

State and Local Tax ADVISORY

April 4, 2012

Georgia Tax Reform in 2012: Valuable Changes for Taxpayers Awaiting Governor's Signature

The Georgia General Assembly recently passed three significant bills that have an impact on the state's tax laws: HB 386, HB 100 and HB 846.

HB 386

HB 386 was passed by both houses of the Georgia General Assembly ("General Assembly") on March 22, 2012. Originally, HB 386 was introduced during the 2011 legislative session as one of several bills representing the culmination of Georgia's comprehensive tax reform effort. As introduced, HB 386 would have repealed many sales and use tax exemptions (including the exemption for groceries), imposed corporate and personal income tax at the flat rate of four percent (while also eliminating or reducing several deductions and credits) and revamped the state communications tax system. The enacted version of HB 386 has a considerably narrower scope, although it still contains several important new provisions for both corporate and individual taxpayers.

Sales and Use Tax Exemptions

Energy

Perhaps the most high-profile provision in the bill is the new exemption for the sale and use of "energy which is necessary and integral to the manufacture of tangible personal property at a manufacturing plant," which will be phased in over a four-year period. Creating that exemption was an important business initiative for Governor Deal and was also recommended by the Special Council, which recommended a series of tax reforms for Georgia in 2010.

Notwithstanding the new exemption for energy at the state level, HB 386 permits local jurisdictions to impose their own tax on energy. Such local tax may be phased in over the next few years, up to a maximum rate of two percent.

Manufacturing and Agriculture

The bill repeals numerous sales and use tax exemptions related to agriculture, poultry, manufacturing, timber and pollution control, while at the same time enacting new exemptions and definitions that pertain to these industries. Interestingly, the legislature has codified much of the existing regulation, setting out the scope of the manufacturing exemptions under the "integrated plant" theory (Ga. Admin Code 560-12-2-.62). The bill largely codifies the language of the regulation in its current form, but the legislature did make some notable modifications (e.g., the exemption specifies that "packaging supplies" used in a packaging operation are exempt and it added a number of examples of items that satisfy the definition of exempt "equipment" under the statute).

The bill also contains a significant new exemption for "agricultural production inputs, energy used in agriculture, and agricultural machinery and equipment," when those items are purchased or used by "qualified agricultural producers."

Incentives for Projects of “Regional Significance”

Separately, the bill creates a new sales and use tax exemption for sales of tangible personal property used in the construction of a “competitive project of regional significance.” To be eligible, such projects must be deemed eligible by Georgia’s commissioner of economic development. This provision follows from another initiative of Governor Deal and a recommendation of the 2010 Special Council, and it is seen as a means of providing an important state official with discretionary powers to provide incentives to attract businesses to Georgia. The current system—in which all incentives are available based on meeting specific statutory requirements—has been criticized for not providing enough flexibility to attract new businesses to Georgia.

Sales and Use Tax Nexus

The bill establishes new sales and use tax nexus standards for sales by out-of-state companies to Georgia residents. In particular, a dealer will be considered to have nexus with Georgia (and thus have a use tax collection obligation) if it makes taxable sales when a related member (other than a common carrier) that has substantial nexus with the state:

- sells a similar line of products as the person and does so under the same or a similar business name; or
- uses trademarks, service marks or trade names in this state that are the same or substantially similar to those used by the person.

Similarly, a dealer will be considered to have nexus with the state if it makes taxable sales when any other person (other than a common carrier) that has substantial nexus:

- delivers, installs, assembles, or performs maintenance services for the person’s customers within this state;
- facilitates the person’s delivery of property to customers in this state by allowing the person’s customers to pick up property sold by the person at an office, distribution facility, warehouse, storage place, or similar place of business maintained by the person in this state; or
- conducts any other activities in this state that are significantly associated with the person’s ability to establish and maintain a market in this state for the person’s sales.

HB 386 also contains an “Amazon” law or click-through nexus provision. It provides that a dealer includes a person who:

Enters into an agreement with one or more other persons who are residents of this state under which the resident, for a commission or other consideration, based on completed sales, directly or indirectly, refers potential customers, whether by a link on an Internet website, an in-person oral presentation, telemarketing or otherwise, to the person, if the cumulative gross receipts from sales by the person to customers in this state who are referred to the person by all residents with this type of an agreement with the person is in excess of \$50,000.00 during the preceding 12 months.

Reform of the “Birthday Tax” on Motor Vehicles

HB 386 makes significant changes to Georgia’s motor vehicle tax system, which has been derided as the “birthday tax” because it requires taxpayers to renew their car tags—and pay an ad valorem tax based on the

value of their cars—each year before their birthday. In addition to the annual ad valorem tax, taxpayers were required to pay sales tax on the price of their cars at the time of purchase.

Under the new system, there will be no sales tax due at the time of purchase of a new or used vehicle and no annual ad valorem tax. Rather, purchasers will pay a one-time “title fee” roughly equivalent to the sales tax during the year of purchase (specifically, beginning on March 1, 2013, the combined state and local title fee will be six and a half percent of the vehicle’s fair market value less any trade-in value; the combined rate increases to seven percent for 2015 and subsequent tax years). The title fee is required to be paid by a purchaser to the county tag agent at the time the purchaser applies for title and registers the vehicle.

Last, under the new system, purchases of motor vehicles from private individuals will no longer receive a tax advantage, as those purchases will be subject to the same one-time title fee as purchases from dealers.

HB 100

HB 100, or the “Georgia Tax Tribunal Act of 2012,” was passed by the General Assembly on March 29, 2012, and creates the Georgia Tax Tribunal. Under the bill, the Georgia Tax Tribunal will serve as an independent and autonomous division within the executive branch’s Office of State Administrative Hearings. Taxpayers may begin filing petitions to the Tribunal on January 1, 2013.

The Tribunal should serve as an extremely valuable new forum for Georgia taxpayers, as a taxpayer aggrieved by a decision of the Georgia Department of Revenue now has a forum independent of the Department to which he can take his appeal and have it heard by an expert in state tax law. The Tribunal received the support of numerous taxpayer and business advocacy groups, including COST, the Georgia Chamber of Commerce, and TEI.

Judge and Jurisdiction

Perhaps most importantly, the administrative law judge who will hear cases filed to the new Georgia Tax Tribunal is required to be an expert in state tax law with experience practicing “primarily in the area of tax law for at least eight years.” The judge will be appointed by the governor.

The Georgia Tax Tribunal will have concurrent jurisdiction with the state superior courts over actions for tax refunds, appeals of orders, rulings, or findings of the commissioner of revenue, and determinations regarding the legality of writs of execution issued by the commissioner of revenue for the collection of any tax, penalty or interest. Unlike petitions to superior court, HB 100 does not require a surety bond or other security as a prerequisite to filing a petition to the Tribunal. HB 100 also contemplates a “small claims” division of the Tribunal. A taxpayer can elect to proceed in this division if an action does not exceed a specified threshold amount.

Rules of Practice and Procedure

HB 100 provides that the Georgia Civil Practice Act, which governs discovery and depositions, shall apply to Tribunal proceedings, although the parties are encouraged to conduct discovery informally. Trials in Tribunal proceedings are de novo and without a jury. Further, under HB 100, Tribunal judges are generally required to apply the rules of evidence as applied in the trial of civil non-jury cases in the superior courts, with the exception of hearings conducted in the Tribunal’s small claims division. Crucially, all decisions of the Tribunal (other than small claims decisions) will be written and published, creating a valuable new source of guidance for Georgia taxpayers.

Appeals

Final judgments of the Tribunal may be appealed to the Superior Court of Fulton County. Such review must be conducted by the reviewing court without a jury and on the record. The reviewing court may reverse or modify the judgment if substantial rights of the petitioner have been prejudiced. The reviewing court's final judgment may be appealed to the Court of Appeals or Supreme Court of Georgia in keeping with the normal rules governing discretionary and direct appeals under O.C.G.A. §§ 5-6-34 and 5-6-35.

Location

The Tribunal is required to be in Fulton County in a building that is separate and apart from any building in which the commissioner of revenue has an office. The Tribunal is authorized to conduct hearings at other locations in the state, provided that the above separation is maintained.

HB 846

HB 846, which was passed by the General Assembly on March 27, 2012, authorizes the commissioner of revenue to promulgate regulations regarding the publication of written tax rulings. While the bill specifies that such rulings do not have precedential value for any taxpayer other than the one to which the ruling is addressed, allowing the commissioner of revenue to publish such rulings will nevertheless be a valuable addition to the guidance issued by the Georgia Department of Revenue.

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