

House Bill 379

By: Representative O`Neal of the 146th

A BILL TO BE ENTITLED
AN ACT

1 To amend Article 2 of Chapter 7 of Title 48 of the Official Code of Georgia Annotated,
2 relating to imposition, rate, computation and exemption regarding income taxes, so as to
3 define certain terms; to disallow expenses paid to certain real estate investment trusts; to
4 provide for procedures, conditions, and limitations; to provide an effective date; to provide
5 for applicability; to repeal conflicting laws; and for other purposes.

6 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

7 **SECTION 1.**

8 Article 2 of Chapter 7 of Title 48 of the Official Code of Georgia Annotated, relating to
9 imposition, rate, computation and exemption regarding income taxes, is amended in
10 subsection (b) of Code Section 48-7-21, relating to taxation of corporations, by adding a new
11 paragraph to read as follows:

12 "(16) Georgia taxable income shall be adjusted as provided in Code Section 48-7-28.4."

13 **SECTION 2.**

14 Said article is further amended in subsection (b) of Code Section 48-7-27, relating to
15 computation of taxable net income, by adding a new paragraph to read as follows:

16 "(13) Georgia taxable income shall be adjusted as provided in Code Section 48-7-28.4."

17 **SECTION 3.**

18 Said title is further amended by adding a new Code section to read as follows:

19 "48-7-28.4.

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

21 (1) 'Association taxable as a corporation', for purposes of paragraph (2) of this subsection,
22 does not include:

23 (A) A real estate investment trust as defined in this Code section, other than a 'captive
24 real estate investment trust';

25 (B) Any qualified real estate investment trust subsidiary under Section 856(i) of the
26 Internal Revenue Code of 1986, as amended, other than a qualified REIT subsidiary of
27 a 'captive real estate investment trust':

28 (C) Any Listed Australian Property Trust, meaning an Australian unit trust registered
29 as a 'Managed Investment Scheme' under the Australian Corporations Act in which the
30 principal class of units is listed on a recognized stock exchange in Australia and is
31 regularly traded on an established securities market, or an entity organized as a trust,
32 provided that a Listed Australian Property Trust owns or controls, directly or indirectly,
33 75 percent or more of the voting power or value of the beneficial interests or shares of
34 such trust; or

35 (D) Any qualified foreign entity, meaning a corporation, trust, association or
36 partnership organized outside the laws of the United States and which satisfies the
37 following criteria:

38 (i) At least 75 percent of the entity's total asset value at the close of its taxable year
39 is represented by real estate assets, as defined at Section 856(c)(5)(B) of the Internal
40 Revenue Code of 1986, as amended, thereby including shares or certificates of
41 beneficial interest in any real estate investment trust, cash and cash equivalents, and
42 U.S. Government securities;

43 (ii) The entity is not subject to tax on amounts distributed to its beneficial owners, or
44 is exempt from entity-level taxation;

45 (iii) The entity distributes at least 85 percent of its taxable income, as computed in
46 the jurisdiction in which it is organized, to the holders of its shares or certificates of
47 beneficial interest on an annual basis;

48 (iv) Not more than 10 percent of the voting power or value in such entity is held
49 directly or indirectly or constructively by a single entity or individual, or the shares
50 or beneficial interests of such entity are regularly traded on an established securities
51 market, as amended; and

52 (v) The entity is organized in a country which has a tax treaty with the United States.

53 (2) 'Captive real estate investment trust' means any real estate investment trust the shares
54 or beneficial interests of which are not regularly traded on an established securities
55 market, and more than 50 percent of the voting power or value of the beneficial interests
56 or shares of which are owned or controlled, directly or indirectly, or constructively, by
57 a single entity that is:

58 (A) Treated as an association taxable as a corporation under the Internal Revenue Code
59 of 1986, as amended; and

60 (B) Not exempt from federal income tax pursuant to the provisions of Section 501(a)
61 of the Internal Revenue Code of 1986, as amended.

62 (3) 'Dividends paid deduction' means the deduction for dividends paid which is allowed
63 pursuant to Sections 561 through 565 and Sections 856 through 859 of the Internal
64 Revenue Code of 1986, as amended.

65 (4) 'Real estate investment trust' means an entity that has elected such status for federal
66 income tax purposes and meets the requirements of Section 856 of the Internal Revenue
67 Code of 1986, as amended.

68 (5) 'Related member' means the same as is defined in Code Section 48-7-28.3.

69 (b) For purposes of computing its Georgia taxable net income under Code Sections
70 48-7-21 and 48-7-27, a taxpayer shall add back all expenses and costs directly or indirectly
71 paid, accrued, or incurred to a captive real estate investment trust. Such expenses and costs
72 shall be added back before the income is apportioned or allocated as provided by Code
73 Section 48-7-31.

74 (c) The commissioner shall have the authority to reverse in whole or in part the
75 adjustments required in subsection (b) of this Code section when the taxpayer and the
76 commissioner agree in writing to the application or use of an alternative method of
77 apportionment under subparagraph (d)(2)(C) of Code Section 48-7-31, Code Section
78 48-7-35, or Code Section 48-7-31.1. Nothing in this Code section shall be construed to
79 limit or negate the commissioner's authority otherwise to enter into agreements and
80 compromises otherwise allowed by law.

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

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

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

98 (2) The amount of the adjustment required by subsection (b) of this Code section shall
99 be reduced, but not below zero, to the extent the corresponding expenses and costs are
100 received as income in an arm's length transaction by the captive real estate investment
101 trust and to the extent such income is not reduced by the dividends paid deduction, and
102 to the extent such income is allocated or apportioned, or both, to and taxed by Georgia
103 or another state that imposes a tax on or measured by the income of the captive real estate
104 investment trust.

105 (3) In claiming the exception allowed by this subsection, the taxpayer shall disclose on
106 its return, with respect to the captive real estate investment trust, the name, the federal
107 identification number, the name of each state, the amount of the expenses and costs
108 allocated or apportioned to and taxed by each state, and such other information as the
109 commissioner may prescribe.

110 (e) Nothing in this Code section shall require a taxpayer to add to its Georgia taxable net
111 income more than once any amount of expenses and costs that the taxpayer pays, accrues,
112 or incurs to a captive real estate investment trust.

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

115 (g) Except as otherwise provided in this Code section, a real estate investment trust that
116 is intended to be regularly traded on an established securities market, and that satisfies the
117 requirements of Section 856(a)(5) and (6) of the Internal Revenue Code of 1986, as
118 amended, by reason of Section 856(h)(2) of the Internal Revenue Code of 1986, as
119 amended, shall not be deemed a captive real estate investment trust within the meaning of
120 this Code section.

121 (h) A real estate investment trust that does not become regularly traded on an established
122 securities market within one year of the date on which it first becomes a real estate
123 investment trust shall be deemed not to have been regularly traded on an established
124 securities market, retroactive to the date it first became a real estate investment trust. For
125 purposes of this subsection, a real estate investment trust becomes a real estate investment
126 trust on the first day that it has both met the requirements of Section 856 of the Internal
127 Revenue Code of 1986, as amended, and has elected to be treated as a real estate
128 investment trust pursuant to Section 856(c)(1) of the Internal Revenue Code of 1986, as
129 amended,.

130 (i) For purposes of this Code section, the constructive ownership rules of Section 318(a)
131 of the Internal Revenue Code of 1986, as amended, as modified by Section 856(d)(5) of
132 the Internal Revenue Code of 1986, as amended, shall apply in determining the ownership
133 of stock, assets, or net profits of any person.

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

137 (k) In addition to other penalties imposed by this title, the penalty for failure to make the
138 adjustment required by this Code section shall be 10 percent of the additional tax that
139 results because of this Code section. The commissioner may waive this penalty pursuant
140 to the provisions of Code Section 48-2-43.

141 (l) The commissioner is authorized to prescribe forms and promulgate rules and
142 regulations deemed necessary in order to effectuate this Code section."

143 **SECTION 4.**

144 This Act shall become effective upon its approval by the Governor or upon its becoming law
145 without such approval and shall be applicable to all taxable years beginning on or after
146 January 1, 2010.

147 **SECTION 5.**

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