House Bill 191

By: Representatives O`Neal of the 146th and Williams of the 4th

A BILL TO BE ENTITLED
AN ACT

To amend Article 2 of Chapter 7 of Title 48 of the Official Code of Georgia Annotated, relating to imposition, rate, computation, and exemptions regarding income taxes, so as to provide for adjustments to taxable net income with respect to certain direct or indirect interest expenses and costs and intangible expenses and costs; to provide for procedures, conditions, and limitations; to change the manner and method of allocating and apportioning income with respect to corporations; to provide for powers, duties, and authority of the state revenue commissioner; to provide effective dates; to provide for applicability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 2 of Chapter 7 of Title 48 of the Official Code of Georgia Annotated, relating to imposition, rate, computation, and exemptions regarding income taxes, is amended in Code Section 48-7-27, relating to computation of taxable net income, by adding a new paragraph at the end of subsection (b), to be designated paragraph (11), to read as follows:

"(11) Georgia taxable income shall be adjusted as provided in Code Section 48-7-28.3."

SECTION 2.

Said article is further amended in Code Section 48-7-21, relating to taxation of corporations, by striking paragraph (10) of subsection (b) and inserting in its place a new paragraph (10) to read as follows:

"(10) ~~Reserved.~~ Georgia taxable income shall be adjusted as provided in Code Section 48-7-28.3."

SECTION 3.

Said article is further amended by adding a new Code section immediately following Code Section 48-7-28.2, to be designated Code Section 48-7-28.3, to read as follows:

″48-7-28.3.

(a) As used in this Code section, the term:

(1) 'Comprehensive income tax treaty' means a convention or agreement, entered into by the United States and approved by Congress, with a foreign government for the allocation of all categories of income subject to taxation or the withholding of tax on interest, dividends, and royalties for the prevention of double taxation of the respective nations´ residents and the sharing of information.

(2) 'Corporation' means:

(A) A corporation incorporated under the laws of this state or incorporated or organized under the laws of any other state, territory, or nation; or

(B) A limited liability company treated as a corporation for federal income tax purposes or any other person treated as a corporation for federal income tax purposes. A limited liability company which is disregarded as a separate entity for income tax purposes shall also be disregarded as a separate entity for purposes of this Code section.

(3) 'Foreign nation' means an established sovereign government that is recognized as such by the United States Department of State.

(4) 'Intangible expenses and costs' means expenses, losses, and costs directly or indirectly for, related to, or in connection with the direct or indirect acquisition, use, maintenance, management, ownership, sale, exchange, or disposition of intangible property, to the extent such amounts are allowed as deductions or costs in determining taxable income before net operating loss deduction and special deductions for the taxable year under the Internal Revenue Code of 1986. The term includes but is not limited to:

(A) Royalty, patent, technical, and copyright fees;

(B) Licensing fees; and

(C) Other similar expenses and costs.

(5) 'Intangible property' includes but is not limited to patents, patent applications, trade names, trademarks, service marks, copyrights, mask words, trade secrets, and similar types of intangible assets.

(6) 'Interest expenses and costs' includes but is not limited to amounts directly or indirectly allowed as deductions under Section 163 of the Internal Revenue Code of 1986 for purposes of determining taxable income under the Internal Revenue Code of 1986 to the extent such expenses and costs are directly or indirectly for, related to, or in connection with the direct or indirect acquisition, use, maintenance, management, ownership, sale, exchange, or disposition of intangible property.

(7) 'Related person' means:

(A) A stockholder who is an individual or a member of the stockholder´s family enumerated in Section 318 of the Internal Revenue Code of 1986 if the stockholder and the members of the stockholder´s family own, directly or indirectly, beneficially or constructively, in the aggregate at least 50 percent of the value of the taxpayer´s outstanding stock;

(B) A stockholder, or a stockholder´s partnerships, estate, trusts, or corporations, if the stockholder and the stockholder´s partnerships, estate, trusts, and corporations own, directly or indirectly, beneficially or constructively, in the aggregate at least 50 percent of the value of the taxpayer´s outstanding stock; or

(C) A corporation, or a person related to the corporation in a manner that would require an attribution of stock from the corporation to the person or from the person to the corporation under the attribution rules of Section 318 of the Internal Revenue Code of 1986, if the taxpayer owns, directly or indirectly, beneficially or constructively, at least 50 percent of the value of the corporation´s outstanding stock.

(D) The attribution rules of Section 318 of the Internal Revenue Code of 1986 apply for purposes of determining whether the ownership requirements in subparagraphs (A) through (C) of this paragraph have been met.

(E) A limited liability company treated as a partnership for federal income tax purposes shall be considered a partnership for purposes of this paragraph and paragraph (8) of this subsection.

(8) 'Related member' means a person, with respect to the taxpayer during all or any portion of the tax year:

(A) That is a related person;

(B) That is a component member as defined in Section 1563(b) of the Internal Revenue Code of 1986;

(C) To or from whom there would be required an attribution of stock ownership in accordance with Section 1563(e) of the Internal Revenue Code of 1986; or

(D) That, notwithstanding its form of organization, bears the same relationship to the taxpayer as a person described in subparagraphs (A) through (C) of this paragraph.

(9) 'Valid business purpose' means one or more business purposes, other than the avoidance or reduction of taxation, 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. The economic position of the taxpayer includes an increase in the market share of the taxpayer, or the entry by the taxpayer into new business markets.

(b) For purposes of computing its Georgia taxable net income under Code Sections 48-7-21 and 48-7-27, a taxpayer shall add back otherwise deductible interest expenses and costs and intangible expenses and costs directly or indirectly paid, accrued, or incurred to, or in connection directly or indirectly with one or more direct or indirect transactions with, one or more related members. Such expenses and costs shall be added before the income is apportioned or allocated as provided by Code Section 48-7-31.

(c) The commissioner shall have the authority to reverse in whole or in part the adjustments required in subsection (b) of this Code section when the taxpayer and the commissioner agree in writing to the application or use of an alternative method of apportionment under subparagraph (d)(2)(E) of Code Section 48-7-31, Code Section 48-7-35, or Code Section 48-7-31.1. Nothing in this Code section shall be construed to limit or negate the commissioner´s authority otherwise to enter into agreements and compromises otherwise allowed by law.

(d)(1) For purposes of this subsection, the term:

(A) 'Allocated or apportioned, or both' does not mean the amount of income that is subject to allocation or apportionment, or both. Rather it means the amount that is arrived at after applying the allocation and apportionment rules of a state as defined in subparagraph (B) of this paragraph. A tax or the portion of a tax, which is or would be imposed regardless of the amount of the income, shall not be considered to be a tax on or measured by the income of the related member.

(B) 'State' means a state in the United States of America, including the District of Columbia, but does not include those states under whose laws the taxpayer files with the related member, or the related member files with another related member, a combined income tax report or return, a consolidated income tax report or return, or any other report or return where such report or return is due because of the imposition of a tax on, or measured by, income and where such combined income tax report or return, consolidated income tax report or return, or other report or return results in the elimination of the tax effects from transactions directly or indirectly between the taxpayer and the related member.

(2) The amount of the adjustment required by subsection (b) of this Code section shall be reduced, but not below zero, to the extent the corresponding interest expenses and costs and intangible expenses and costs:

(A) Are received as income in an arm´s length transaction by the related member; and

(B) Such income is allocated or apportioned, or both, to and taxed by Georgia or another state that imposes a tax on or measured by the income of the related member.

(3) In claiming the exception allowed by this subsection, the taxpayer shall disclose on its return, with respect to the related member, the name of the related member, the federal identification number of the related member, the name of each state, the amount of the interest expenses and costs and intangible expenses and costs allocated or apportioned to and taxed by each state for such related member, and such other information as the commissioner may prescribe.

(e)(1) The adjustment required by subsection (b) of this Code section shall be reduced, but not below zero, if and to the extent:

(A) The interest expenses and costs and intangible expenses and costs are paid, accrued, or incurred to a related member domiciled in a foreign nation which has in force a comprehensive income tax treaty with the United States;

(B) The transaction giving rise to the interest expenses and costs and intangible expenses and costs has a valid business purpose; and

(C) The amounts of such interest expenses and costs and intangible expenses and costs were determined at arm´s length rates.

(2) In claiming the exception allowed by this subsection, the taxpayer shall disclose on its return:

(A) The name and federal identification number of the related member;

(B) The amount of the interest expenses and costs and intangible expenses and costs;

(C) The country of domicile of the related member; and

(D) Such other information as the commissioner may prescribe.

(f) The adjustment required in subsection (b) of this Code section shall not apply to the portion of interest expenses and costs and intangible expenses and costs that the taxpayer establishes by a preponderance of the evidence that meets both of the following:

(1) The related member during the same taxable year directly or indirectly paid, accrued, or incurred such portion to a person that is not a related member; and

(2) The transaction giving rise to the interest expenses and costs and intangible expenses and costs has a valid business purpose.

(g) Nothing in this Code section shall require a taxpayer to add to its Georgia taxable net income more than once any amount of interest expenses and costs and intangible expenses and costs that the taxpayer pays, accrues, or incurs to a related member.

(h) Nothing in this Code section shall be construed to limit or negate the commissioner´s authority to make adjustments under Code Section 48-7-58.

(i) The adjustment required by this Code section shall apply to a corporation that files a separate return with Georgia and to the separate taxable income computation of each member of a Georgia consolidated return.

(j) In addition to other penalties imposed by this title, the penalty for failure to make the adjustment required by this Code section shall be 10 percent of the additional tax that results because of this Code section.

(k) The commissioner is authorized to prescribe forms and promulgate rules and regulations deemed necessary in order to effectuate this Code section.″

SECTION 4.

Said article is further amended by striking paragraphs (1) and (2) of subsection (d) of Code Section 48-7-31, relating to the allocation and apportionment formula with respect to corporate income, and inserting in their places new paragraphs (1) and (2) to read as follows:

″(1) Where the net business income of the corporation is derived principally from the manufacture, production, or sale of tangible personal property, the portion of ~~the~~ net income therefrom attributable to property owned or business done within this state shall be taken to be the portion arrived at by application of the following formula:

(A) Property factor. The property factor is a fraction, the numerator of which is the average value of the taxpayer´s real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer´s real and tangible personal property owned or rented and used during the tax period;

(i) Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals;

(ii) The average value of property shall be determined by averaging the values at the beginning and end of the tax period, except that the commissioner may require the averaging of monthly values during the tax period if such averaging is reasonably required to reflect properly the average value of the taxpayer´s property;

(B) Payroll factor. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period. The term 'compensation' means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or any other person not properly classified as an employee are excluded. Compensation is paid in this state if:

(i) The employee´s service is performed entirely within this state;

(ii) The employee´s service is performed both within and outside this state and the service performed outside this state is incidental to the employee´s service within this state; or

(iii) Some of the service is performed in this state and either the base of operations, or the place from which the service is directed or controlled, is in this state or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed but the employee´s residence is in this state;

(C) Gross receipts factor.

(i) The gross receipts factor is a fraction, the numerator of which is the total gross receipts from business done within this state during the tax period and the denominator of which is the total gross receipts from business done everywhere during the tax period. For the purposes of this subparagraph, receipts shall be deemed to have been derived from business done within this state only if the receipts are received from products shipped to customers in this state, or from products delivered within this state to customers. In determining the gross receipts within this state, receipts from sales negotiated or effected through offices of the taxpayer outside this state and delivered from storage in this state to customers outside this state shall be excluded;

(ii) Where a taxpayer´s gross receipts are also derived from activities described in paragraph (2) of this subsection, gross receipts shall also include the gross receipts from the activities described in paragraph (2) of this subsection and shall be attributed to Georgia based upon division (2)(C)(i) of this subsection;

(D) Apportionment formula. The property factor, the payroll factor, and the gross receipts factor shall be ~~separately~~ determined separately and an apportionment fraction shall be calculated using the following formula:

(i) The property factor shall represent ~~25~~ 10 percent of the fraction;

(ii) The payroll factor shall represent ~~25~~ 10 percent of the fraction; and

(iii) The gross receipts factor shall represent ~~50~~ 80 percent of the fraction.

The net income of the corporation shall be apportioned to this state according to such fraction;

(2) Except as otherwise provided in paragraph (2.1) or (2.2) of this subsection, where the net business income is derived principally from business other than the manufacture, production, or sale of tangible personal property, the net business income of the corporation shall be ~~arrived at~~ determined by ~~application of~~ applying the following three-factor formula:

(A) Property factor. The property factor is a fraction, the numerator of which is the average value of the taxpayer´s real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer´s real and tangible personal property owned or rented and used during the tax period;

(i) Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals;

(ii) The average value of property shall be determined by averaging the values at the beginning and end of the tax period, except that the commissioner may require the averaging of monthly values during the tax period if such averaging is reasonably required to reflect properly the average value of the taxpayer´s property;

(B) Payroll factor. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period. The term 'compensation' means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or any other person not properly classified as an employee are excluded. Compensation is paid in this state if:

(i) The employee´s service is performed entirely within this state;

(ii) The employee´s service is performed both within and outside this state and the service performed outside this state is incidental to the employee´s service within this state; or

(iii) Some of the service is performed in this state and either the base of operations or the place from which the service is directed or controlled is in this state or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed but the employee´s residence is in this state;

(C) Gross receipts factor.

(i) The gross receipts factor is a fraction, the numerator of which is the total gross receipts from business done within this state during the tax period and the denominator of which is the total gross receipts from business done everywhere during the tax period. For purposes of this subparagraph, the term 'gross receipts' means all gross receipts received from activities which constitute the taxpayer´s regular trade or business. Gross receipts are in this state if the receipts are derived from customers within this state or if the receipts are otherwise attributable to this state´s marketplace;

(ii) Where a taxpayer´s gross receipts are also derived from activities described in paragraph (1) of this subsection, gross receipts shall also include the gross receipts from the activities described in paragraph (1) of this subsection and shall be attributed to Georgia based upon division (1)(C)(i) of this subsection;

(D) Apportionment formula. The property factor, payroll factor, and gross receipts factor shall be ~~separately~~ determined separately and an apportionment fraction shall be calculated using the following formula:

(i) The property factor shall represent ~~25~~ 10 percent of the fraction;

(ii) The payroll factor shall represent ~~25~~ 10 percent of the fraction; and

(iii) The gross receipts factor shall represent ~~50~~ 80 percent of the fraction.

The net income of the corporation shall be apportioned to this state according to such fraction;

(E) If the allocation and apportionment provisions provided for in this paragraph do not fairly represent the extent of the taxpayer´s business activity in this state, the taxpayer may petition the commissioner for, or the commissioner may by regulation require, with respect to all or any part of the taxpayer´s business activity, if reasonable:

(i) Separate accounting;

(ii) The exclusion of any one or more of the factors;

(iii) The inclusion of one or more additional factors that will fairly represent the taxpayer´s business activity within this state; or

(iv) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer´s income.

The denial of a petition under this ~~paragraph~~ subparagraph shall be appealable pursuant to either Code Section 48-2-59 or 50-13-12;″

SECTION 5.

Said article is further amended by striking paragraphs (1) and (2) of subsection (d) of Code Section 48-7-31, relating to the allocation and apportionment formula with respect to corporate income, and inserting in their places new paragraphs (1) and (2) to read as follows:

″(1) Where the net business income of the corporation is derived principally from the manufacture, production, or sale of tangible personal property, the portion of net income therefrom attributable to property owned or business done within this state shall be taken to be the portion arrived at by application of the following formula:

(A) Property factor. The property factor is a fraction, the numerator of which is the average value of the taxpayer´s real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer´s real and tangible personal property owned or rented and used during the tax period;

(i) Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals;

(ii) The average value of property shall be determined by averaging the values at the beginning and end of the tax period, except that the commissioner may require the averaging of monthly values during the tax period if such averaging is reasonably required to reflect properly the average value of the taxpayer´s property;

(B) Payroll factor. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period. The term 'compensation' means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or any other person not properly classified as an employee are excluded. Compensation is paid in this state if:

(i) The employee´s service is performed entirely within this state;

(ii) The employee´s service is performed both within and outside this state and the service performed outside this state is incidental to the employee´s service within this state; or

(iii) Some of the service is performed in this state and either the base of operations, or the place from which the service is directed or controlled, is in this state or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed but the employee´s residence is in this state;

(C) Gross receipts factor.

(i) The gross receipts factor is a fraction, the numerator of which is the total gross receipts from business done within this state during the tax period and the denominator of which is the total gross receipts from business done everywhere during the tax period. For the purposes of this subparagraph, receipts shall be deemed to have been derived from business done within this state only if the receipts are received from products shipped to customers in this state, or from products delivered within this state to customers. In determining the gross receipts within this state, receipts from sales negotiated or effected through offices of the taxpayer outside this state and delivered from storage in this state to customers outside this state shall be excluded;

(ii) Where a taxpayer´s gross receipts are also derived from activities described in paragraph (2) of this subsection, gross receipts shall also include the gross receipts from the activities described in paragraph (2) of this subsection and shall be attributed to Georgia based upon division (2)(C)(i) of this subsection;

(D) Apportionment formula. The property factor, the payroll factor, and the gross receipts factor shall be determined separately and an apportionment fraction shall be calculated using the following formula:

(i) The property factor shall represent 5 percent of the fraction;

(ii) The payroll factor shall represent 5 percent of the fraction; and

(iii) The gross receipts factor shall represent 90 percent of the fraction.

The net income of the corporation shall be apportioned to this state according to such fraction;

(2) Except as otherwise provided in paragraph (2.1) or (2.2) of this subsection, where the net business income is derived principally from business other than the manufacture, production, or sale of tangible personal property, the net business income of the corporation shall be determined by applying the following three-factor formula:

(A) Property factor. The property factor is a fraction, the numerator of which is the average value of the taxpayer´s real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer´s real and tangible personal property owned or rented and used during the tax period;

(i) Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals;

(ii) The average value of property shall be determined by averaging the values at the beginning and end of the tax period, except that the commissioner may require the averaging of monthly values during the tax period if such averaging is reasonably required to reflect properly the average value of the taxpayer´s property;

(B) Payroll factor. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period. The term 'compensation' means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or any other person not properly classified as an employee are excluded. Compensation is paid in this state if:

(i) The employee´s service is performed entirely within this state;

(ii) The employee´s service is performed both within and outside this state and the service performed outside this state is incidental to the employee´s service within this state; or

(iii) Some of the service is performed in this state and either the base of operations or the place from which the service is directed or controlled is in this state or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed but the employee´s residence is in this state;

(C) Gross receipts factor.

(i) The gross receipts factor is a fraction, the numerator of which is the total gross receipts from business done within this state during the tax period and the denominator of which is the total gross receipts from business done everywhere during the tax period. For purposes of this subparagraph, the term 'gross receipts' means all gross receipts received from activities which constitute the taxpayer´s regular trade or business. Gross receipts are in this state if the receipts are derived from customers within this state or if the receipts are otherwise attributable to this state´s marketplace;

(ii) Where a taxpayer´s gross receipts are also derived from activities described in paragraph (1) of this subsection, gross receipts shall also include the gross receipts from the activities described in paragraph (1) of this subsection and shall be attributed to Georgia based upon division (1)(C)(i) of this subsection;

(D) Apportionment formula. The property factor, payroll factor, and the gross receipts factor shall be determined separately and an apportionment fraction shall be calculated using the following formula:

(i) The property factor shall represent 5 percent of the fraction;

(ii) The payroll factor shall represent 5 percent of the fraction; and

(iii) The gross receipts factor shall represent 90 percent of the fraction.

The net income of the corporation shall be apportioned to this state according to such fraction;

(E) If the allocation and apportionment provisions provided for in this paragraph do not fairly represent the extent of the taxpayer´s business activity in this state, the taxpayer may petition the commissioner for, or the commissioner may by regulation require, with respect to all or any part of the taxpayer´s business activity, if reasonable:

(i) Separate accounting;

(ii) The exclusion of any one or more of the factors;

(iii) The inclusion of one or more additional factors that will fairly represent the taxpayer´s business activity within this state; or

(iv) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer´s income.

The denial of a petition under this subparagraph shall be appealable pursuant to either Code Section 48-2-59 or 50-13-12;″.

SECTION 6.

Said article is further amended by striking paragraphs (1) and (2) of subsection (d) of Code Section 48-7-31, relating to the allocation and apportionment formula with respect to corporate income, and inserting in their places new paragraphs (1) and (2) to read as follows:

"(1) Where the net business income of the corporation is derived principally from the manufacture, production, or sale of tangible personal property, the portion of net income therefrom attributable to property owned or business done within this state shall be taken to be the portion arrived at by application of the following formula:

(A) Gross receipts factor. The gross receipts factor is a fraction, the numerator of which is the total gross receipts from business done within this state during the tax period and the denominator of which is the total gross receipts from business done everywhere during the tax period. For the purposes of this subparagraph, receipts shall be deemed to have been derived from business done within this state if:

(i) The receipts are received from products shipped to customers in this state or from products delivered within this state to customers. Except as provided in division (ii) of this subparagraph, in determining the gross receipts within this state, receipts from sales negotiated or effected through offices of the taxpayer outside this state and delivered from storage in this state to customers outside this state shall be excluded; or

(ii) The receipts are from sales where the property is delivered from storage in this state and the taxpayer is not taxable in the state of the purchaser. For purposes of this subparagraph, the term 'state' includes the 50 states in the United States of America and the District of Columbia. A taxpayer is considered taxable in another state if:

(I) The taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax imposed by that state. Whether or not a taxpayer is subject to any such tax depends upon the nature and substance of the tax and not upon its form or title. Any taxpayer which claims it is subject to such taxes in another state must furnish to the commissioner upon request documentary evidence to support the claim. The documentary evidence should include proof that the taxpayer has filed the requisite tax return and has paid the tax due. A taxpayer that does not establish that it has filed a return and paid the tax due in a particular state is presumed not to be subject to tax in that state. If a taxpayer´s activities in another state are protected from state taxation by the United States Constitution or by other federal law, including 15 U.S.C. Sections 381-384 (P. L. 86-272), or if the taxpayer is not required to file returns under the law of the other state, the taxpayer is not subject to tax in the other state, even if the taxpayer voluntarily files returns with, or pays tax to, that state. A taxpayer that has filed a return in another state and paid tax to that state nevertheless is presumed not to be subject to tax in that state if the taxpayer has filed a refund claim or similar claim in that state alleging it is not subject to tax in such state;

(II) The other state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether, in fact, the state does or does not impose such a tax on the taxpayer. Another state has jurisdiction to subject the taxpayer to a tax with respect to a business activity if, under the Constitution and laws of the United States, the taxpayer´s business activity could be taxed in Georgia under the same facts and circumstances that exist in the other state. A state does not have such jurisdiction where the state is prohibited from imposing the tax by reason of the provisions of 15 U.S.C. Sections 381-384 (P. L. 86-272). The commissioner will presume that any activities of a corporation in another state are protected from such other state´s tax jurisdiction by federal law, including 15 U.S.C. Sections 381-384 (P. L. 86-272), if the corporation does not file returns in that jurisdiction. Any taxpayer that claims to be subject to the tax jurisdiction of another state must furnish evidence to the commissioner upon request to substantiate the claim. Documentary evidence contemporaneous with the events in question will be given greater weight than affidavits or other evidence not contemporaneous with those events in determining whether the taxpayer´s activities subject it to another state´s tax jurisdiction; or

(III) The tangible personal property is delivered or shipped to a purchaser in a foreign country.

Where a taxpayer´s gross receipts are also derived from activities described in paragraph (2) of this subsection, gross receipts shall also include the gross receipts from the activities described in paragraph (2) of this subsection and shall be attributed to Georgia based upon division (2)(A)(i) of this subsection; and

(B) Apportionment formula. The net income of the corporation shall be apportioned to this state according to the gross receipts factor pursuant to subparagraph (A) of this paragraph;

(2) Except as otherwise provided in paragraph (2.1) or (2.2) of this subsection, where the net business income is derived principally from business other than the manufacture, production, or sale of tangible personal property, the net business income of the corporation shall be determined by applying the following formula:

(A) Gross receipts factor.

(i) The gross receipts factor is a fraction, the numerator of which is the total gross receipts from business done within this state during the tax period and the denominator of which is the total gross receipts from business done everywhere during the tax period. For purposes of this subparagraph, the term 'gross receipts' means all gross receipts received from activities which constitute the taxpayer´s regular trade or business. Gross receipts are in this state if the receipts are derived from customers within this state or if the receipts are otherwise attributable to this state´s marketplace;

(ii) Where a taxpayer´s gross receipts are also derived from activities described in paragraph (1) of this subsection, gross receipts shall also include the gross receipts from the activities described in paragraph (1) of this subsection and shall be attributed to Georgia based upon subparagraph (A) of paragraph (1) of this subsection;

(B) Apportionment formula. The net income of the corporation shall be apportioned to this state according to the gross receipts factor pursuant to subparagraph (A) of this paragraph;

(C) If the allocation and apportionment provisions provided for in this paragraph do not fairly represent the extent of the taxpayer´s business activity in this state, the taxpayer may petition the commissioner for, or the commissioner may by regulation require, with respect to all or any part of the taxpayer´s business activity, if reasonable:

(i) Separate accounting;

(ii) The exclusion of any one or more of the factors;

(iii) The inclusion of one or more additional factors that will fairly represent the taxpayer´s business activity within this state; or

(iv) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer´s income.

The denial of a petition under this subparagraph shall be appealable pursuant to either Code Section 48-2-59 or 50-13-12;"

SECTION 7.

(a) Sections 1, 2, 3, this section, and Section 8 of this Act shall become effective January 1, 2006, and shall be applicable to all taxable years beginning on or after January 1, 2006.

(b) Section 4 of this Act shall become effective January 1, 2006, and shall be applicable to all taxable years beginning on or after January 1, 2006, and prior to January 1, 2007.

(c) Section 5 of this Act shall become effective January 1, 2007, and shall be applicable to all taxable years beginning on or after January 1, 2007, and prior to January 1, 2008.

(d) Section 6 of this Act shall become effective January 1, 2008, and shall be applicable to all taxable years beginning on or after January 1, 2008.

SECTION 8.

All laws and parts of laws in conflict with this Act are repealed.