



State & Local Tax Advisory ■

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Looking Back at Georgia's 2022 Legislative Session

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With the signature of Gov. Brian Kemp on a number of new tax bills passed by the Georgia General Assembly this spring, Georgia's 2022 legislative session has finally come to a close. This year's session was consequential for Georgia individual and business taxpayers both because of what passed (e.g., rate cuts and elective consolidation) and what didn't (e.g., major proposed revisions to the film tax credits and sales taxes on software delivered electronically).

What Passed: New Legislation from This Year's Session

Individual income tax rate cuts

The headline tax bill from this past session for individual taxpayers was HB 1437, which authorizes an income tax rate cut for individuals from the current 5.75% annual tax rate down to a 4.99% rate by 2029. The rate cuts would be phased in over several years, assuming that certain revenue and tax collection thresholds are met.

Note that this tax rate cut does not apply to corporations, which will continue to be taxed at 5.75%. Similarly, pass-through entities (PTEs) that elect to be taxed at the entity level will continue to be taxed at the higher 5.75% rate. Owners of such PTEs need to consider that disparity between tax rates on individuals and PTEs as part of their decision tree for whether to make the PTE election for the PTEs' Georgia-sourced taxable income.

Elective consolidation

The General Assembly also passed HB 1058, which allows affiliated groups to elect to file a consolidated return for Georgia corporate income tax purposes. Current law only allows taxpayers to file on a consolidated basis if the Department of Revenue grants them permission to do so.

Consolidated elections will be binding for five years and are effective for tax years beginning on or after January 1, 2023. While each entity included in the consolidated group will still compute its Georgia taxable income on a separate basis, the consolidated election would allow members of the group to offset net operating losses against taxable income of other group members (subject to rules governing losses that accrued in years before consolidation, called "separate return limitation year" or "SRLY" rules). Taxpayer groups that are already filing

on a consolidated basis with permission from the department have the option to either continue filing on that basis or to terminate their approved consolidated basis and elect (or not) to file on a consolidated basis under the new law.

We expect that the Department of Revenue will update its consolidated election regulation to reflect the new law.

Data center sales tax exemption

House Bill 1291 extended the sunset of sales tax exemptions for purchases of qualified computer equipment for a high-technology company (to December 31, 2028) and for high-technology data centers meeting certain investment thresholds (to December 31, 2031).

While extending the life of both exemptions, HB 1291 also modified them. Beginning in 2024, the \$15 million purchase threshold can include only taxable purchases or leases of computer equipment, and purchases of prewritten computer software and computers or devices issued to employees are specifically excluded. This change undoes the Georgia Court of Appeals' decision in *Choicepoint Services Inc. v. Graham*,¹ in which the court held that the \$15 million exemption threshold could be met with nontaxable purchases of electronically delivered prewritten software. Also starting in 2024, a taxpayer claiming the exemption must pay tax on 10% of the first \$15 million of qualifying purchases.

HB 1291 also changed the job creation and investment requirements to qualify for the data center sales tax exemption:

1. In counties with a population greater than 50,000, the job creation requirement for high-tech data centers increased from 20 to 25 new quality jobs.
2. In counties with a population between 30,001 and 50,000, the job creation requirement decreased from 20 to 10 new quality jobs, and the minimum investment decreased from \$150 million to \$75 million.
3. In counties with a population of 30,000 or less, the job creation requirement decreased from 20 to 5 new quality jobs, and the minimum investment decreased from \$100 million to \$25 million.

These changes reflect an effort to increase the attractiveness of locating data centers outside metro Atlanta in smaller, more rural counties.

Appeals to superior courts

House Bill 916 amended the procedure for appealing decisions from an administrative court (such as the Georgia Tax Tribunal) to a superior or state court by providing a uniform procedure for appeal called a "petition for review." One of the goals of this bill is to increase access to justice through greater resolution of appeals on a substantive basis, rather than on complex procedural grounds.

For example, the bill revises Code Section 48-5-311, which relates to appeals to and from decisions of county boards of equalization, to reflect the change from a "notice of appeal" to the uniform procedure of "petition for

¹ *Choicepoint Services Inc. v. Graham*, 699 S.E.2d. 452 (2010).

review.” The bill takes effect for cases filed in superior courts on or after July 1, 2023. Three additional changes worth noting:

- Superior courts are required to hold hearings for non-jury property tax appeals within 30 days of filing (unless continued by the court for a period not to exceed an additional 90 days).
- The county board of tax assessors may, with taxpayer consent, conduct settlement conferences by audio or video teleconference, or any other remote communication medium, reflecting the practical changes made during the pandemic.
- In a favorable change for taxpayers, courts no longer have discretion in determining whether the value asserted by the board of tax assessors is “unreasonable” if the board of tax assessors fails to meet its burden of proof (i.e., proving its opinions of value and the validity of its proposed assessment by a preponderance of evidence). Instead, if the board of tax assessors fails to meet this preponderance standard, then the court “shall” find that the value asserted by the board of assessors is “incorrect” and authorize the determination of the final value of the property.

What Didn’t Pass – But May Return in Future Years to a Legislature Near You

Taxation of digital goods and services

House Bill 594, which was amended and carried over from the 2021 legislative session, would have imposed sales and use tax on certain digital goods and services. That proposed bill would have amended the definition of tangible personal property to include “digital goods or services,” which were defined as “(A) Specified digital products or prewritten computer software delivered electronically to an end user...; (B) A digital code; (C) Specified digital products or prewritten computer software for which rights may be permitted for access or use and for which possession is maintained by the seller or a third party ...; or (D) Rights, licenses, or benefits delivered electronically to enhance, maintain, update, renew, upgrade, or expand benefits for specified digital products or prewritten computer software.”

Confusingly, certain versions of the proposed HB 594 would not have amended O.C.G.A. § 48-8-3(91), thus leaving intact the exemption from sales/use tax of the sale of prewritten software that has been delivered to a purchaser electronically or by “load and leave.”

While the bill did not pass this session, taxpayers should expect the General Assembly to consider another proposal to extend the sales/use tax to digital goods and services in a future session. Taxpayers should be ready to advocate for a sensible, well-defined imposition of this extension of the sales and use tax; in particular, business taxpayers should be prepared to seek memorialization of the concept embedded in the 2021 language that sought to tax only sales to, or uses by, an individual end-user, with an exclusion for software purchased to be used in a business enterprise.

Film tax credits

Finally, the General Assembly considered but did not include language in its headline tax-cut bill (HB 1437, discussed above) that proposed to either (1) cap the available number of film tax credits on an annual basis; or (2) eliminate the ability of production companies to transfer the credits that they earn to a buyer that has sufficient Georgia income tax liability to utilize the credits.

While the credit program's role in helping to create and maintain the massive film industry within Georgia is beyond dispute, a number of legislators continue to bristle at the costs of a specific industry subsidy. Concerns about the credits were alleviated – but obviously not eliminated – by a new audit program that began in 2021 in response to contentions that the film tax credit program lacked sufficient safeguards.

For now, the film tax credit program appears safe, but both the production industry and the Georgia taxpayers that have benefited from purchasing and using the credits to reduce their Georgia tax liabilities should remain alert to advocate for the program's value in future years. In addition to enjoying economic benefits from the industry's presence, Atlantans – including these authors – love seeing their neighborhoods, favorite restaurants and local parks frequently featured on screen (even if we are often just a stand-in for Chicago or Anytown, USA).

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