

H.B. 149 as Implemented under Georgia Rule 560-7-3-.03 – Election to Pay Tax at the Pass-Through Entity Level and amended by H.B. 412

Summary of Key Provisions

- S corporations and partnerships will be allowed to annually make an irrevocable election, on a timely filed applicable income tax return including extensions, to pay tax on their Georgia allocated or apportioned income at the entity level. This election, as provided by O.C.G.A. § 48-7-21 for S corporations and O.C.G.A. § 48-7-23 for partnerships, is an annual election which must be made each year. The income will be subject to a 5.75% tax rate, or the applicable current tax rate in effect, and no deduction will be allowed for taxes based on gross or net income.
- We received confirmation from the GA DOR Office of Tax Policy of their understanding that the disallowance of a deduction for taxes based on gross or net income includes the Georgia entity-level tax paid by an electing S corporation or partnership, and that this tax cannot be deducted for Georgia tax purposes either at the entity level or the owner level.
- An electing pass-through entity makes the election by checking the box and completing the applicable schedules on either Form 600S or Form 700. While each electing pass-through entity may decide how to obtain consent from its owners, the election is binding on all owners once the election is made.
- An electing S corporation must be directly owned by persons eligible to be shareholders of an S corporation under federal tax law. Eligible S corporation shareholders include individuals (except for nonresident aliens), estates and certain trusts, and exclude corporations, partnerships and LLCs.
- HB 149 originally provided that an electing partnership was also required to be directly owned by persons eligible to be shareholders of a S corporation under federal tax law. However, HB 412 eliminates this requirement for all taxable years beginning on or after January 1, 2023, which means that going forward any partnership with any ownership structure will be eligible to make the election.
- Electing S corporations and partnerships will be subject to the same estimated payment requirements that apply to C corporations.
 - Estimated payments made by owners are not eligible to be transferred to the electing pass-through entity, but the regulations do provide some relief. If the owners have made estimated payments or otherwise have credits or other attributes that would reduce their tax liability, the entity may check the “UET Annualization Exception Attached” box on the Form 600S or Form 700 and compute the underpayment of estimated tax penalty as if the electing pass-through entity had made such payments or applied such credits or attributes.

- Owners who make their own estimated payments for the income attributable to an electing pass-through entity may not transfer their estimated payments to the electing pass-through entity but must instead claim a refund of the overpayment on their own income tax return.
- A pass-through entity that makes estimated payments but then does not make the election to pay tax at the pass-through entity level may not transfer the payments to its owners but must instead claim a refund of the overpayment for the year the estimates were made.
- Electing S corporations and partnerships will be eligible to claim the following income tax credits: the Qualified Education Expense Credit, Qualified Rural Hospital Organization Expense Credit, and Qualified Education Donation Credit. For purposes of these credits the electing S corporation or partnership will be treated as an “other entity”, and therefore will be eligible to claim a credit of up to 75% of the entity’s Georgia tax liability.
- Except for the Qualified Education Expense, Qualified Rural Hospital Organization Expense and Qualified Education Donation Credits, an electing pass-through entity may make an irrevocable election to pass-through all or part of any credit to its owners for the taxable year the credit is generated.
 - For example, an electing pass-through entity may not pass through a Georgia GOAL or Georgia HEART credit earned by the entity to its owners.
 - An owner of an electing pass-through entity may separately contribute to Georgia GOAL or Georgia HEART only with respect to income that passes through to the owner and which was not taxed at the pass-through entity level in Georgia. In determining the Georgia income on which tax was paid by the owner, the owner must exclude any income that was subtracted on their Georgia return because the entity paid tax at the pass-through entity level in Georgia.
 - If a pass-through entity is preapproved to make and makes a contribution to Georgia GOAL or Georgia HEART because the entity intends to make the election but then does not make the election to pay tax at the entity level for the taxable year of the preapproval and contribution, the pass-through entity will be allowed to pass through the credits to its owners based on the year ending profit/loss percentages.
- The income on which tax is paid by the electing S corporation or partnership will not be reported on the Georgia personal tax returns of the shareholders and partners and therefore will not be taxed at the shareholder/partner level.
 - An owner of an electing pass-through entity starts with federal adjusted gross income and then subtracts on their Georgia income tax return their share of the income apportioned and allocated to Georgia at the entity level. Since any Georgia entity-level tax deducted for federal tax purposes is added back to arrive at the electing entity’s Georgia taxable income, and the owner’s share of Georgia taxable income taxed at the entity level is subtracted on

the owner's tax return, the owner will also need to separately add back their share of the Georgia entity-level tax deducted for federal tax purposes.

- If the electing pass-through entity has a loss at the entity level, the owner starts with federal adjusted gross income and then adds on their Georgia return their share of the loss apportioned and allocated to Georgia at the entity level.
- Resident shareholders and partners of electing S corporations and partnerships will be subject to Georgia income tax on income that is allocated or apportioned to other states. This is because the owner's federal K-1 will still report the entire amount of the electing pass-through entity's income and on their Georgia personal return the owner will only be subtracting the income allocated or apportioned to Georgia being taxed at the entity level.
- Nonresident shareholders and partners of electing S corporations and partnerships will not be subject to Georgia tax on the income allocated or apportioned to Georgia that will be subject to the entity-level tax. Therefore, if a nonresident owner's only source of Georgia income is that taxed at the pass-through entity level, no Georgia return is required to be filed by such nonresident owner. Also, the required withholding on distributions to nonresident members of partnerships, S corporations and LLCs will not apply to electing S corporations and partnerships.
- This new regime will be applicable to all taxable years beginning on or after January 1, 2022.

Observations

- HB 149 represents Georgia's response to IRS Notice 2020-75, issued on November 9, 2020, which apparently endorsed workarounds that have been adopted by several states involving entity-level state income taxes on pass-through entities devised to avoid the \$10,000 SALT cap. Notice 2020-75 announced that Treasury and the IRS plan to issue proposed regulations that 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. The regulations will further confirm that the deduction for such income tax payments will be included in the partners' or shareholders' distributive share of non-separately stated income or loss for the tax year.
- Georgia follows the federal definition of a partnership, so for purposes of HB 149 a "partnership" can be a general partnership, limited liability company, limited liability partnership, or other form of legal entity that is treated as a partnership for federal income tax law.
- Because an electing S corporation or partnership will be treated as an "other entity" for purposes of the Qualified Education Expense Credit and the Qualified Rural Hospital Organization Expense Credit, such entities will therefore be eligible to claim a credit of up to 75% of their Georgia tax liability.

- The Treasury regulations under IRC Section 162 provide safe harbors permitting the deductibility of payments made by C corporations or pass-through entities to charitable entities in return for state or local tax credits that reduce the entity's state or local tax liability. The safe harbors do not extend specifically to payments for credits that reduce a pass-through entity's state or local income tax liability. However, the regulations provide generally that a payment made to a charitable entity that is directly related to the taxpayer's trade or business and that is made with a reasonable expectation of financial return commensurate with the amount of the payment can be deducted as an ordinary and necessary business expense. It is reasonable to take the position that a payment to Georgia GOAL or Georgia HEART to satisfy an electing pass-through entity's Georgia income tax liability satisfies the requirements for the payment to be deducted as an ordinary and necessary business expense for federal tax purposes under IRC Section 162, thereby reducing an owner's allocable share of "ordinary" income. **The shareholder or partner of an electing S corporation or partnership will therefore trade a nondeductible state tax payment (if they have already met the \$10,000 SALT cap) for an ordinary deduction which will reduce their federal tax liability to the extent of their marginal federal tax rate.**
- This legislation will therefore enable the owners of electing S corporations and partnerships to be in the same economic position (to the extent of the payment to Georgia GOAL or Georgia HEART) as the owners of pass-through entities where the pass-through entity currently makes the payment to Georgia GOAL or Georgia HEART while claiming a business purpose for the payment. **However, the electing S corporation or partnership should not be required to claim any business purpose for the payment besides satisfying the entity's Georgia tax liability. This will significantly reduce the pass-through entity's potential exposure to claims that a payment to Georgia GOAL or Georgia HEART did not have sufficient business purpose and was not made in anticipation of receiving a financial return commensurate with the payment.**
- The other states that have adopted entity-level taxes on pass-through entities have included corresponding income tax credits for the S corporation shareholders and partners to offset their distributive share of income from the S corporation or partnership, to avoid that income being double-taxed. **In contrast, Georgia's workaround is unique in that an electing S corporation or partnership will essentially be treated as a C corporation for Georgia tax purposes for the period of the election.**
- For electing S corporations and partnerships that operate solely in Georgia and do not have nonresident owners, tax compliance will be relatively straightforward. HB 149 provides that the election will have no impact on the determination of the basis of the shareholders of an electing S corporation or the partners of an electing partnership, except that the entity-level Georgia tax paid or accrued is taken into account. Further, HB 412 confirms that the election will have no impact on the accounting or tax treatment of distributions made by an electing pass-through entity. The Georgia Code was amended apparently because there had been concern that distributions made by an electing pass-through entity could be taxable for Georgia purposes because an electing pass-through entity is treated as a "C corporation" for some purposes.
- Tax compliance will be somewhat more complicated for pass-through entities operating in multiple states and/or having nonresident owners. The C corporation treatment for Georgia purposes will apply only to income allocated or apportioned to Georgia. Therefore, Georgia

residents will be subject to Georgia tax on income apportioned to other states from electing S corporations and partnerships, and presumably may receive K-1s for other states from an electing S corporation or partnership and will be subject to nonresident income tax in those states.

- If an electing pass-through entity apportions income to another state, and a Georgia resident owner files an income tax return in the other state that levies a tax upon net income, the resident owner will be eligible for a credit on the owner's Georgia tax return for the income tax paid to the other state.
- In contrast, if the other state also allows an election to pay tax on or measured by income at the pass-through entity level, and the entity makes such an election and files a return in the other state for the income apportioned to that state, current regulations provide for relief depending on whether the electing pass-through entity is a partnership or S corporation. The resident owner of an electing partnership will be eligible for an adjustment on their Georgia return by which their Georgia income will be reduced by their share of the electing partnership's income taxed by the other state. The resident owner of an electing S corporation will be eligible to claim a credit for their share of the tax paid to the other state by the electing S corporation.
- More significantly, nonresidents owners of electing S corporations and partnerships will not be personally subject to Georgia taxation and the nonresident withholding requirements will not apply to them. However, they will still be out of pocket for their share of the Georgia entity-level tax paid. If their resident state has an income tax and taxes world-wide income, to be made whole their own resident state will need to provide them with an offsetting credit or adjustment. **This will likely make Georgia pass-through entities with nonresident owners (who reside in states with an income tax) reluctant to make the election until this uncertainty is resolved with respect to the other states involved.** This issue is illustrated by the following example:

Assume individual N is a nonresident of Georgia and a resident of state B who is a partner of partnership P conducting business in Georgia and each year pays tax of \$1,000 to Georgia on N's distributive share of P's net taxable income. Also assume that N does not receive a federal deduction for the \$1,000 payment because N has already exceeded the \$10,000 SALT cap, but N does receive a full resident state tax credit of \$1,000 for the tax paid to Georgia. With the workaround under HB 149, P, rather than N, pays the \$1,000. The payment is fully deductible by P, and therefore N receives a federal tax benefit of \$370 assuming the highest marginal federal tax rate. N still bears the economic burden of the \$1,000 payment. However, because the payment is made by P, N does not personally pay nonresident tax to Georgia and therefore may not receive a resident state tax credit of \$1,000. If not, N is out-of-pocket in the amount of \$630 (i.e., \$370 federal tax benefit less \$1,000 lost resident state tax credit).