

House Bill 379 (AS PASSED HOUSE AND SENATE)

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

74 (c) The amount of the adjustment required by subsection (b) of this Code section shall be
75 reduced, but not below zero, to the extent the corresponding expenses and costs received
76 as income by the captive real estate investment trust are reduced by expenses paid, accrued
77 or incurred to persons that are not related members, and such expenses shall be allowed in
78 computing the captive real estate investment trust's federal taxable income.

79 (d) The commissioner shall have the authority to reverse in whole or in part the
80 adjustments required in subsection (b) of this Code section when the taxpayer and the
81 commissioner agree in writing to the application or use of an alternative method of
82 apportionment under subparagraph (d)(2)(C) of Code Section 48-7-31, Code Section
83 48-7-35, or Code Section 48-7-31.1. Nothing in this Code section shall be construed to
84 limit or negate the commissioner's authority otherwise to enter into agreements and
85 compromises otherwise allowed by law.

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

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

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

99 combined income tax report or return, consolidated income tax report or return, or other
100 report or return results in the elimination of the tax effects from transactions directly or
101 indirectly between the taxpayer and the captive real estate investment trust or between
102 the captive real estate investment trust and another related member.

103 (2) The amount of the adjustment required by subsection (b) of this Code section shall
104 be reduced, but not below zero, to the extent the corresponding expenses and costs are
105 received as income in an arm's length transaction by the captive real estate investment
106 trust and to the extent such income is allocated or apportioned, or both, to and taxed by
107 Georgia or another state that imposes a tax on or measured by the income of the captive
108 real estate investment trust. For purposes of this paragraph, the corresponding expenses
109 and costs shall not be considered to have been received as income by the captive real
110 estate investment trust to the extent such income is reduced, in computing the income of
111 the captive real estate investment trust in Georgia or another state, by the dividends paid
112 deduction or by expenses paid, accrued, or incurred to persons that are not related
113 members, or both.

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

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

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

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

130 (i) A real estate investment trust that does not become regularly traded on an established
131 securities market within one year of the date on which it first becomes a real estate
132 investment trust shall be deemed not to have been regularly traded on an established
133 securities market, retroactive to the date it first became a real estate investment trust. For
134 purposes of this subsection, a real estate investment trust becomes a real estate investment
135 trust on the first day that it has both met the requirements of Section 856 of the Internal

136 Revenue Code of 1986, as amended, and has elected to be treated as a real estate
137 investment trust pursuant to Section 856(c)(1) of the Internal Revenue Code of 1986, as
138 amended..

139 (j) For purposes of this Code section, the constructive ownership rules of Section 318(a)
140 of the Internal Revenue Code of 1986, as amended, as modified by Section 856(d)(5) of
141 the Internal Revenue Code of 1986, as amended, shall apply in determining the ownership
142 of stock, assets, or net profits of any person.

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

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

150 (m) The commissioner is authorized to prescribe forms and promulgate rules and
151 regulations deemed necessary in order to effectuate this Code section."

152 **SECTION 4.**

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

156 **SECTION 5.**

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