

Georgia Letter Ruling: LR IT-2017-03
Topic: Quality Jobs Tax Credit and Jobs Tax Credit
Date Issued: October 12, 2017

This letter is in response to your letter requesting a ruling on whether Organization is eligible as a tax-exempt organization to claim the Jobs Tax Credit, Less Developed Census Tract (LDCT) Jobs Tax Credit, and/or Quality Jobs Tax Credit.

Facts as Presented by the Organization

Your letter to the Department states:

“Organization is a nonprofit corporation formed in <year> under the laws of Georgia. Pursuant to section <section> of the Internal Revenue Code (I.R.C.), as an organization organized and operated exclusively for <deleted text>, Organization is exempt from federal income taxation under I.R.C. § <section>. As such, Organization is required to file Federal Form 990, Return of Organization Exempt from Income Tax. Additionally, <deleted text> Organization is required to file Federal Form 990-T, Exempt Organization Business Income Tax Return.¹ As required by O.C.G.A. § 48-7-25(c)(1) and rules 560-7-3-.09(5) and (9) of the Georgia Administrative Code, Organization similarly files with the Department copies of the aforementioned forms required to be filed annually with the Internal Revenue Service (“IRS”).² Further, as an exempt organization who derives unrelated business income from Georgia sources, and who is required to file Federal Form 990-T, Organization annually files Georgia Form 600-T, Exempt Organization Unrelated Business Income Tax Return.”

Issue #1

Whether Organization, as a tax exempt organization, is eligible for the Jobs Tax Credit, LDCT Jobs Tax Credit, and/or Quality Jobs Tax Credit set out in O.C.G.A. §§ 48-7-40, 48-7-40.1, and 48-7-40.17?

Issue #2

Whether Organization, as a tax exempt organization, is eligible for the Jobs Tax Credit, LDCT Jobs Tax Credit, and/or Quality Jobs Tax Credit through activity associated with its unrelated business income (“UBI”)?

Authority

O.C.G.A. § 48-7-25 provides:

(a) The following organizations shall be exempt from taxation imposed by Code Section 48-7-21 as indicated:

(1) Subject to subsections (b) and (c) of this Code section, those organizations which are exempt from federal income taxation pursuant to Section 501(c), 501(d), 501(e), 664, or 401 of the Internal Revenue Code of 1986 shall be deemed to have similar exempt status for purposes of Code Section 48-7-21; and

(2) Insurance companies which pay to the state a tax upon premium income.

...

¹ Instructions for Form 990-T (Jan. 15, 2016).

² “All exempt organizations, described in O.C.G.A. § 48-7-25(a)(1), which have sufficient activity in Georgia to be declared a taxable entity (if not so exempt), shall file annually, with the State Revenue Commissioner, a copy of the form(s) filed annually with the Internal Revenue Service” Ga. Comp. R. & Regs. r. 560-7-3-.09(5)(a).

(c)(1) A tax is imposed on income of an organization exempted pursuant to paragraph (1) of subsection (a) of this Code section when the income is derived from trade or business which is not related to exempt purposes of organizations described in paragraph (1) of subsection (a) of this Code section. This income shall be referred to as unrelated business income and shall be the income which is defined in Section 512 of the Internal Revenue Code of 1986. The tax imposed on unrelated business income shall be at the rate provided in Code Section 48-7-21.

....

O.C.G.A. § 48-7-40 provides:

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

....

(2) "Business enterprise" means any business or the headquarters of any such business which is engaged in manufacturing, including, but not limited to, the manufacturing of alternative energy products for use in solar, wind, battery, bioenergy, biofuel, and electric vehicle enterprises, warehousing and distribution, processing, telecommunications, broadcasting, tourism, research and development industries, biomedical manufacturing, and services for the elderly and persons with disabilities. Such term shall not include retail businesses. Businesses are eligible for the tax credit provided by this Code section at an individual establishment of the business based on the classification of the individual establishment under the North American Industry Classification System. For purposes of this Code section, the term "establishment" means an economic unit at a single physical location where business is conducted or where services or industrial operations are performed. If more than one business activity is conducted at the establishment, then only those jobs engaged in the qualifying activity will be eligible for the tax credit provided by this Code section.

O.C.G.A. § 48-7-40.1 provides:

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

....

(2) "Business enterprise" means any business or the headquarters of any such business which is engaged in manufacturing, including, but not limited to, the manufacturing of alternative energy products for use in solar, wind, battery, bioenergy, biofuel, and electric vehicle enterprises, warehousing and distribution, processing, telecommunications, broadcasting, tourism, biomedical manufacturing, and research and development industries. Such term shall not include retail businesses. Businesses are eligible for the tax credit provided by this Code section at an individual establishment of the business based on the classification of the individual establishment under the North American Industry Classification System. For purposes of this Code section, the term "establishment" means an economic unit at a single physical location where business is conducted or where services or industrial operations are performed. If more than one business activity is conducted at the establishment, then only those jobs engaged in the qualifying activity will be eligible for the tax credit provided by this Code section.

O.C.G.A. § 48-7-40.17 provides:

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

....

(6) "Taxpayer" means any person required by law to file a return or to pay taxes, except that any taxpayer may elect to consider the jobs within its disregarded entities, as defined in the Internal Revenue Code, for purposes of calculating the number of new quality jobs created by the taxpayer under this Code section.

Ruling

Ruling on Issue #1

Based on the facts provided by Organization, it is not eligible for the Jobs Tax Credit, LDCT Jobs Tax Credit, or Quality Jobs Tax Credit based on its tax-exempt activity. Organization is ineligible for the following reasons.

First, with respect to the Quality Jobs Tax Credit, Organization is not a taxpayer. The Quality Jobs Tax Credit and the Revenue Code's general definition statute define "taxpayer" as "any person required by law to file a return or to pay taxes." O.C.G.A. §§ 48-1-2, 48-7-40.17(a)(3). The Department has previously interpreted this definition to exclude exempt organizations because they are only required to file an "information return" pursuant to O.C.G.A. § 48-7-25(b)(2)(iv)(B) and Revenue Rule 560-7-3-.09. Organization argues that an "information return" is a "return" within the meaning of these definitions under Revenue Rule 560-3-2-.27(2)(h), which states "[r]eturn' shall mean any tax return, registration application, form, signature form, or information return required to be filed with the Department."

Organization's use of this authority is unpersuasive because there is no evidence that the Department intended this definition to apply to the use of the term "return" in the income tax statutes and rules for the purposes of reporting and paying income taxes. Revenue Rule 560-3-2-.27 is titled "Signature Requirements For Tax Returns" and is contained within the Revenue Rule Chapter 560-3 which is titled "Fiscal Operations Division." The limited purpose of this Rule is to "define terms and explain the requirements for signatures under Title 48." Revenue Rule 560-3-2-.27(1).³

Moreover, Revenue Rule 560-7-3-.09, which establishes filing requirements for exempt organizations like Organization, uses the term in various ways which have nothing to do with reporting income for income tax purposes:

Paragraph (1)(a)(1):

A copy of the Internal Revenue Service determination letter, along with a copy of all formation documents must be attached to the applicable, initial exempt organization tax *return* filed with the State of Georgia.

Paragraph (5):

Annual requirement of filing forms:

(a) All exempt organizations, described in O.C.G.A. § 48-7-25(a)(1), which have

³ This does not mean that Department Rule 560-3-2-.27 is in any way invalid or does not apply to income tax returns – income tax returns clearly fall within the definition of "return" in paragraph (2)(h) of this Rule and must meet the Rule's signature requirements. The limited purpose of this Rule simply means that it is not an appropriate source of authority to determine the meaning of "return" as used in the statutes at issue here, O.C.G.A. §§ 48-1-2 and 48-7-40.17.

sufficient activity in Georgia to be declared a taxable entity (if not so exempt), shall file annually, with the State Revenue Commissioner, a copy of the form(s) filed annually with the Internal Revenue Service, unless such organization has received written exemption from the filing requirements from the Internal Revenue Service. Such filings shall be made within the period prescribed for filing said forms with the Internal Revenue Service. For taxable years beginning on or after January 1, 2008, the initial *return* filed by an exempt organization described in O.C.G.A. § 48-7-25(a)(1), must include a copy of the determination letter received from the Internal Revenue Service granting exempt status, as well as a copy of all information documents. The *return* will be rejected if these required documents are not attached. In addition, the Commissioner may require whatever additional forms and data he or she reasonably deems necessary for the proper administration of the tax laws of this State.

(b) The filing of annual *returns* as described in subparagraph (a) of this paragraph fulfills the requirement for filing annual returns under the Georgia Trust Act.

(emphasis added). Hence, “return” as referenced in Revenue Rules 560-3-2-.27 and 560-7-3-.09 is distinct from a “return” filed to report taxable income. See, e.g., O.C.G.A. §§ 48-7-50(a) (“An income tax return with respect to the tax imposed by this chapter shall be filed with the commissioner by every: (1) Resident who is required to file a federal income tax return for the taxable year; (2) Nonresident who has federal gross income from sources within this state. . . .”); 48-7-51 (“Every corporation subject to taxation under this chapter shall make a return stating specifically the items of its gross income and the deductions and credits allowed by this chapter.”). Because income tax credits must be strictly construed, the term “return” in O.C.G.A. § 48-7-40.17(a)(3) should be construed to refer to income tax returns, not every informational form required to be filed with the Department. See Citibank (South Dakota), N.A. v. Graham, 315 Ga. App. 120, 122 (2012) (“Deductions, tax credits and refunds ‘are allowed as a matter of legislative grace and are authorized only where there is a clear statutory provision for them.’”) (quoting Brosnan v. Undercofler, 111 Ga. App. 95, 96 (1965)).

Second, Organization, based on the facts presented, is specifically ineligible for the Jobs and LDCT Jobs Tax Credits because it is not a “business enterprise.” Under O.C.G.A. §§ 48-7-40 and 48-7-40.1, a “business enterprise” is allowed a job tax credit when certain employment criteria are met. Organization is incorporated under the Georgia Nonprofit Corporation Code, which is separate and distinct from the Georgia Business Corporation Code governing for-profit corporations. See O.C.G.A. §§ 14-2-101 to 14-2-1703, 14-3-101 to 14-3-1703. As a tax-exempt organization incorporated under the Georgia Nonprofit Corporation Code, Organization as a whole cannot be considered a “business enterprise” within the plain meaning and ordinary use of those words. Nor does it fall within the statutory definition of “business enterprise” based on its tax-exempt activity.

Ruling on Issue #2

Organization may be eligible for Quality Jobs Tax Credit based on its UBI generating activity. As discussed above, Organization would be a taxpayer with respect to UBI generating activity since it would file a return and pay taxes. However, Organization is only eligible for these credits based on UBI generating activity – it may not count jobs created through tax-exempt activity toward these tax credits.

Additionally, parts of the Organization may meet the “business enterprise” requirement for the Jobs and LDCT Jobs Tax Credit if there are different individual establishments of Organization. Under O.C.G.A. §§ 48-7-40(a)(2) and 48-7-40.1(a)(2), an entity may be eligible for these credits based on activity at an “individual establishment” rather than the entity as a whole. Accordingly, even though Organization as a whole is not a “business enterprise,” if Organization has separate and identifiable individual establishments

that seek profit and generate UBI, then these may qualify as “business enterprises” on an establishment-by-establishment basis. Jobs created at these establishments could count toward these tax credits which could then be applied to tax on Organization’s UBI.

The opinions expressed in this ruling are based upon the information contained in your request and limited to the specific transactions, facts, circumstances and taxpayer in question. The facts herein are those presented by the taxpayer and the Department accepts them as true for this ruling. If the facts presented herein change, are not true, are different, or material facts have been omitted, the conclusions reached in this ruling may change. In addition, subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different tax treatment than that expressed in this ruling.