57. Ga. H.R. Bill 846 § 1-4(B).

58. *See also* O.C.G.A. § 48-8-49.1(a) (2021); Ga. H.R. Bill 846 § 1-4(A)(1)–(2).

the prior thirty-six months; or (3) met a lower purchase threshold prescribed by the Department.”⁵⁹ In addition to meeting one of the above requirements, the taxpayer’s industry classification code must be equivalent to one of the statutorily enumerated North American Industry Classification Systems (NAICS) codes or a code otherwise determined by the Department.⁶⁰

The new statute also identifies purchases where a direct pay permit does not apply. These purchases include certain fuel purchases; purchases of meals, beverages, and tobacco; certain telephone, transportation, and lodging services; certain purchases relating to entertainment; and certain purchases relating to rental charges for motor vehicles.⁶¹ Additionally, the bill provides that taxpayers are not required to waive interest on refunds under O.C.G.A. § 8-2-35 as a condition for obtaining a direct pay permit.⁶²

B. Sales Tax Policy Bulletins

The Department issued several sales and use tax Policy Bulletins. A Policy Bulletin lacks the force or effect of law and is not binding on the public. It is, however, the Department’s position and is binding on agency personnel until superseded or modified by a change in statute, regulation, court decision, or subsequent Policy Bulletin.⁶³

1. SUT-2017-07 Exemption for Admission to Certain Performances and Exhibitions, revised May 28, 2021.

Effective July 1, 2021 to December 31, 2022, the “sales of tickets, fees, or charges for admission to fine arts performances or exhibitions that are performed or exhibited by, or within a facility owned by, an organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code or a museum of cultural significance” are exempt from the sales tax.⁶⁴

2. SUT-2021-01 Exemption for Nonresident Purchases of Mechanically Propelled Watercraft.

Effective May 7, 2021, Georgia allows a sales and use tax exemption for mechanically propelled watercraft sold to individuals, not business

59. O.C.G.A. § 48-8-49.1(a)(2)(A).

60. O.C.G.A. § 48-8-49.1(a)(2)(B).

61. O.C.G.A. § 48-8-49.1(b)(1)–(5).

62. O.C.G.A. § 48-8-49.1(c).

63. O.C.G.A. § 50-13-3 (2021).

64. Ga. Dep’t. of Revenue, Policy Bulletin SUT-2017-07 Exemption for Admission to Certain Performances and Exhibitions (2021).

entities, who reside outside of Georgia. The individual must immediately transport the watercraft outside of Georgia and use it exclusively outside of Georgia; provide Form ST-W8 to the Georgia dealer; and the Georgia dealer must report the information about the sale and the individual's residency to the Department.⁶⁵ Beginning March 31, 2022, Georgia dealers will also be required to annually report, on the Georgia Tax Center (GTC) website, "information that is collected on Form ST-W8 from nonresidents making exempt purchases during the previous calendar year."⁶⁶

3. SUT-2017-02 Exemption for Qualified Food Banks, revised August 11, 2020.

Previously under O.C.G.A. § 48-8-3(57.1), sales of food and food ingredients to a qualified food bank were exempt from sales and use tax until June 30, 2021. Senate Bill 104 was signed on August 5, 2020 and extends the exemption indefinitely.⁶⁷

4. SUT-2017-03 Exemptions for Nonprofit Volunteer Health Clinics and Nonprofit Health Centers, revised August 11, 2020.

Previously under O.C.G.A. § 48-8-3(7.3), sales of tangible personal property to a nonprofit volunteer health clinic were exempt from sales and use tax until June 30, 2024. Senate Bill 104 extended the exemption indefinitely.⁶⁸

5. SUT-2017-04 Exemption for Qualified Job Training Organizations, revised August 5, 2020.

Pursuant to O.C.G.A. § 48-8-3(98), "sales of certain tangible personal property and services to a qualified job training organization are exempt from state sales and use tax" until June 30, 2020.⁶⁹ Although the exemption has expired, a qualified job training organization may still apply for a refund of taxes by obtaining or holding a Letter of Authorization that is valid for the period in which the purchase was

65. Ga. Dep't. of Revenue, Policy Bulletin SUT-2021-01 Exemption for Nonresident Purchases of Mechanically Propelled Watercraft (2021).

66. *Id.*

67. Ga. Dep't. of Revenue, Policy Bulletin SUT-2017-02 Exemption for Qualified Food Banks (2020).

68. Ga. Dep't. of Revenue, Policy Bulletin SUT-2017-03 Exemptions for Nonprofit Volunteer Health Clinics and Nonprofit Health Centers (2020).

69. Ga. Dep't. of Revenue, Policy Bulletin SUT-2017-04 Exemption for Qualified Job Training Organizations (2020).

made. The claim must be made within three years of paying the tax to the commissioner.⁷⁰

IV. GEORGIA PROPERTY TAX

House Bill 451 provides temporary relief for *ad valorem* taxes to offset inventory disruptions stemming from the COVID-19 pandemic.⁷¹ Specifically, H.B. 451 permits taxpayers claiming a Level 1 freeport exemption the option to claim the amount of finished goods inventory entitled to the exemption based on the value of qualifying finished goods inventory as of either January 1, 2020 or January 1, 2021.⁷² H.B. 451 does not provide a deadline extension for the freeport exemption application, due on April 1st of each year. Instead, taxpayers may amend timely-filed freeport exemptions to use 2020 property values in lieu of 2021 property values.⁷³

V. TAX CONTROVERSY

On April 29, 2021, Georgia Governor Brian Kemp signed into law Senate Bill 185.⁷⁴ The bill amends four O.C.G.A. code sections within Chapter 2 of Title 48 and Chapter 13 of Title 50 by reducing the level of deference accorded to determinations and interpretations issued by the Department.⁷⁵

A. Amendments to Chapter 2 of Title 48

For assessments issued by the State Board of Equalization, all questions of law shall now be decided without deference to determinations or interpretations made on the matter by the Department.⁷⁶ The amendment applies to matters before a court or the Georgia Tax Tribunal and includes written and unwritten interpretations of constitutional, statutory, and regulatory provisions.⁷⁷ The amendment does not alter the “judicial standard of deference

70. *Id.*

71. Ga. H.R. Bill 451, Reg. Sess., 2021 Ga. Laws 162 (codified at O.C.G.A. § 48-5-48.1 (2021)).

72. O.C.G.A. § 48-5-48.1(f).

73. *Id.*

74. Ga. S. Bill 185, Reg. Sess., 2021 Ga. Laws 41.

75. *Id.* at § 1.

76. *Id.* (codified at O.C.G.A. § 48-2-18(c) (2021)).

77. *Id.* at § 2.

accorded to rules promulgated pursuant to . . . the ‘Georgia Administrative Procedure Act.’”⁷⁸

S.B. 185 also amends the standard of deference applied in a refund action brought pursuant to O.C.G.A. § 48-2-35(4).⁷⁹ Subject to limitations, O.C.G.A. § 48-2-35(4) grants taxpayers the right to bring a refund claim when a prior claim has been denied by the commissioner or its delegate, or is not decided within one year from the date of filing the claim.⁸⁰ In such cases, all questions of law brought before the court or Georgia Tax Tribunal shall now be decided without deference to determinations or interpretations made on the matter by the Department.⁸¹ The amendment closely mirrors language used in section 28 and expressly carves out any effect on the judicial standard of deference under the Georgia Administrative Procedure Act.⁸²

Finally, S.B. 185 amends O.C.G.A. § 48-2-59.⁸³ Subject to limitations, section 59, subsection (a) permits a party to appeal from an order, ruling, or finding of the commissioner.⁸⁴ The appeal can be made to the Georgia Tax Tribunal or the superior court of the county in which the taxpayer resides.⁸⁵ Questions of law arising in an appeal pursuant to subsection (a) shall now be decided without deference to determinations or interpretations made on the matter by the Department.⁸⁶ Like previous sections, the amendment has no effect on the judicial standard of deference under the Georgia Administrative Procedure Act.⁸⁷

B. Amendments to Chapter 13A of Title 50

The legislature also incorporated the amendments to Chapter 2 of Title 48 into the provisions governing conduct of trial, evidence, and recordings before tax tribunals.⁸⁸ S.B. 185 mandates all questions of law be decided without deference to determinations or interpretations made on the matter by the Department.⁸⁹

78. *Id.*

79. *Id.* at §§ 2, 4.

80. O.C.G.A. § 48-2-35(c)(ii)(D)(4)(A)–(B).

81. O.C.G.A. § 48-2-35(c)(ii)(D)(7).

82. *Id.*

83. Ga. S. Bill 185, Reg. Sess. § 3.

84. O.C.G.A. § 48-2-59(a) (2021).

85. *Id.* at (a)(1)–(2).

86. *Id.* at (e).

87. *Id.*

88. Ga. S. Bill 185, Reg. Sess. § 4.

89. O.C.G.A. § 50-13A-14(a) (2021).