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Maria Friedman

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REVENUE AND TAXATION

Income Taxes: Provide Provisions Regarding Treatment by Corporations of Foreign Dividends, Job Tax Credits, Withholding Taxes on Distributions from Partnerships, Withholding Taxes on Transfers of Real Property by Nonresidents, and Computer Software Ad Valorem Tax

CODE SECTIONS:	O.C.G.A. §§ 48-7-21 (amended), -40.1, -100(2.1), -100(6.1), -100(6.2), -128, -129 (new), 48-2-56 (amended), 48-1-8 (new), 48-6-21 (amended)
BILL NUMBERS:	HB 536, HB 384, HB 385, HB 350
ACT NUMBERS:	568, 400, 438, 567
SUMMARY:	HB 536 clarifies which dividends received from foreign sources a corporation may deduct from its net income and creates a jobs tax credit program for jobs created in less developed areas. HB 384 creates a withholding tax equal to four percent of the distributions made from partnerships, S corporations, and limited liability companies that do business in Georgia to nonresident members. HB 385 creates a withholding tax on transfers of real property from nonresidents to residents. HB 350 changes the list of intangible personal property subject to ad valorem taxation to include computer software.
EFFECTIVE DATES:	April 3, 1993, O.C.G.A. §§ 48-2-56, -7-128B; April 9, 1993, O.C.G.A. §§ 48-7-100, -128A; April 23, 1993, O.C.G.A. § 48-7-21; January 1, 1994, O.C.G.A. §§ 48-1-8, 48-6-21, 48-7-40.1

History

A number of revenue and taxation bills were introduced during the 1993 legislature for a variety of reasons. First of all, several corporations had requested that the General Assembly amend current law to clarify the extent to which income from foreign subsidiaries should be taxed in Georgia.¹ This technical correction or clarification was accomplished through HB 536. The bill was essentially revenue neutral and, therefore, was not expected to be opposed by the Governor and the House Ways and Means Committee.² However, this revenue

1. Telephone Interview with Rep. Thomas Buck, III, House District No. 135 (Apr. 14, 1993) [hereinafter Buck Interview]. Rep. Buck cosponsored HB 536. *Id.*

2. Letter from Thomas J. Harrold, Jr. to Subpart F State Tax Committee

neutral bill was amended to include a jobs tax credit for the Atlanta project.³ Former President Carter urged the jobs tax credit amendment and assisted in pushing the amended bill through the General Assembly.⁴

Additionally, two bills were introduced, and later passed, to create tax provisions that increase the voluntary compliance of tax filings by nonresidents.⁵ The Georgia Department of Revenue requested the legislation in order to close loopholes that created inequities between Georgia residents and non-Georgia residents.⁶ Two bills were enacted that require resident parties transacting business with nonresidents to withhold taxes from the proceeds of such transactions.⁷ By withholding taxes from nonresidents, the General Assembly hoped to encourage the voluntary compliance of nonresidents with Georgia revenue laws.⁸ In particular, taxes must be withheld from both partnership distributions made to nonresidents and the proceeds of real estate transactions.⁹

Finally, legislation was enacted to increase the revenue base by imposing an ad valorem tax on the value of computer software.¹⁰

HB 536

Foreign Dividends Received by Corporations

Georgia law allows corporations to reduce taxable income by the amount of dividends received from sources outside the United States.¹¹

(Jan. 28, 1993) [hereinafter Harrold Letter] (available in Georgia State University College of Law Library).

3. Buck Interview, *supra* note 1.

4. Letter from Thomas J. Harrold, Jr. to Subpart F State Tax Committee (Mar. 23, 1993) (available in Georgia State University College of Law Library).

5. *See, e.g.*, HB 384, as introduced, 1993 Ga. Gen. Assem.; HB 385, as introduced, 1993 Ga. Gen. Assem.

6. Telephone Interview with Rep. William J. Dover, House District No. 9 (Apr. 12, 1993) [hereinafter Dover Interview]. Rep. Dover, Chairman of the House Ways and Means Committee, was one of several sponsors HB 384 and HB 385. *Id.*

7. *See, e.g.*, HB 384, as introduced, 1993 Ga. Gen. Assem.; HB 385, as introduced, 1993 Ga. Gen. Assem.

8. Dover Interview, *supra* note 6.

9. *Id.*

10. O.C.G.A. § 48-1-8(2) (Supp. 1993).

11. O.C.G.A. § 48-7-21(b)(8)(A) (Supp. 1993) provides:

There shall be subtracted from taxable income dividends received by:

(A) A corporation from sources outside the United States as defined in the Internal Revenue Code of 1986. For purposes of this subparagraph, dividends received by a corporation from sources outside of the United States shall include amounts treated as a dividend and income deemed to have been received under provisions of the Internal Revenue Code of 1986 by such corporation if such amounts could have been subtracted from taxable income under this paragraph, had such amounts actually been received. Amounts to be subtracted under this

The purpose of the Act is to clarify to what extent corporations may deduct foreign dividends.¹² Previous law provided that a corporation could deduct from taxable income dividends received "from sources outside the United States as defined by the Internal Revenue Code of 1986."¹³ The Act revised the previous law to expand the definition of foreign dividends and to include examples of deductible dividends.¹⁴ This section of the Act applies to all taxable years beginning on or after the effective date of the Act.¹⁵

The section of the Act that relates to the deductibility of foreign dividends was adopted almost verbatim in the form of the original bill.¹⁶ However, a new version of the bill was substituted on the House floor to add provisions for a new tax credit for corporations that create jobs in less developed areas.¹⁷

Jobs Tax Credit in Less Developed Areas

The Act allows "business enterprises" that locate within a "less developed area" a tax credit equal to \$2000 per year for "each new full-time employee job for five years beginning with years two through six after the creation of the job."¹⁸ Two major tax credit programs for

subparagraph shall include the following, as defined by the Internal Revenue Code of 1986:

- (i) Qualified electing fund income;
- (ii) Subpart F income; and
- (iii) Income attributable to an increase in United States property by a controlled foreign corporation.

The amount subtracted under this subparagraph shall be reduced by any expenses directly attributable to the dividend income. . . .

O.C.G.A. § 48-7-21(b)(8)(A) (Supp. 1993).

12. Letter from Claude L. Vickers, State Auditor, Georgia Department of Audits, and Henry M. Huckaby, Director, Office of Planning and Budget, to The Honorable Bill Dover, Chairman, House Ways and Means Committee (Feb. 17, 1993) [hereinafter Vickers Letter #1] (available in Georgia State University College of Law Library).

13. O.C.G.A. § 48-7-21(b)(8)(A) (Supp. 1988).

14. Vickers Letter #1, *supra* note 12.

15. O.C.G.A. § 48-7-21(b)(8)(A) (Supp. 1993).

16. HB 536, as introduced, 1993 Ga. Gen. Assem.

17. HB 536 (HFS), 1993 Ga. Gen. Assem.

18. O.C.G.A. § 48-7-40.1(e) (Supp. 1993). This section provides that:

Business enterprises in areas designated by the commissioner of community affairs as less developed areas shall be allowed a job tax credit for taxes imposed under this article equal to \$2,000.00 annually for each new full-time employee job for five years beginning with years two through six after the creation of the job. The number of new full-time jobs shall be determined by comparing the monthly average number of full-time employees subject to Georgia income tax withholding for the taxable year with the corresponding period of the prior taxable year. Only those business enterprises that increase employment by ten or more in a less developed area shall be eligible for the credit. In addition, not

economically distressed areas precede this Act.¹⁹ Prior to the passage of this bill, a similar credit was available for jobs created in eighty of the poorest Georgia counties.²⁰ This Act expands the existing jobs tax credit to include areas the Commissioner of Community Affairs designates as less developed in addition to the poorest eighty Georgia counties.²¹

The Act designates an area as a "less developed area" where ten or more contiguous tracts meet several criteria for high rates of unemployment, low per capita income, and a high percent of below poverty residents.²² The Commissioner of Community Affairs is authorized to designate an area as "less developed" upon a "sudden and severe period of economic distress caused by the closing of one or more business enterprises located in such area."²³ The Act defines "business enterprise" as businesses engaged in a variety of industries, not to include the retail industry.²⁴

In order for a business to receive the credit, certain requirements must be fulfilled. First, the business must locate in an area that the Commissioner of Community Affairs has designated as less

less than 60 percent of such new full-time jobs must be held by a resident of the less developed area for which the credit is sought or another such designated less developed area. Credit shall not be allowed during a year if the net employment increase falls below ten. Any credit received for years prior to the year in which the net employment increase falls below ten shall not be affected. The state revenue commissioner shall adjust the credit allowed each year for net new employment fluctuations above the minimum level of ten.

Id.

19. *Legislative Review*, 9 GA. ST. U.L. REV. 338, 340 (1992).

20. O.C.G.A. § 48-7-40 (1992).

21. *Id.* § 48-7-40.1(e) (Supp. 1993).

22. *Id.* § 48-7-40.1(b) (Supp. 1993). This section provides in full as follows:
Not later than December 31 of each year, using the most current data available from the Department of Labor and the United States Department of Commerce, the commissioner of community affairs shall rank and designate as less developed areas the areas which are comprised of ten or more contiguous census tracts in this state using a combination of the following factors:

- (1) Highest unemployment rate for the most recent 36 month period;
- (2) Lowest per capita income for the most recent 36 month period; and
- (3) Highest percentage of residents whose income is below the poverty level according to the most recent data available.

Id.

23. *Id.* § 48-7-40.1(c) (Supp. 1993).

24. *Id.* § 48-7-40.1(a) (Supp. 1993). The section provides that "the term business enterprise' means any business which is engaged in manufacturing, warehousing and distribution, processing, tourism, and research and development industries. Such term shall not include retail businesses." *Id.*

developed.²⁵ Second, businesses receive the credit only for newly created jobs, and the credit inures to the company beginning in years two through six.²⁶ Third, a business must create ten or more new jobs in order to receive any credits.²⁷ Fourth, at least sixty percent of the employees that accept the newly created jobs must reside within the less developed area.²⁸ Furthermore, a business may claim the credit against Georgia income tax liability only up to fifty percent of the liability.²⁹ This section of the Act applies to all taxable years beginning on or after January 1, 1994.³⁰

HB 384

The purpose of this Act is to increase the compliance of nonresident members of partnerships, S corporations, and limited liability companies which are subject to Georgia income tax.³¹ The Act provides that distributions made by partnerships, S corporations, and limited liability companies doing business in the state of Georgia to nonresident partners or shareholders are subject to a withholding tax of four percent of the amount distributed.³² The Act further provides procedures for remitting withheld taxes and for the imposition of penalties for failure to withhold.³³ The partnership, S corporation, or limited liability company is jointly and severally liable with its members for the payment of taxes and penalties.³⁴ Prior to the enactment of this Act, some nonresidents neglected their obligation to pay Georgia income tax due to the fact that information on nonresident members was not maintained by the State of Georgia.³⁵

A distribution is defined generally as money or an interest in money that a partnership, S corporation, or limited liability company passes through to its members.³⁶ A member includes a "partner, shareholder,

25. *Id.* § 48-7-40.1(e) (Supp. 1993).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* § 48-7-40.1(h) (Supp. 1993).

30. *Id.* § 48-7-21(b)(8)(A) (Supp. 1993).

31. Letter from Claude L. Vickers, State Auditor, Georgia Department of Audits, and Henry M. Huckaby, Director, Office of Planning and Budget, to The Honorable Bill Dover, Chairman, House Ways and Means Committee (Feb. 18, 1993) [hereinafter Vickers Letter #2] (available in Georgia State University College of Law Library).

32. O.C.G.A. § 48-7-128A (Supp. 1993).

33. *Id.*

34. *Id.* § 48-7-129(a)(4), (c)(1) (Supp. 1993).

35. Vickers Letter #2, *supra* note 31.

36. O.C.G.A. § 48-7-100(2.1) (Supp. 1993). The full definition provides that "[d]istribution paid or credited" shall mean any disbursement of funds or recognition or assignment of interest in proceeds or property of a partnership, Subchapter S' corporation, or limited liability company which is passed through to the members and

or other person to whom the taxpaying obligation of the partnership, Subchapter S' corporation, or limited liability company falls."³⁷ Additionally, a nonresident is defined as "an individual member who resides outside this state and a foreign or domestic corporate member whose headquarters or principal place of business is located outside this state."³⁸

Penalties may be assessed in an amount equal to the tax that the company is required to withhold when it fails to withhold the proper tax.³⁹ The State may impose an additional penalty against a partnership, S corporation, or limited liability company for a false representation of the residency of its members.⁴⁰ This penalty is equal to the greater of \$250 or five percent of the tax a company is required to withhold.⁴¹

The partnership, S corporation, or limited liability company must complete a form and remit it with the payment to the Department of Revenue "on or before the last day of the calendar month following the calendar month within which the distribution was paid or credited."⁴² Additionally, the partnership, S corporation, or limited liability company must furnish a statement to each member within thirty days of the close of the entity's taxable year reflecting the name of the entity and member, the total amount of distributions made during the year,

which may be subject to Georgia income tax." *Id.*

37. *Id.* § 48-7-100(6.1) (Supp. 1993).

38. *Id.* § 48-7-100(6.2) (Supp. 1993).

39. *Id.* § 48-7-129(a)(3) (Supp. 1993). The full text of this section provides:

Any partnership, Subchapter "S" corporation, or limited liability company which fails to withhold and pay over to the commissioner any amount required to be withheld under this Code section may be liable for a penalty equal to the amount not withheld and paid over. Any penalty imposed under this subsection shall be paid upon notice and demand by the commissioner or the commissioner's delegate and shall be assessed and collected in the same manner as the withholding taxes imposed by this article.

Id.

40. *Id.* § 48-7-129(c)(1) (Supp. 1993). This section provides in full:

If a partnership, Subchapter "S" corporation, or limited liability company fails to remit withholding for a nonresident member and the commissioner determines that such failure is due to a false representation that the member is a resident of Georgia, there shall be imposed in addition to the tax a penalty of the greater of \$250.00 or 5 percent of the amount which should have been withheld. The partnership, Subchapter "S" corporation, or limited liability company and the nonresident member shall be jointly and severally liable for any such penalty imposed.

Id.

41. *Id.*

42. *Id.* § 48-7-129(d)(1) (Supp. 1993).

and the total amount of taxes withheld during the year.⁴³ The company must provide copies of this form which must be provided to the Commissioner as well.⁴⁴ The Commissioner may impose penalties for a failure to file these forms and for fraudulent or false filing.⁴⁵

The Act provides an exception to the withholding requirement for several situations.⁴⁶ First, no withholding is required if "[t]he aggregate annual distributions made to a member are less than \$1000.00."⁴⁷ Second, an S corporation that is subject to the corporate income tax is not required to withhold tax on distributions to shareholders.⁴⁸ Third, a publicly traded partnership is not required to withhold.⁴⁹ Fourth, the Commissioner may waive the withholding requirement following the submission of a written request for exemption, the basis of which is that the requirement creates an undue hardship.⁵⁰ Fifth, distributions that are subject to withholding under other provisions of the tax code are exempt from this withholding requirement.⁵¹ Sixth, distributions that "represent a return of such member's investment or a return of capital" are not subject to withholding.⁵² The original bill did not provide an exception for distributions representing a return of capital.⁵³ This provision was added during deliberations in the House.⁵⁴

The last exception allows the partnership, S corporation, or limited liability company to file composite returns on behalf of its nonresident members in lieu of withholding tax on distributions made to such members.⁵⁵ In order to adopt the composite return alternative to the withholding requirement, the entity must comply with regulations that the Commissioner will prescribe.⁵⁶ Companies must file composite

43. *Id.* § 48-7-129(d)(2) (Supp. 1993).

44. *Id.*

45. *Id.* § 48-7-129(d)(3) (Supp. 1993).

46. *Id.* § 48-7-129(e) (Supp. 1993).

47. *Id.* § 48-7-129(e)(1)(B) (Supp. 1993).

48. *Id.* § 48-7-129(e)(1)(C) (Supp. 1993).

49. *Id.* § 48-7-129(e)(1)(E) (Supp. 1993). Publicly traded partnership is "as defined in Section 7704 of the Internal Revenue Code of 1986. . . ." *Id.*

50. *Id.* § 48-7-129(e)(1)(D) (Supp. 1993). Under this section, the Commissioner is authorized to create the standards for determining the existence of an undue hardship. *Id.*

51. *Id.* § 48-7-129(e)(2) (Supp. 1993).

52. *Id.*

53. HB 384, as introduced, 1993 Ga. Gen. Assem.

54. HB 384 (HFACS), 1993 Ga. Gen. Assem.

55. O.C.G.A. § 48-7-129(b)(1), (e)(1)(A) (Supp. 1993).

56. *Id.* § 48-7-129(b)(1) (Supp. 1993). The text of this section provides in full: As an alternative to the withholding requirement imposed by subsection (a) of this Code section, the Commissioner may allow the filing of composite returns by partnerships, Subchapter "S" corporations, or limited liability companies on behalf of their nonresident members and may

returns on behalf of all nonresident members and must remit the Georgia income tax of all nonresident members.⁵⁷ The Act applies to distributions paid or credited after January 1, 1994.⁵⁸

HB 385

The Act provides that a Georgia resident buyer or transferee must withhold a portion of the price paid for the sale or transfer of real property where the seller or transferor is not a Georgia resident.⁵⁹ An individual or corporation is subject to Georgia income tax on "net income . . . received by the taxpayer from services performed, property owned, or from business carried on in this state."⁶⁰ Thus, a taxpayer whose only connection to Georgia is the ownership of real property located in Georgia, who does not receive annual income from the property, will not be subject to Georgia income tax until such property is sold. Since nonresident taxpayers may neglect this filing requirement,⁶¹ the General Assembly enacted a provision to enhance their voluntary compliance by imposing a withholding tax on the residents who are parties to such transactions.⁶²

Georgia residents who buy or receive real property from a nonresident of Georgia must withhold three percent of the price paid.⁶³

provide for the requirements of filing composite returns by regulation. For purposes of this subsection, the term "composite return" shall mean a return filed by a partnership, Subchapter "S" corporation, or limited liability company on behalf of all of its nonresident members which reports and remits the Georgia income tax of the nonresident members.

Id.

57. *Id.*

58. *Id.* § 48-7-128A(4) (Supp. 1993).

59. *Id.* § 48-7-128 (Supp. 1993); *see also* Letter from Claude L. Vickers, State Auditor, Georgia Department of Audits, and Henry M. Huckaby, Director, Office of Planning and Budget, to The Honorable Bill Dover, Chairman, House Ways and Means Committee (Feb. 18, 1993) [hereinafter Vickers Letter #3] (available in Georgia State University College of Law Library).

60. O.C.G.A. § 48-7-20 (Supp. 1993).

61. Vickers Letter #3, *supra* note 59.

62. *Id.*

63. O.C.G.A. § 48-7-128(b)(1) (Supp. 1993). The full text of this section provides:

Except as otherwise provided in this Code section, in the case of any sale or transfer of real property and related tangible personal property located in Georgia by a nonresident of Georgia, the buyer or transferee shall be required to withhold and remit to the commissioner on forms provided by the commissioner a withholding tax equal to 3 percent of the purchase price or a consideration paid for the sale or transfer; provided, however, that if the amount required to be withheld pursuant to this subsection exceeds the net proceeds payable to the seller or transferor, the buyer or transferee shall withhold and pay over to the commissioner only the net proceeds otherwise payable to the seller or transferor. Any buyer or transferee who fails to withhold such amount shall be

If the net proceeds realized from such a transaction are less than three percent of the price paid, then the net proceeds must be withheld and remitted instead.⁶⁴ Additionally, the resident buyer may withhold an amount equal to the tax from the gain on such transaction (or the net proceeds if less) where the nonresident seller or transferor proves by a sworn affidavit that the tax on the gain from such transaction will be less than the amount otherwise required to be withheld.⁶⁵ A resident buyer who does not withhold taxes as required by this Act will be personally liable for such tax.⁶⁶

The Act provides several exceptions to the withholding requirement.⁶⁷ First, no tax must be withheld on the transfer of the seller's principal residence.⁶⁸ Second, where the seller or transferor is a mortgagor, the property transferred was the subject of foreclosure, and no additional consideration follows the transfer, the mortgagor does not have to withhold tax.⁶⁹ Third, where the transferor or transferee is "an agency or authority of the United States of America, an agency or authority of the State of Georgia, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or the Government National Mortgage Association, or a private mortgage insurance company, the transferor does not have to withhold tax."⁷⁰ Fourth, a partnership, S corporation, or limited liability company that certifies to the buyer that it will file a composite return on behalf of its nonresident members does not have to withhold tax.⁷¹ Additionally, the Commissioner is authorized to set a minimum purchase price below which withholding is not required.⁷²

The Act denies a seller or transferor to be a Georgia resident where such taxpayer has filed Georgia tax returns for the preceding two years, does business within the state and will continue that business following the sale, and will report the sale on its current year timely filed

personally liable for the amount of such tax.

Id.

64. *Id.*

65. *Id.* § 48-7-128(c) (Supp. 1993).

66. *Id.* § 48-7-128(b)(1) (Supp. 1993).

67. *Id.* § 48-7-128(d) (Supp. 1993).

68. *Id.* § 48-7-128(d)(1) (Supp. 1993).

69. *Id.* § 48-7-128(d)(2) (Supp. 1993).

70. *Id.* § 48-7-128(d)(3) (Supp. 1993).

71. *Id.* § 48-7-128(e)(1) (Supp. 1993). A penalty may be imposed on any partnership, S corporation, or limited liability company that falsely certifies this fact to the buyer. *Id.*

72. *Id.* § 48-7-128(d)(3) (Supp. 1993).

Georgia tax return.⁷³ This provision was not included in the original bill⁷⁴ but was added during deliberations on the floor of the House.⁷⁵

Companies must remit the taxes they withhold pursuant to this requirement to the State of Georgia on or before the last day of the calendar month following the month in which the transaction giving rise to the withholding tax occurred.⁷⁶ The Act is applicable to any sale or transfer occurring on or after January 1, 1994.⁷⁷

HB 350

The Act expands the definition of intangible personal property, for purposes of ad valorem taxation, to include computer software.⁷⁸ Further, the Act defines computer software to include programs that are intended to cause computers to perform tasks.⁷⁹ The software is considered to be personal property only "to the extent of the value of the unmounted or uninstalled medium on or in which it is stored or transmitted."⁸⁰ This definition does not include copies of computer software that are held as inventory by a retailer and subject to both sales and use tax.⁸¹ This Act is effective for taxable years beginning on or after January 1, 1994.⁸²

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73. *Id.* § 48-7-128(a) (Supp. 1993).

74. HB 385, as introduced, 1993 Ga. Gen. Assem.

75. HB 385 (HFS), 1993 Ga. Gen. Assem.

76. O.C.G.A. § 48-7-128(f) (Supp. 1993).

77. *Id.* § 48-7-128(3) (Supp. 1993).

78. *Id.* § 48-6-21(10) (Supp. 1993). The Act amends O.C.G.A. § 48-6-21 by increasing the list of intangible personal property to include "[c]omputer software as defined in Code Section 48-1-8." *Id.*

79. *Id.* § 48-1-8(1)(a) (Supp. 1993). The section provides in full:

As used in this Code section, the term "computer software" means any program or routine, or any set of one or more programs or routines, which are used or intended for use to cause one or more computers or pieces of computer related peripheral equipment, or any combination thereof, to perform a task or set of tasks. Without limiting the generality of the foregoing, the term "computer software" shall include operating and application programs and all related documentation.

Id.

80. *Id.* § 48-1-8(1)(b) (Supp. 1993).

81. *Id.* § 48-1-8(1)(c) (Supp. 1993). The full text of this section provides as follows: Nothing herein shall be deemed to affect the taxation under Chapter 5 or Chapter 8 of this title of copies of computer software held as inventory in a tangible medium ready for sale at retail by one who is a dealer with respect to such property and the sale of which is subject to sales and use taxation.

Id.

82. *Id.* § 48-1-8(3) (Supp. 1993).