

Code Head Quarterly

SPRING 2006

NOTE FROM THE CHAIR 2

CURRENT DEVELOPMENTS IN TAX LAW 2

CIRCULAR 230 3

GOOD NEWS FOR CHARITABLE REMAINDER TRUSTS 5

TAXATION LAW SECTION CALENDAR OF EVENTS 5

NEW SINGLE-SALES FACTOR APPORTIONMENT AND INTANGIBLE

HOLDING COMPANY ADDBACK RULES 6

STATE AND LOCAL TAX REVISION ACT OF 2005 8

TAXATION LAW SECTION OFFICERS 12

TAXATION
LAW SECTION

A publication of the Taxation Law Section of the State Bar of Georgia

Section Needs You to Thrive

By Charles Edward Hodges II, Chamberlain Hrdlicka White Williams & Martin

Welcome to the State Bar of Georgia Taxation Law Section's Code Head Quarterly. This edition of the Quarterly emphasizes significant tax developments over the last year. I hope it is helpful. I would appreciate any suggestions on future articles, as well as request anyone with an article on a timely topic to submit it for consideration in upcoming editions.

I also encourage each of you to get more involved in the Taxation Law Section. The Tax Section performs numerous functions for Georgia's tax lawyers, whether you focus on federal or state tax issues. The purposes of the Section include providing continuing legal education in the areas of federal and state tax law, maintaining liaisons with the IRS and Georgia Department of Revenue, as well as holding social events in order for members to meet each other. This last purpose is extremely important to me because as tax lawyers, we generally do not see each other in the courthouses around Georgia or have direct contact with each other on a regular basis. Therefore we need to make an extra effort to attend meetings and social events in order for us to grow and thrive. I invite you to attend upcoming Tax Section events.

Current Developments in Tax Law

By Charles Edward Hodges II, Chamberlain Hrdlicka White Williams & Martin

The purpose of the "Current Developments" column is to provide a brief description of recent legislative and judicial highlights pertinent to the Georgia tax lawyer.

IRS deletes book-tax transactions from reportable transaction list, Notice 2006-6, 2006-5 I.R.B. 1

The IRS announced that transactions with significant book-tax differences are no longer subject to the tax shelter disclosure and list maintenance requirements for reportable transactions since the additional disclosure was no longer necessary with the recent introduction of the new version of the Schedule M-3.

Tax Court has no jurisdiction over refund claim when IRS applies overpayment to offset other liabilities, *Llewellyn Greene-Thapedi v. Commissioner*, 126 T.C. No. 1 (2006)

The Tax Court dismissed an individual's claim for refund, holding that the Court was divested of jurisdiction when the IRS applied an overpayment to offset her liability and ceased collection activities.

Tax Returns Go to Different Centers than Last Year

For tax year 2005, taxpayers should send tax returns to the following locations:

- Returns from Delaware and Virginia to the IRS Center in Atlanta, Ga.;
- Returns from the District of Columbia and Maryland to the IRS Center in Andover, Mass.;
- Returns from Ohio to the IRS Center in Kansas City, Mo.;
- Returns from Kansas, Mississippi and West Virginia to the IRS Center in Austin, Texas;
- Returns from Colorado, Nebraska, New Mexico, and

South Dakota to the IRS Center in Fresno, Calif.

Final regulations issued on statutory mergers of foreign corporations, T.D. 9243

The IRS issued final regulations on statutory mergers or consolidations under I.R.C. § 368(a)(1)(A) involving one or more foreign corporations.

Tax Court invalidates regulations under Section 882(c), *Swallows Holding, Ltd v. Commissioner*, 126 T.C. No. 6 (2006)

The Tax Court invalidated Treas. Reg. §1.882-4 finding that its requirement that a foreign corporation timely file its tax return in order to claim certain deductions is erroneous as the statute itself—Section 882(c)(2)—has no timely filed requirement.

Ownership change under Section 382 occurs upon sale between brothers, *Garber Industries v. United States*, 435 F.3d 555 (5th Cir. 2006)

The Court of Appeals for the Fifth Circuit upheld the Tax Court's ruling that the sale of stock between brothers is an ownership change for purposes of I.R.C. § 382, thereby limiting the deduction for net operating loss carryforwards.

Couple's transfer of stock to a limited partnership and then transfer of partnership interest were indirect gifts of the stock, *Senda v. Commissioner*, 433 F.3d 1044 (8th Cir. 2006)

The Court of Appeals for the Eighth Circuit affirmed the Tax Court's decision that a transfer of stock to a limited partnership, with a subsequent transfer of an interest in the partnership to their children, was indirect gifts of stock because the couple did not prove they contributed the stock

See Current Developments on page 9

Circular 230: It Will Change Your Practice (If It Has Not Already)

By Edward M. Manigault, Jones Day
David F. Golden, Troutman Sanders

Overview of Changes

Practitioners who are not yet familiar with the recent changes to Circular 230 should soon carefully review them, as the new rules started to apply after June 20, 2005. (The revisions to Circular 230 are found at T.D. 9165, as amended by T.D. 9201.) The most controversial change to Circular 230 is new Section 10.35, which compels practitioners to meet extensive requirements for written communications (even emails) that are required to be “covered opinions.” Although Section 10.35 was intended to thwart the proliferation of tax shelter opinions, many other types of written communications could fit within those which are supposed to be issued only as “covered opinions.” Even IRS officials have conceded that Section 10.35 may be read literally to have a broader reach than intended. The other revisions to Circular 230 set a “best practices” standard for practitioners (Section 10.33), impose requirements for all written advice (Section 10.37) and require leaders of tax practices to implement procedures to ensure compliance with the covered opinion rules. Violations can result in censure, suspension or disbarment from practice before the IRS. (The American Jobs Creation Act added fines to the list of penalties for Circular 230 violations, but Circular 230 does not yet reflect this legislative change.)

Best Practices

Section 10.33 has been added to Circular 230 establishing best practices for tax advisors. These provisions are aspirational. Section 10.33 requires that practitioners:

1. Communicate clearly with the client regarding the terms of the engagement;
2. Establish the facts and the relevance thereof;
3. Evaluate the reasonableness of assumptions and representations;
4. Relate the applicable law (including potentially applicable judicial doctrines) to the relevant facts;
5. Arrive at a conclusion supported by the law and facts;
6. Advise clients regarding penalties; and
7. Act “fairly and with integrity” in practicing before the IRS.

Covered Opinion Rules

The most controversial part of the revisions of Circular

230 are found in new Section 10.35, which establishes a higher standard for certain written advice delivered to clients. Such opinions are referred to in Section 10.35 as covered opinions. The controversy generated by Circular 230 is in large part the definition of “covered opinions”. The basic requirements of covered opinions are as follows:

- Written advice (including electronic communications);
- Concerning one or more “Federal tax issues”;
- Arising from
 - ♦ A transaction the same as or substantially similar to a “listed transaction” as described in Treasury Regulation 1.6011-4(b)(2);
 - ♦ Any partnership, other entity or any plan or arrangement the “principal purpose” of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code; or
 - ♦ Any partnership, other entity or any plan or arrangement a “significant purpose” of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code.

A “Federal tax issue” is defined as “a question concerning the Federal tax treatment of an item of income, gain, loss, deduction, or credit, the existence or absence of a taxable transfer of property, or the value of property for Federal tax purposes.”

“Principal purpose” is defined as a purpose of avoidance or evasion that exceeds any other purpose, but does not include a purpose of “claiming tax benefits in a manner consistent with the statute and Congressional purpose.” Note, however, that a transaction may fall outside of the “principal purpose” definition and still fall within the definition of a “significant purpose” transaction (which is not defined).

Unless an exception applies, *any* written advice rendered in connection with either a listed transaction or principal purpose transaction is a covered opinion, but written advice rendered in connection with a “significant purpose” transaction is a covered opinion only if it is (1) a reliance opinion, (2) a market opinion, (3) subject to conditions of confidentiality, or (4) subject to contractual protection.

A “reliance opinion” is written advice in which the author

See Circular 230 on page 4

Circular 230

Continued from page 3

concludes on a “more likely or not” basis that at least one “significant Federal tax issue” would be resolved in a taxpayer’s favor. A “significant Federal tax issue” is a Federal tax issue for which the IRS has a reasonable basis for a successful challenge and its resolution would have a significant impact, good or bad, on the overall Federal tax treatment of the transaction in question.

A “marketed opinion” is written advice that the practitioner knows or has reason to know that the written advice will be used or referred to by a person other than a practitioner in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to one or more taxpayers. For example, this might include private placement memoranda.

Written advice is “subject to conditions of confidentiality” if the author imposes for his or her benefit limitations on the disclosure of the tax treatment or tax structure of the transaction.

Written advice is “subject to contractual protection” either if the taxpayer has a right to a full or partial refund of fees paid to the author if all or part of tax consequences of the transaction are not sustained or if the fees paid are contingent on a taxpayer’s realization of tax benefits from the transaction.

Practitioners have voiced many concerns regarding Section 10.35, especially with regard to the broad definition of covered opinion. For example, there is no definition of “significant purpose” and therefore much advice could be encompassed, depending upon the eye of the beholder. Additionally, “written advice” is used as a filter - not “opinion” - so essentially any writing can be a covered opinion. As will be noted briefly below, Section 10.35 sets forth significant requirements that such an opinion must satisfy. The concern among tax practitioners is that it is simply not feasible to satisfy all these requirements for routine tax advice given to clients. Accordingly, most practitioners have added disclaimers to electronic and written communication to clients that such communication may not be relied upon by clients to avoid penalties. Such disclaimers will remove certain types of written advice from the definition of covered opinions (although not with respect to advice rendered in connection arising out of a “listed transaction” or a “principal purpose” transaction).

The revisions of Circular 230 do exclude certain written advice from the covered opinion requirements. Certain initial advice, certain post-return advice, certain advice provided by an employee to his or her employer and certain negative advice is completely excluded from the covered opinion requirements of Section 10.35. Additionally, as long as not rendered in connection with either a listed transaction or principal purpose transaction, written advice rendered regarding a qualified plan, which is included in documents required to be filed with the Securities and Exchange Commission or which is a “State or local bond

opinion” does not need to meet the covered opinion requirements (however, the IRS has announced that such opinions will be the subject of a new section of Circular 230).

As noted earlier, the requirements for covered opinions may sometimes be avoided if the practitioner “prominently discloses” that the advice may not be used to avoid penalties. Section 10.35 provides specific guidance as to the format of such prominent disclosures.

A detailed discussion of the specific requirements for rendering covered opinions are beyond the scope of this article. Generally, Section 10.35 mandates the form and content of covered opinions. For example, Section 10.35 generally requires practitioners to use reasonable efforts to identify and ascertain relevant facts and requires that any facts or representation or statement be set forth in a separate section in the opinion. Representations and assumptions must also be reasonable and identified in a separate section of the written advice. Generally, covered opinions must evaluate each and every significant Federal tax issue involved in a transaction unless the opinion is a “limited scope” opinion. Of significance is that any representation that a transaction has a business purpose must include a specific description of the purpose. Section 10.35 of Circular 230 reinforces the already existing Circular 230 standard that in any opinion, the author must not consider the audit lottery in arriving at a conclusion on the merits. Section 10.35 also sets forth numerous other requirements for covered opinions which must be adhered to by tax practitioners.

Other Written Advice and Compliance Committees

Section 10.37 of Circular 230 sets forth requirements for other written advice, i.e. advice that does not rise to the level of covered opinion. These rules are less controversial. Generally, this section requires that written advice must not be based on unreasonable assumptions, representations, statements or findings. Moreover, practitioners must consider all relevant facts in when rendering an opinion. Finally, Section 10.38 of Circular 230 establishes certain advisory committees.

It is clear that Circular 230 has impacted the practice of tax law. (Many practitioners have already adopted internal compliance procedures, formed internal “Circular 230 Committees” and added “Circular 230 Legends” to all emails and other informal written communications.) What is not yet clear, however, is the extent to which Circular 230 will change the practice of tax law. Will states adopt Circular 230, either completely or piecemeal? Will Circular 230 be revised again?

© Edward M. Manigault and David F. Golden. The views set forth herein are the personal views of the authors and do not necessarily reflect those of Jones Day or Troutman Sanders.

Good News and More Good News For Charitable Remainder Trusts

Rev. Proc. 2005- 24, Rev. Procs. 2005-52 through 59, & IRS Notice 2006-15

By Edward M. Manigault, Jones Day

Practitioners who deal with charitable remainder trusts should be aware of several recent Revenue Procedures - one which came as a surprise, was not welcome but is now essentially moot, and several which have been long-awaited and should be well-received.

Spousal elective shares - Rev. Proc. 2005-24

Surviving spouses in some states are entitled to a minimum statutory share of a decedent's estate. This "spousal share" is sometimes determined based on an "augmented estate" (which is defined to include probate assets as well as non-probate assets, such as assets held in trust), and in some states may be satisfied from those assets outside of the probate estate. The IRS has apparently encountered at least one case in which a surviving spouse elected against a charitable remainder trust (CRT) and obtained assets which were intended to go to charity (and for which an income tax deduction had previously been taken). Rev. Proc. 2005-24 was issued on March 30, 2005 with the stated goal of providing a "safe harbor procedure under which the Internal Revenue Service will disregard" a surviving spouse's right to elect to receive a statutory share from the assets of a CRT. Rev. Proc. 2005-24 was said to apply only to CRTs created on or after June 28, 2005. (It was clear how post-June 28, 2005 contributions to a charitable remainder unitrust created before June 28, 2005 were to be treated.) Rights of election were to be disregarded with respect to CRTs created before June 28, 2005 unless a surviving spouse exercises a right of election against the CRT.

In a somewhat surprise development, however, the IRS extended this grandfather date until further guidance is

issued. See Notice 2006-15. This change was in response to many comments submitted to the IRS.

New sample trust instruments - Rev. Procs. 2005-52 to -59

After a long wait, the Treasury has finally issued updated sample trust agreements for charitable remainder unitrusts (CRUTs). (Updated sample agreements for charitable remainder annuity trusts, or CRATs, were issued in 2003. See Rev. Procs. 2003-53 to -60.) The templates cover both inter vivos CRTs (2005-52, -53, -54 and -55) and testamentary CRTs (2005-56, -57, -58 and -59). Six of the samples supersede versions issued 25 years ago, but Rev. Procs. 2005-53 and -57 provide new templates for inter vivos and testamentary CRTs payable for a term of years.

As in the past, the Service will recognize a trust as a qualified CRUT if the trust operates in a manner consistent with the terms of the trust instrument, if the trust is a valid trust under applicable local law, and if the trust instrument is substantially similar to the relevant sample trust agreement. The revenue procedures also include valuable annotations and alternative provisions not included in the older templates, so the IRS will also recognize a trust as a qualified CRUT if the trust agreement properly integrates one or more of the alternate provisions. A trust that contains additional substantive provisions, or that omits any of the provisions of the templates, will not necessarily be disqualified, but it will not fit within the safe harbor provided by the templates.

© Edward M. Manigault. The views set forth herein are the personal views of the author and do not necessarily reflect those of Jones Day.

Taxation Law Section Calendar of Events

April 17: DUE DATE FOR FILING IRS FORM 1040, AND GEORGIA FORM 500

April 26: TAXATION LAW SECTION GENERAL MEETING AT THE STATE BAR OF GEORGIA, 12 – 1:30 P.M.

June 1-3: STATE BAR OF GEORGIA ANNUAL MEETING IN HILTON HEAD ISLAND, S.C.

June 22: "TAX ASPECTS OF REAL ESTATE TRANSACTIONS," SPONSORED BY ABA TAX SECTION, STATE BAR TAXATION LAW SECTION, AND THE ATLANTA BAR TAX SECTION AT THE STATE BAR CONFERENCE CENTER

July 25-27: IRS TAX FORUM

Fall 2006: TAXATION LAW SECTION GENERAL MEETING WITH PRESENTATION BY JUDGE LARO OF THE U.S. TAX COURT

New Single-Sales Factor Apportionment and Intangible Holding Company Addback Rules

By Brent W. Herrin, Cohen Pollock Merlin & Small, P.C.
Kent Clay, Deloitte Tax LLP

In Spring 2005 the Georgia State Legislature enacted, and Gov. Perdue signed into law, H.B. 191, making significant changes to Georgia's corporate income tax law, including:

1. Transition to a single-sales factor formula over three years from a traditional three-factor apportionment formula based on property, payroll, and sales;
2. Inclusion of all gross receipts from regular business activity in the sales factor regardless of primary business activity; and
3. Addback to taxable net income of otherwise deductible intangible expenses and costs resulting from transactions with related members.

Summary of Key Changes

Transition of Apportionment Method to a Single-Sales Factor

Georgia historically apportioned taxable net income through a traditional three-factor formula, with evenly weighted property and payroll factors, and a double-weighted sales factor. The new law phases in a single-sales factor formula over three years. During this phase-in, the property and payroll factors remain equally weighted, but the sales factor weight will steadily increase. Specifically the statute phases in the apportionment factor changes as follows:

- 80 percent sales, 10 percent property and 10 percent payroll for tax years beginning on or after Jan. 1, 2006 and before Jan. 1, 2007.¹
- 90 percent sales, five percent property and five percent payroll for tax years beginning on or after Jan. 1, 2007 and before Jan. 1, 2008.²
- 100 percent sales for tax years beginning on or after Jan. 1, 2008.³

Inclusion of All Regular Business Gross Receipts in the Apportionment Factor

Applicable to tax years beginning on or after Jan. 1, 2006, H.B. 191 virtually eliminates the current differences between the sales factor components for businesses that derive income primarily from the manufacture, production, or sale of tangible personal property, and those sales factor components used by all other businesses.

Under prior law, businesses engaged primarily in selling tangible personal property included in their sales factor only those regular business receipts from the sale of tangible personal property; that is, the sales reflected on Federal

Form 1120, line 1. The new law amended this provision to require these businesses to also include in their factor the gross receipts from other regular business activities.

In regard to those companies engaged in businesses that are *not* primarily involved in the manufacture or sale of tangible personal property, the new law provides that these businesses must additionally include in their sales factor those receipts from sales of tangible personal property received through regular business activities.⁴

The Department of Revenue recently promulgated regulations providing additional guidance on the allocation and apportionment of income for corporate taxpayers.⁵ As interpreted under these regulations, unless otherwise explicitly excluded, gross receipts reflected in the sales factor means all gross receipts from activities that constitute the taxpayer's regular trade or business. Nevertheless, the regulations provide detailed guidance regarding certain receipts that are specifically excluded from the sales factor computation. In addition, the regulations address how to determine which receipts are attributable to customers within Georgia and which are attributable to Georgia's marketplace.⁶ Under the statute and regulations, gross receipts from activities not in the taxpayer's regular trade or business continue to be allocated and not apportioned.

Addback of Deductible Interest Expenses and Intangible Expenses

Applicable to tax years beginning on or after Jan. 1, 2006, H.B. 191 added O.C.G.A. § 48-7-28.3 which requires an adjustment to taxable net income to include otherwise deductible intangible expenses and costs resulting from certain transactions with related members.⁷

This adjustment is commonly known as the "addback" rule.⁸ The new law addresses (i) which expenses and costs are subject to the requirement, (ii) exceptions to the disallowance of the deductions, and (iii) disclosures necessary to sustain such exceptions. The addback requirement applies to a corporation filing a separate Georgia return as well as the separate taxable income computation of each member included in a Georgia consolidated return.⁹

Intangible Expenses and Costs. The addback provision applies to deductions made for intangible expenses and costs paid, accrued, or incurred to related parties to the extent allowed as a deduction in calculating federal taxable income.¹⁰ Intangible expenses and costs are those related to the acquisition, use, maintenance, management, ownership, sale,

exchange or disposition of intangible property. These expenses or costs can include licensing, royalty, patent, technical, and copyright fees.¹¹

Interest. Interest expenses and costs are added back to income if such amounts are related to or are incurred in connection with the acquisition, use, maintenance, management, ownership, sale, exchange, or disposition of intangible property. Such interest might include, but is not limited to, deductions otherwise allowed under IRC § 163.

Exceptions to the Addback Rule. If proper disclosure is made, a taxpayer is not required to add back any intangible expenses and costs to the extent these items meet one of the three following exceptions:

- The expenses are received as income in an arm's length transaction and the income is allocated or apportioned to and subject to tax in Georgia or another state imposing a tax on the income of the related member;¹²
- The expenses are paid, accrued, or incurred to a related member domiciled in a foreign nation that has in force a comprehensive income tax treaty with the United States, the transaction has a valid business purpose, and the expenses and costs are determined at arm's length rates;¹³ or
- The related member directly or indirectly paid such expenses or costs to a non-related member and the transaction has a valid business purpose.¹⁴

"Valid business purposes" is defined in H.B. 191 as "one or more business purposes . . . which alone or in combination constitute the primary motivation for some business activity or transaction, which activity or transaction changes in a meaningful way, apart from tax effects, the economic position of the taxpayer." Avoidance or reduction of taxes is not a valid business purpose.¹⁵

The new statute specifies that these exceptions, even if met, will not prevent the Commissioner from making adjustments under the existing authority of Georgia Code Section 48-7-58, to correct any asserted distortion of income.¹⁶

Disclosure to Sustain Exemptions. In order to successfully claim any of the exceptions to the addback rule, a taxpayer must disclose on its return information about the related members and the states or foreign jurisdictions where related members file income tax returns, as well as details of the transactions with these members. The Commissioner of Revenue is granted discretionary authority to require additional information.¹⁷

Penalties. The penalty to a taxpayer failing to make the required adjustment is 10 percent of the additional tax that would be due as a result of the addback requirements.¹⁸

Copyright © 2006 Deloitte Development LLC. All rights reserved. This article does not constitute tax, legal or other advice from Deloitte Tax LLP or Cohen Pollock Merlin & Small, PC., which assume no responsibility with respect to assessing or advising the reader as to tax, legal or other consequences arising from the reader's particular situation.

Endnotes

1. H.B. 191, 148th Gen. Assem., Reg. Sess. (Ga. 2005) (Ga. H.R. Comm. on Ways & Means, Subcomm. on Income Tax Substitute Bill), § 4.
2. H.B. 191, § 7.
3. *Id.*
4. H.B. 191, § 4 (2)(C)(ii).
5. Reg. 530-7-7-.03, amended Dec. 2, 2005, applicable to taxable years beginning on or after Jan. 1, 2006.
6. *Id.*
7. A related member is a person that, with respect to the taxpayer during all or any portion of the taxable year, is: (1) a "related person," (2) a component member as defined in Internal Revenue Code ("IRC") § 1563(b), or (3) a person to or from whom there is attribution of stock ownership in accordance with IRC § 1563(e). A "related person" is a stockholder and/or a member of the stockholder's family who is enumerated in IRC § 318 and owns at least 50 percent of the outstanding stock based on the attribution rules of IRC § 318. A related person can be an individual or a partnership, estate, trust, corporation, or limited liability company. O.C.G.A. § 48-7-28.3 (a)(7), (8).
8. O.C.G.A. § 48-7-28.3(b).
9. O.C.G.A. § 48-7-28.3(i).
10. O.C.G.A. § 48-7-28.3(a)(4).
11. O.C.G.A. § 48-7-28.3(a)(4), (5). The list as provided by the statute is not an exclusive list of intangible expenses and could include "similar expenses and costs." Intangible property can include (but is not limited to) patents, tradenames and trademarks, copyrights, trade secrets, and similar types of intangible assets.
12. O.C.G.A. § 48-7-28.3(d)(2)(A),(B). O.C.G.A. § 48-7-28.3(d)(1)(B) defines "state" to mean any state in the United States (and the District of Columbia), but does not include states where the taxpayer files a combined or consolidated return with a related member when the return or report results in elimination of the tax effects from the transactions between the taxpayer and the related member.
13. O.C.G.A. § 48-7-28.3(e)(1)(A), (B), (C).
14. O.C.G.A. § 48-7-28.3(f).
15. O.C.G.A. § 48-7-28.3(a)(9).
16. O.C.G.A. § 48-7-28.3(h).
17. O.C.G.A. § 48-7-28.3(d)(3), (e)(2).
18. O.C.G.A. § 48-7-28.3(j). This penalty is in addition to other penalties that could be assessed under Georgia law.

State and Local Tax Revision Act of 2005

By Jeffrey C. Glickman, Alston & Bird
Michael T. Petrik, Alston & Bird

The 2005 Georgia legislative session produced several changes to the Georgia tax code (the "Code"), including House Bill 488. H.B. 488, referred to as the State and Local Tax Revision Act of 2005, made more than 20 changes to the Code (mostly dealing with income tax provisions). Several of the more noteworthy changes are discussed below.

IRC Conformity

Effective for tax years beginning on or after Jan. 1, 2005, the Georgia Code is updated to conform to the IRC as enacted on or before Jan. 1, 2005.¹ IRC section 199 (allowing a deduction for certain qualified production activities income) is added to the list of IRC sections to which Georgia does not conform.² The other IRC sections to which Georgia does not conform are 168(k) (bonus depreciation) and 1400L (New York Liberty Zone credits).³

Taxable Nonresident

Currently, Georgia provides a safe-harbor from Georgia personal income tax filing and payment obligations for non-residents whose only activity in Georgia is the performance of services as an employee for an employer when the remuneration for those services is 5 percent or less of the total income received by the nonresident for performing services everywhere.⁴ Effective for all tax years beginning on or after Jan. 1, 2005, this legislation would revise that safe harbor to be the lesser of the amount discussed above or \$5,000.⁵

Like-Kind Exchange

House Bill 488 repeals the constitutionally suspect provision in O.C.G.A. § 48-7-21(b)(5) that disallowed the non-recognition of gain or loss for like-kind exchanges on the sale of Georgia property when the replacement property was not located in Georgia.⁶ This amendment is effective for all tax years beginning on or after Jan. 1, 2004.⁷

Net Operating Losses

The new legislation codifies Georgia's treatment of net operating losses. Prior to the legislation, the only specific guidance regarding the treatment of net operating losses was in the regulations.⁸ The new law essentially enacts the principles set forth in the regulations by (i) requiring that taxpayers add back the federal net operating loss deduction to federal taxable income and (ii) providing for a separate Georgia net operating loss deduction based on the aggregate of Georgia net operating loss carryovers to the tax year plus Georgia net operating loss carrybacks to such tax year.⁹

In addition, the new law conforms the Code to IRC sec-

tion 172, regarding the number of years in which a Georgia net operating loss may be carried forward or carried back, and to IRC sections 381-384, regarding the carry over of net operating losses to successor taxpayers and limitations relating to their use.¹⁰ Finally, refund claims arising from a net operating loss carryback for a period prior to the period in which such loss is incurred will not be entitled to interest provided the claim for refund is processed within 90 days from the last day of the month in which the claim for refund is filed.¹¹

These net operating loss provisions are effective for tax years beginning on or after Jan. 1, 2005.¹²

Investment Partnerships

Georgia law, under O.C.G.A. § 48-7-24(c), currently exempts from income tax the distributive share of a nonresident member (individual or corporate) of a limited partnership (or similar nontaxable entity) that is doing business in Georgia provided that the limited partnerships derives income exclusively from buying, selling, dealing in, and holding securities on its own behalf and not as a broker (such partnership is commonly referred to as an investment partnership). The new legislation excludes from the exemption the distributive share of a nonresident member if such member participates in the management of the limited partnership or is engaged in a unitary business with another person that participates in the management of the limited partnership.¹³ This amendment is effective upon approval by the Governor or upon it becoming law without approval.¹⁴

Corporate Limited Partners

House Bill 488 amends O.C.G.A. § 48-7-31 (relating to corporate taxation and allocation and apportionment) to read as follows (new language highlighted):

The tax imposed by this chapter shall apply to the entire net income, as defined in this article, received by every foreign or domestic corporation owning property within this state, doing business within this state, or *deriving income from sources within this state to the extent permitted by the United States Constitution*.¹⁵

The new phrase "deriving income from sources within this state to the extent permitted by the United States Constitution" might at least arguably suggest that the Department of Revenue wishes to take an expanded view of nexus to include the much-debated "economic nexus" standard. For example, the Department could conceivably seek

to tax a nonresident corporation that sells to customers located in the state but that does not have any physical presence here. However, it is our understanding based on discussions with Department personnel that this language was added to codify Department policy, as expressed in Regulations 560-7-3-.08 and 560-7-7-.03(a),¹⁶ whereby a corporate limited partner, whose sole connection with Georgia is its ownership of a limited partnership interest in a limited partnership that does business in the state, is subject to Georgia corporate income tax. The Department has indicated to the authors that it does not view this amendment as providing a warrant to change its current practice of requiring physical presence in the state in order to subject a corporation to tax. This amendment is effective upon approval by the Governor or upon it becoming law without approval.¹⁷

Vendor Registration

House Bill 488 does not only address income taxes; it adds new section 48-8-14 (sales and use tax statutes). That section prohibits a state agency from entering into a contract with a nongovernmental vendor for the sale of goods and/or services in an amount exceeding \$100,000 if the vendor, or an affiliate of the vendor, is a "dealer" under O.C.G.A. § 48-8-2(3) but fails or refuses to collect Georgia sales or use taxes on sales delivered to Georgia.¹⁸ This amendment is effective upon approval by the governor or upon it becoming law without approval.¹⁹

IRS and Georgia Department of Revenue Taxpayer Assistance Centers

On pages 10 and 11 are tables listing offices of the IRS and Georgia Department of Revenue that assist taxpayers and their representatives in resolving tax issues during a face-to-face meeting. Before traveling to the office, taxpayers or their representatives should call the particular office to ensure that office deals with the type of tax problem in issue.

Endnotes

1. H.B. 488, Laws 2005, Section 2, amending Code section 48-1-2(14); H.B. 488, Laws 2005, Section 27(a).

2. H.B. 488, Laws 2005, Section 2, amending Code section 48-1-2(14).
3. See O.C.G.A. § 48-1-2(14).
4. See O.C.G.A. § 48-7-1(11)(A), effective prior to January 1, 2005.
5. H.B. 488, Laws 2005, Section 7, amending Code section 48-7-1(11)(A); H.B. 488, Laws 2005, Section 27(c).
6. H.B. 488, Laws 2005, Section 9, amending Code section 48-7-21(b)(5).
7. H.B. 488, Laws 2005, Section 27(h).
8. See Ga. Reg. Rule 560-7-3-.06(3).
9. H.B. 488, Laws 2005, Section 11, amending Code section 48-7-21(b)(10).
10. Id.
11. Id.
12. H.B. 488, Laws 2005, Section 27(c).
13. H.B. 488, Laws 2005, Section 12, amending Code section 48-7-24(c).
14. H.B. 488, Laws 2005, Section 27(f).
15. H.B. 488, Laws 2005, Section 15, amending Code section 48-7-31(a).
16. These regulations were amended effective for tax years beginning on or after January 1, 2002 to subject corporate limited partners of limited partnerships that are doing business in Georgia to the corporate income tax.
17. H.B. 488, Laws 2005, Section 27(f).
18. H.B. 488, Laws 2005, Section 22, adding new Code section 48-8-14.
19. H.B. 488, Laws 2005, Section 27(f).

Current Developments

Continued from page 2

before transferring the interests.

The Streamlined Sales Tax Agreement became effective Oct. 1, 2005.

The full members (those who have substantially conformed their laws to the uniform agreement) include Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, New Jersey, North Carolina, North Dakota, Oklahoma, South Dakota and West Virginia. The associate members include Arkansas, Nevada, Ohio, Tennessee and Wyoming.

While Georgia is not a member (it is a participating state), multistate taxpayers should be alert to changes in the laws of states who have conformed and are attempting to conform to the agreement. In addition, the member states are offering an amnesty for taxes, interest and penalty for taxpayers who register under the central registration system and collect and remit tax for all full member states.

The amnesty, available to nexus and non-nexus taxpayers, is applicable to sales and use taxes in a taxpayer's capacity as a seller and has several conditions, including that a taxpayer may not have been contacted for audit by the member state. A full explanation of the project and the amnesty is available at www.streamlinedsalestax.org.

IRS Taxpayer Assistance Offices

Below are tables listing offices of the IRS and Georgia Department of Revenue that assist taxpayers and their representatives in resolving tax issues during a face-to-face meeting. Before traveling to the office, taxpayers or their representatives should call the particular office to ensure that office deals with the type of tax problem in issue. The Taxpayer Advocate Service: Call 404.338.8099 in Atlanta or 877.777.4778 elsewhere.

| City | Street Address | Days/Hours of Service | Telephone |
|------------------|--|--|----------------|
| Albany | 235 Roosevelt Ave. Albany, GA 31701 | Monday-Friday - 8:30 a.m.-4:30 p.m. | (229) 430-8401 |
| Athens | 355 E. Hancock Ave. Athens, GA 30601 | Monday-Friday - 8:30 a.m.-4:30 p.m. | (706) 546-2008 |
| Atlanta (Koger) | 2888 Woodcock Blvd. Atlanta, GA 30341 | Monday-Friday - 8:30 a.m.-4:30 p.m. | (404) 338-7962 |
| Atlanta (Summit) | 401 W. Peachtree St., NW Atlanta, GA 30308 | Monday-Friday - 8:30 a.m.-4:30 p.m. | (404) 338-7962 |
| Augusta | 2743 Perimeter Pkwy. Augusta, GA 30909 | Monday-Friday - 8:30 a.m.-4:30 p.m. | (706) 868-1374 |
| Columbus | 3604 Macon Rd. Columbus, GA 31907 | Monday-Friday - 8:30 a.m.-4:30 p.m. | (706) 494-9079 |
| Dalton | 414 N. Park Drive Dalton, GA 30720 | Monday-Friday - 8:30 a.m.-4:30 p.m. | (404) 338-7962 |
| Gainesville | 329 Oak St Gainesville, GA 30501 | Monday-Friday - 8:30 a.m.-4:30 p.m. | (770) 536-2235 |
| Macon | 600 North Ave. Macon, GA 31201 | Monday-Friday - 8:30 a.m.-4:30 p.m. | (478) 752-8243 |
| Rome | 600 E. First St. Rome, GA 3016 | Monday-Friday - 8:30 a.m.-4:30 p.m. | (706) 291-5680 |
| Savannah | 120 Barnard St. Savannah, GA 31401 | Monday-Friday - 8:30 a.m.-4:30 p.m. | (912) 652-4011 |
| Smyrna/Marietta | 2400 Herodian Way Smyrna, GA 30082 | Monday-Friday - 8:30 a.m.-4:30 p.m. | (404) 338-7962 |

Georgia Department of Revenue Taxpayer Assistance Offices

The Georgia Department of Revenue is headquartered at 1800 Century Center Blvd., near the intersection of Clairmont Road and I-85. There are 11 Regional Offices listed below for assistance in the areas of Sales, Income, Motor Fuel, Alcohol and Tobacco Taxes and Enforcement, and Coin-Operated Amusement Machine Licenses and Decals. The office hours for all of the offices are 8 a.m.- 4:45 p.m., Monday through Friday.

| Office | Address | City | Zip | Phone | Fax |
|-------------------------|---------------------------------|----------------|-------|----------------|----------------|
| Albany Regional | 1105-D W. Broad Ave. | Albany | 31707 | (229) 430-4241 | (229) 430-3922 |
| Athens Regional | 190 Ben Burton Cr. | Bogart | 30622 | (706) 542-6058 | (706) 542-9973 |
| Atlanta Headquarters | 1800 Century Center Blvd., N.E. | Atlanta | 30345 | (404) 417-4477 | |
| Atlanta Regional | 4245 International Parkway | Hapeville | 30354 | (404) 968-0480 | 404-968-0472 |
| Augusta Regional | 130 Davis Road | Martinez | 30907 | (706)651-7600 | (706)651-7614 |
| Columbus Regional | 1501 13th Street, Suite A | Columbus | 31901 | (706) 649-7451 | (706) 649-1050 |
| Douglas Regional | 1214 N. Peterson Ave. | Douglas | 31533 | (912) 389-4094 | (912) 389-4411 |
| Lithia Springs Regional | 351 Thornton Road, Suite 101 | Lithia Springs | 30122 | (770) 732-5812 | (770) 732-5823 |
| Macon Regional | 630 North Avenue, Suite B | Macon | 31211 | (478) 751-6055 | (478) 751-6016 |
| North East Metro | 1800 Century Blvd, NE. | Atlanta | 30345 | (404) 417-6605 | |
| Rome Regional | 1401 Dean Street, Suite E | Rome | 30161 | (706) 295-6667 | (706) 295-6744 |
| Savannah Regional | 6606 Abercorn Street, Suite 220 | Savannah | 31405 | (912) 356-2140 | (912) 353-3012 |

Taxation Law Section Officers

Charles Edward Hodges II, Chair

Chamberlain Hrdlicka White Williams & Martin
191 Peachtree Street, N.E., 9th Floor
Atlanta, GA 30303-1747
Phone: 404-658-5439
Fax: 404-659-1852
E-mail: charles.hodges@chamberlainlaw.com

Sam Leonard Brannen Jr., Chair-Elect

Dekalb County Law Department
1300 Commerce Drive, 5th Floor
Decatur, GA 30030
Phone: 404-371-3011
Fax: 404-371-3024
E-Mail: sbrannen@co.dekalb.ga.us

Edward Middleton Manigault, Vice-Chair

Jones Day
1420 Peachtree St., N.E., Suite 800
Atlanta, GA 30309-3053
Phone: 404-581-8340
Fax: 404-581-8330
E-mail: emmanigault@jonesday.com

Timothy Lynn Fallaw II, Secretary

Alston & Bird LLP
1201 West Peachtree Street
Atlanta, GA 30309
Phone: 404-881-7836
Fax: 404-253-8596
E-mail: tim.fallaw@alston.com

Donald Pike Edwards, Treasurer

Frantz, Grattan & DeLoach, LLP
6100 Lake Forrest Drive, Suite 400
Atlanta, GA 30328
Phone: 404-255-0500
Fax: 404-257-9657
E-mail: dedwards@fgdlaw.com

Mary Terry Benton, Immediate Past Chair

Alston & Bird, LLP
1201 West Peachtree Street
Atlanta, GA 30309-3424
Phone: 404/881-7255
Fax: 404/881-4777
E-mail: mbenton@alston.com

Code Head Quarterly

Taxation Law Section
Charles Edward Hodges II, Chair
Sam L. Brannen Jr., Editor
Edward M. Manigault, Editor
State Bar of Georgia
104 Marietta St., NW
Atlanta, GA 30303

Nonprofit Org.
US Postage Paid
Atlanta, GA
Permit. No. 1447