

## GA Income Subtraction for Individual Resident Owners of Flow-throughs

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### Overview

A recent summary judgment decision by the Georgia Tax Tribunal (“Tribunal”) in *Rosenberg v. Macginnittie*<sup>1</sup> highlights a unique statutory provision that may allow individual residents to subtract, from adjusted gross income (“AGI”) used in determining Georgia tax, income received from a flow-through entity that was subject to an entity-level tax in another state. The applicable statute permits an individual resident who is a partner in a partnership, a member of a limited liability company (“LLC”), or the single member of an LLC disregarded for federal income tax purposes to “make an adjustment to federal adjusted gross income for the entity’s income taxed in another state that imposes on the entity a tax on or measured by income.”<sup>2</sup> The *Rosenberg* decision addresses whether this statute applies to individual owners of pass-through entities subject to the Texas Franchise Tax.<sup>3</sup> In the decision, issued in response to the taxpayer’s motion for summary judgment, the Tribunal determined that the Texas Franchise Tax constitutes a tax “on or measured by income” for purposes of determining state taxable income for a Georgia individual resident.<sup>4</sup> Although the case is not yet final, the Tribunal’s decision suggests that Georgia individual residents may be entitled to a subtraction from AGI for income received from a flow-through entity subject to the Texas tax in addition to entity-level income taxes imposed by other states.<sup>5</sup>

In this Tax Alert we summarize the Tribunal’s summary judgment decision and offer some taxpayer considerations.

### The Georgia Tax Tribunal’s Summary Judgment Decision

The *Rosenberg* summary judgment decision involves a Georgia individual resident taxpayer who owned interests in an LLC taxed as a flow-through entity for federal and Georgia income tax purposes. The LLC filed Texas Franchise Tax returns as a result of its in-state operations through its ownership in other flow-through entities. On the taxpayer’s 2008 Georgia income tax return, the taxpayer reported the entire amount of his distributive share of flow-through income attributable to his ownership interest in the LLC.<sup>6</sup> The taxpayer subsequently filed an amended return to reduce federal AGI by his distributive share of the LLC’s income, which had been subject to the Texas tax. This adjustment resulted in a refund, which the Department denied.<sup>7</sup> In response, the taxpayer filed a petition with the Tribunal to challenge the denied refund claim.<sup>8</sup>

In *Rosenberg*, the Tribunal ruled, in a summary judgment, that the Texas Franchise Tax constitutes a tax “on or measured by income” under either a broad or restrictive definition of “income” or “gross income.”<sup>9</sup> Additionally, the Tribunal rejected the Department’s argument that the adjustment should apply only to taxes on or measured by *net* income. The Tribunal, however, did not decide how the subtraction should be calculated. The Department has not yet decided whether it will pursue an appeal as other issues remain undecided.

<sup>1</sup> *Rosenberg v. Macginnittie*, No. 1414626 (Ga. Tax Trib. Nov. 25, 2014).

<sup>2</sup> Ga. Code Ann. § 48-7-27(d)(1)(C). A similar adjustment applies to Georgia resident shareholders of Subchapter “S” Corporations where another state does not recognize an S Corporation. Ga. Code Ann. § 48-7-27(d)(1)(B). Note, however, that Ga. Code Ann. § 48-7-27(d)(1)(B) was not at issue in the Tribunal’s decision in *Rosenberg*.

<sup>3</sup> The Texas Franchise Tax is often referred to as the “Texas Margin Tax.”

<sup>4</sup> *Rosenberg v. Macginnittie*, No. 1414626 at 43.

<sup>5</sup> The Georgia Department of Revenue (“Department”) has indicated in court filings that the subtraction rule applies to income taxes such as the Tennessee excise tax. *Id.* at 11. To our knowledge, however, the Department has not provided a complete list of which other entity-level taxes qualify under the rule.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 25.

## Considerations

The *Rosenberg* case is not yet final. However, taxpayers who believe they may potentially benefit from the subtraction rule may wish to consider filing amended tax returns prior to the expiration of the applicable statute of limitations for filing refund claims. Although the *Rosenberg* decision specifically addresses the applicability of the subtraction statute to the Texas Franchise Tax, the statute may also potentially apply to other state entity-level taxes based on income. While the Department has not identified the taxes that it considers to be “income” taxes to which the rule would apply, the *Rosenberg* case may provide some insight regarding how the Department would analyze its applicability to other entity-level taxes that may not be considered traditional income taxes.

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