

**RULES
OF
DEPARTMENT OF REVENUE
INCOME TAX DIVISION**

**CHAPTER 560-7-3
SUBSTANTIVE REGULATIONS**

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560-7-3-.03 Election to Pay Tax at the Pass-Through Entity Level

**560-7-3-.03 Election to Pay Tax at the Pass-Through Entity
Level**

(1) **Purpose.** This rule provides guidance concerning the implementation and administration of the irrevocable election to pay tax at the Subchapter “S” corporation level and partnership level as provided by O.C.G.A. § 48-7-21 and O.C.G.A. § 48-7-23, respectively.

(2) **Definitions.**

(a) “Credit” means those credits provided by Article 2 of Chapter 7 of Title 48 of the O.G.G.A and Chapter 7A of Title 48 of the O.G.G.A.

(b) “Electing pass-through entity” means a pass-through entity which is qualified to make and has made the election to pay the tax levied by Chapter 7 of Title 48 at the entity level as provided by O.C.G.A. § 48-7-21 or O.C.G.A. § 48-7-23.

(c) “Internal Revenue Code of 1986” means the same as defined in O.C.G.A. § 48-1-2.

(d) “Owners” means the direct shareholders or partners of a pass-through entity that is eligible to make the election.

(e) “Pass-through entity” means a partnership or Subchapter “S” corporation.

(3) Which entities are eligible to make the election.

(a) The election may only be made by a pass-through entity that is 100 percent directly owned and controlled by persons eligible to be shareholders of an “S” corporation under § 1361 of the Internal Revenue Code of 1986, as amended.

(b) A disregarded single member limited liability company, qualified Subchapter “S” subsidiary, and any other disregarded entity cannot by itself make the election; provided, however, a regarded owner of such entities may make the election, provided the owner is eligible to make such election. In such event, the election would be for itself and all of its disregarded entities; provided, however, if the election is made, credits are still earned by the disregarded entity as provided by Georgia law and regulation.

(c) If a pass-through entity is owned by another pass-through entity, such owner may make the election for itself if it is qualified to do so.

(d) A limited liability company that is treated as a partnership for Georgia income tax purposes shall be treated as a partnership for purposes of this regulation.

(4) Making the election.

(a) An electing pass-through entity makes the election by checking the box and filling out the applicable schedule(s) on

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Form 600S if the entity is a Subchapter “S” corporation or on Form 700 if the entity is a partnership.

(b) The election is an irrevocable election for that year which must be made by the due date of the return including any extensions, if applicable.

(c) Each electing pass-through entity decides how to obtain consent from its owners; provided, however, the election is binding on all the owners once the election is made.

(d) The election is an annual election which must be made each year. If in a later year the pass-through entity decides to not make the election, no notice is required to be filed with the Department.

(5) Estimated payments.

(a) An electing pass-through entity is required to make estimated payments in the same manner as a C-Corporation and using the same form.

(b) The estimated tax form is required to be filed on the same due dates as is required for a C-Corporation.

(c) An electing pass-through entity is subject to the C-Corporation failure to pay estimated income tax penalties.

(d) Estimated payments made by owners are not eligible to be transferred to the pass-through entity. However, if the owners have made estimated payments or otherwise have credits or other attributes that would reduce their liability, the entity may check the “UET Annualization Exception Attached” box on the Form 600S or Form 700 and compute the penalty on Form 600 UET as if the entity had made such payments or applied such credits or attributes.

(e) For purposes of the 100% of the immediately preceding year's tax exception, the entity may check the "UET Annualization Exception Attached" box on the Form 600S or Form 700 and compute the penalty on Form 600 UET assuming the tax for the prior year was equal to 5.75% of the prior's year's income computed pursuant to paragraph (6).

(f) Owners who make estimated payments for the income attributable to an electing pass-through entity, may not transfer the estimated payments to the electing pass-through entity but must instead claim a refund of the overpayment, for the year the estimates were made for, by filing the income tax form the owner would normally file.

(g) 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 for. The entity may contact the Department and direct that the payments be transferred to its composite estimated tax account or its nonresident withholding tax account.

(6) Computation of Income and the Tax.

(a) If an electing pass-through entity that is a Subchapter "S" corporation makes the election, the Subchapter "S" corporation's federal taxable income for purposes of O.C.G.A. § 48-7-21 shall be the federal taxable income of the Subchapter "S" corporation as computed pursuant to the Internal Revenue Code of 1986 including the separately stated items of income or loss (such as charitable contributions, the Section 179 deduction, etc.); provided, however, charitable contributions, the Section 179 deduction, and any other deduction which is subject to an Internal Revenue Code of 1986 limitation, shall be limited to what is allowed pursuant to the Internal Revenue Code of 1986 for a C-Corporation. Once the federal taxable income is determined, the Subchapter "S"

corporation shall then make the adjustments required by O.C.G.A. § 48-7-21 to arrive at Georgia taxable income before apportionment and allocation; provided, however, in computing the net income that is subject to taxation, the electing Subchapter “S” corporation shall not be allowed any deduction for taxes that are based on or measured by gross or net income or any other variant thereof. The Georgia taxable income before apportionment and allocation shall then be apportioned and allocated pursuant to O.C.G.A. § 48-7-31 to arrive at the income that is taxed at the entity level.

(b) If an electing pass-through entity that is a partnership makes the election, the partnership’s federal taxable income for purposes of O.C.G.A. §§ 48-7-23 shall be the federal taxable income of the partnership as computed pursuant to the Internal Revenue Code of 1986 including the separately stated items of income or loss (such as charitable contributions, the Section 179 deduction, etc.); provided, however, charitable contributions, the Section 179 deduction, and any other deduction which is subject to an Internal Revenue Code of 1986 limitation, shall be limited to what is allowed pursuant to the Internal Revenue Code of 1986 for a C-Corporation. The electing pass-through entity shall not be allowed the deduction provided by Internal Revenue Code Section 743(b); provided, however, such adjustment is still eligible to be made at the owner level. The electing pass-through entity shall not be allowed deductions based on self-employment, self-employed health insurance, Keogh or SEP or other deductions normally allowed in computing Adjusted Gross Income. Once the federal taxable income is determined, the partnership shall then make the adjustments required by O.C.G.A. § 48-7-27 to arrive at Georgia taxable income before apportionment and allocation. The electing pass-through entity shall not be allowed the exemptions provided by O.C.G.A. § 48-7-26, the standard deductions provided by O.C.G.A. § 48-7-27, any deduction for taxes that are based on or measured by gross or net income or any other variant thereof, and any other deduction provided in O.C.G.A. § 48-7-27 which is

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allowed based on the person being a natural person such as the retirement exclusion, etc. The Georgia taxable income before apportionment and allocation shall then be apportioned and allocated pursuant to O.C.G.A. § 48-7-31 to arrive at the income that is taxed at the entity level.

(c) The electing pass-through entity shall multiply its income that is taxed at the entity level by 5.75 percent or, if subsequently changed, the applicable statutory income tax rate to arrive at the tax levied by Chapter 7 of Title 48. Except as provided in this regulation, such tax shall be assessed and collected in the same manner and be subject to the same penalties and interest as the other income taxes imposed by Chapter 7 of Title 48.

(d) The electing pass-through entity may file amended returns subject to the applicable statute of limitations.

(e) The consolidated provisions of Regulation 560-7-3-.13 shall not apply to electing pass-through entities.

(7) Tax Attributes.

(a) Tax attributes, including, but not limited to credits and net operating losses, for an electing pass-through entity shall be generated, claimed, and utilized in the same manner as a C-Corporation.

(b) Tax attributes, including but not limited to credits and net operating losses, from tax years when an election was not made remain with the owners and shall not be eligible to be transferred to the electing pass-through entity. Except as provided in this paragraph, any tax attributes, including but not limited to credits and net operating losses, do not pass through to the owners and remain with the electing pass-through entity if the entity does not make the election in a later year. Net operating losses shall be treated in the same manner as is allowed for C-Corporations as

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provided in Regulation 560-7-3-.06. The electing pass-through entity shall file Form IT-552 to carryback net operating losses if eligible.

1. Except with respect to the credits allowed by O.C.G.A. §§ 48-7-29.16, 48-7-29.20, and 48-7-29.21, an electing pass-through entity may make an irrevocable election to pass through all or part of any credit, that is generated within the applicable statute of limitation period for the entity, to its owners for the taxable year the credit is generated. Such election is made by completing the “credit allocation to owners” schedule on an original or amended Form 600S or Form 700 for the taxable year the credit is generated. Such election must be made within the owner’s applicable statute of limitation claiming period. If such election is made, the electing pass-through entity shall be required to pass-through the credits using the method provided in the applicable credit statute or regulation.

(i) For example. Regulation 560-7-8-.36 provides that the job tax credit is passed through “to its members, shareholders, or partners based on the year ending profit/loss percentage and the limitations of this regulation”. As such any job tax credit that is elected to be passed through must be passed through in this manner.

2. With respect to the credits allowed by O.C.G.A. §§ 48-7-29.16, 48-7-29.20, and 48-7-29.21, any credit earned by an electing pass-through entity shall not pass through to its owners; provided, however, the owner may separately earn the credits allowed by O.C.G.A. §§ 48-7-29.16, 48-7-29.20, and 48-7-29.21 with respect to any income that passes through to the owner and which was not taxed at the pass-through entity level in Georgia. As such, in determining the Georgia income on which such tax was actually 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. Also, if a pass-

through entity is preapproved to make and makes a contribution with respect to the credits allowed by O.C.G.A. §§ 48-7-29.16, 48-7-29.20, and 48-7-29.21 because the entity intends to make but then does not make the election to pay tax at the pass-through entity level for the taxable year of the preapproval and contribution, the pass-through entity shall be allowed to pass through such credits to its owners based on the year ending profit/loss percentage; provided however, the amount that is generated and passed through by the pass-through entity is computed and generated in the same manner as if the pass-through entity had made such election and the amount that is passed through shall reduce the amount the owner is allowed to generate as provided in each respective statute for contributions related to pass through entities; any amounts that exceed such generation limits shall be disallowed entirely.

(i) For example. An electing pass-through entity apportions, pursuant to O.C.G.A. § 48-7-31, 30% of its income to Georgia and pays tax at the entity level on such income. If such entity earns the credit allowed by O.C.G.A. §§ 48-7-29.16, 48-7-29.20, or 48-7-29.21, the credit that is allowed will be limited to 75% of its income tax liability and no part of such credit may be passed through to its owners. The other 70% of the income passes through to such entity's owners. The owner may separately earn the credit, but in determining the credit that is allowed to an owner of a pass-through entity, the owner may only include the 70% of the income that passes through to such owner.

(c) No electing pass-through entity nor any of its owners shall be entitled to any credit under O.C.G.A. § 48-7-28 with respect to the electing pass-through entity tax paid to Georgia; provided, however, with respect to the income not taxed at the entity level by Georgia, a resident owner would be eligible for the credit under O.C.G.A. § 48-7-28 provided the requirements of that code section are met.

1. For example. A Subchapter “S” corporation makes the election to pay tax at the pass-through entity level in Georgia. Such electing pass-through entity apportions, pursuant to O.C.G.A. § 48-7-31, 30% of its income to Georgia and pays tax at the entity level on such income. The entity also apportions 70% of its income to another state. The resident owner files an income tax return in another state, that levies a tax upon net income, and the owner pays tax on such 70% of the income in that other state. The resident owner would be eligible for a credit under O.C.G.A. § 48-7-28 for such taxes.

(d) No electing pass-through entity nor any of its owners shall be entitled to any adjustment under subsection (d) of O.C.G.A. § 48-7-27 for the income taxed at the entity level by Georgia; provided, however, with respect to the income not taxed at the entity level by Georgia, a resident owner would be eligible for the adjustment under subsection (d) of O.C.G.A. § 48-7-27 provided the requirements of subsection (d) of O.C.G.A. § 48-7-27 are met. As such a resident owner would be eligible for the adjustment under subsection (d) of O.C.G.A. § 48-7-27 if the electing pass-through entity makes a similar election in another state provided the requirements of subsection (d) of O.C.G.A. § 48-7-27 are met.

1. For example. A partnership makes the election to pay tax at the pass-through entity level in Georgia. Such electing pass-through entity apportions, pursuant to O.C.G.A. § 48-7-31, 30% of its income to Georgia and pays tax at the entity level on such income. The entity also apportions 70% of its income to another state that allows a similar election to pay a tax on or measured by income at the pass-through entity level. The entity files a return in such state for the other 70% of the entity’s income and the entity pays tax on such income. A resident owner would be eligible for the adjustment under subsection (d) of O.C.G.A. § 48-7-27 for such income.

(8) Electing Pass-Through Entity with Certain Pension Plans. If an electing pass-through entity has a pension plan where certain qualified retirement income is paid to retired owners (normally as a guaranteed payment) and such income can only, based on Federal law, be taxed by a retiree's state of residence in the year of payment, such electing pass-through entity shall subtract such guaranteed payment from its Georgia's income before allocating and apportioning such income pursuant to O.C.G.A. § 48-7-31. The amount subtracted shall then be taxed by the retiree's state of residence and such retiree shall not be eligible for the subtraction or addition to income for such respective share of the portion of income provided by paragraph (9).

(9) Owner Subtraction.

(a) Owners of an electing pass-through entity shall not recognize their respective share of the portion of income or loss that was apportioned and allocated to Georgia pursuant to this regulation. Such owner shall start with Federal Adjusted Gross income and then subtract on their Georgia income tax return their respective share of the income that was apportioned and allocated to Georgia at the entity level. In the event the electing pass-through entity has a loss at the entity level, the owner shall start with Federal Adjusted Gross income and add on their Georgia income tax return their respective share of the apportioned and allocated loss at the entity level. Any Georgia adjustments attributable to the owner's distributive share of such income or loss shall be adjusted proportionally.

(b) The subtraction or addition shall be made by the owners even when the electing pass-through entity uses credits to offset the tax that is due or uses net operating losses to offset the income.

(c) The remaining income of the owner is taxed using the rates provided in O.C.G.A. § 48-7-20 or the applicable rate provided in

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Chapter 7 of Title 48 for an owner not subject to O.C.G.A. § 48-7-20.

(d) If a nonresident owner's only source of Georgia income is the income that was taxed at the pass-through entity level, no return is required to be filed by such owner.

(e) In the event the electing pass-through entity has a different year end than the owners, the income shall be subtracted or added in the year in which the income was included in federal taxable income by the owners.

(10) Audits.

(a) A partnership that is audited by the Internal Revenue Service shall be required to report and pay the tax attributable to the audit at the entity level for a reviewed year where the election was made. The adjusted income that is taxed at the entity level shall be computed as provided in this regulation. In such case the provisions of Regulation 560-7-3-.11 shall not apply, instead the partnership shall file an amended return and report such adjustments and pay any tax required or claim any refund that is allowed based on the rules that normally apply to C-Corporations.

(b) An electing pass-through entity that is audited by the Department of Revenue shall be required to report and pay the tax attributable to the audit at the entity level for a reviewed year where the election was made. The adjusted income that is taxed at the entity level shall be computed as provided in this regulation. In such case the provisions of Regulation 560-7-3-.11 shall not apply, instead the pass-through entity shall be subject to the rules that normally apply to C-Corporations.

(11) Investment Pass-Through Entities and Exempt Owners. A pass-through entity that has owners that are exempt pursuant to O.C.G.A. § 48-7-24(c) or that are otherwise exempt

pursuant to O.C.G.A. § 48-7-25, shall be eligible to make the election and shall exclude the income that is exempt in arriving at the Georgia taxable income before apportionment and allocation; provided, however, any owners for which their respective share of the portion of income was excluded shall not be eligible for the subtraction or addition to income for such respective share of the portion of income provided by paragraph (9).

(12) Withholding Under O.C.G.A. §§ 48-7-129 and 48-7-128.

(a) An electing pass-through entity shall not be required to withhold tax as provided by O.C.G.A. § 48-7-129.

(b) An electing pass-through entity that sells property shall certify to the buyer on Form IT-AFF3 that the seller qualifies for and has made or will make the election to be taxed at the entity level pursuant to O.C.G.A. § 48-7-21 and O.C.G.A. § 48-7-23 and as such the seller is exempt from the withholding required by O.C.G.A. § 48-7-128.

(13) Subchapter “S” Corporation Specific Issues.

(a) A Subchapter “S” corporation with nonresident owners, which has pursuant to Regulation 560-7-3-.06 been filing as a C-Corporation and that makes the election to pay tax at the pass-through entity level, shall carryover any tax attributes, including but not limited to credits and net operating losses, from tax years when the entity was filing as a C-Corporation.

(b) A Subchapter “S” corporation is not required to file Form 600S-CA “Consent Agreement of Nonresident Shareholders of S Corporations” for any year where the election is made. A Subchapter “S” corporation with nonresident owners which has filed the required Form 600S-CA “Consent Agreement of Nonresident Shareholders of S Corporations” which is effective for

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the year before the year it elects to pay tax at the entity level, shall not be required to obtain and file such consents again if it does not make the election in a later year.

(14) **Effective Date.** The principles set forth in this regulation will apply to taxable years beginning on or after January 1, 2022.

Authority: O.C.G.A. §§ 48-2-12, 48-7-21, 48-7-23, 48-7-24, 48-7-27, 48-7-51, 48-7-53, 48-7-100, 48-7-117, 48-7-119, 48-7-120, 48-7-121, and 48-7-129.