

WHITEPAPER

The Necessity of Georgia Income Tax Credit for Depository Financial Institutions

Purpose

This whitepaper examines the effects of eliminating the Georgia income tax credit for depository financial institutions found in O.C.G.A. § 48-7-29.7. As discussed below, eliminating this credit would expose banks to potential double taxation that no other group of Georgia taxpayers faces. The credit exists only to ensure that Georgia's unique method of taxing banks operates fairly and properly.

Income Tax Credits in Georgia

Georgia provides numerous credits against corporate and individual income taxes. Many of these credits provide incentives for certain behaviors. For example, Georgia provides tax credits to manufacturers who create jobs within the state,¹ to taxpayers who rehabilitate historic structures,² and—perhaps most famously—to producers of films and television programs.³ These incentive-based credits reflect the General Assembly's decision to encourage certain activities through tax policy. Incentive-based credits are tax benefits, lowering income tax liabilities compared to standard income tax rules.

Not all credits in the Georgia Code provide incentives, however. Some simply make the income tax system work properly and fairly. To take the most common example, Georgia residents are taxed on 100% of their personal income. But Georgia residents also receive a credit against their Georgia income tax liability for income taxes paid to other states.⁴ Without this credit, Georgia residents would be taxed twice on exactly the same income—once by Georgia and once by another state. This is certainly an unfair result.

The Credit for Depository Financial Institutions

Similarly, the income tax credit for depository financial institutions in O.C.G.A. § 48-7-29.7 exists to make the taxation of financial institutions in Georgia fair and proper, while

¹ O.C.G.A. § 48-7-40.

² O.C.G.A. § 48-7-29.8.

³ O.C.G.A. § 48-7-40.26.

⁴ O.C.G.A. § 48-7-28.

providing a significant and reliable funding source for local governments. To understand why, we must examine the unique way that Georgia taxes banks.

Georgia levies its corporate income tax on almost all corporations doing business in the state. Like the federal income tax, Georgia's corporate income tax allows taxpayers to deduct ordinary business expenses. In that way, the income tax reaches a taxpayer's *net* income, rather than gross income (or receipts). The income tax is collected solely at the state level; counties and municipalities are not empowered to levy a tax on net income, although they may levy a business license and/or occupation tax on a certain amount of a business' gross receipts.⁵

Georgia taxes banks differently, however. In fact, banks are subject to *three* special taxes found in O.C.G.A. §§ 48-6-93 & 48-6-95. The state, the county, and the municipality in which a bank operates may each collect a 0.25% tax on a bank's gross receipts, for a total tax of 0.75% of a bank's gross receipts (together, we will refer to these as the "bank tax").⁶ "Gross receipts" for purposes of the bank tax are income from the bank's normal business operations, with deductions only for interest paid on liabilities and income from foreign operations.⁷ So while the 0.75% combined bank tax rate is lower than Georgia's corporate income tax rate of 6%, the bank tax provides *no* deductions for business expenses such as employee salaries, depreciation, supplies, etc.

In addition, though depository financial institutions are subject to the bank tax regime described above, they also remain subject to the general corporate income tax.⁸ If Georgia law said nothing more, banks would be subject to *both* a tax on 0.75% of their gross receipts *and* a tax on 6% of their net income—unlike any other taxpayers in the state. The tax credit for depository financial institutions was created to prevent such a double tax. Code Section 48-7-29.7 provides that "[t]here shall be a dollar-for-dollar credit against the state income tax liability of depository financial institutions which shall be equal to the amount of taxes, if any, paid by such taxpayers pursuant to Code Section 48-6-93 and Code Section 48-6-95." The section also provides that a bank may carry forward any unused credit against its income tax liability (if any) in the subsequent five years.

Code Section 48-7-29.7 states that **a bank will always pay the higher of the bank tax or the income tax**. Even with the credit, banks are in no better position than other corporate taxpayers subject only to the income tax. In fact, under a fairly common set of circumstances, banks are much worse off. The bank tax is levied on gross receipts, not net income. So banks that have high receipts *and* high expenses (i.e., little or no net income) have significant tax

⁵ See O.C.G.A. § 48-13-6.

⁶ Except in cases where the bank operates an office in the unincorporated portion of a county, in which case the tax is 0.5% of gross receipts allocated to those offices under O.C.G.A. § 48-6-93(d).

⁷ O.C.G.A. § 48-6-95(b)(2), (3).

⁸ See O.C.G.A. § 48-6-90.1. Compare this treatment to that of insurance companies, which are the only other class of taxpayers that Georgia taxes other than through the corporate income tax. Insurance companies pay a tax on premium income, and in exchange they are *completely exempt* from Georgia income tax. See O.C.G.A. § 48-7-25(a)(2).

burdens under the bank tax, although they would have little or no tax liability if subject only to the corporate income tax. While no other group of Georgia taxpayers is in this position, banks did not object to the enactment of the bank tax because the bank tax supports local communities in return for a Georgia income tax credit.

Thus, the credit in O.C.G.A. § 48-7-29.7 should by no means be looked at as a benefit to banks as it does not incentivize any particular behavior. It merely ensures that banks are not charged with responsibility of the full amount of *both* the bank tax and the income tax. With the credit in O.C.G.A. § 48-7-29.7 in place, banks pay *at least* as much in bank tax as they would pay in income tax if the bank tax did not exist. If the credit were eliminated, banks would be subject to multiple taxes on the same income, a position no other Georgia taxpayer faces.⁹ This would certainly be an unfair result.

Relationship of the Credit to the Tax Cut and Jobs Act

The credit in O.C.G.A. § 48-7-29.7 ensures that banks pay the higher of either the bank tax or the corporate income tax, but not both. Even so, the value of the credit has been diminished by Georgia's recent conformity to the federal Tax Cut and Jobs Act (TCJA). The TCJA modified the net operating loss ("NOL") provisions for corporate taxpayers. Under prior law, a taxpayer could use an NOL to offset up to 100% of its income tax liability in the 20 years after the NOL was created, or in the two years before. Under the TCJA, a taxpayer may offset only 80% of its income tax liability with NOLs and may carry forward an NOL indefinitely, but may not use NOLs to offset any prior-year tax liability.¹⁰ Georgia has incorporated these new federal NOL provisions into its corporate income tax.¹¹

Banks, like other corporate taxpayers, can now use NOLs to reduce only 80% of their Georgia taxable income and cannot carry back any NOLs to prior years. This means that, compared to prior law, NOLs take longer to utilize. Nonetheless, the credits under O.C.G.A. § 48-7-29.7 continue to expire after only five years. Under the new NOL rules, therefore, banks may find it increasingly likely that this 5-year period ends before the credit under O.C.G.A. § 48-7-29.7 yields its full value.

Georgia's adoption of the TCJA greatly extended the time horizon over which NOLs operate. The credit in O.C.G.A. § 48-7-29.7 works in tandem with NOLs to ensure fair taxation of banks. It would be sound policy to extend the 5-year carry-forward period for these credits to more closely align with the now-unlimited lifespan of NOLs.

⁹ Other taxpayers must pay the standard business and occupation tax on gross receipts levied by many local governments under O.C.G.A. § 48-13-6. Banks are exempt from this tax. See O.C.G.A. § 48-6-93(f). However, the standard business and occupation tax is levied by *either* a county or municipality, and frequently at a significantly lower rate than the bank tax. By contrast, banks are subject to three bank taxes—one each to a county, a municipality, and the state.

¹⁰ See 26 U.S.C. § 172.

¹¹ Ga. Act 284 (H.B. 918) (2018).

Conclusion

Removing the credit for depository institutions in O.C.G.A. § 48-7-29.7 is inappropriate. The credit is not an example of using Georgia's income tax code to incentivize certain taxpayer behavior. Instead, the credit ensures that banks and other depository financial institutions do not carry an unfairly large tax burden compared to other corporations doing business in Georgia. In addition, because of Georgia's recent adoption of new federal NOL provisions, Georgia should consider extending the carry-forward period of the credit to more closely align with the new lifespan of NOLs.